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THE

# LAW-DICTIONARY:

EXPLAINING THE

## RISE, PROGRESS, AND PRESENT STATE

OF THE

# BRITISH LAW;

DEFINING AND INTERPRETING

## THE TERMS OR WORDS OF ART;

AND COMPRISING ALSO

COPIOUS INFORMATION ON THE SUBJECTS

OF

# TRADE AND GOVERNMENT.

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BY

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OF THE INNER TEMPLE, BARRISTER AT LAW.


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THE THIRD EDITION,

WITH CONSIDERABLE ADDITIONS.

IN TWO VOLUMES.

VOL. I.


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# TRADE AND GOVERNMENT

# BRITISH LAW:

# LAW-DICTIONARY:

# ADVERTISEMENT.

MORE than twenty years have now elapsed since the first publication of THE LAW DICTIONARY by the present Editor; the Work was founded on the well known Compilations of the industrious GILES JACOB, enlarged and improved by the introduction of legal and historical information, to an extent which, in the Preface to that Edition, was explained in detail.

THE SECOND EDITION, published in 1809, was continued on the same plan to the end of the Session of Parliament 48 GEO. III. In that Edition several of the terms of the Law of SCOTLAND were introduced, as also occasional statements and explanations of the Laws in force in IRELAND, as compared with those in GREAT BRITAIN.

SINCE that time MR. GABBETT's very correct "ABRIDGEMENT *and* COMPARATIVE VIEW *of the Statute Law of England and Ireland*" has been published: to which the Profession throughout the United Kingdom owe great obligations; and by which the reference to the Irish Statutes, and the knowledge of all the instances in which the British Laws have as yet been adopted in Ireland, are facilitated in both Countries.

ANOTHER PRODUCTION has also appeared, the Design of which is so excellent, that it is to be lamented that the Execution should be any way incomplete or inaccurate. But the Task of compiling an entire Collection and Arrangement of the BRITISH STATUTE LAW, with applicable Notes, is so extensive and difficult, that it becomes the duty of all who pursue the same track, to be thankful to MR. EVANS for what he has done, and to endeavour to supply what he has omitted.

To those useful Volumes, to the Statutes at Large, to the now ever-increasing Series of TERM REPORTS in the several Courts, as also to Treatises on separate branches of the Law, Reports from both Houses of Parliament, and to many other authentic Resources, Recourse has been had, for the purpose of rendering this THIRD EDITION of the LAW DICTIONARY useful to the general Inquirer for information, and to the Lawyer, for reference.

WITH the ADDENDA, annexed at the end of each Volume, resulting chiefly from Acts passed during the progress of this Work through the press, it is hoped that nothing material has been omitted, up to the END of the reign of our late venerated Sovereign GEORGE THE THIRD.

IN THIS, as in each former Edition, the Principle has been adhered to of endeavouring to convey that competent general knowledge of all matters relating to LAW, TRADE, AND GOVERNMENT, and to the Origin and present State of public POLICY and JURISPRUDENCE, which the celebrated Author of *The Commentaries* recommends as absolutely requisite to every Man of liberal education.

THE EMPLOYMENTS of the Editor in the service of GOVERNMENT, and under the Commissioners on the RECORDS of the Realm, while perhaps they may have rendered him more conversant with the progress and features of the great System of our Law, may not have allowed him sufficient leisure for attending to the minutiæ of Practice. Should Life and Health be spared him, until the encouragement and indulgence of the Public shall call for a FOURTH EDITION, it is probable that his leisure may be greater; and he shall be happy if he may then, at last, flatter himself with the hope of leaving behind him no unacceptable Present to his Country and his Profession.

T. E. TOMLINS.

*Hilary Vacation,*
1820.

THE

# LAW DICTIONARY.



AB, From the word *abbot*, in the beginning of the name of any place, shews that probably it once belonged to some *abbey*; or that an abbey was founded there. *Blount*.

ABACOT. A cap of state wrought up in the form of two crowns; worn by our ancient British kings. *Chron. Angl.* 1463. *Spelm. Gloss.*

ABACTORS, *abactores*, ab *abigendo*.] Stealers and drivers away of cattle *by herds*, or in great numbers. *Cowel.*

ABACUS. Arithmetick: from the *abacus*, or table strewed with dust, on which the ancients made their characters and figures. *Cowel: Du Fresne.* Hence

ABACISTA. An arithmetician. *Cowel.*

ABANDUM, *abandonum*.] Any thing sequestered, proscribed, or abandoned. *Abandon*, i. e. *in bannum res missa*; a thing banned or denounced as forfeited and lost; from whence, to abandon, desert, or forsake as lost and gone. See title *Insurance*.

ABARNARE, from *Sax. Abarian*.] To discover and disclose to a magistrate any secret crime. *Leg. Canuti*, c. 104.

ABATAMENTUM. An entry by interposition. 1 *Inst.* 277. See the succeeding articles.

TO ABATE, from the *Fr. Abattre*.] To prostrate, break down, or destroy; and in law to *abate* a castle or fort is, to beat it down. *Old Nat. Br.* 45. *Stat. West.* 1. *c.* 17. *Abattre maison*, to ruin or cast down a house, and level it with the ground; so *to abate a nuisance* is to destroy, remove, or put an end to it. See title *Nuisance*.

To *abate a writ*, is to defeat or overthrow it, by showing some error or exception. *Brit. c.* 48.—In the statute *de conjunctim feoffatis*, it is said the writ shall be abated; i. e. disabled and overthrown. *Stat.* 34 *E.* 1. *st.* 1.—So it is said an appeal shall *abate*, and be defeated by reason of covin or deceit. *Staundf. P. C.* 148.—And the justices shall cause the said writ to be *abated* and quashed. *Stat.* 11 *H.* 6. *c.* 2.

The word *abate*, is also used in contradistinction to *disseise*; for as he that puts a person out of possession of his house, land, &c. is said to disseise; so he that steps in between the former possessor and his heir, is said to *abate*; he is called an *abator*, and this act of intrusion or interposition is termed an *abatement*. 1 *Inst.* 277. *a. Kitch.* 173. *Old Nat. Br.* 91, 115. See titles *Disseisin*; *Intrusion*.

ABATEMENT. For its least usual meanings see the two preceding articles.

In its present most general signification it relates to writs or plaints; and means, the quashing or destroying the plaintiff's writ or plaint.

*A Plea in Abatement* is, a plea put in by the defendant, in which he shows cause to the court why he should not be impleaded or sued; or if impleaded, not in the manner and form he then is; therefore praying that the writ or plaint may abate; that is, that the suit of the plaintiff may for that time cease. 1 *Inst.* 134 *b*, 277. *F. N. B.* 115. *Cowel. Gilb. H. C. P.* 186. *Terms de Ley* 1.

As to abatement in Chancery, see this Dictionary, title *Revivor*.

On this subject shall be considered

I. *The various Pleas in Abatement, at Law.*—
1. To the Jurisdiction of the Court.
2. To the Person of the Plaintiff.
   *a.* Outlawry.
   *b.* Excommunication.
   *c.* Alienage.
   *d.* Attaint; and other Pleas in Abatement.
3. To the Person of the Defendant.
   *a.* Privilege.
   *b.* Misnomer.
   *c.* Addition.
4. To the Writ and Action.
5. To the Count or Declaration.
6. On Account of; *a.* The Demise of the King.
   *b.* The Marriage } of the Parties.
   *c.* The Death }

II. *The Time and Manner of pleading in Abatement; and herein of pleading in Bar or Abatement.*

III. *The Judgment in Abatement.*

I. 1. The courts of Westminster have a superintendancy over all other courts, and may, if they exceed their jurisdiction, restrain them by prohibition; or, if their proceedings are erroneous, may rectify them by writs of error and false judgment. Nothing shall be intended within the jurisdiction of an inferior court, but what is expressly alleged; so that where an action on promise is brought in such inferior court, not only the promise, but the consideration of it (*i. e.* the whole cause of action) must be alleged to arise within that jurisdiction; such inferior courts being confined in their original creation, to causes *arising* within the express limits of their jurisdiction; and therefore if a debtor who has contracted a debt out of such limited jurisdiction comes within it, yet he cannot be sued there for such debt.

There are no pleas to the jurisdiction of the courts at Westminster in transitory actions, unless the plaintiff by his declaration shows, that the cause of action accrued within a county palatine, or it be between the scholars of Oxford or Cambridge. 4 *Inst.* 213. 1 *Sid.* 103.

There is a difference between a franchise to demand conusance, and a franchise *ubi breve domini regis non currit*. For in the first case the tenant or defendant shall not plead it, but the lord of the franchise must demand conusance; but in the other case the defendant must plead it to the writ. 4 *Inst.* 224. See titles *Franchise, Conusance, County Palatine.*

Where a franchise, either by letters patent or prescription, hath a privilege of holding pleas within their jurisdiction, if the courts at Westminster entrench on their privileges, they must demand conusance; that is, desire that the cause may be determined before them: for the defendant cannot plead it to the jurisdiction. And the reason is, because when a defendant is arrested by the king's writ, within a jurisdiction where the king's writ doth not run, he is not legally convened, and therefore he may plead it to the jurisdiction; but the creating *a new franchise* does not hinder the king's writ from running there as before, but only grants jurisdiction to the lord of the liberty. *Bacon's Abr.* tit. *Courts.* (D. 3.)

If the court has not a general jurisdiction of the subject, the defendant *must plead* to the jurisdiction, for he cannot take advantage of it on the general issue. And in every plea to the jurisdiction another jurisdiction must be stated. *Cowp.* 172.

The pleas to the jurisdiction, are either that the cause of action, or the person of the party, is not the object of the jurisdiction of the court; of the first sort, are pleas that the land is held in Ancient demesne, or that the cause of action arose in the County Palatine, or within the Cinque Ports, or other inferior courts, having peculiar local jurisdiction. Of the latter sort is the plea of *Privilege;* but which is generally considered rather as a plea to the person of the defendant. See this Dictionary under those titles; and *post* Division 3. *a.* of the present head.

2. *a. Outlawry* may be pleaded in abatement, because the plaintiff having refused to appear to the process of the law, thereby loses its protection; but this is only a disability till the outlawry is reversed, or till he has obtained a charter of pardon. 1 *Inst.* 128. *Lit.* § 197. *Dy.* 23. 222. *Ass.* 49. *Br. Nonability*, 25.

This disability is only pleadable when the plaintiff sues in his *own right;* for if he sues in *auter droit* as executor or administrator, or as mayor with his commonalty, outlawry shall not disable him; because the person or body whom he represents has the privilege of the law. When the plaintiff brings a writ of error to reverse an outlawry, the outlawry in that suit, or in any other, shall not disable him. The outlawry itself must not be an objection, for that would be *exceptio ejusdem rei cujus petitur dissolutio;* and if a man were outlawed at several men's suits, and one should be a bar to another, he could never reverse any of them. 1 *Inst.* 128. *Doct. Plac.* 396, 7.

When outlawry is pleaded in abatement, the plaintiff shall not reply that the outlawry is erroneous, for it is good till reversed. 1 *Lutw.* 36.

As to the time and manner of pleading outlawry, see *post*, under division II. of this title *Abatement.*

Outlawry in a county palatine cannot be pleaded in any of the courts of Westminster, for the plaintiff is only ousted of his law *within that jurisdiction. Gilb. Hist. C. P.* 200. *Fitz. Coron.* 233. It has been suggested, but surely without reason, that outlawry, in the county palatine of Lancaster, *may* be pleaded in the courts of Westminster; because that county was erected by act of parliament in the time of *E.* 3; whereas those of Chester and Durham are by prescription. 12 *E.* 4. 16. *Doct. Plac.* 396.

*b.* A person *excommunicated* is disabled to do any judicial act; as to prosecute any action at law; (though he may be sued); be a witness, &c.

*Excommunication* is a good plea even to an executor or administrator, though they sue *in auter droit;* for an excommunicated person is excluded from the body of the church, and is incapable to lay out the goods of the deceased to pious uses; also it is one of the effects of excommunication, that he cannot be a prosecutor or attorney for any other person, and therefore cannot represent the deceased. 1 *Inst.* 134. 43 *E.* 3. 13. *Thel.* 11.

But in an action brought by officers with their corporation, the defendant shall not plead excommunication in the officers; because a corporation cannot be excommunicated as such; and they sue and answer by attorney. *Thel.* 11. 30 *E.* 3, 4. 1 *Inst.* 134. 4 *Inst.* 340.

Excommunication is no plea in a *qui tam* action; the statute giving the informer ability to sue. 12 *Co.* 61.

When excommunication is pleaded in the plaintiff, he shall not reply that he has appealed from the sentence; for it is in force until repealed, and whilst it is in force he cannot appear in any of the courts of justice; but he may reply that he is absolved, for then his disability is taken away. *Bro. Excom.* 3. 3 *Bulst.* 72. 20 *H.* 6. 25. *Roll.* 226.

When prohibition is brought against a bishop, and he pleads excommunication against the plaintiff, and in the excommunication there is no cause thereof shown, this is not a good plea; for in such case it will be intended, that the excommunication was for endeavouring to hinder the bishop's proceeding, by application to the temporal court; and if such excommunication were allowed, it would destroy all prohibitions. *Thel.* 10, 11. 28 *E.* 3. 27. 8 *Co.* 68.

*c. Alienage* is a plea in abatement, now discouraged, and but seldom used; the following however appears to be still law on the subject.

It may be pleaded in abatement, in an action real, personal, or mixed, that the demandant or plaintiff is an alien, if he be an alien enemy; and in an action real or mixed, that he is an alien, though he be in amity. But in an action personal it is no plea that he is an alien if he be in amity. 1 *Inst.* 129. *b. Ast. Ent.* 11. 9 *E.* 4. 7. *Yelv.* 198. 1 *Bulst.* 154. *Bro.* tit. *Denizen.* But see 1 *Ld. Raym.* 282.

Where the defendant pleads that the plaintiff is an alien, in abatement of the writ, it is triable where the writ is brought, and the replication must conclude to the *country;* but otherwise, it is said, where it is pleaded in bar, that the plaintiff is an alien, the replication must conclude with an *averment. Salk.* 2. *West.* 5. *Amb.* 394.

Where the defendant pleaded that the plaintiff was an alien, born at Rouen in the kingdom of France, within the ligeance of the king of France; the plaintiff replied that he was an alien friend, born at Hamburgh, within the ligeance of the emperor, and traversed that he was born at Rouen; *Holt* inclined that it was an ill traverse, and offered an ill issue. *Comb.* 212. See title *Aliens.*

*d. Attaint, &c.* It may be pleaded in abatement, that the plaintiff is attainted of treason or felony; or attainted in a *præmunire;* or that he hath abjured the realm. 1 *Inst.* 128 *a*, 129 *b*, 130 *a. Noy.* 1. *Sho.* 155.

*Popish Recusancy*, can no longer be considered as pleadable since the *stat.* 31 *Geo.* 3. *c.* 32. See tit. *Papist.*

*Coverture;* It is also pleadable in abatement to the person of the plaintiff that she is a *feme covert.* 1 *Inst.* 132. *b.* and that she is the wife of the defendant. 1 *Bro. Ent.* 63. And by the defendant that she is herself a *feme covert. Lutw.* 23. *Barnes* 334. See tit. *Baron* and *Feme*, and *post* 6, *b.*

*Joint Actions;* Of pleas in abatement for want of proper parties. See *Com. Dig.* tit. *Abatement* (E. 8.) (F. 4.)

If the cause of action arise *ex contractu*, the plaintiff must sue all the contracting parties; but if *ex delicto* he may sue all or any one. And the same rule applies where a tort is committed by a servant. See 5 *Term. Rep.* 65. 7 *T. R.* 279. 2 *New. Rep.* 365, and tit. *Action, Joint-tenants.*

A defendant may plead in abatement to the person of the plaintiff, that there never was any such person *in rerum naturâ*. See *Com. Dig.* tit. *Abatement* (E. 16.)

An action does not abate by the plaintiff's becoming a bankrupt, and where he became so between interlocutory and final judgment, and sued out execution in his own name, the Court of King's Bench refused to set aside the proceeding. 3 *Term Rep.* 437.

3. *a*. The officers of each court enjoy the privilege of being sued only in those courts to which they respectively belong; because of the duty they are under of attending those courts, and lest their clients' causes should suffer if they were drawn to answer to actions in other courts. 2 *Mod.* 297: *Vaugh.* 155. 2 *H.* 7. 2. 2 *Ro. Ab.* 272. 1 *Lutw.* 44, 639. So a baron of the Cinque Ports is to be impleaded within that jurisdiction. See *Com. Dig.* tit. *Abatement* (D. 3.) and this Dict. tit. *Cinque Ports*.

But this is to be understood when the plaintiff can have the same remedy against the officer in his own court, as in that where he sues him; for if money be attached in an attorney's hands by foreign attachment in the Sheriff's Court in London, the attorney shall not have his privilege; because in this case the plaintiff would be remediless. 1 *Saund.* 67, 8..

So if a writ of entry, or other real action, be brought against an attorney of the King's Bench, he cannot plead his privilege; for the King's Bench hath not cognizance of real actions. 1 *Saund.* 67.

So if an attorney of the Common Pleas be sued in a criminal *appeal*, he shall not have his privilege; for his own court hath not cognizance of this action. 38 *H.* 6. 29 *b*. 9 *E.* 4. 35. *Cro. Car.* 585. 1 *Leon.* 189. 2 *Leon.* 156.

This privilege, which the courts indulge their officers with, is restrained to such suits only as they bring in their own right; for if they sue or are sued as executors or administrators, they then represent common persons, and are entitled to no privilege. *Hob.* 177.

So if an officer of one court sue an officer of another court, the defendant shall not plead his privilege; for the attendance of the plaintiff is as necessary in his court as that of the defendant in his; and therefore the cause is legally attached in the court where the plaintiff is an officer. 2 *Mod.* 298. 2 *Lev.* 129. 2 *Ro. Ab.* 275, *pl.* 4. *Moor.* 556.

So if a privileged person brings a joint action, or if an action be brought against him and others, he shall not have his privilege; but if the action can be *severed* without doing any injury, the officer shall have his privilege. *Dy.* 377. *Godb.* 10. 2 *Ro. Ab.* 275. 2 *Lev.* 129. 1 *Vent.* 298, 9.

An officer shall not have his privilege against the king. *Bro. Supersed.* 1. 2 *Ro. Ab.* 274. But in a *qui tam* action, at the suit of an informer, he shall have his privilege. *Lil. Reg.* 7. 3 *Lev.* 398. *Lutw.* 193.

If a person who hath the privilege of being sued in another court, be in *actual custody* of the marshal of King's Bench, he cannot plead his privilege; but otherwise where he is bailed, and so only legally supposed in custody. 1 *Salk.* 1. *Comb.* 390.

The Court of King's Bench will take notice of the privilege of their own officers; as where a *filazer* of the King's Bench was arrested by writ, he was discharged on common bail; being an immediate officer of the court where his attendance was absolutely necessary. *Salk.* 544. But where an *attorney* of the Common Pleas was sued by bail in the Court of King's Bench, on motion for his being discharged, the court denied it and put him to plead his privilege. 1 *Mod. Ent.* 26. See 1 *Wils.* 306. 2 *Black. Rep.* 1085.

After a *general imparlance* an officer cannot plead his privilege, because by imparling he affirms the jurisdiction of the court, but after a *special* imparlance he may plead his privilege. *Bro. Priv.* 25. 22 *H.* 6. 6, 22, 71. 1 *Ro. Rep.* 294. 1 *Sid.* 29. 2 *Ro. Ab.* 273, 9. *Hardr.* 365. 1 *Lutw.* 46. 1 *Salk.* 1. And now the common practice is to use a special imparlance. See further this Dict. tit. *Privilege*. Indeed no plea in abatement is good after a general imparlance. 4 *Term Rep.* 227.

*b. Misnomer*, is the using one name for another, the misnaming either of the parties. This may be pleaded in abatement by the defendant, whether the misnomer is in his own name, or in that of the plaintiff; and this in christian or surname, name of dignity, name of office or addition. See *post*, and *Com. Dig.* tit. *Abatement* (E. 18.) (F. 17.)

A misnomer may be pleaded in abatement where the plaintiff misnames himself. 1 *Bos. & Pul.* 44.

But though a defendant may by pleading in abatement take advantage of a misnomer, yet in such plea he must set forth his right name (surname as well as christian name), so as to give the plaintiff a better writ. *Finch* 363. 9 *H.* 5. 1.—which is the intent of all pleas in abatement. 4 *Term Rep.* 227. 8 *Term Rep.* 515.

Where a defendant comes in *gratis*, or pleads by the name alleged by the plaintiff, he is estopped to allege any thing against it. *Sty.* 440. Where one is misnamed in a bond, the writ should be in the right name, and the count show that defendant by *such* a name made the bond. To a plea of misnomer the plaintiff may reply, that defendant was known by the name in the writ. 1 *Salk.* 6, 7.

One defendant cannot plead *misnomer* of his companion, for the other defendant may admit himself to be the person in the writ. 1 *Lutw.* 36. The defendant, though his name be mistaken, is not obliged to take advantage of it; and therefore if he be impleaded by a wrong name, and afterwards impleaded by his right name, he may plead in bar the former judgment, and aver that he is the same person. *Gilb. H. C. P.* 218.

Where an indictment for a capital crime is abated for *misnomer* of the defendant, the court will not dismiss him, but cause him to be indicted *de novo* by his true name. 2 *Hawk. P. C.* 523. See further this Dict. tit. *Misnomer*.

*c. Addition*, is a title given to a man besides his christian and surname, setting forth his estate, degree, trade, &c. Of estate, as yeoman, gentleman, esquire, &c. Of degree, as knight, earl, marquis, duke, &c. Of trade, as merchant, clothier, carpenter, &c. There are likewise additions of place of residence, as London, York, Bristol, &c. If one be both a duke and earl, &c. he shall have the addition of the most worthy (i. e. superior) dignity. 2 *Inst.* 669. But the title of duke, marquis, earl, &c. are not properly additions but names of dignity. *Terms de Ley* 20. The title of knight or baronet is part of the party's name (as is also clarencieux or king at arms, &c.) and ought to be exactly used; but the titles of esquire, gentleman, yeoman, &c. being no part of the names are merely additions. 1 *Lil.* 34. An earl of Ireland is not an addition of honour here in England, but such person must be called by his christian and surname with the addition of esquire only; so sons of English noblemen, though they have titles given them by courtesy in respect of their families, if they are sued, must be named by their christian and surnames, with the addition of esquire; as, A. B. Esq. commonly called Lord A. 1 *Inst.* 16 *b*. 2 *Inst.* 596, 666.

By the common law, if a man that had no name of dignity was named by his christian and surname in all writs it was sufficient. If he had an inferior name of dignity, as knight, &c. he ought to be named by his christian and surname, with the name of dignity; but a duke, &c. might be sued by his christian name only, and name of dignity, which stands for his surname. 2 *Inst.* 665, 6. By *stat.* 1. *H.* 5. *c.* 5, it is enacted that in suits or actions where process of *outlawry* lies, (See 1 *Salk.* 5.) *additions* are to be made to the name of the defendant to show his estate, mystery, and place of dwelling; and that writs not having such additions shall be *abated*, if the

defendant take exception thereto, but not by the court *ex officio*. See *Cro. Jac.* 610. 1 *Ro. Rep.* 780. If a city be a county of itself, wherein are several parishes, addition thereof, as of London, is sufficient. But addition of a parish not in a city must mention the county, or it will not be good. 1 *Danv.* 287.

The name of earl, if omitted, abates the writ, *Dav. Rep.* 60 *a*; and it shall not be amended, *Hob.* 129. 1 *Vent.* 154. But if a person is created an earl pending the action, bill, or suit, it shall not *abate*. See stat. 1 *E.* 6. *c.* 7. § 3. But there must be an entry on the roll stating that after the last continuance, *ss.* on such a day and year, the king, by his letters patent, created, &c. setting them forth with a *profert in curiâ*, &c. which the said defendant doth not deny, &c. 1 *Mod. Ent.* 31, 32.

If there are two persons, father and son, with the same name and addition, in an action brought against the son, he ought to be distinguished by the appellation of *the younger*, added to his other description, or the writ may be abated; but in an action against the father he need *not* be distinguished by the appellation of *the elder*. See 2 *Hawk. P. C.* 187.

On the whole it is proper to observe as to *misnomers* and want of addition, that the courts of Westminster will not abate a writ for a trifling mistake; and will in all cases amend, if possible; see title *Amendment*.

As the Court of King's Bench will not grant Oyer of an original writ, and yet a plea in abatement, for want of additions to the defendant, is bad without oyer, the effect is to prevent such plea from being pleaded, and therefore, if pleaded, that court will quash it. 7 *East's Rep.* 383.

4. The writ being the foundation of the subsequent proceedings, great certainty and exactness is requisite, to the end that no person be arrested or attached by his goods, unless there appear sufficient grounds to warrant such proceedings; so that if the writ vary materially from that in the register, or be defective in substance, the party may take advantage of it. See 5 *Co.* 12. 9 *H.* 7. 16. 10 *E.* 3. 1. *Hob.* 1. 51, 52. 80. *Carth.* 172. But where the writ shall not abate for variance from the register, so that it be equivalent, see *Hob.* 1. 51, 52.

Where a demand is of two things, and it appears the plaintiff hath action only for one, the writ may not be abated in the whole, but shall stand for that which is good; but if it appear that though the plaintiff cannot have this writ which he hath brought for part, he may have another, the writ shall abate in the whole. 11 *Rep.* 45. 1 *Saund.* 285.

In case administration be granted, after the action brought, and this appears, the plaintiff's writ shall abate. *Hob.* 245.

It is a good plea in abatement that *another action* is depending for the same thing; for whenever it appears on record that the plaintiff has sued out two writs against the same defendant, for the same thing, the second writ shall abate; and it is not necessary that both should be pending at the time of the defendant's pleading in abatement; for if there was a writ in being at the time of suing out the second, it is plain the second was vexatious and ill, *ab initio*. But it must appear plainly to be for the same thing; for an assize of lands in one county shall not abate an assize in another county, for these cannot be the same lands. 4 *H.* 6. 24. 9 *H.* 6. 12, 5 *Co.* 61. *Doct. Pl.* 10.

In general writs, as *trespass*, *assize*, *covenant*, where the special matter is not alleged, and the plaintiff is nonsuited before he counts, and the second writ is sued pending the other, yet the former shall not be pleaded in abatement; because it doth not appear to the court that it was for the *same thing*; for the first writ being general, the plaintiff might have declared for a distinct thing from what he demanded by the second writ; but when the first is a special writ, and sets forth the particular demand, as in a *præcipe quod reddat*, &c. there the court can readily see that it is for the same thing; and therefore, though the plaintiff be nonsuited before he counts, yet the first shall abate the second writ, it being apparently brought for the same thing. 5 *Co.* 61. *Doct. Pl.* 11, 12. In an action of debt, &c. another action depending in the courts of Westminster for the same matter is a good plea in abatement; but a plea of an action in an inferior court is not good, unless judgment be given. 5 *Co.* 86. and see 5 *Co.* 62.

If a second writ be brought, tested the same day the former is abated, it shall be deemed to be sued out after the abatement of the first. *Allen* 34.

If an action pending in the same court be pleaded to a second action brought for the same thing, the plaintiff may pray that the record may be inspected by the court, or demand *oyer* of it, which, if not given him in convenient time, he may sign his judgment. *Dy.* 227. *Carth.* 453. 517.

In action of debt on a judgment, defendant cannot plead a writ of error brought and pending either in bar or abatement; but the court usually stays proceedings on terms till the error is decided. 1 *Bac. Abr.* 14.

5. After the party suing has declared, the party impleaded may demand *oyer* of the writ; and then if there be any fault or insufficiency in the count for a cause apparent in itself, or if there be a variance between the count and the writ, or between the writ and a record, specialty, &c. mentioned in the count, the party impleaded ought to show it by his pleading. *Thel. lib.* 10. *c.* 1. § 5. *Fitz. Count.* 27.

Defendant may plead in abatement of a declaration where the action is by original; but if it be by bill he must plead in abatement of the bill only. 5 *Mod.* 144. A little variance between the declaration and the bond pleaded will not vitiate the declaration; but uncertainty will abate it. *Plowd.* 84. The variance of the declaration from the obligation, or other deed on which it is grounded, will sometimes abate the action. *Hob.* 18. 116. *Moor.* 645. And if a declaration assign waste in a town not mentioned in the original writ, the writ of waste shall abate. *Hob.* 38.

Likewise where the declaration is otherwise defective, in not pursuing the writ, or not setting forth the cause of action with that certainty which the law requires, or laying the offence in a different county from that in which the writ is brought. 1 *New. Abr.* 6.

6. *a*. As to the *demise* of the king; at common law, all suits depending in the king's courts were discontinued by the death of the king; so that the plaintiffs were obliged to commence new actions, or to have re-summons or attachment on the former processes, to bring the defendant in; but to prevent the inconvenience, expence, and delay which this occasioned, the stat. 1 *E.* 6. *c.* 7, was made.

Proceedings on an information, in nature of a *quo warranto*, are not abated by the demise of the crown. 2 *Stra.* 782. Where the king brings a writ of error in *quare impedit*, it abates by his death. 2 *Stra.* 843.

*b*. With respect to the *marriage* of the parties; *coverture* is a good plea in *abatement*, which may be either before the writ sued, or pending the writ. By the first the writ is abated *de facto*, but the second only proves the writ abateable; both are to be pleaded with this difference, that coverture, pending the writ, must be pleaded after the last continuance; whereas coverture before the writ brought may be pleaded at any time, because the writ is *de facto* abated. *Doct. Pl.* 3. 1 *Leon* 168, 169. Vide 2 *Ld. Raym.* 1525. *Comb.* 449. *Lut.* 1639.

If a writ be brought by *A.* and *B.* as baron and feme, whereas they were not married until the suit depended, the defendant may plead this in abatement; for though they cannot have a writ in any other form, yet the writ shall abate, because it was false when sued out. *Fitz. Brief*, 476. If a writ be brought against a feme covert as sole, she may plead her coverture; but if she neglects to do it, and there is a recovery against her

as a feme sole, the husband may avoid it by writ of error, and may come in at any time and plead it. *Latch.* 24. *Stile* 254, 280. 2 *Roll Rep.* 53. If an action be brought in an inferior court against a feme sole, and pending the suit she intermarries, and afterwards removes the cause by *habeas corpus*; and the plaintiff declares against her as a feme sole, she may plead coverture at the time of suing the *habeas corpus*; because the proceedings here are *de novo*; and the court takes no notice of what was precedent to the *habeas corpus*; but upon motion on the return of the *habeas corpus*, the court will grant a *procedendo*. For though this be a writ of right, yet where it is to abate a rightful suit, the court may refuse it; and the plaintiff had bail below to this suit, which by this contrivance he might be ousted of, and possibly by the same means of the debt. 1 *Salk.* 8.

In ejectment against baron and feme, after verdict for the plaintiff, baron dies between the day of *Nisi prius* and the day in Bank; adjudged that the writ should stand good against the feme, because it is in nature of a trespass, and the feme is charged for her own act; and therefore the action survives against her. So if the wife had died, the baron should have judgment entered against him. *Cro. Jac.* 356: *Cro. Car.* 509. 1 *Roll. Rep.* 14. *Moor* 469.

If a feme sole plaintiff, after verdict, and before the day in Bank, takes husband, she shall have judgment, and the defendant cannot plead this coverture, for he has no day to plead it at. *Cro. Car.* 232. 1 *Bulst.* 5.

If an original be filed against a feme sole, and before the return she marries, you may declare against her without taking notice of her husband, for her intermarriage is no abatement of the writ in fact, but only makes it abateable. *Comb.* 449. 1 *Roll. Rep.* 53.

'Tis now in general held, that if a *feme sole* commences an action, and pending the same marries, the suit is abated; but that it is otherwise with respect to a feme sole defendant, as she shall not take advantage of her own act. See further, title *Baron and Feme.*

If the plaintiff take husband, after suing out the writ and before the declaration, the defendant must plead this in abatement, and cannot give the coverture in evidence under the general issue. 6 *Term. Rep.* 265.

*c.* The general rule is, that whenever the death of any party happens pending the writ, and yet the plaintiff is in the same condition as if such party were living, there such death makes no alteration or *abatement* of the writ. 1 *New Abr.* 7.

The death of a plaintiff did generally at common law *abate* the writ before judgment, till the stat. 8 & 9 *W.* 3. *c.* 11; which declares that neither the death of plaintiff or defendant after interlocutory judgment shall *abate* it, if the action might be originally prosecuted by and against the executors or administrators of the parties; and if there are two or more plaintiffs or defendants, and one or more die, the writ or action shall not *abate*, if the cause of action survives to the surviving plaintiff, or against the surviving defendant, but such death being suggested on record the action shall proceed. For the cases previous to this statute, see *Cro. Eliz.* 652. 1 *Inst.* 139. *Dy.* 279. *Hard.* 151. 164. *Stile* 299. 3 *Mod.* 249. *Cro. Car.* 426. 1 *Jones* 367. 1 *Rol. Abr.* 756. 1 *Show. Rep.* 186. 1 *Vent.* 34. 3 *Mod.* 249.

But in a writ of error, if there be several plaintiffs, and one dies, the writ shall abate, because the writ of *error* is to set persons *in statu quo*, before the erroneous judgment given below; and they that are plaintiffs in error were *distinct* sufferers in the judgment, since there might be different executions issued thereupon, and different representatives were by such judgment affected; and by consequence the survivor cannot prosecute the writ of error for the whole, lest by a collusive persuasion, or by negligence or design he should hurt the representative of the deceased. *Bridg.* 78. *Yelv.* 208. 10 *Co.* 1351. 1 *Vent.* 34. 1 *Sid.* 419. *cont.* But if any of the defendants in error die, yet all things shall proceed, because the benefit of such judgment goes to the survivor, and he only is to defend it. *Sid.* 419. *Yelv.* 208. 1 *L. Raym.* 439. If there be several persons named as plaintiffs in the writ, and one of them was dead at the time of purchasing the writ, this may be pleaded in *abatement*; because it falsifies the writ; and because the right was in the survivors, at the time of suing the writ, and the writ not according to the case. 20 *Hen.* 6. 30. 18 *E.* 4. 1. 2 *H.* 7. 16. 1 *Brownl.* 3. 4. *Clift. Ent.* 6. *Rast. Ent.* 126.

By stat. 17 *Car.* 2. *c.* 8, (made perpetual by 1 *Jac.* 2. *c.* 17. § 5,) it is enacted that the death of either of the parties between verdict and judgment shall not be alleged for error, so as judgment be entered within two terms after such verdict. See 1 *Salk.* 8. 2 *Ld. Raym.* 1415. *Sid.* 385.—See tit. *Amendment*; *Pleading*; *Joint Action.*

The death of a defendant between the commission-day and day of trial was held by the Court of King's Bench not to be a ground for setting aside a verdict for the plaintiff. 7 *Term Rep.* 31. But where a defendant died on the night before the trial of a cause at the sittings in term, the Court of Common Pleas set aside the verdict and the judgment entered thereon. 3 *Bos. & Pul.* 549.

II. A plea in abatement must be put in within *four* days (both days inclusive) after the return of the writ, because the person coming in by the process of the court ought not to have time to delay the plaintiff. *Lutw.* 1181. 2 *Stra.* 1192. 1 *Term Rep.* 277. 5 *T. R.* 210. 3 *T. R.* 642.

But if a declaration be delivered against one in custody, he has the whole term to plead in abatement. *Salk.* 515.

If the declaration be delivered in the vacation, or so late in term, that defendant is not bound to plead to it that term, he may plead in abatement, within the first four days of next term; and where Sunday is the last of the four days the plea in abatement may be filed on the fifth day. 3 *Term Rep.* 642. But see 4 *Term. Rep.* 520.

As pleas in abatement enter not into the merits of the cause, but are dilatory, the law has laid the following restrictions on them. First, by the statute of 4 & 5 *Ann. cap.* 16. for amendment of the law, no dilatory plea is to be received unless on oath, and probable cause shewn to the court. Secondly, no plea in abatement shall be received after *respondeas ouster*, for then they would be pleaded *in infinitum*. 2 *Saund.* 41. Thirdly, they are to be pleaded before imparlance. See *Yelv.* 112. 1 *Lutw.* 46. 178. 2 *Lutw.* 1117. *Doct. Pla.* 224. 4 *Term Rep.* 227. 520. Except where antient demesne is pleaded; for this may be done after imparlance, because the lord might reverse the judgment by writ of disceit, and it goes in bar of the action itself. For this see *Dyer in marg.* 210. *Stile* 30. *Latch.* 83. 5 *Co.* 105. 9 *Co.* 31. *Han. Ent.* 103.

A plea in abatement must be signed by counsel, and filed with the clerk of the papers; and without an affidavit annexed to it judgment may be signed. *Impey's Instruct. Cler. K. B.*

With respect to pleas to the *jurisdiction* of the court, it is to be observed that the defendant must plead *in propriâ personâ*; for he cannot plead by attorney without leave of the court first had, which leave acknowledges the jurisdiction; for the attorney is an officer of the court; and if he put in a plea by an officer of the court, that plea must be supposed to be put in by leave of the court. 1 *New Abr.* 2.

The defendant must make but half defence, for if he makes the full defence *quando et ubi curia consideraverit*, &c. he submits to the jurisdiction of the court. *Lutw.* 9. 1 *Show. Rep.* 386.

If a plea is pleaded to the *jurisdiction* of the court, it ought to conclude with a prayer of judgment in this manner, *viz. The said defendant prays judgment, whether the court will take any further cognizance of the said plea.* 1 *Mod. Ent.* 34.

Pleas in *disability* of the *plaintiff*, may not be pleaded after a general imparlance. 1 *Lutw.* 19. In pleading *outlawry* in disability in another court, the ancient way was to have the record of the outlawry itself, *sub pede sigilli* by *certiorari* and *mittimus*; (See *Doct. Pl.* 393. *Stam.* 103. *Fitz. Coron.* 233.;) but this being very expensive, it is now sufficient to plead the *capias ut lagatum* under the seal of the court from whence it issues; for the issuing of execution could not be without the judgment; and therefore such execution is a proof to the court that there is such a judgment, which is a proof that the defendant's plea of matter of record is proved by a matter of record; and consequently appears to the court not to be merely dilatory; and therefore, on shewing such execution, if the plaintiff will plead *nul tiel record*, the court will give the defendant a day to bring it in. *Co. Lit.* 128. *Doct. Plac.*—See tit. *Outlawry*.

Outlawry may be pleaded in bar, after it is pleaded in abatement, because the thing is forfeited, and the plaintiff has no right to recover. 11 *H.* 7. 11. 2 *Lutw.* 1604.

Outlawry may be always pleaded in *abatement*, but not in *bar*, unless the cause of action be forfeited. *Co. Lit.* 128. *b. Doct. Pl.* 395.

In *personal actions*, where the *damages* are uncertain, *outlawry* cannot be pleaded in *bar*; but in *actions on the case*, where the *debt*, to avoid the *law wager*, is turned into *damages*, there *outlawry* may be pleaded in *bar*, for it was vested in the king, by the forfeiture, as a debt certain, and due to the outlaw; and the turning it into damages, whereby it becomes uncertain, shall not divest the king of what he was once lawfully possessed of. 2 *Lutw.* 1604. 3 *Lev.* 29. 2 *Vent.* 282. 3 *Leon* 197. 205. *Cro. Eliz.* 204. *Owen* 22.

Where *excommunication* is pleaded, it is not sufficient to shew the writ *de excommunicato capiendo* under the seal of the court; for the writ is no evidence of the continuance of the excommunication, since we may be absolved by the bishop, and that will not appear in the king's court, because such assoilment is not returned into the king's court from whence the *significavit* is sent.

*Alienage* may be pleaded either in bar or abatement: In the latter case to an alien in league; in the former to an alien enemy. 1 *Inst.* 129. *b.* See *ante* I. 2. *c.*

If a plea in abatement be pleaded to the *person* of the *plaintiff*, there it must conclude, *if he ought to be compelled to answer*. 1 *Mod. Ent.* 34.

In all pleas of abatement which relate to the person, there is no necessity of laying a venue, for all such pleas are to be tried where the action is laid. 1 *Bac. Abr.* 15.

If it be pleaded to the *writ*, then the plea concludes with the prayer of *judgment of the writ*, and that the *writ* may be *quashed*. When it is to the *action* of the *writ*, there he should shew that the party ought not to have *that* writ, but by the matter of his plea should intimate to him how he should have a better. *Latch.* 178. *Respondere non debet* is a proper beginning to a plea to the *jurisdiction* of the court, but a plea of *ne unques executor* ought to begin with *petit judic'* de *billâ*. 5 *Mod.* 132, 133. 146. 1 *Saund.* 283. 2 *Saund.* 97. 189, 190. 339. *Lutw.* 44. *Show.* 4.—In a replication to a plea in abatement, where matter of fact is pleaded, the plaintiff must pray his damages; but where matter of *law* is pleaded, the plaintiff must only pray that his *writ* may be *maintained*. 1 *Ld. Raym.* 339. 594. 2 *Ld. Raym.* 1022.—If one pleads matter of *abatement*, and *concludes* in *bar*, *Et petit judicium si actionem habere debet*, though he *begins* in *abatement*, and the matter be also in *abatement*, yet the conclusion being in *bar*, makes it a *bar*; and the reason is, because you *admit* the *writ* by concluding specially against the *action*. 18 *H.* 6. 27. 32 *H.* 6. 17. 36 *H.* 6. 18. 22 *H.* 6. 536. 1 *Show.* 4. 2 *Ld. Raym.* 1018.—If a man pleads matter in *bar*, and concludes in abatement, it shall be taken for a plea in *bar*, from the nature and reason of the thing; for the plaintiff can have no writ if he has not a cause of action, and therefore the court will take the plea to be in bar. 37 *H.* 6. 24. 36 *H.* 6. 24. 2 *Mod.* 6.

The *nature* of a *plea* in *abatement* is to intitle the plaintiff to a *better writ*; See 4 *Term Rep.* 227.; and it hath been expressly resolved, that where the plea is in abatement, and it is of necessity that the defendant must disclose matter of bar, he shall have his election to take it either by way of bar or abatement. 2 *Roll. Rep.* 64. *Salkill* v. *Shilton.* In short, whatever destroys the plaintiff's action, and disables him *for ever* from recovering, may be pleaded in *bar*. But the defendant is not always obliged to plead in bar, but may plead in *abatement*, as in *replevin* for goods, the defendant may plead property in himself, or in a stranger, either in bar or in *abatement*, for if the *plaintiff* cannot prove property in himself, he fails of his action for ever; and it is of no avail to *him* who has the property if *he* has it not. 1 *Vent.* 249. 2 *Lev.* 92. 1 *Salk.* 5. 94. *Carth.* 243.

Where matter of *bar* may be pleaded in *abatement*, *vide* 2 *Ld. Raym.* 1207, 1208.

If a defendant, together with a plea in abatement, plead also a plea in bar, or the general issue, he thereby waves the plea in abatement: and the plea in bar or general issue only shall be tried. 2 *Hawk. P. C.* 277. and the authorities there cited.

III. If issue be taken upon a plea to the *writ*, judgment against the defendant is *peremptory*; but if there be a *demurrer*, the judgment is then, only that the plaintiff *answer over*. *Yelv.* 12. *Allen* 66.

Whatever matters are pleaded in abatement of an appeal or indictment of felony, and found against the defendant, yet he may afterwards plead over to the felony. 2 *Hawk. P. C.* 277. But in criminal cases, not capital, on *demurrer* in abatement adjudged against the party, the court will give final judgment, and not *respondeas ouster*. *Ibid* 471.

In appeals of *mayhem* and all civil actions, (except *assizes* of *mort d'ancestor*, *novel disseisin*, *nuisance*, and *juris utrum*,) if a plea in abatement, triable by the county, be found against the defendant, he shall not be suffered afterwards to plead any new matter, but final judgment shall be given against him. 2 *Hawk. P. C.* 277.; and see the authorities there cited.

Upon a judgment in *waste* for the damages recovered, the defendant *demurs* partly in *abatement*, and partly in *bar*, the court shall give judgment in chief. *Show.* 255. In debt, if the defendant pleads in abatement to the writ, to which the plaintiff imparls, and at the day given the defendant makes default, judgment is *final* upon the default, though the plea was only in abatement. 10 *E.* 4. 7. *Mod. Cases* 5. The judgment for the defendant, on a plea in abatement, is *quod breve*, or *narratio cassetur*; if issue be joined on a *plea* in *abatement*, and it be found for the plaintiff, it shall be peremptory against the defendant, and the judgment shall be *quod recuperet*, because the defendant choosing to put the whole weight of his cause upon this issue, when he might have had a plea in chief, is an admittance that he had no other defence. *Yelv.* 112. 2 *Show.* 42. *Str.* 532. and in this case the jury who try that issue shall assess the damages.

If there be two defendants, and they plead two several pleas in abatement, and there be issue to one and demurrer to the other, if the issue be found for the defendant the court will not proceed on the demurrer; and *sic vice versâ*, for either way the writ is abated, and the other plea becomes useless. *Hob.* 250. 1 *Bac. Abr.* 15.

It seems that where the defendant's plea goes to bar the action, if the plaintiff demurs to it, and the demurrer is determined in favour of the plea, judgment of *nil capiat* shall be entered, notwithstanding there may be also one or more issues in fact; because, upon the whole, it appears that the plaintiff

had no cause of action. So where *several* pleas are pleaded since the stat. of 4 *&* 5 *Ann. c.* 16. all of them going to destroy the action, and one or more issues are joined on some of the pleas, and there are one or more demurrers to the rest, if the court determine the demurrers in favour of the defendant *before* the issues are tried, they shall not be tried; and if *after* the trial, it will make no difference, for in each case judgment of *nil capiat* shall be given against the plaintiff. Thus, where in an action for criminal conversation the defendant pleaded, 1. not guilty, and 2. not guilty, within six years, and there was an issue on the first plea, and a demurrer to the other, although the issue was tried before the demurrer was disposed of, and a verdict was given for the plaintiff, yet the court having afterwards determined the demurrer in favour of the defendant, judgment of *nil capiat* was given. 2 *Burr.* 749. *Cooke* v. *Sayer.* See *Williams's Saunders*, i. 80. *n.* 1.

To a plea in abatement of misnomer of plaintiff, replication that plaintiff was known as well by the one name as the other, upon demurrer overruled, there will be judgment of *respondeas ouster*, and not *quod recuperet.* 1 *East's Rep.* 542.

In abatement the court will give no other than the proper judgment prayed for by the party. 10 *East's Rep.* 83, and see 2 *Bos. & Pul.* 422.

ABATOR. See *Abate.*

ABATUDA. Any thing diminished.—*Moneta* abatuda, is money clipped or diminished in value. *Cowel. Du Fresne.*

ABBACY, *abbatia.*] The government of a religious house, and the revenues thereof, subject to an *abbot*, as bishoprick from bishop.

ABBAT, or *Abbot; abbas*, Lat.—*abbé*, Fr.—*abbud*, Sax. by some derived from the Syriac *abba*, *pater.*] A spiritual lord or governor, having the rule of a religious house. Of these abbots here in England some were elective, some presentative; and some were mitred, and some were not; such as were mitred had episcopal authority within their limits, being exempted from the jurisdiction of the diocesan; but the other sort of *abbots* were subject to the diocesan in all spiritual government. The mitred *abbots* were lords of parliament, and called *abbots sovereign*, and *abbots general*, to distinguish them from the other *abbots.* And as there were *abbots*, so there were also *lords priors*, who had exempt jurisdiction, and were likewise lords of parliament. Some reckon twenty-six of these lords *abbots* and priors that sat in parliament. Sir Edw. Coke says, there were twenty-seven parliamentary *abbots* and two priors. 1 *Inst.* 97. In the parliament 20 *R.* 2. there were but twenty-five; but *anno* 4. *Ed.* 3. in the summons to the parliament at Winton, more are named. And in *Monasticon Anglicanum* there is also mention of more, the names of which were as follow: *abbots* of St. Austin, Canterbury, Ramsey, Peterborough, Croyland, Evesham, St. Bennet de Hielmo, Thornby, Colchester, Leicester, Winchcomb, Westminster, Cirencester, St. Alban's, St. Mary York, Shrewsbury, Selby, St. Peter's Gloucester, Malmsbury, Waltham, Thorney, St. Edmund's, Beaulieu, Abingdon, Hide, Reading, Glastonbury, and Osney.—And priors of Spalding, St. John's of Jerusalem, and Lewes.—To which were afterwards added the *abbots* of St. Austin's Bristol, and of Bardeny, and the priory de Sempringham. See also Spelman's Glossary. These *abbeys* and priories were founded by our ancient kings and great men, from the year 602 to 1133. An *abbot*, with the monks of the same house, were called the *convent*, and made a corporation. *Terms de Ley* 4.—By stat. 27 *H.* 8. *c.* 28. all *abbeys*, monasteries, priories, &c. not above the value of 200*l. per ann.* were given to the king, who sold the lands at low rates to the gentry. *Anno* 29 *H.* 8. the rest of the *abbots*, &c. made voluntary surrenders of their houses to obtain favour of the king; and *anno* 31 *H.* 8. a bill was brought into the house to confirm those surrenders; which passing, completed the dissolution, except the hospitals and colleges which were not dissolved, the first till the 33d, and the last till the 37th of *H.* 8.; when commissioners were appointed to enter and seize the said lands, &c.

ABBATIS. An avener or steward of the stables; an ostler. *Spelm.*

ABBREVIATE of ADJUDICATION. This term (in the Scotch law) is applied to an abstract of the adjudication.—Adjudication is that diligence of the law by which the heritage of a debtor is adjudged to belong to his creditor in payment of debt; and the abbreviate of the adjudication is an abridgment of the record, containing the names of the creditor, of the debtor, and of the lands, with the amount of the debt; it is signed by the judge who pronounced the decree in the process of adjudication, and must be recorded in the register of abbreviates. *Scotch Dict.*

ABBROCHMENT, *abbrocamentum.*] The forestalling of a market or fair. *MS. Antiq.*

ABBUTTALS. See *Abuttals.*

ABBY. See *Abbot.*

To ABDICATE, *abdicare.*] To renounce or refuse any thing. *Terms de Ley* 5.

ABDICATION, *abdicatio.*] In general, is where a magistrate, or person in office, renounces and gives up the same before the term of service is expired. And this word is frequently confounded with resignation, but differs from it, in that *abdication* is done purely and simply; whereas *resignation* is in favour of some other person. *Chamb. Dict.* 'Tis said to be a renunciation, quitting and relinquishing, so as to have nothing further to do with a thing; or the doing of such actions as are inconsistent with the holding of it. On king James II's leaving the kingdom, and *abdicating* the government, the Lords would have had the word *desertion* made use of; but the Commons thought it was not comprehensive enough, for that the king might then have liberty of returning. The Scots called it a forefalture *(forfeiture)* of the crown, from the verb *forisfacio.*—This word was fully canvassed in the *Parliamentary Debates* at that time.

ABDITORIUM. An abditory or hiding place, to hide and preserve goods, plate, or money; and is used for a chest in which reliques are kept, as mentioned in the inventory of the church of York. *Mon. Ang. p.* 173.

ABEREMURDER, *aberemurdrum.*] Plain or downright murder; as distinguished from the less heinous crimes of manslaughter or chance-medley. It is derived from the Saxon *æbere*, apparent, notorious, and *morth*, murder; and was declared a capital offence, without fine or commutation, by the laws of *Canute*, *cap.* 93. and of *Hen.* 1. *cap.* 13. *Spelm.*

To ABET, *abettare*, from the Saxon *a (ad* vel *usque)* and *bedan* or *beteren*, to stir up or incite. In our law signifies to encourage or set on; the substantive *abetment* is used for an encouraging or instigation. *Staundf. Pl. Cr.* 105. An *abettor (abettator)* is an instigator or setter on; one that promotes or procures a crime. *Old Nat. Br.* 21. See title *Accessary.*

ABEYANCE, or *abbayance*, [from the Fr. *beer*, or *bayer*, to expect.] Is what is in expectation, remembrance, and intendment of law. By a principle of law, in every land there is a fee-simple in somebody, or it is in *abeyance;* that is, though for the present it be in no man, yet it is in expectancy, belonging to him that is next to enjoy the land. 1 *Inst.* 342. The word *abeyance* hath been compared to what the civilians call *hæreditatem jacentem;* for as the civilians say lands and goods *jacent*, so the common lawyers say that things in like estate *are in abeyance;* as the logicians term it *in posse*, or in understanding; and as we say *in nubibus*, that is, in consideration of law. See *Plowd. Rep.* 547.

If a man be a patron of a church, and presents one thereto, the fee of the lands and tenements pertaining to the rectory is in the parson; but if the parson die, and the church become void, then the fee is in *abeyance*, until there be a new parson

presented, admitted, and inducted; for the patron hath not the fee, but only the right to present, the fee being in the incumbent that is presented. *Terms de Ley* 6.

If a man makes a lease for life, the remainder to the right heirs of *J. S.*, the fee-simple is in *abeyance* until *J. S.* dies. 1 *Inst.* 342. If lands be leased to *A. B.* for life, the remainder to another person for years, the remainder for years is in *abeyance*, until the death of the lessee for life; and then it shall vest in him in remainder as a purchaser, and as a chattel shall go to his executors. 3 *Leon.* 23. Where tenant for term of another's life dieth, the freehold of the lands is in *abeyance* till the entry of the occupant. 1 *Inst.* 342. *b.*

Fee-simple in *abeyance* cannot be charged until it comes *in esse*, so as to be certainly charged or aliened; though by possibility it may fall every hour. 1 *Inst.* 378.

The necessity there was in the old law, that there should always be some person to do the feudal duties, to fill the possession, and to answer the actions which might be brought for the fief, introduced the maxim that the freehold could never be in abeyance. (See 2 *Wils.* 165.) But it was admitted there were some cases in which the *inheritance*, when separated from the freehold, might be so. But this abeyance or suspension of the inheritance could not but be considered with a very jealous eye, and it was agreed that it should be discountenanced and discouraged as much as possible, and allowed upon none but the most urgent occasions.—The chief reasons of this may be found in Blackstone's argument in the case of *Perryn* and *Blake;* and Mr. Hargrave's observations on the rule in *Shelly's* case. To these reasons the modern law has added her marked and unremitted odium of every restraint upon alienation; it being clear that no restraint could be more effectual than the admission of a suspension of the inheritance. The same principles have in some degree given rise to the well known rule of law, that a preceding estate of freehold is indispensably necessary for the *support* of a contingent remainder; and they influence in some degree the doctrines respecting the destruction of contingent remainders. See 1 *Inst.* 216 *a*, and 342 *b.* and the notes there.

As to the *abeyance of titles of honour*, and their being revived by the royal nomination, see 1 *Inst.* 165 *a*; where Lord *Coke* says, that if an earl of Chester die, leaving more daughters than one, the eldest shall not of right be a countess, but the king may, for the uncertainty, confer the dignity on which daughter he pleases. And this doctrine, says Mr. Hargrave in his note, is undoubtedly law, though our books furnish little matter on the subject; and there are many instances of an exertion of this prerogative. One of the most remarkable took place in the person of the late Mr. Norborn Berkley, who, in 1764, was called to the House of Peers in right of the old barony of Botetourt, after an *abeyance* of several centuries, and was allowed to sit according to the antiquity of that barony. See *Cas. in Dom. Proc.* 1764. Another instance was in the case of Sir Francis Dashwood, late Lord De Spencer; for in 1763 he was called to the antient barony of that name in right of his deceased mother, who was eldest sister and one of the co-heirs of an earl of Westmoreland, on whose death that barony had become in *abeyance*, and being so summoned he took his seat as premier baron, in place of Lord Abergavenny, who before possessed that distinction.

ABGETORIA, *abgetorium.* The alphabet. *Mat. Westm.* —The Irish still call the alphabet *abghitten.*

ABIDING-BY. This term is used (in the Scotch law) where a deed is challenged as forged; the party founding on the deed must appear in court and abide by it; this is done by his signing a declaration that he abides by the deed quarrelled *sub periculo falsi*, which has the effect of pledging him to stand to the consequences of founding on a forged deed. It will most commonly happen, however, that the abiding-by is qualified; as for instance, in the case of a bill, the holder will state that it came fairly into his hands in the course of business, and he will abide by it, under that protestation and qualification, and as in no shape accessary to the forgery if there be one. *Scotch Dict.*

ABIGEVUS, for *abigens.* The same as *Abactor*, which see, and *Bract. Tract.* 1. 1. 1. 3. *cap.* 6. 105. *a.*

ABILITY to inherit. See title *Alien.*

ABISHERING or ABISHERSING. Is understood to be quit of amercements. It originally signified a forfeiture or amercement, and is more properly *mishering*, *mishersing*, or *miskering*, according to Spelman. It hath since been termed a liberty or freedom: because wherever this word is used in a grant or charter, the persons to whom made, have the forfeitures and amercements of all others, and are themselves free from the controul of any within their fee. *Rastal's Abr. Terms de Ley* 7.

ABJURATION, *abjuratio.*] A forswearing or renouncing by oath: in the old law it signified a sworn banishment, or an oath taken to forsake the realm for ever. *Staundf. Pl. C. l.* 2. *c.* 40.

Formerly in king Edward the Confessor's time, and other reigns down to the 22 *H.* 8. (in imitation of the clemency of the Roman emperors towards such as fled to the church,) if a man had committed felony here, and he could fly to a church or church-yard before his apprehension, he might not be taken from thence to be tried for his crime; but on confession thereof before the justice, or before the coroner, he was admitted to his oath, to *abjure* or forsake the realm; which privilege he was to have forty days, during which time any person might give him meat and drink for his sustenance, but not after, on pain of being guilty of felony. See *Horn's Mirror, lib.* 1. But at last, this punishment being but a perpetual confinement of the offender to some sanctuary, wherein (upon *abjuration* of his liberty and free habitation) he would choose to spend his life, (as appears by the stat. *anno* 22 *H.* 8. *c.* 14.) this privilege was abolished by stat. 21 *Jac.* 1. *cap.* 28.; and this kind of abjuration ceased. 2 *Inst.* 629.

As to the effect of abjuration on the marriage tie, see tit. *Baron and Feme.*

In its modern and now more usual signification, it extends to the person as well as place; as for a man to *abjure* the Pretender by oath, is to bind himself not to own any regal authority in the person called the Pretender, nor ever to pay him any obedience, &c. See, on this subject, tit. *Nonconformists, Oaths, Papist, Recusants, &c.*

ABOLITION. A destroying or effacing, or putting out of memory; it also signifies the leave given by the king, or judges, to a criminal accuser to desist from further prosecution. Stat. 25 *H.* 8. *c.* 21.

ABORTION. See *Homicide.*

To ABRIDGE, *abbreviare*, from the Fr. *abbreger.*] To make shorter in words, so as to retain the sense and substance. And in the common law it signifies particularly the making a declaration or count shorter, by severing some of the substance from it: a man is said to *abridge* his plaint in assize, and a woman her demand in action of dower, where any land is put into the plaint or demand which is not in the tenure of the defendant; for if the defendant pleads non-tenure, joint-tenancy, &c. in abatement of the writ, as to part of the lands, the plaintiff may leave out those lands, and pray that the tenant may answer to the rest. See *Brook* tit. *Abridgement, vide* 21. *H.* 8. *c.* 3.

ABRIDGEMENT. A large work contracted into a narrow compass. See tit. *Books, Literary Property.*

ABROGATE, *abrogare.*] To disannul or take away any thing: to *abrogate* a law is to lay aside or repeal it. Stat. 5 & 6 *Ed.* 6. *c.* 3.

ABSENCE. A decree (in the Scotch law) is said to be, in absence, where no appearance is made for the defender.

Every Scotchman who is within the kingdom is liable to be called in an action before the court of session; in which action decree may be given against the defender, although no appearance be made for him. Even a foreigner, though not within the kingdom, provided he be possessed of a land estate in it, or of goods which have been attached for the purpose of founding jurisdiction, may be exposed to a decree in absence. *Scotch Dict.*

ABSENTEES, or *des absentees.* A parliament so called, was held at *Dublin*, 10 May, 8 *Hen.* 8. And mentioned in letters patent, dated 29 *Hen.* 8. 4 *Inst.* 354.

ABSOLVE. See *Assoile.*

ABSOLUTE WARRANDICE, is a warrant against all mortals. *Scotch Dict.*

ABSOLUTIONS, from Rome. See title *Papists.*

ABSONIARE, a word used by the English Saxons in the oath of fealty, and signifying to shun or avoid.—As in the form of the oath among the Saxons recorded by *Somner.*

ABSQUE HOC. See title *Traverse.*

ABUTTALS, from the French *abutter* or *abouter*, to limit or bound.] The buttings and boundings of lands, East, West, North, or South, with respect to the places by which they are limited and bounded. Camden tells us that limits were distinguished by hillocks raised in the lands called *Botentines*, whence we have the word *butting.* The sides on the breadth of lands are properly *adjacentes*, lying or bordering; and the ends in length *abbuttantes*, *abutting* or bounding. The boundaries and *abuttals* of corporation and church lands, and of parishes, are preserved by an annual procession. Boundaries are of several sorts; such as inclosures of hedges, ditches, and stones in common fields, brooks, rivers, and highways, &c. of manors and lordships.

ACCAPITARE, *accapitum.* To pay relief to lords of manors.—*Capitali domino* accapitare. *Fleta, l.* 2. *c.* 50.

ACCEDAS AD CURIAM, A writ to the sheriff, where a man hath received false judgment in a hundred court, or court baron. It issues out of the Chancery, but is returnable into B. R. or C. B. And is in the nature of the writ *de falso judicio*, which lies for him that had received false judgment in the county court. In the *Register of Writs*, it is said to be a writ that lies as well for justice delayed, as for false judgment; and that it is a species of the writ *recordare*, the sheriff being to make record of the suit in the inferior court, and certify it into the king's court. *Reg. Orig.* 9. 56. *F. N. B.* 18. *Dyer*, 169.

ACCEDAS AD VICECOMITEM. Where a sheriff hath a writ called *Pone* delivered to him, but suppresseth it, this writ is directed to the coroner, commanding him to deliver a writ to the sheriff. *Reg. Orig.* 83.

ACCEPTANCE, *acceptatio.*] The taking and *accepting* of any thing in good part, and as it were a tacit agreement to a preceding act, which might have been defeated and avoided were it not for such *acceptance* had.

*As to the effect of acceptance of Rent*, see titles *Rent*, *Lease.*

*How far the acceptance of one Estate shall destroy another*, see title *Estate.*

*Where the acceptance of money shall discharge a Bond*, see title *Bond* V.

*As to acceptance of Bills*, see *Bills of Exchange.*

*How far the acceptance of one thing shall be a good bar to the demand of another.*

Where the condition of a bond is to pay money, acceptance of another thing is good. But if the condition is not for money, but a collateral thing, it is otherwise. *Dyer* 56. 9 *Rep.* 79. The *acceptance* of uncertain things, as customs, &c. made over, may not be pleaded in satisfaction of a certain sum due on bond. *Cro. Car.* 193. If a woman hath title to an estate of inheritance, as dower, &c. she shall not be barred by any collateral satisfaction or recompence: and no collateral *acceptance* can bar any right of inheritance or freehold, without some release, &c. 4 *Rep.* 1. When a man is entitled to a thing in gross, he is not bound to *accept* it by parcels; and if a lessor distrain for rent, he is not obliged to *accept* part of it; nor in action of detinue, part of the goods, &c. 3 *Salk.* 2.

Debt upon bond, conditioned for the obligor to make an assurance of such lands to such uses as in the condition mentioned; the defendant pleaded that he had made a feoffment of the same lands to other uses than in the condition expressed, which the obligee had accepted; upon demurrer it was adjudged an ill plea; for the obligor ought not to vary from the uses set forth in the condition. 1 *Brownl.* 60.

Acceptance of a *less* sum may be in satisfaction of a *greater* sum, if it be before the day on which the money becomes due. 3 *Bulst.* 301. See title *Payment.*

ACCEPTILATION (in Scotch law) the extinction of a debt, with a declaration that the debt has been paid when it has not; or the acceptance of something merely imaginary in satisfaction of the debt. *Scotch Dict.*

ACCESSARY or ACCESSORY. *Accessorius*, *Particeps criminis.*] One guilty of a felonious offence, not principally, but by participation; as by command, advice, or concealment, &c.

*Abettors* and *Accomplices* also come in some measure under the name, though the former not strictly under the legal definition, of Accessories. An *Abettor* is one who stirs up, incites, instigates, or encourages, or who commands, counsels, or procures another to commit felony; and in many, indeed in almost all cases, is now considered as much a principal as the actual felon, in some cases more, as in the case of murder. See *Leach's Hawk. P. C. l.* 2. *c.* 29. § 7. 8. and *c.* 33. § 98—103. An *Accomplice* is one of many equally concerned in a felony, and is generally applied to those who are admitted to give evidence against their fellow criminals, for the furtherance of justice, which might otherwise be eluded; and this is done on the ancient principle of law relative to *Approvers.* See *Leach's Hawk. P. C. l.* 2. *c.* 37. § 3. 7. and notes. 4 *Comm.* 329.

The following extracts from *Blackstone's Commentaries*, (4 *Comm.* 34—40. and 323.) with some slight additions inserted, seem to be most proper to give the reader a methodized general idea of the subject.—Consult also *Hale's Hist. P. C.* and *Hawk. P. C.* for fuller information.

I. *Of Principals.*—A man may be principal in an offence in two degrees. A principal in the first degree, is he that is the actor, or absolute perpetrator of the crime; and in the second degree, he who is present, aiding and abetting the fact to be done. 1 *Hale's P. C.* 615.—Which presence need not always be an actual immediate standing by, within sight or hearing of the fact; but there may be also a constructive presence, as when one commits a robbery or murder, and another keeps watch or guard at some convenient distance. *Foster* 350. And this rule hath also other exceptions; for, in case of murder by poisoning, a man may be a principal felon by preparing and laying the poison, or persuading another to drink it, (*Keb.* 52.) who is ignorant of the poisonous quality, (*Foster* 349.) or giving it to him for that purpose; and yet not administer it himself, nor be present when the very deed of poisoning is committed. 3 *Inst.* 138. And the same reason will hold with regard to other murders committed in the absence of the murderer, by means which he had prepared before hand, and which probably could not fail of their mischievous effect. As by laying a trap, or pitfall, for another, whereby he is killed; letting out a wild beast, with an intent to mischief; or exciting a madman to commit murder, so that death thereupon en-

sues; in every of these cases the party offending is guilty of murder as a principal in the first degree. For he cannot be called an accessary, that necessarily presupposing a principal; and the poison, the pitfall, the beast, or the madman, cannot be held principals, being only the instruments of death. As therefore he must be certainly guilty either as principal or accessary, and cannot be so as accessary, it follows that he must be guilty as principal; and if principal, then in the first degree, for there is no other criminal, much less a superior in the guilt, whom he could aid, abet, or assist. 1 *Hale's P. C.* 617. 2 *Hawk. P. C.* 441, 2.

II. *Of Accessories.*—An Accessory is he who is not the chief actor in the offence, nor present at its performance, but is some way concerned therein, either before or after the fact committed. In considering the nature of which degree of guilt, we will examine, 1st. What offences admit of accessories, and what not; 2. Who may be an accessory before the fact: 3. Who may be an accessory after it: 4. How accessories, considered merely as such, and distinct from principals, are to be treated: 5. Of accessories or accomplices accusing principals.

1. In high treason there are no accessories, but all are principals: the same acts that make a man accessory in felony, making him a principal in high treason, upon account of the heinousness of the crime. 3 *Inst.* 138. 1 *Hale's P. C.* 613. Besides, it is to be considered, that the bare intent to commit treason is many times actual treason; as imagining the death of the king, or conspiring to take away his crown. And as no one can advise and abet such a crime without an intention to have it done, there can be no accessories before the fact, since the very advice and abetment amount to principal treason. But this will not hold in the inferior species of high treason, which do not amount to the legal idea of compassing the death of the king, queen, or prince. For in these, no advice to commit them, unless the thing be actually performed, will make a man a principal traitor. *Foster* 342. In petit treason, murder, and felonies, with or without benefit of clergy, there may be accessories; except only in those offences, which, by judgment of law, are sudden and unpremeditated, as manslaughter and the like, which, therefore, cannot have any accessories before the fact. 1 *Hale's P. C.* 615. So too in petit larceny, and in all crimes under the degree of felony, there are no accessories either before or after the fact: but all persons concerned therein, if guilty at all, are principals. 1 *Hale's P. C.* 613. the same rule holding with regard to the highest and lowest offences; though upon different reasons. In treason all are principals, *propter odium delicti;* in trespass all are principals, because the law, *quæ de minimis non curat*, does not descend to distinguish the different shades of guilt in petty misdemeanors. It is a maxim that *accessorius sequitur naturam sui principalis:* 3 *Inst.* 139.: and therefore an accessory cannot be guilty of a higher crime than his principal, being only punished as a partaker of his guilt. So that if a servant instigates a stranger to kill his master, this being murder in the stranger as principal, of course the servant is accessory only to the crime of murder, though, had he been present and assisting, he would have been guilty, as principal, of petty treason, and the stranger of murder. 2 *Hawk. P. C.* 441, 2.

Though generally an act of parliament, creating a felony, renders (consequentially) accessaries before and after, within the same penalty, yet the special penning of the act of parliament in such cases sometimes varies the case. Thus the statute of 3 *Hen.* 7. *c.* 2. against taking away maidens, &c. makes the offence, and the procuring and abetting, yea, and wittingly receiving also, to be all equally principal felonies, and excluded of clergy. 1 *Hale's P. C.* 614.

In what cases accessaries are excluded from clergy, see tit. *Felonies without Clergy.*

2. Sir Matthew Hale (5 *Hale's P. C.* 615, 616.) defines *An accessory before the fact* to be one, who being absent at the time the crime was committed, doth yet procure, counsel, or command another to commit a crime. Herein absence is necessary to make him accessory; for if such procurer, or the like, be present he is guilty of the crime as principal. If A. then advises B. to kill another, and B. does, in the absence of A., now B. is principal, and A. is accessory in the murder. And this holds though the party killed be not *in rerum naturâ* at the time of the advice given. As if A. the reputed father, advises B. the mother of a bastard child, unborn, to strangle it when born, and she does so, A. is accessory to the murder. *Dyer* 186. And it is also settled, (*Foster* 125,) that whoever procureth a felony to be committed, though it be by the intervention of a third person, is an accessory before the fact. It is likewise a rule, that he who in anywise commands or counsels another to commit an unlawful act is accessory to all that ensues upon that unlawful act, but is not accessory to any act distinct from the other: as if A. commands B. to beat C., and B. beats him so that he dies, B. is guilty of murder as principal, and A. is accessory; but if A. commands B. to burn C.'s house, and he in so doing commits a robbery, now A., though accessory to the burning, is not accessory to the robbery, for that is a thing of a distinct and unconsequential nature. 1 *Hale's P. C.* 617. But if the felony committed be the same in substance with that which is commanded, and only varying in some circumstantial matters; as if, upon a command to poison A. he is stabbed or shot, and dies, the commander is still accessory to the murder, for the substance of the thing commanded was the death of A. and the manner of its execution is a mere collateral circumstance. 2 *Hawk. P. C.* 443. By stat. 3 & 4 *W. & M. c.* 9. benefit of clergy is taken away from accessories before the fact to *burglary*, by commanding, counselling, &c.

3. *An accessory after the fact* may be, where a person, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon. 1 *Hale's P. C.* 618. Therefore to make an accessory *ex post facto*, it is in the first place requisite that he knows of the felony committed. 2 *Hawk. P. C.* 446. In the next place, he must receive, relieve, comfort, or assist him. And, generally, any assistance whatever given to a felon, to hinder his being apprehended, tried, or suffering punishment, makes the assister an accessory. As furnishing him with a horse to escape his pursuers, money or victuals to support him, a house or other shelter to conceal him, or open force or violence to rescue or protect him. 2 *Hawk. P. C.* 444, 5. So likewise to convey instruments to a felon to enable him to break gaol, or to bribe the gaoler to let him escape, makes a man an accessory to the felony. And by stat. 11 & 12 *W.* 3. *c.* 7. the receiving a pirate or any vessel or goods piratically taken renders the receivers accessory to the piracy. But to relieve a felon in gaol with cloaths or other necessaries, is no offence: for the crime imputable to this species of accessory is the hindrance of public justice, by assisting the felon to escape the vengeance of the law. 1 *Hale's P. C.* 624. To buy or receive stolen goods, knowing them to be stolen, falls under none of those descriptions; it was therefore at common law a mere misdemeanor, and made not the receiver accessory to the theft, because he received the goods only and not the felon. 1 *Hale's P. C.* 620. To remedy this the stat. 3 *W. & M. c.* 9. and 1 *Anne c.* 9, were passed against such receivers; and now by the stat. 5 *Anne c.* 31, and 4 *Geo.* 1. *c.* 11, all such receivers are made accessories (where the principal felony admits of accessories) *Foster* 73; and may be transported for fourteen years; and in the case of receiving linen, goods stolen from the bleaching-grounds, are by stat. 18 *Geo.* 2. *c.* 27, declared felons without benefit of clergy. And see stat. 10 *Geo.* 3. *c.* 48. *post.* 4.

The felony must be complete at the time of the assistance

given; else it makes not the assistant an accessary. As if one wounds another mortally, and after the wound given, but before death ensues, a person assists or receives the delinquent, this does not make him accessory to the homicide; for till death ensues, there is no felony committed, 2 *Hawk. P. C.* 447. But so strict is the law, where a felony is actually complete, in order to do effectual justice, that the nearest relations are not suffered to aid or receive one another. If the parent assists the child or the child his parent, if the brother receives the brother, the master his servant, or the servant his master, or even if the husband relieves his wife, who may have any of them committed a felony, the receivers become accessories, *ex post facto*. 3 *Inst.* 108. 2 *Hawk. P. C.* 320. But a feme covert cannot become an accessory by the receit and concealment of her husband; for she is presumed to act under his coercion, and therefore she is not bound, neither ought she to discover her lord. 1 *Hale's P. C.* 621.

4. The general rule of the ancient law is, that accessories shall suffer the same punishment as their principals; if one be liable to death, the other is also liable. 3 *Inst.* 188. Why, then, it may be asked, are such eloborate distinctions made between accessories and principals, if both are to suffer the same punishment? For these reasons; 1st, To distinguish the nature and denomination of crimes, that the accused may know how to defend himself when indicted: the commission of an actual robery being quite a different accusation from that of harbouring the robber. 2dly, Because, though by the antient common law the rule is as before laid down, that both shall be punished alike, yet now by the statutes relating to the benefit of clergy, a distinction is made between them; accessories *after the fact* being still allowed the benefit of clergy in all cases (except horse-stealing, stat. 31 *Eliz. c.* 12, and stealing of linen from bleaching-grounds, stat. 18 *Geo.* 2. *c.* 27.) which is denied to the principals, and accessories *before the fact*, in many cases; as among others in petit-treason, murder, robbery, and wilful burning. 1 *Hale's P. C.* 615. And perhaps if a distinction were constantly to be made between the punishment of principals and accessories, even before the fact, the latter to be treated with a little less severity than the former, it might prevent the perpetration of many crimes, by increasing the difficulty of finding a person to execute the deed itself; as his danger would be greater than that of his accomplices, by reason of the difference of his punishment. *Beccar. c.* 37. 3dly, Because no man formerly could be tried as accessory till after the principal was convicted, or at least he must have been tried at the same time with him, though that law is now much altered. 4thly, Because, though a man be indicted as accessory and acquitted, he may afterwards be indicted as principal; for an acquittal of receiving or counselling a felon is no acquittal of the felony itself: but it is a matter of some doubt, whether if a man be acquitted as principal, he can be afterwards indicted as accessory *before* the fact; since those offences are frequently very nearly allied, and therefore an acquittal of the guilt of one may be an acquittal of the other also. 1 *Hale's P. C.* 625, 626. 2 *Hawk. P. C.* 529, 530. *Foster* 361. But it is clearly held, that one acquitted as principal may be indicted as accessory *after* the fact; since that is always an offence of a different species of guilt, principally tending to evade the public justice, and is subsequent in its commencement to the other. Upon these reasons the distinction of principal and accessory will appear to be highly necessary, though the punishment is still much the same with regard to principals and such accessories as offend before the fact is committed.

By the old common law, the accessory could not be arraigned till the principal was attainted, unless he chose it, for he might waive the benefit of the law; and therefore principal and accessory might and may still be arraigned and plead, and also be tried together. But otherwise if the principal had never been indicted at all, had stood mute, had challenged above thirty-five jurors peremptorily, had claimed the benefit of clergy, had obtained a pardon, or had died before attainder, the accessory in any of these cases could not be arraigned: for *non constitit* whether any felony was committed or no, till the principal was attainted; and it might so happen that the accessory should be convicted one day, and the principal acquitted the next, which would be absurd. However, this absurdity could only happen where it was possible that a trial of the principal might be had *subsequent* to that of the accessory: and therefore the law still continues that the accessory shall *not* be tried so long as the principal remains liable to be tried *hereafter*. But by stat. 1 *Anne, c.* 9. if the principal be once convicted, and before attainder, (that is, before he receives judgment of death or outlawry,) he is delivered by pardon, the benefit of clergy, or otherwise: or if the principal stands mute, or challenges peremptorily above the legal number of jurors, so as never to be convicted at all; in any of these cases in which no *subsequent* trial can be had of the principal, the accessory may be proceeded against, as if the principal felon had been attainted; for there is no danger of future contradiction. See tit. *Receivers*. And upon the trial of the accessory, as well after as before the conviction of the principal, it seems to be the better opinion, and founded on the true spirit of justice, that the accessory is at liberty (if he can) to controvert the guilt of his supposed principal, and to prove him innocent of the charge, as well in point of fact, as in point of law. *Foster*, 365, &c. By the stat. 2 & 3 *E.* 6. *c.* 24. the accessory is indictable in that county where he was accessory, and shall be tried there, as if the felony had been committed in the same county; and the justices before whom the accessory is, shall write to the justices, &c. before whom the principal is attainted, for the record of the attainder. 1 *Hale's Hist. P. C.* 623.

Where the principal is not attainted, but discharged, by being burnt in the hand only, the accessory after the fact ought to be discharged without burning in the hand, on being put to his book. *Cro. Car.* 566, *pl.* 3.

Where there are two principals, the attainder of one of them gives sufficient foundation to arraign the *accessory*. *Jenk. Cent.* 76.

In Great Britain, by stat. 43 *G.* 3. *c.* 113. *accessaries* to felonies may be tried either in the county where the principal offence was committed, or in that where the offence of being accessary was done; and if the principal offence shall be committed on the high seas, the accessaries shall be tried in manner prescribed by 28 *H.* 8. *c.* 15.—Similar provisions are enacted for Ireland by stat. 43 *G.* 3. *c.* 79.

By the said act 43 *G.* 3. *c.* 113. § 6. the provisions of the act 33 *H.* 8. *c.* 23. respecting the trial of persons examined before the council for murders, &c. is extended to accessaries before the fact in murder, and to the offence of man-slaughter.—(See tit. *Homicide*, III. 3.)

5. The old doctrine of *approvements*, when one criminal appealed or accused his accomplices in order to obtain his pardon, is now grown into disuse; but is fully provided for in the case of *coining*, *robbery*, *burglary*, *house-breaking*, *horse-stealing*, and *larceny*, (from shops, warehouses, stables, and coach-houses,) by stat. 4 & 5 *W.* & *M. c.* 8. 6 & 7 *W.* 3. *c.* 17. 10 & 11 *W.* 3. *c.* 23. & 5 *Anne, c.* 31. which enact, that if any such offender, being out of prison, shall discover *two* who have committed the like offences, he shall on their conviction, in cases of *burglary* or *house-breaking*, receive the reward of 40*l.* given to persons apprehending such felons; and in general be entitled to a pardon of all capital offences, excepting only murder and treason, and of them also in cases of coining; but under stat. 15 *Geo.* 2. *c.* 28. the pardon extends only to offences by coinage. And in cases of stealing iron, lead, or other metals, the accomplice convicting receivers shall, (under stat. 29 *Geo.* 2, *c.* 30.) be pardoned all *such* offences. It is usual also for jus-

tices of peace to admit accomplices to other felonies, to be witnesses against their fellows; on an *implied confidence* that, in case of a complete discovery without prevarication or fraud, they shall receive a pardon; but to which they are not entitled of right. *Leach's Hawk. l.* 2. *c.* 37. § 7. and notes. 3 *Comm.* 330.

ACCESSION; property by, see title *Occupant*.

This is also the term used in speaking of the commencement of the king's reign.

ACCOLA. An husbandman who came from some other parts or country to till the lands, *eo quod adveniens terram* colat. And is thus distinguished from *Incola, viz.* Accola *non propriam, propriam colit* Incola *terram*. Du Fresne.

ACCOLADE, from the Fr. *accoler, collum amplecti.*] A ceremony used in knighthood by the king's putting his hand about the knight's neck.

ACCOMPLICE. See *Accessary*.

ACCOMPT. See *Account*.

ACCORD. *Fr.*] Is an agreement between two or more persons, where any one is injured by a trespass, or offence done, or on a contract, to satisfy him with some recompence; which accord, if executed and performed, shall be a good bar in law, if the other party after the *accord* performed, bring an action for the same trespass, &c. *Terms de Ley*.

When a duty is created by deed in certainty, as by bill, bond, or covenant to pay a sum of money, this duty accruing by writing, ought to be discharged by matter of as high a nature; but when no certain duty arises by deed, but the action is for a tort or default, &c. for which damages are to be recovered, there an *accord* with satisfaction is a good plea. 6 *Rep.* 43. In *accord* one promise may be pleaded in discharge of another, before breach; but after breach, it cannot be discharged without a release in writing. 2 *Mod.* 44. *Accord* with satisfaction upon a covenant broken, is a good plea in satisfaction and discharge of the *damages*. *Lutw.* 359. And *accord* made before the covenant broken, hath been adjudged a good bar to an action of covenant, as it may be in satisfaction of damage to come. 1 *Danv. Abr.* 546.

If a contract *without deed* is to deliver goods, &c. there money may be paid by *accord* in satisfaction; but if one is bound in an obligation to deliver goods, or to do any collateral thing, the obligee cannot by *accord* give money in satisfaction thereof: though when one is bound to pay money, he may give goods, or any other valuable thing in satisfaction. 9 *Rep.* 78. 1 *Inst.* 212. Where damages are *uncertain*, a lesser thing may be done in satisfaction, and in such case an *accord* and satisfaction is a good plea; but in action of debt on a bond, there a lesser sum cannot be paid in satisfaction of a greater. 4 *Mod.* 88. *Accord* with satisfaction is a good plea in personal actions, where damages only are to be recovered; and in all actions which suppose a wrong *vi et armis*, where a *capias* and *exigent* lie at the common law, in trespass and ejectment, detinue, &c. *accord* is a good plea: So in an appeal of maihem. But in *real* actions it is not a good plea. 4 *Rep.* 1. 9. 70. 9 *Rep.* 77. Of late it hath been held, that upon mutual promises an action lies, and consequently, there being equal remedy on both sides, an *accord* may be pleaded without execution, as well as an arbitrament. *Raym.* 450. 2 *Jones* 158. *Acceptance* of the thing agreed on in these *accords* is the only material thing to make them binding. *Hob.* 178. 5 *Mod.* 86.

*Accord executed* only is pleadable in bar, and *executory* not. 1 *Mod.* 69. See *Com. Dig.* title *Accord* (C). Also in pleading it, it is the safest by way of *satisfaction*, and not of *accord* alone. For if it be pleaded by way of *accord*, a precise execution thereof in every part must be pleaded: but, by way of satisfaction, the defendant need only allege, that he paid the plaintiff such a sum, &c. in full satisfaction of the *accord*, which the plaintiff received. 9 *Rep.* 80. The defendant must plead that the plaintiff *accepted* the thing agreed upon *in full satisfaction, &c.* And if it be on a *bond*, it must be in satisfaction of the *money* mentioned in the condition, and *not* of the *bond;* which cannot be discharged but by writing under hand and seal. *Cro. Jac.* 254. 650. See further *Com. Dig.* tit. *Accord*. See tit. *Acceptance, Award, Bond, Estate, Lease, Rent, Payment*.

ACCOUNT or ACCOMPT; *computus.*] Is a writ or action which lies against a bailiff or receiver to a lord or others, who, by reason of their offices and businesses, are to render *accompt*, but refuse to do it. *F. N. B.* 116.

This action is now seldom used; but the most liberal, extensive, and beneficial action is for *money had and received* by defendant to plaintiff's use, which will lie in almost every case where one hath money of another's in his hands, which he ought to pay him. This form of action is equivalent to a bill in equity. An action on the case on *insimul computasset* is also usual for the balance of a setted account. See *Godfrey* v. *Saunders*, 3 *Wils.* and 3 *Comm.* 162.—The action of account however lies in the following cases.

If a person receives money due to me upon an obligation, &c. I may either have an action of *accompt* against him as my receiver; or action of debt, or on the case, as owing me so much money as he hath received. 1 *Lill.* 33. If I pay money in my own wrong to another, I may bring an action against him for so much money received to my use; but then he may discharge himself by alleging it was for some debt, or to be paid over by my order to some other person, which he hath done, &c. 1 *Lill.* 30. But if a man have a servant, whom he orders to receive money, the master shall have *accompt* against him, if he were his receiver. *Co. Lit.* 172. If money be received by a man's wife to his use, action of *accompt* lies against the husband, and he may be charged in the declaration as his own receipt. *Co. Lit.* 295. *Account* does not lie against an infant, but it lies against a man or woman, that is *guardian, bailiff*, or *receiver*, being of age and dis-covert: and though an apprentice is not chargeable in this action, for what he usually receives in his master's trade, yet upon collateral receipts he shall be charged as well as another. *Co. Lit.* 172. *Roll. Abr.* 117. 3 *Leon.* 92.

As to other actions of *accompt*, they will not lie of a thing certain; if a man delivers 10*l.* to merchandize with, he shall not have *account* of the 10*l.* but of the profits, which are uncertain; and this is one reason why this action will not lie for the arrears of rent. 1 *Danv. Abr.* 215. Action of account may be brought against a factor that sells goods and merchandizes upon credit, without a particular commission so to do, though the goods are *bona peritura*. 2 *Mod.* 100. If there are two demands in a declaration, to which the defendant pleads an *accompt* stated, the plaintiff can never after resort to the original contract, which is thereby merged and discharged in the *accompt*; if A. sells his horse to B. for 10*l.* and there being divers other dealings between them, they come to an *accompt* upon the whole, and B. is found in arrear 5*l.* A. must bring his *insimul computasset* for it; but if there be only one debt betwixt the parties, entering into an *accompt* for that would not determine the first contract. 1 *Mod. Rep.* 206. 2 *Mod.* 44. It has been held, that mutual demands on an *accompt* are not extinguished by settling it, and promise to pay the balance; wherefore *assumpsit* lies for the original debt. *Fitzgib.* 44. A man having received of another 100*l.* to be employed in merchandize abroad, covenants at his return to *accompt* to him; this doth not alter the case; but, notwithstanding the covenant, action of *accompt* may be brought. 2 *Bulst.* 256. And if I deliver to another person goods or money beyond sea, to be delivered again to me in England at a certain place, and he delivers it not, I may be relieved by this action. *F. N. B.* 18.

*Accompt* may be brought against the following persons:

If a man makes one his *bailiff* of a manor, &c. he shall have a writ of *accompt* against him as *bailiff;* where a person makes one *receiver*, to receive his rents or debts, &c. he shall have *accompt* against him as *receiver*, and if a man makes one his *bailiff* and also his *receiver*, then he shall have *accompt* against him in *both* ways. Also a person may have a writ of *accompt* against a man as bailiff or receiver, where he was not his bailiff or receiver; as if a man receive money for my use, I shall have an *accompt* against him as receiver; or if a person deliver money unto another to deliver over unto me, I shall likewise have *accompt* against him as my receiver: so if a man enter into my lands to my use, and receive the profits thereof, I shall have *accompt* against him as bailiff. 9 *H.* 6. 36 *H.* 6. 10 *R.* 2. *Fitz. Accompt.* 6.

A judgment in *accompt*, as receiver, is no bar to action of *accompt* as bailiff; but 'tis said a bailiff cannot be charged as receiver, nor a receiver as bailiff; because then he might be twice charged. 2 *Lev.* 127. 1 *Danv. Abr.* 220, 221. The heir may have writ of *accompt*, before or after his full age, against a guardian in socage, and if he sue the guardian for profits of his lands taken before he is fourteen years old, he must charge him as guardian; but if it be for taking the profits after that age, there he must sue him as bailiff. *Lit.* 124. *F. N. B.* 118. Where an heir sues a stranger that doth intermeddle with his land, he shall charge him in *accompt* as guardian. *F. N. B.* 18.

A man devises lands to be sold by his executors, and the money thence arising to be distributed amongst his daughters; action of *accompt* lies in this case, for the daughters against the executors. *Jenk. Cent.* 215. 2 *Roll. Abr.* 285. An action of *accompt* lies against a bailiff, not only for what profits he hath made and raised, but also for what he might have made and raised by his care and industry, his reasonable charges and expences deducted. *Co. Lit.* 172. In this instance the action of *accompt* may be preferable to that for *money had and received.*—One merchant may have *accompt* against another, where they occupy their trade together; and if one charges me as bailiff of his goods *ad mercandizandum*, I must answer for the increase, and be punished for my negligence; but if he charges me as receiver *ad computandum*, I must be answerable only for the bare money or thing delivered. *F. N. B.* 117. *Co. Lit.* 272. 2 *Leon. Ca.* 245.

If a bailiff or receiver make a deputy, action of *accompt* will not lie against the deputy, but against him. 1 *Leon.* 32.

*Statutes.*—In the writ of *accompt* the process by the common law was summons, attachment, and distress infinite. The statute of *Marlbridge* (52 *H.* 3. *c.* 23.) gave attachment by the body, if the bailiff had no lands by which he might be distrained. 2 *Inst.* 380.—By the stat. *Westm.* 2. (13 *E.* 1. *st.* 1.) *c.* 11. if the accountant be found in arrearages, the *auditors* that are assigned to him have power to award him to prison.—In the process of outlawry, &c. the stat. 13 *E.* 3. *c.* 23. gives an action of *accompt* to the executors of a merchant; the stat. 25 *E.* 3. *c.* 5. to executors of executors; the stat. of 31 *E.* 3. *c.* 11. to administrators; and by the stat. 3 and 4 *Ann. c.* 16, actions of *account* may be brought against the executors and administrators of every guardian, bailiff, and receiver, and by one joint-tenant, tenant in common, his executors and administrators, against the other as bailiff, for receiving more than his share, and against their executors and administrators; and the auditors appointed by the court may examine the party on oath.

It may be proper to say something concerning the *plea* and *judgment* in account; and though the order may seem somewhat irregular, it will be necessary first to explain the nature of the judgment, which being rightly understood, the distinctions as to the method of pleading will be more easily conceived.

The usual judgment is *quod computet*, on which the defendant is taken by *capias ad computandum;* but there are two judgments in this writ, for if the defendant cannot avoid the suit by plea, judgment is first given, *That he do accompt;* and having done this before the auditors, there is another judgment entered, that the plaintiff shall recover of the defendant so much as is found in arrear. 11 *Rep.* 40. The first judgment is but an award of the court, like a writ to inquire of damages; and these two judgments depend one upon another; for if judgment be to *accompt*, and the party die before he hath *accounted*, the executor cannot proceed in the action, but it must be begun again; and no writ of error will lie upon the first till after the second judgment. *Ibid.*

*With respect to the plea, the following distinctions are to be noticed:*

What may be pleaded in bar to the action, shall not be allowed to be pleaded before the auditors. *Cro. Car.* 82. 161. Some pleas are in bar of the *accompt*, and others in discharge before auditors; and some pleas will be allowed before auditors, that will not be in bar to the *accompt*. *Dyer* 21. 11 *Rep.* 8. In *accompt* the plaintiff declared of the receipt of money by the hands of a stranger; the defendant pleaded a gift of the money afterwards by the plaintiff; this was a good plea as well in bar of the action as before auditors. *Winch.* 9.

The pleas in this action are, *quod nunquam fuit receptor; quod plenè computavit, &c.* It is no plea by an *accomptant* that he was robbed; unless he alleges it was without his default and negligence, and then it will be a good plea. *Co. Lit.* 89. That the defendant *never was bailiff*, is the general bar; and it is a good plea in bar, by claiming a property in the things to be *accounted* for. 29 *E.* 3. *c.* 47. A defendant, as receiver, cannot wage his law where he receives the money by another's hands: it is otherwise where he received it of the plaintiff himself. 1 *Cro.* 919.

It may be proper to add, that the process in *accompt* is summons, *pone* and distress; and, upon a *nihil* returned, the plaintiff may proceed to outlawry. The statute of limitations, 21 *J.* 1. *c.* 16. doth not bar a man who is a merchant from bringing action of *accompt* for merchandize at any time; but all other actions of *accompt* are within the statute.

In *Chancery*, upon an *accompt* of fifteen or twenty years standing, the defendant may be allowed to prove, on his own *oath*, what he cannot otherwise make proof of; but here the particulars must be named, as to whom the money was paid, for what, and when, &c. 1 *C. Rep.* 146. And a defendant shall be discharged upon his oath of sums under 40*s.*; though it is held a plaintiff shall not so charge another, or be allowed any thing in equity on his oath. 2 *C. Cas.* 249. 1 *Vern.* 283. See *Oath.* Vide *Comyns's Digest*, tit. *Accompts.*—*Kidd's Com. Dig.* Introduction to that title.

ACCOUNTANT-GENERAL, An officer in the court of Chancery, appointed by act of parliament to receive all money lodged in court. He is to convey the money to the Bank, and take the same out by order; and he is only to keep the account with the Bank; for the Bank is to be answerable for all money received by them, and not the *Accountant-General*, &c. *stat.* 12 *Geo.* 1. *c.* 32. No fees shall be taken by this officer or his clerks, on pain of being punished for extortion; but they are to be paid salaries. The *Accountant-General* 650*l. per annum*, out of interest made of part of the suitors' money. See title *Chancery.*

Counterfeiting the hand of the Accountant-General is felony without clergy, by stat. 12 *Geo.* 1. *c.* 32. § 9.

Property in the hands of the Accountant-General shall on his removal, death, &c. vest in his successor. *Stat.* 54 *Geo.* 3. *c.* 14.

ACCOUNTS PUBLICK. By stat. 25 *Geo.* 3. *c.* 52. the patents formerly granted to Lord Sondes and Lord Mountstuart, as auditors of the imprest, were vacated, and the an-

nual sum of 7000*l.* each made payable to them during their respective lives, § 1. 3.

Under this act his Majesty was empowered to appoint five commissioners by letters patent. These were stiled *the Commissioners for auditing the public accounts;* and held their offices *quamdiu se bene gesserint.*

The commissioners under this act were invested with all the powers, and subject to the same duties and controul, as the auditors of the imprest formerly were; except as altered by the act.

Stat. 34 *Geo.* 3. *c.* 59. extended the provisions of 25 *Geo.* 3. *c.* 52. for better examining and auditing the public accounts of the board of *Ordnance*, the commissioners of the *Navy*, the commissioners for *victualling the Navy*, and the commissioners of the *Sick* and *Hurt.*

39 *Geo.* 3. *c.* 83. transferred to the commissioners for auditing the public accounts the duties then performed in the offices of the auditors of the land revenue. § 1—10.

See also 39 & 40 *Geo.* 3. *c.* 54. 47 *Geo.* 3. *st.* 2. *c.* 39. 54 *Geo.* 3. *c.* 83. for more effectually charging public accountants with payment of interest, for allowing them interest in certain cases, and for compelling payment of balances due from them.

By stat. 41 *Geo.* 3. *c.* 22. extended by 48 *Geo.* 3. *c.* 91. his Majesty was empowered to appoint five commissioners for the more effectual examination of accounts of public expenditure for the forces in the West Indies, and to report to the commissioners for auditing public accounts in England.

By 42 *Geo.* 3. *c.* 70. § 4. the Treasury shall annually cause accounts of the revenues, expenditure, debt, &c. of Great Britain, to be made up to January 5, and laid before parliament on or before 25th March yearly.—And the like provisions are made for laying the like accounts before parliament by the Treasury of Ireland, by 44 *Geo.* 3. *c.* 58. By 50 *Geo.* 3. *c.* 117. and 53 *Geo.* 3. *c.* 86. accounts of the increase and diminution of public salaries, pensions, and allowances, shall be annually laid before parliament.

By 43 *Geo.* 3. *c.* 68. § 49. Treasury shall in future cause an account to be kept of what the hereditary revenues of the crown would have produced if not blended with other duties, and laid before parliament with the public accounts directed by 42 *Geo.* 3. *c.* 70.

By 46 *Geo.* 3. *c.* 141. "for more effectual provision for the more speedy and regular examination and audit of the public accounts of this kingdom;" after reciting 25 *Geo.* 3. *c.* 52. 45 *Geo.* 3. *c.* 55. and 45 *Geo.* 3. *c.* 91. it enacts that the offices of comptroller of army accounts, and of auditor of public accounts, be henceforth distinct. His Majesty is empowered to appoint commissioners for auditing public accounts, not exceeding ten in the whole, and to grant salaries to the commissioners, viz. to the chairman 1500*l. per annum*, and 1200*l.* to each of the other commissioners.—The lords of the treasury are empowered to allow salaries to officers, clerks, &c. out of the consolidated fund, and to subdivide commissioners into boards, and apportion their business.—But no vacancy is to be filled up without authority of parliament, until the number of commissioners shall be reduced to five; and the majority of commissioners of any board competent to act, &c. § 1—7.—Such commissioners are ineligible to a seat in parliament by § 22 of said act.

See further provisions for enforcing these acts, 47 *Geo.* 3. *st.* 2. *c.* 9. 49 *Geo.* 3. *c.* 95:—for extending them to accounts of the Paymaster General, 48 *Geo.* 3. *c.* 49. 128:—to the Barrack Master General, 47 *Geo.* 2. *st.* 1. *c.* 13. 48 *Geo.* 3. *c.* 79. 90:—for the examination of the civil and military accounts of Ireland, 52 *Geo.* 3. *c.* 51, 52:—and for securing the due application of money in the hands of public accountants there, 54 *Geo.* 3. *c.* 83.

ACCROCHE, from the Fr. *accrocher*, to hook or grapple unto.] It signifies to encroach, and is mentioned in the stat. 25 *Ed.* 3. *c.* 8. to that purpose. The French use it for delay; as *accrocher un proces*, to stay the proceedings in a suit.

ACCUSATION, *accusatio.*] The charging any person with a crime. By *Magna Charta* no man shall be imprisoned or condemned on any *accusation*, without trial by his peers, or the law. None shall be vexed upon any *accusation*, but according to the law of the land: and no man may be molested by petition to the king, &c. unless it be by indictment, or presentment of lawful men, or by process at common law. *Stat.* 25 *Ed.* 3. *st.* 5. *c.* 4. 28 *Ed.* 3. *c.* 3. None shall be compelled to answer an *accusation* to the king, without presentment, or some matter of record. *Stat.* 42 *Ed.* 3. *c.* 3. See stat. 38 *Ed.* 3. *c.* 9. By stat. 5 and 6 *Ed.* 6. *c.* 11. § 12; and 1 *P. & M. c.* 10, 11. in treason there must be two lawful *accusers.* As to self-accusation, see tit. *Evidence.* See tit. *Malicious Prosecution.*

ACEMANNES-CEASTER, *Acemanni Civitas.*] BATH. *q. v.*

ACEPHALI, The levellers in the reign of king *Hen.* 1.; who acknowledged no head or superior. *Leges Hen.* 1.; *Du Cange.*

AC ETIAM BILLÆ:—*And also to a bill* to be exhibited for 20*l.* debt, &c.] Words in, or a clause of, a writ, where the action requires bail. The stat. 13 *Car.* 2. *st.* 2. *c.* 2. which enjoins the cause of action to be particularly expressed in the writ or process which holds a person to bail, hath caused the adding of this clause in writs to the usual complaints of trespass, which latter gives cognizance to the court, while that of debt authorises the arrest. This ought not to be made out against a peer of the realm, or upon a penal statute, or against an executor or administrator, or for any debt under 10*l.* in the superior courts. Nor in any action of account, action of covenant, &c. unless the damages are 10*l.* or more; nor in action of trespass, or for battery, wounding, or imprisonment: except there be an order of court for it, or a warrant under the hand of one of the judges of the court out of which the writ issues. 1 *Lill. Abr.* 13. See *North's* Life of Lord keeper *Guildford*, fol. 90, 100. *Impey's Instructor Clericalis*, *K. B.* and *C. P.* and this Dictionary, tit. *Arrest, Bail, Process, Capias, Common Pleas.*

ACHAT, Fr. *Achet.*] A contract or bargain. Purveyors by stat. 34 *Ed.* 3. *c.* 2. were called *Achators.*

ACHERSET. An ancient measure of corn, conjectured to be the same with our quarter or eight bushels.

ACHOLITE, *Acholitus.*] An inferior church servant, who, next under the subdeacon, followed or waited on the priests and deacons, and performed the meaner offices of lighting the candles, carrying the bread and wine, and paying other servile attendance.

ACKNOWLEDGMENT-MONEY, Is a sum paid in some parts of England by the copyhold tenants on the death of their landlords, as an acknowledgment of their new lords; in like manner as money is usually paid on the attornment of tenants.

ACQUIETANDIS PLEGIIS. A writ of *justices*, lying for the surety against a creditor, who refuses to acquit him after the debt is satisfied. *Reg. of writs*, 158.

ACQUIETANTIA DE SHIRIS ET HUNDREDIS. To be free from suits and services in shires and hundreds.

ACQUIETARE, *quietum reddere.*] To acquit. *Dr. Wilk. Gloss.* It also sometimes signifies to pay. *Mon. Angl. tom.* 1. *fol.* 199.

ACQUITTAL, from the French word *Aquitter*, and the Latin compound *Acquietare.*] To free or discharge. It signifies in one sense to be free from entries and molestations of a superior lord for services issuing out of lands; (See *Termes de la Ley;*) and in another signification (the most general) it is taken for a deliverance and setting free of a person from the suspicion of guilt; as he that on trial is discharged of a

felony, is said to be *acquietatus de feloniâ;* and if he be drawn in question again for the same crime, he may plead *auter foits acquit;* as his life shall not be twice put in danger for the same offence. 2 *Inst.* 385.

*Acquittal* in *fact*, is when a person is found not guilty of the offence by a jury, on verdict, &c. But in murder, if a man is *acquitted*, appeal may be brought against him. 3 *Inst.* 273.

If one be *acquitted* on an indictment of murder, supposed to be done at such a time; and after indicted again in the same county, for the murder committed at another time: here, notwithstanding that variance, the party may plead *auter foits acquit*, by averring it to be the same felony; so where a person is indicted a second time, for robbery upon the same person, but at another vill, &c. 2 *Hawk. P. C.* Where a man is discharged on special matter found by the *grand jury*, yet he may be indicted *de novo* seven years afterwards, and cannot plead this *acquittal;* as he may upon the special matter found by the petty jury, and judgment given thereon. *Ibid.* 246. See also *Leach's Hawkins*, c. 26. § 64.

If a person is lawfully *acquitted* on a malicious prosecution, he may bring his action, &c. for damages, after he hath obtained a copy of the indictment; but it is usual for the judges of gaol delivery to deny a copy of an *acquittal* to him who intends to bring an action thereon, when there was probable cause for a criminal prosecution. *Carth. Rep.* 421. See *Leach's Hawkins*, c. 23. § 142, &c. By stat. 3 *Hen.* 7. c. 1. if either principal or accessary be *acquitted* on an indictment for murder, the court may remit him to prison, or bail him, at their discretion till the year and day (for appeal) be passed.

ACQUITTANCE, *Acquietantia.*] Signifieth a discharge in writing, of a sum of money, or debt due; as, where a man is bound to pay rent, reserved upon a lease, &c. and the party to whom due, on receipt thereof, gives a writing under his hand witnessing that he is paid; this will be such a discharge in law, that he cannot demand and recover the sum or duty again, if the *acquittance* be produced. *Terms de Ley*, 15. *Dyer* 6. 25. 51. An *acquittance* is a discharge and bar in the law to actions, &c. And if one acknowledges himself to be satisfied by deed, it may be a good plea in bar, without any thing received; but an *acquittance*, without seal, is only evidence of satisfaction, and not pleadable.

It is observed, that a general receipt or *acquittance* in full of all demands, will discharge all debts, except such as are on specialty, viz. bonds, bills, and other instruments sealed and delivered; on which account those can be destroyed only by some other specialty of equal force, such as a general release, &c. There being this difference between that and the *general acquittance*. See *Cro. Jac.* 650.

But in some cases a court of equity will order accounts to be opened, even after an *acquittance* in full of all demands.

And now, in the superior courts of law, the producing an *acquittance* will not bar the action, if the plaintiff can by any means show a mistake, and that he has not been paid, or paid so much as the *acquittance* is for.

In some cases payment may be refused, unless an acquittance is given. Thus the obligor is not bound to pay money upon a single bond, except an *acquittance* be given him by the obligee; nor is he obliged to pay the money before he hath the *acquittance*. But in case of an obligation with a condition, it is otherwise; for there one may aver payment. And by stat. 3 & 4 *Ann. c.* 16. if an action of debt is brought upon a single bill, and the defendant hath paid the money, such payment may be pleaded in bar of the action.

A servant may give an *acquittance* for the use of his master, where such servant usually receives his master's rents, &c. and a master shall be bound by it. *Co. Lit.* 112. The manner of tender and payment of money shall be generally directed by him who pays it, and not by him who receives it; and the *acquittance* ought to be given accordingly.

ACRE, from the German *Acker*, *Ager.*] A quantity of land, containing in length 40 perches, and in breadth four perches; or in proportion to it, be the length or breadth more or less. By the customs of various countries, the perch differs in quantity, and consequently the *acre* of land. It is commonly about 16 feet and a half, but in Staffordshire it is 24 feet. According to the stat. 24 *Hen.* 8. *c.* 14. concerning the sowing of flax, it is declared that 160 perches make an *acre*, which is 40 multiplied by four; and the ordinance of measuring land, 33 *Ed.* 1. *st.* 6. agrees with this account. The word *acre* formerly meant an open ground or field; as *castle-acre*, *west-acre*, &c. and not a determined quantity of land. The general calculation is that there are 4840 square yards in an acre.—See *Turner* v. *Probyn*, 1 *Anst.* 66.

ACRE, or ACRE FIGHT; an old sort of duel fought by single combatants, English and Scotch, between the frontiers of their kingdoms, with sword and lance; this duelling was also called camp fight, and the combatants, champions, from the open field that was the place of trial.

ACT BEFORE ANSWER, is when the lords ordain probation to be led, before they determine the relevancy, and then take both at once under their determination. Scotch Dict.

ACT OF CURATORY, is the act extracted by the clerk upon any one's acceptation of being curator. Scotch Dict.

ACT OF GRACE. In Scotland the act so termed is 1696, *c.* 32, for providing maintenance for debtors imprisoned by their creditors. It is usually applied in England to insolvent acts and general pardons. See *Debtors*.

ACT OF PARLIAMENT. See *Statute*.

ACTILIA. Military utensils. *Du Cange.*

ACTION, *Actio.*] Is the form of a suit given by law for recovery of that which is one's due; or it is a legal demand of a man's right. *Co. Lit.* 285. The learned Bracton thus defines it, *Actio nihil aliud est quam jus prosequendi in judicio quod alicui debetur.* *Actions* are either *criminal* or *civil;* criminal to have judgment of death, as appeals of death, robbery, &c. or only to have judgment for damage to the party, fine to the king and imprisonment, as appeals of maihem, &c. *Co. Lit.* 284. 2 *Inst.* 40. *Civil actions* are such as tend only to the recovery of that which by reason of any contract, &c. is due to us; as *action* of debt, upon the case, &c. 2 *Inst.* 61.

Under *criminal actions* may be classed *actions penal;* which lie for some penalty or punishment on the party sued, be it corporal or pecuniary. *Bract.*

*Actions upon statute*, brought upon the breach of any statute, whereby an action is given to the person injured that lay not before; as where one commits prejury to the prejudice of another, the party that is injured may have a writ upon the statute. Such action is now obsolete.

*Actions popular*, given on the breach of some penal statute, which *every man* hath a right to sue for himself and the king, by information, action, &c. And because this *action* is not given to one especially, but generally to any that will prosecute, it is called *action popular;* and from the words used in the process, (*qui tam* pro domino rege sequitur quam pro se ipso, who sues *as well* for the king as for himself) it is called a *qui tam* action. See title *Information*.

*Civil actions* are divided into *real*, *personal*, and *mixed*. Action *real* is that action whereby a man claims title to lands, tenements, or hereditaments, in fee or for life: and these *actions* are possessory, or auncestrel; possessory, of a man's own possession and seisin; or auncestrel, of the possession or seisin of his ancestor.

*Action personal* is such as one man brings against another, on any contract for money or goods, or on account of any offence or trespass; and it claims a debt, goods, chattels, &c. or damages for the same.

*Action mixed* is an *action* that lieth as well for the thing demanded, as against the person that hath it; in which the thing is recovered, and likewise damages for the wrong sustained; it seeks both the thing whereof a man is deprived, and a penalty for the unjust detention. But detinue is not an *action mixed*, notwithstanding the thing demanded, and damages for withholding it be recovered; for it is an *action* merely personal, brought only for goods and chattels.

In a *real action*, setting forth the title in the writ, several lands held by several titles may not be demanded in the same writ; in *personal actions* several wrongs may be comprehended in one writ. 8 *Rep.* 87. A bar is perpetual in *personal actions*, and the plaintiff is without remedy, unless it be by writ of error or attaint: but in *real actions*, if the defendant be barred, he may commence an action of a higher nature, and try the same again. 5 *Rep.* 33. *Action of waste* sued against tenant for life, is in the realty and personalty; in the realty, the place wasted being to be recovered, and, in the personalty, as treble damages are to be recovered. *Co. Lit.* 284.

Many *personal actions* die with the person. Real actions survive. If lessee for years commit waste, and dies, *action of waste* may not be had against his executor or administrator, for waste done by the deceased. And where a keeper of a prison permits one in execution to escape, and afterwards dieth, no *action* will lie against his executors. This must be understood, of that kind of keeper, to whom the prison actually belongs, as the *marshal*, the *warden* of the Fleet, &c. not of a gaoler who acts as servant to a sheriff, &c. for in such case, the death of the gaoler, is not any bar to an action against the sheriff, to whom in fact, the prison actually belongs. *Co. Lit.* 53. Action of *debt* lies not against executors upon a contract for the eating and drinking of the testator. 9 *Rep.* 87. But an action on the *case* on promises will lie against an executor or administrator on the promises of their testator or intestate. An executor cannot bring an appeal of larceny from the testator, for it is a mere personal action. *H. P. C.* 184. *S. P. C.* 50. And an appeal of death is a personal action given to the heir; and like others shall therefore die with the person. 2 *Hawk. P. C.* 244.

In all actions merely personal arising *ex delicto*, for wrongs actually done or committed by the defendant, as trespass, battery, and slander, the action dies with the person. 4 *Inst.* 315; and it never shall be revived either by or against the executors or other representatives. For neither the executors of the plaintiff have received, nor those of the defendant committed, in their own personal capacity, any manner of wrong or injury. But in actions arising *ex contractu*, by breach of promise and the like, where the right descends to the representatives of the plaintiff, and those of the defendant have assets to answer the demand, though the suits shall abate by the death of the parties, yet they may be revived against, or by, the executors, (*March* 14,) being indeed rather actions against the property than the person. 3 *Comm.* 302.

Again, actions are either *local* or *transitory*. *Actions real* and *mixed*, ejectment, waste, trespasses *quare clausum fregit*, &c. are to be laid in the same county where the land lieth: *personal* and *transitory actions*, as debt, detinue, assault and battery, &c. may be brought in any county. *Co. Lit.* 282. Except against justices and officers of corporations and parishes, (under stat. 21 *Jac.* 1. *c.* 12.) or against officers acting under particular acts of parliament; which frequently direct actions against them to be laid in the respective counties where the facts happen. *Actions transitory* may be laid in any county, although the stat. 6 *R.* 2. enacted, That writs of debt, account, &c. should be commenced in the county where the contracts were made; for that statute was never put in use; and yet generally *actions* have been laid in the county where the cause of them was arising, except as above. If the cause of *action* arise in two counties, an *action* may be brought in either county; but if a nuisance be erected in one county, to the damage of a man in another, the assise must be brought *in confinio comitatuum*. *Mich.* 8. *Ann. B. R.* By stat. 21 *Jac.* 1. *c.* 4. all suits on penal statutes shall be laid in the county where the offence was committed. See tit. *Venue.*

An action for rent, for use and occupation, is not a local action. 5 *W. P. T.* 25.

Actions likewise are said to be *perpetual* and *temporary*. *Perpetual*, those which cannot be determined by time; and all *actions* may be called *perpetual* that are not limited to time for their prosecution: *temporary actions* are those that are expressly limited; and since the statute of limitations, (21 *Jac.* 1. *c.* 16.) all *actions* seem to be temporary; or not so perpetual, but that they may in time be prescribed against; a *real action* may be prescribed against within *five* years, on a fine levied, or recovery suffered. See tit. *Limitation of actions.*

Actions are also *joint* or *several*; *joint*, where several persons are equally concerned, and the one cannot bring the *action*, or cannot be sued, without the other; *several*, in case of trespass, &c. done, where persons are to be severally charged, and every trespass committed by many is several. 2 *Leon.* 77.

As to joining several matters in one action the following is to be observed.

In personal actions, several wrongs may be joined in one writ; but actions founded upon a tort, and on a contract, cannot be joined, for they require different pleas and different process. 1 *Keb.* 847. 1 *Vent.* 366. So where there is a tort by the common law, and a tort by statute, they may not be joined; though where several torts are by the common law, they may be joined, if personal. 3 *Salk.* 203. See also post tit. *Joinder* and *Misjoinder.*

Trover and assumpsit may not be joined; but in an action against a common carrier, the plaintiff may declare in case upon custom of the realm, and also upon trover and conversion; for not guilty answers to both. 1 *Danv. Abr.* 4. Debt upon an *amerciament*, and upon a *mutuatus*, may be joined in one declaration. *Wils. p.* 1. 218. So case for a *misfeasance* and negligence may be joined with a count in *trover*, in the same declaration. *Ib. par.* 2. 319. Two counts may be joined in the same declaration, where there *is the same judgment* in both. *Wils. p.* 2. 321. And any action may be joined, where the plea of not guilty goes to all. 8 *Rep.* 47. But, it seems, ejectment and battery cannot be joined; for after verdict, where several damages were found, the plaintiff was allowed to release those for the battery, and had judgment for the ejectment. 1 *Danv.* 3. If this is law, it shews that causes of action cannot in every instance be joined, where the same plea will go to the whole. The doctrine in Danvers seems to be law, for supposing *ejectment*, *assault and battery*, &c. joined in one action, and a general verdict on not guilty for the plaintiff, a new execution on such a judgment must be framed. Indeed the joining two such actions seems rather absurd. Although persons may join in the personalty, they shall always sever in actions concerning the realty; and *waste* being a mixed action, savouring of the realty, that being worthy, draws over the personalty with it. 2 *Mod.* 62. A person cannot, as administrator, &c. join an action for the right of another, with any action in his own right; *because the costs will be entire, and it cannot be distinguished how much he is to have as administrator, and how much for himself.* 1 *Salk.* 10. See a variety of cases, well selected and digested on this subject. *Com. Dig.* tit. *Action.* See *Joinder in Action.*

It remains now to consider,

I. *By whom, and against whom Actions may be brought.*
II. *What particular Actions are adapted to particular Cases.*

It may be previously observed, that an action does not lie before a cause of action accrued; and if it be not pleaded in abatement, yet if it appears on the record, it may be moved in arrest of judgment. 2 *Lev.* 197. *Carth.* 114. Vide *Sho.* 147.; or assigned for error. *Cro. Eliz.* 325. See further *Kyd's Com. Dig.* tit. *Abatement*, (G. 6.), and *Action* (E.)

In some cases, certain things are required by act of parliament to be done by the plaintiff previous to the commencement of an action, or he cannot recover; as in actions against justices of the peace, a month's notice must be given by stat. 24 *Geo.* 2. *c.* 44.—Vide *Morgan's Vade Mec.* 20.

I. In all *actions* there must be a person able to sue; the party sued must be one suable for the thing laid; and the plaintiff is to bring his right and proper *action* which the law gives him for relief. 1 *Shep. Abr.* 20. There are three sorts of *damages* or wrongs, either of which is a sufficient foundation for an *action*. 1. Where a man suffers damages in his *fame* and credit. 2. Where one has damage to his person, as by battery, imprisonment, &c. which respects his *liberty*. 3. Where a person suffers any damage in his *property*. *Carth. Rep.* 416.

A man attainted of treason or felony, convict of recusancy, an outlaw, excommunicated person, convict of *præmunire*, an alien enemy, &c. cannot bring an *action*, till pardon, reversal, absolution, &c. But executors or administrators, being outlawed, may sue in the right of the testator or intestate, though not in their own right. A feme covert must sue with her husband; and infants are to sue by guardian, &c. *Co. Lit.* 128. *Actions* may be brought *against* all persons, whether attainted of treason or felony, a convict recusant, outlawed or excommunicate, &c. and a feme covert must be sued with her husband. A *scire facias*, or any writ to which the defendant may plead, or by which the plaintiff may recover, is an *action*. 6 *Rep.* 3. *Salk.* 5. See tit. *Abatement*.

II. There are various kinds of actions, suited to different cases, as actions of COVENANT, DEBT, DETINUE, TRESPASS, TROVER, &c. which see under their respective titles.

But where the law has made no provision, or rather, where no general action could well be framed before hand, the ways of injuring, and methods of deceiving being so various, every person is allowed to bring a special action on his own case. 1 *New Abr.* 44. *Co. Lit.* 56. *a.* 6 *Mod.* 53, 54.

This action is, in practice, become the most universal of any; as most of the other actions may, under particular circumstances, be resolved into this, which it will be necessary, therefore, to consider somewhat largely.

*Action* upon the *case* is a general *action* given for redress of wrongs and injuries, done without force, and not particularly provided against by law, in order to have satisfaction for damage; and (by stat. 19 *H.* 7. *c.* 9) in *actions upon the case*, the like process is to be had as in *actions* of trespass or debt. It is called *action on the case*, because the whole cause or *case*, as much as in the declaration (except time and place) is set down in the writ; and there is no other action given in the case, save only where the plaintiff hath his choice to bring this or another *action*. Formerly, all actions were sued in the court of Common Pleas, and there the foundation of the suit is, a writ, called an *original*, whereupon the *capias* is grounded, and which *original* contains the nature of the plaintiff's complaint at large; and it is the same where suits are commenced in B. R. by *original* out of Chancery.

In all cases, where a man has a temporal loss, or damage by the *wrong* of another, he may have an action upon the case to be repaired in damages. But the particular damage must be specially alleged.

This action, as hath been intimated, lies in a great variety of instances, which are particularly enumerated in COMYNS's Digest. Of these the chief are,

1. Action on the case for WORDS; which is brought for words spoken or written, which affect a person's life, reputation, office, or trade, or tend to his loss of preferment, in marriage or service, or to his disinheritance, or which occasion him any *particular damage*. This action therefore will lie for charging another with any capital or other crime. To say of another he is a traitor, *action* lies. 1 *Bulstr.* 145. But if one call another a seditious, traiterous knave, no *action* lieth; because the words imply an intention only, and not an unlawful act. 4 *Rep.* 19. Nor to say of a man he deserves to be hanged; nor to call another a rogue generally, or say he will prove him to be a rogue; though it will lie to say a man is a rogue on record. 4 *Rep.* 15. *Danv.* 92. Words which charge a person with being a murderer, highwayman, or thief, in express terms, are held *actionable*. 1 *Rol. Abr.* 47. Though for saying such a one would have taken his purse on the highway, or have robbed him, an *action* lies not; for nothing is shown to be done in order thereto. *Cro. Eliz.* 250. Likewise to say a man was in gaol for stealing any thing is not *actionable*, for the words do not affirm the theft. *Danv.* 140. But to say, I think A. B. committed such a felony; or, I dreamt he stole a horse, &c. these words are *actionable*. *Dal.* 144. 1 *Danv.* 105. If a felony be done, and common fame is that such a person did it, although one may charge or arrest him on suspicion of that felony, yet a man may not affirm that he did the same, for he may be innocent all the while, and therefore affirming it hath been held *actionable*. *Hob.* 138. 203. 381.

It was heretofore held, that no action would lie for words importing a charge of murder, without an averment that the person said to be killed was dead; but the latter and better opinion is, that the party shall be intended to be dead, unless the contrary appears in the pleadings. 1 *Vent.* 117. *Cro. Jac.* 489. *Sid.* 53. *Cro. Eliz.* 560. 823. Though *quære* if the party is proved alive? So words accusing of sodomy. 1 *Sid.* 373.

When such words are spoken of another maliciously, for which, if true, the party spoken of might be punished criminally, *action* lies; as, to say of a person, he hath perjured himself; or that he would prove him perjured; or that he was forsworn in the court of Chancery, Common Pleas, &c. are *actionable*; but not to call a person a forsworn man, unless it be said in a court of record. 3 *Inst.* 168. *Danv.* 87. 89. To say a man hath forged an obligation, &c. and he will prove it; this is *actionable*. *Danv.* 130.

Some writers make a difference, where the subsequent words are introduced by the word *and*; as, you are a thief, *and* have stolen, &c. which are additional, and shall not correct; and the word *for*; as you are a thief, *for* you have, &c. *Hob.* 386. *Style* 115. *Godb.* 89. The words, He is a maintainer of thieves, and keeps none but thieves in his house, will not support an *action*, unless it be averred that he knew them to be thieves. *Cro. Eliz.* 746.

To say an alehouse-keeper keeps a bawdy-house, *action* lies. *Cro. Eliz.* 582. Though to say of an inn-keeper, that he harbours rogues, &c. is not *actionable*; for his inn is common to all guests. 2 *Roll. Rep.* 136. To say of another he hath the French pox, *action* will lie. *Cro. Jac.* 430. See *Noy*, 151. To call a man a whore master, or a woman whore, no *action* lies; for these are merely spiritual offences. *Danv. Abr.* 80. But calling a woman whore in London is *actionable*, as she is liable to be punished by the custom of the city. See *Com. Dig.* tit. *Action upon the Case for Defamation*, (D. 10.)

Words likewise are actionable which tend to the disgrace or detriment of a person in *office*, or of a man in the exercise of his *profession* or *trade*.

Calling an officer in the government, &c. Jacobite, hath been held *actionable*; not of a private person. 7 *Mod. Ca.* 107. To say a justice of peace doth not administer justice, is

*actionable.* *Cro. Eliz.* 358. And so for other disgrace in his office. But words relating to a man's office must have a plain and direct meaning, to charge him with some crime that is punishable; and be spoken of his office, or otherwise they are not *actionable.* 6 *Mod.* 200. Thus the plaintiff, being a *justice of peace*, the defendant said Mr. Stukely *covereth and hideth felonies, and is not worthy to be a justice of peace;* actionable, for though his office is not named, the words necessarily refer to it. 4 *Rep.* 16. See 1 *Leon.* 335. 1 *Vent.* 50.

*Slander,* &c. brought by a *doctor of the civil law,* who was also a *justice of peace,* and *chancellor of the bishoprick of* Norwich, for these words, *he is not fit to be a chancellor or a justice of peace, he is a knave, a rascal, and a villain, he is not fit to practice, he ought to have his gown pulled over his ears;* actionable. 2 *Lutw.* 1288.

The defendant spoke to an officer, (viz.) *You have cozened the state of* 20,000*l. and I will prove it; for you have received* 25,000*l. of the office, and not compounded for it, and have foisted in words in the order of your commission;* actionable. *Style,* 436.

In offices of *profit*, for such words as impute the want either of understanding, ability, or integrity to execute them, this *action* lies. But in offices of *honour*, words that impute want only of ability, are not actionable; as to say of a justice of peace, *He a justice of peace! he is an ass, and a beetle-headed justice;* the reason is, because a man cannot help his want of ability, as he may his want of honesty; otherwise where words impute dishonesty or corruption. 2 *Salk.* 695. But if *special* damage can be proved, it is actionable; and indeed in every case, where special damage can be proved, an action will lie.

As to words tending to the disgrace or detriment of a man in his *profession* or *trade;* where the words are disgracing to a man's profession, they also must appear to be spoken precisely of it; for to say a person hath cozened one in the sale of certain goods, is not *actionable;* unless you show that the party lived by such selling. 1 *Roll. Abr.* 62.

To say of a *doctor in divinity,* Doctor S. *is robbing the church;* and at another time, Doctor S. *hath robbed the church;* actionable. *Cro Car.* 301. 417.

In *case,* &c. in which the plaintiff declared, that he was instituted and inducted into a parsonage in, &c. and that he executed the office of a pastor in that church for the space of four years, and that the defendant said of him, *You are a drunkard, a whore-master, a common swearer, and a common liar, and you have preached false doctrine, and deserve to be degraded;* after a verdict for the plaintiff, it was objected that the words are not actionable, because they import no civil or temporal damage to the plaintiff; but adjudged actionable; for, if true, he may be degraded, and so lose his freehold. *Allen* 63.

These words spoken of a preaching parson, Parrat *is an adulterer, and had two children by* B. G.'s *wife, and I will cause him to be deprived for it;* not actionable, for it is a *spiritual defamation,* and punishable in that court. *Cro. Eliz.* 592.

To say of a counsellor, that he is no lawyer; that they are fools who come to him for law, and that he will get nothing by the law, *action* lies. 1 *Danv.* 113. And it is the same to say, he hath disclosed secrets in a cause.

To call a doctor of physic fool, ass, empiric, and mountebank, or say he is no scholar, are *actionable.* *Cro. Car.* 270. So to say of a schoolmaster, put not your son to him, for he will come away as very a dunce as he went. *Hetl.* 71. Where one says of a midwife, that many have perished for her want of skill, an *action* will lie. *Cro. Car.* 211. If one calls a merchant bankrupt, *action* lies. 1 *Leon.* 336. And to call a trading person bankrupt, or knave, is *actionable.* 1 *Danv.* 90. Also if one say of a merchant, that he is a beggarly fellow, and not able to pay his debts; or say of a person that he is a runaway, and dares not show his face, by reason whereof he is disgraced, and injured in his calling, these are *actionable.* *Raym.* 184.

Words tending to the loss of preferment in marriage, &c. are actionable. Thus to say that a woman hath a bastard, or is with child; or that a certain person hath had the use of her body, whereby she loses her marriage, *action* lies, i. e. by reason of the special damage. If a man is in treaty with a woman to marry, and another tells him she is under a precontract; this doth not imply a scandal, but yet, if false, an *action* will lie if she loses her marriage by means of those words. To say of a man that he lay with a certain woman, &c. by which he loses his marriage, is *actionable;* for in these cases there is a temporal damage. 1 *Danv.* 81.

As to words tending to a person's disinheritance, if one says of another that has land by descent, that he is a bastard; *action upon the case* lies, as it tends to his disinheritance. *Co. Ent.* 28. But to say of a son and heir apparent, that he is a bastard *action* lies not until he is disinherited, or is prejudiced thereby. 1 *Danv.* 83. To slander the title of another person to his lands is *actionable;* but the words must be false, and be spoken by one that neither hath, nor pretendeth title to the land himself; and who is not of counsel to him that pretends right. 4 *Rep.* 17. If a man shall pretend title to the land another hath in possession, and hath no colour of title to it; and shall say he hath such a deed or conveyance of it, where in truth he hath none, or if he hath any, it is a counterfeit and forged deed, and he knows it to be so; in this case the words may bear an *action;* but if there be any colour for what is said, they will not be *actionable.* *Cro. Jac.* 163. *Yelv.* 80. 88. And the party of whom the words are spoken must have, or be likely to have, some special damage by the speaking of them; as that he is hindered in the sale of his lands, or in his preferment in marriage, &c. without which it is said *action* doth not lie. 1 *Cro.* 99. *Cro. Jac.* 213. 397. *Poph.* 187. 2 *Bulst.* 90. The affirming that another hath title to the land, where *actionable.* See 4 *Rep.* 175.

If A. says, that B. said that C. did a certain scandalous thing, C. shall have *action* against A. with averment that B. never said so, whereby A. is the author of the scandal. Supposing B. did not in fact say so. *Cro. Jac.* 406. See 1 *Roll. Abr.* 64.

It is to be observed in general, that though scandalous words are spoken before a man's face, or behind his back, by way of affirmation or report, when drunk or sober; and although they are spoken in any other than the English language, if they are understood by the hearers, they are *actionable;* also words may be *actionable* in one county which are not so in another, by the different construction, &c. 4 *Rep.* 14. *Hob.* 165. 236. But if the defendant can make proof of the words, he may, in an action for damages, plead a special justification. *Co. Ent.* 26. The words to maintain this *action* must be direct and certain, that there may be no intendment against them; but as some words separate, without others joined with them, are not *actionable,* so some words that are *actionable* may be qualified by the precedent or subsequent words, and all the words are to be taken together. 4 *Rep.* 17. 1 *Cro.* 127. *Moor Ca.* 174. 331. Vide 4 *Rep.* 20. *Hob.* 126. Where words spoken are somewhat uncertain, they may, by apt averments, be made certain and actionable. 2 *Bulst.* 227. So by the pleadings of the parties, and verdict of a jury for the plaintiff. *Cro. Jac.* 107. The thing charged by the words must be that which is possible to have been done; for if it be of a thing altogether and apparently impossible, no action lies. 4 *Rep.* 16. No action will lie for words spoken in pursuit of a prosecution in an ordinary course of justice; as where a lawyer, in pleading his client's cause, utters words according to his instructions; as saying of one

he is a bastard, when this is to defend the party's own title where he himself doth claim to be heir of the land that is in question, these words will not bear an action. *Cro. Jac.* 90. 4 *Rep.* 13.

In this action the nature of the words must be set forth, with the manner of speaking them, when and where spoken, and before whom, and the damage thereby to the plaintiff; that his credit was, and how, impaired, with the aggravating circumstances; but it matters not whether the plaintiff doth in his declaration set forth *all* the *circumstantial* words as they are spoken; so as to show the very words that are *actionable*, and the substance of them, &c.

There is no branch of the law in which the decided cases are so contradictory to each other, and the decisions so frequently irreconcileable to their avowed principles, as this action on the case for words; many cases in the old authors are certainly not law, and the fairest observation on the subject is, that "what words are actionable or not, will be more satisfactorily determined by an accurate application of the general principles on which such actions depend, than by a reference to adjudged cases, especially those in old authors." See the case of *Onslow* v. *Horne*, 3 *Wils.* 177, where the principles are well explained.

2. Action on the case likewise lies upon an *assumpsit* or undertaking; and such action is founded on a contract either express or implied by law, and the verdict gives the party damages in proportion to the loss he has sustained by the violation of the contract. 4 *Co.* 92. *Moor* 667. See tit. *Assumpsit*.

3. It has been premised, that a special action on the case lies in all instances wherein no general action could be framed; it will be necessary, therefore, to point out some of those particular cases to which it is most peculiarly applicable.

It was formerly held, that if my fire, by misfortune, burnt the goods of another man, for this wrong he should have *action on the case* against me; and if my servant put a candle or other fire in any place in my house, and this burnt my house and the house of my neighbour, *action of the case* lay for him against me. 1 *Danv.* 10. But this action is now destroyed by stat. 6 *Ann. c.* 31. See tit. *Fire*, *Waste*.

Action on the case likewise lies against *carriers* and others upon the custom of England. See tit. *Carrier*.

A common inn-keeper is chargeable for goods stolen in his house. See tit. *Inns* and *Inn-keeper*.

This *action* lies for *deceit* in contracts, bargains, and sales; if a vintner sells wine, knowing it to be corrupt, as good and not corrupt, though without warranty, *action* lies. *Danv.* 173. So if a man sells a horse, and warrants him to be sound of his limbs, if he be not, *action on the case* lies. A person warrants a horse, wind and limb, that hath some secret disease known to the seller, but not to the buyer, this *action* may be brought; though if one sell a horse, and warrant him sound, and he hath at the time visible infirmities, which the buyer may see, *action on the case* will not lie. *Yelv.* 114. *Cro. Jac.* 675. Where one sells me any wares or commodities, and is to deliver that which is good, but delivers what is naught; or sells any thing by false or deceitful weights and measures, with or without warranty, *action on the case* lies; and so where a man doth sell corrupt victuals, as bread, beer, or other thing for food, and knows it to be unwholesome. *Dyer* 75. 4 *Rep.* 18. *Cro. Jac.* 270. Yet if the buyer or his servant shall see and taste the victuals, &c. and like and accept the same, no *action* can be maintained. 7 *H.* 4. 16. Nor will *case* lie upon a warranty of what is out of a man's power, or of a future thing: as that a horse shall carry a man thirty miles a day, or the like. *Finch* 188. If a man sells certain packs of wool, and warrants that they are good and merchantable, if they are damaged, *action on the case* lies against him. 1 *Danv.* 187. The bare affirmation by the seller of a particular sort of diamond without warranting it to be such, will not maintain an *action*. *Cro. Jac.* 4. 196. But where a man hath the possession of a personal thing, the affirming it to be his own is a warranty that it is so; though it is otherwise in case of lands, where the buyer at his peril is to see that he hath title. 1 *Salk.* 210. If a person sells to another cattle or goods, that are not his own, *action on the case* lies; so if he warrants cloth to be of such a length, that is deficient of it. See tit. *Deceit*.

For *neglect* or *malfeazance*; as if a taylor, &c. undertakes to make a suit of clothes, and spoils them, *action* lies; and if a carpenter promises to repair my house before a certain day, and doth not do it, by which my house falls; or if he undertakes to build a house for me, and doth it ill, *action on the case* lies. 1 *Danv.* 32. If a surgeon neglects his patient, or applies unwholesome medicines, whereby the patient is injured, this *action* lieth. And if a counsel retained to appear on such a day in court, doth not come, by which the cause miscarries, *action* lies against him: so if after retainer, he become of counsel to the adversary against the plaintiff. 11 *H.* 6. 18.

Where a smith promises to shoe my horse well, if he pricks him, *action on the case* lies; and so when he refuses to shoe him, on which I travel without, and my horse is damaged. For stopping up a water-course or way; breaking down a party-wall; stopping of ancient lights, and for any private nuisance to a man's water, light, or air, whereby a person is damnified, this *action* lieth. *Cro. Eliz.* 427. *Yelv.* 159.

This action lies also for killing another person's dogs, by means of traps placed near to the highway, and baited with flesh, for the purpose of leading the animal to its destruction. *Townsend* v. *Wathen*. 9 *E. R.* 277. And for firing at wild fowl in a decoy. *Carrington* v. *Taylor*. 11 *E. R.* 571.

Where any one personates another, for cheating at gaming, where a surety is not saved harmless, &c. 2 *Inst.* 193.

But not where the money was *fairly* won, and the action was not upon the statute. 1 *Maul. & Sel. Rep.* 500. See tit. *Gaming*.

If I lend another my horse to ride so far; and he rides further, or forward and backward, or doth not give him meat, this *action* lieth. *Cro. Eliz.* 14. And where one lends me a horse for a time, if he take him from me within that time, or disturb me before I have done what I hired him for; *action on the case* lies: and though I ride the horse out of the way in my journey, he may not take him from me. 8 *Rep.* 146. See tit. *Bailment*. This *action* lies for keeping a dog accustomed to bite sheep, if the owner knew the vicious quality of the dog. But not for a man's dog running at my sheep, though he kills them, if it be without his consent, and he did not know that the dog was accustomed to bite sheep. Vide 1 *Danv. Abr.* 19. *Hetl.* 171.

*Action on the case* will lie against a *gaoler* for putting irons on his prisoner; or putting him in the stocks, or not giving sufficient sustenance to him, being committed for debt. *F. N. B.* 83. The master may in many cases have this *action* against his servant, steward, or bailiff, for any special abuse done to him, and for negligence, &c. Also it lies for taking or enticing away my servant, and retaining him; or threatening a servant, whereby I lose his service. *Lane*, 68. *Cro. Eliz.* 777. 1 *Shep. Abr.* 52, 59. A servant is trusted with goods and merchandize consigned to him by a merchant, to pay the customs for them, and dispose of them to profit; if he deceive the merchant, and have allowance for it on his account, and to defraud the king, lands some of the goods without paying the customs, by which they are forfeited, *action on the case* lieth. *Lane* 65. *Cro. Jac.* 266.

If I trust one to buy a lease or other thing for me, and he buyeth it for himself, or doth not buy it, this *action* lies against him; but if he doth his endeavour it sufficeth. *Bro.* 117.

Where a man is disturbed in the use of a seat in the church, which he hath had time out of mind; a steward is hindered in the keeping of his courts; a keeper of a forest disturbed in taking the profits of his office; a bailiff in distraining for an amerciament, or the like; *action on the case* will lie. *Bendl.* 89. *Lib. Intr.* 5. *Moor* 987. But an *action on the case* does not lie for *disturbing* a solicitor retained in certain business if no tortious act be done. 15 *E. R.* 501. An *action on the case* lies for him in reversion, against a stranger, for damage to his inheritance, though there be a term *in esse.* 3 *Lev.* 360. 14 *E. R.* 489. Also if a lessor comes to the house he has demised, to see if it be out of repair, or any waste be done, and meets with any disturbance therein; or if one disturbs a parson in taking his tithes, this *action* lies. *Cro. Jac.* 478. 2 *Inst.* 650. And for setting up a new mill on a river, to the prejudice of another who hath an ancient mill, an *action* will lie. *Lib. Intr.* 9.

Action on the case likewise lies for and against commoners, &c. for injuries done in commons. *Sty.* 164. *Sid.* 106. *Cro. Jac.* 165. 2 *Inst.* 474. See tit. *Common.*

An action on the case for permissive waste does not lie against a tenant by lease who has not covenanted to repair. 4 *W. P. T.* 764.

Action on the case may likewise be brought for malicious prosecutions: where a suit is without ground, and one is arrested, *action on the case* lies for unjust vexation: And for falsely and maliciously arresting a person for more than is due to the plaintiff, whereby the defendant is imprisoned, for want of bail; or if it be on purpose to hold him to bail, *action on the case* will lie, after the original *action* is determined. 1 *Lev.* 275. 1 *Salk.* 15. An *action* likewise lies against sheriffs, for default in executing writs; permitting escapes, &c.

This action lies upon the stat. 6 *G.* 1. *c.* 16. § 1. to recover damages against the township for trees, &c. feloniously burnt by persons unknown. 11 *E. R.* 349.

Actions on the case likewise lie for *conspiracy*, *escape* and *rescous*, *nuisances*, &c. which see under the several titles. And for a general abridgement of the law on this subject, see *Com. Dig.* tit. *Action.* See further *Limitation, Original.*

ACTION PREJUDICIAL, (otherwise called *preparatory*, or *principal.*) Is an action which arises from some doubt in the principal; as in case a man sues his younger brother for lands descended from his father, and it is objected against him that he is a bastard; now this point of bastardy is to be tried before the cause can any further proceed; and therefore it is termed *prejudicialis, quia prius judicanda. Bract. lib.* 3. *c.* 4. *numb.* 6. *Cowel.*

ACTION OF A WRIT, Is a phrase of speech used, when one pleads some matter, by which he shows the plaintiff had no cause to have the writ he brought, yet it may be that he may have another *writ* or *action* for the same matter. Such a plea is called *a plea to the action of the writ;* whereas, if by the plea it should appear that the plaintiff hath no cause to have an *action* for the thing demanded, then it is called *a plea to the action. Cowel. Termes de la Ley.*

ACTION OF ABSTRACTED MULTURES, Is an action for multures against those who are thirled to a mill, and come not. *Scotch Dict.*—An action to compel persons to grind at a mill according to their tenure.

ACTION FOR POYNDING OF THE GROUND, Is so called because it is founded upon some infeoftment for an annuity (whether annual rent, life-rent, or feu duty, &c.) that affects the ground; and the ground being thus debitor, it is called *debitum fundi*, for which both moveables found upon the ground may be poynded (distrained), and these failing, the property affected by this servitude, may be apprized or adjudged, even in prejudice of intervening singular successors. *Scotch Dict.*

ACTION IN THE SCOTCH LAW, Is a prosecution by any party of their right, in order to a judicial determination thereof. Scotch Dict.

ACTIONARE, i. e. *In jus vocare*, or to prosecute one in a *suit* at law. *Thorn's Chron.*

ACTO, *Acton, Aketon*, Fr. *Hauqueton.*] A coat of mail. *Du Fresne.*

ACTON BURNEL. The statute of 11 *Ed.* 1. *ann.* 1288, ordaining the *statute merchant:* it was so termed from a place named *Acton-Burnel*, where it was made; being a castle formerly belonging to the family of Burnel, and afterwards of Lovel, in Shropshire. *Cowel. Termes de la Ley.*

ACTOR. The proctor or advocate in civil courts or causes. *Actor dominicus*, was often used for the lord's bailiff or attorney. *Actor ecclesiæ*, was the ancient forensick term for the advocate or pleading patron of a church. *Actor villæ*, was the steward or head bailiff of a town or village. *Cowel.*

ACTS DONE, Are distinguished into *acts of God*, the *acts of the law*, and *acts of men.* The *act of God* shall prejudice no man; as where the law prescribeth means to perfect or settle any right or estate; if by the *act of God* the means, in some circumstances, become impossible, no party shall receive any damage thereby. *Co. Lit.* 123. 1 *Rep.* 97. As in an action on the *case* a *bargeman* may justify, by pleading that there were several passengers in his barge, and a sudden *tempest* arising, all the goods in the barge were thrown overboard to save the lives of the passengers. See tit. *Carrier.*

The acts of the *law* are esteemed beyond the acts of man; and when to the perfection of a thing divers acts are required, the law hath most regard to the original act. 8 *Rep.* 78. The law will construe things to be lawfully done, when it standeth indifferent whether they should be lawful or not: but whatsoever is contrary to law is accounted not done. *Co. Lit.* 42. 3 *Rep.* 74. Our law doth favour substantial more than circumstantial *acts;* and regards *deeds* and *acts* more than words; and the law doth not require unnecessary things. *Plowd.* 10.

As *to acts of men;* that which a man doth by another, shall be said to be done by himself; but personal things cannot be done by another. *Co. Lit.* 158. A man cannot do an *act* to himself, unless it be where he hath a double capacity; no person shall be suffered to do any thing against his own *act;* and every man's *acts* shall be construed most strongly against himself. *Plowd.* 140. But if many join in an *act*, and some may not lawfully do it, it shall be adjudged the *act* of him who might lawfully do the same. *Dyer* 192. *Acts* that men are forced by necessity and compulsion to do, are not regarded: and an *act* done between persons shall not injure a stranger not party or privy thereto. *Plowd.* 19. 6 *Rep.* 16.

Where mutual acts are to be done, who is to do the first act, see tit. *Condition.*

ACTS OF PARLIAMENT. See tit. *Statute.*

ACTS OF SEDERUNT, Are Ordinances of the Court of Session, under authority of the act 1540, *c.* 93. by which authority is given to make such statutes as may be necessary for the ordering of processes and the expediting of justice. The court is also authorised by other acts of parliament, to make enactments relative to certain matters therein pointed out. *Scotch Dict.*

ACTS OF THE GENERAL ASSEMBLY OF THE CHURCH OF SCOTLAND. The acts of the general assembly issued under their legislative powers, are binding on all the members and judicatories of the church. The form of their procedure in these enactments is regulated by an act of the church (1697) termed the *barrier act. Scotch Dict.*

ACTUARY, *actuarius.*] A clerk that registers the acts and constitutions of the Convocation.

ADCREDULITARE. To purge one's self of an offence by oath. *Leges Inæ, c.* 36.

ADDITION. The title or estate, and place of abode given to a man besides his name. See tit. *Abatement*, I. 3. (*c.*)

ADELING, *Ethling* or *Edling*, from the Saxon *ædelan*, noble or excellent.] A title of honour among the Anglo-Saxons; properly belonging to the king's children; it being usual for the Saxons to join the word *ling* to the paternal name, signifying a son, or the younger. King Edward the Confessor having no issue, and intending to make Edgar, his nephew, the heir of the kingdom, gave him the stile and title of *Adeling*. It was also used among the Saxons for the nobles in general. *Spelm. Gloss. Lamb.*

ADEMPTION. A taking away of a legacy. See *Legacy*.

AD INQUIRENDUM. A judicial writ commanding inquiry to be made of any thing relating to a cause depending in the king's courts. It is granted upon many occasions for the better execution of justice. *Reg. Judic.* See tit. *Writ of Inquiry*.

ADJOURNMENT, *adjournamentum*, *Fr. adjournement*.] A putting off until another time or place. As *adjournment* in eyre, (by stat. 2 *E.* 3. *c.* 11. & 25 *E.* 3. *c.* 18.) is an appointment of a day, when the justices in eyre will sit again. A court, the parliament, and writs, &c. may be *adjourned*; and the substance of the *adjournment* of courts is to give licence to all parties that have any thing to do in court to forbear their attendance till such a time. Every last day of the term, and every eve of a day in term, which is not *dies juridicus*, or a law day, the court is *adjourned*. 2 *Inst.* 26. The terms may be *adjourned* to some other place, and there the King's Bench and other courts at Westminster be held: and if the king puts out a proclamation for the *adjournment* of the term, this is a sufficient warrant to the keeper of the Great Seal to make out writs accordingly; and proclamation is to be made, appointing all persons to keep their day, at the time and place to which, &c. 1 *And.* 279. 1 *Lev.* 176. Though by *Magna Charta* the court of Common Pleas is to be held at Westminster, yet necessity will sometimes supersede the law, as in the case of a *plague*, a *civil war*, &c. In the first year of Charles I. a writ of *adjournment* was delivered to all the justices, to *adjourn* two returns of *Trinity* term: and in the same year *Michaelmas* term was *adjourned* until *crastino animarum* to Reading; and the king by proclamation signified his pleasure, that his court should be there held. *Cro. Car.* 13. 27. In the 17th of Charles II. the court of *B. R.* was adjourned to Oxford, because of the plague; and from thence to Windsor; and afterwards to Westminster again. 1 *Lev.* 176. 178.

On a foreign plea pleaded in *assise*, &c. the writ shall be *adjourned* into the Common Pleas to be tried; and, after *adjournment*, the tenant may plead a new plea pursuant to the first; but if he pleads in abatement a plea triable by the assise, on which it is *adjourned*, he cannot plead in bar afterwards, &c. 1 *Danv. Abr.* 249. The justices of assise have power to *adjourn* the parties to Westminster, or to any other place; and by the express words of *Magna Charta*, (*cap.* 12.) they may *adjourn*, &c. into *C. B.* before the judges there. *Dyer* 132.

If the judges of the court of King's Bench, &c. are divided in opinion, two against two, upon a demurrer or special verdict (not on a motion), the cause must be *adjourned* into the Exchequer Chamber, to be determined by all the judges of England. 3 *Mod.* 156. 5 *Mod.* 335.

ADIRATUS, strayed, lost. See *Bract. l.* 3. *tract.* 2. *c.* 32.

ADJUDICATION. The English use this term to express the act of giving judgment. But in Scotch law it is used to express the diligence by which land is attached in security and payment of debt, or by which a feudal title is made up in a person holding an obligation to convey without procuratory or precept. There is thus, 1st, The adjudication for debt; 2d, The adjudication in security; and 3d, The adjudication in implement. *Scotch Dict.*

ADJUDICATION SPECIAL, Is when the lords of session, proportionably to the sums due, adjudge to the creditor some part of the creditor's lands, with a fifth part more, beside composition due to the superior, and the expences for obtaining infeoftment: but if the debitor do not consent to such an adjudication, in the terms of the act of *Parl.* 1672, all his lands and other heritable subjects are adjudged in the same manner as they were formerly apprized. *Scotch Dict.*

ADJUDICATION AFTER THE OLD FORM, Is when the *hæreditas jacens* (the heir having renounced) is adjudged to the creditor for payment of his money. *Scotch Dict.*

ADJUDICATION UPON OBLIGEMENT, Is when a man having obliged himself to infeoft another in lands disponed by him, the lords adjudge upon his refusal to perform. *Scotch Dict.*

AD JURA REGIS. A writ brought by the king's clerk presented to a living, against those that endeavour to eject him, to the prejudice of the king's title. *Reg. of Writs*, 61.

AD LARGUM, At large: It is used in the following and other expressions: *title* at large, *assise* at large, *verdict* at large; to *vouch* at large, &c.

ADLEGIARE, or *aleier* in *Fr.*] To purge himself of a crime by oath. See the laws of king Alfred, in *Brompt. Chron. cap.* 4 & 13.

ADMEASUREMENT, Writ of, *admensuratio.*] Is a writ brought for remedy against such persons as usurp more than their share. It lies in two cases; one is termed *admeasurement of dower*, (*admensuratio dotis*,) where a man's widow after his decease holdeth from the heir more land, &c. as dower, than of right belongs to her: and the other is *admeasurement of pasture*, (*admensuratio pasturæ*,) which lies between those that have common of pasture, where any one or more of them surcharge the common. *Reg. Orig.* 156. 171. In the first case the heir shall have this writ against the widow, whereby she shall be admeasured, and the heir restored to the overplus; and in the last case it may be brought against all the other commoners, and him that surcharged; for all the commoners shall be admeasured. *Termes de Ley* 23. See tit. *Common* and *Dower*.

ADMINICLE, *adminiculum.*] Aid, help, or support. See stat. 1 *E.* 4. *c.* 1.

In the Scotch law *adminicle* is a term used in the action of proving the tenor of a lost deed; and applicable to any deed or even scroll tending to establish the existence or terms of the deed in question. *Scotch Dict.*

ADMINISTRATOR, *Lat.*] He that hath the goods of a man dying intestate committed to his charge by the Ordinary, for which he is accountable when thereunto required. For matters relating to this title, and to Admininistration in general, see tit. *Executor*.

ADMINISTRATRIX, *Lat.*] She that hath goods and chattels of an intestate committed to her charge, as an *administrator*.

ADMIRAL. *Admiralius*, *admirallus*, *admiralis*, *capitaneus* or *custos maris*, from the French *ameral*, or from the Saxon, *aen mereal*, over all the sea; and in ancient time the office of the *admiralty* was called *custodia maritimæ Angliæ*. *Co. Lit.* 260. Many other fanciful derivations are recapitulated in Spelman's Glossary, and see *Com. Dig.* tit. *Admiralty*.—The term appears to have been first used *temp. E.* 1. and the first *Admiral* of England, by name, was Richard Fitz Alan, Earl of Arundel, 10 *Ric.* 2.] A High Officer or Magistrate, having the government of the king's navy; and (in his court of *Admiralty*) the determining of all causes belonging to the sea, and offences committed thereon.—The office is now usually executed by Commissioners who, by *stat.* 2 *W.* & *M. stat.* 2. *c.* 2. are declared to have the same authorities, jurisdictions, and

powers as the *Lord High Admiral*, who is usually understood by this term in law, not adverting to the naval distinctions.

Under this head therefore shall be included all that relates as well to such ADMIRAL as to the COURT OF ADMIRALTY.

The warden of the Cinque Ports has the jurisdiction of Admiral within those ports exempt from the admiralty of England. 4 *Inst.* 223. 2 *Inst.* 556. 2 *Jon.* 67. 1 *Jenk.* 85. It appears that antiently the *Admirals* of England had jurisdiction of all causes of merchants and mariners, happening not only upon the main sea, but in all foreign parts within the king's dominions, and without them, and were to judge them in a summary way, according to the laws of Oleron and other sea laws. 4 *Inst.* 75. In the time of king Ed. 1. and king John, all causes of merchants and mariners, and things arising upon the main sea, were tried before the lord *Admiral:* but the first title of *Admiral* of England, expressly conferred upon a subject, was given by patent of king Rich. 2. to the earl of Arundel and Surry. In the reign of *Ed.* 3. the court of *admiralty* was established, and *Ric.* 2. limited its jurisdiction.

By the statute 13 *Ric.* 2. *st.* 1. *c.* 5. it is enacted, that *upon complaint of encroachments made by the admirals and their deputies, the admirals and their deputies shall meddle with nothing done within the realm, but only with things done upon the sea.* For the construction of this statute, see 2 *Bulstr.* 323. 3 *Bulstr.* 205. 13 *Co.* 52.

By stat. 15 *Ric.* 2. *c.* 3. it is declared, that *all contracts, pleas, and quarrels, and other things done within the bodies of counties by land or water, and of wreck, the admiral shall have no conusance, but they shall be tried, &c. by the law of the land; but of the death of a man, and of mayhem done in great ships, being in the main stream of great rivers beneath the* points nearest *the sea, and in no other place of the same river, the admiral shall have conusance; and also to arrest ships in the great flotes, for the great voyages of the king and the realm, saving to the king his forfeitures; and shall have jurisdiction in such flotes during such voyages, only saving to lords, &c. their liberties.*

By the statute 2 *Hen.* 4. *c.* 11. reciting 13 *R.* 2. *c.* 5. it is enacted, *that he that finds himself aggrieved against the form of the statute, shall have his action by writ grounded upon the case against him that so pursues in the admiralty, and recover double damages against him, and he shall incur the pain of* 10*l. if he be attainted.*

By stat. 27 *H.* 8. *c.* 4., all offences of *piracy*, *robbery*, and *murder* done on the sea, or within the admiral's jurisdiction, shall be tried in such places of the realm as shall be limited in the king's commissions, directed to the lord admiral, and his lieutenant and deputies, and other persons, to determine such offences after the common course of law, as if the same offences had been done on land.

By the statute 28 *Hen.* 8. *cap.* 15. "all treasons, felonies, robberies, and murders, &c. upon the sea, or within the admiralty jurisdiction, shall also be tried in such shires and places in the realm as shall be limited by the king's commission, as if done on land, and the consequences of the offences are the same. See 3 *Inst.* 111, 112. But in cases which would be manslaughter at land the jury is always directed to acquit. *Foster* 288.—See *Homicide.*

It was held, *Yelv.* 134., That by force of this statute, accessaries to robbery, &c. could not be tried; but this is remedied by 11 & 12 *W.* 3. *cap.* 7.; by which their aiders and comforters, and the receivers of their goods, are made accessaries, and to be tried as pirates, by 28 *Hen.* 8. *cap.* 15.; also the said statute 11 & 12 *W.* 3. directs how pirates may be tried beyond sea, according to the civil law, by commission under the great seal of England.—See title *Piracy.*

By the statute 5 *Eliz. cap.* 5., several offences in the act mentioned, if done on the main sea, or coasts of the sea, being no part of the body of any county, and without the precinct, jurisdiction, and liberties of the cinque-ports, and out of any haven and pier, shall be tried before the admiral or his deputy, and other justices of *oyer* and *terminer*, according to the statute of 28 *H.* 8. *c.* 15.

By the statute 1 *Ann. cap.* 9. captains and mariners belonging to ships, and destroying the same at sea, shall be tried in such places as shall be limited by the king's commission, and according to 28 *H.* 8. *c.* 15. The statute 10 *Ann. cap.* 10. directs how the trial shall be had of officers and soldiers, that either upon land out of Great Britain, or at sea, hold correspondence with a rebel enemy. See tit. *Piracy*, *Treason.*

And by the statute 4 *Geo.* 1. *cap.* 11. all persons who shall commit any offence for which they ought to be adjudged pirates, felons, or robbers, by 11 & 12 *W.* 2. may be tried and judged for every such offence according to the form of 28 *H.* 8. *c.* 15. and shall be excluded from the benefit of clergy.

The jurisdiction of the lord admiral therefore is confined to the main sea, or coasts of the sea, not being within any county. Thus, the *admiralty* hath cognizance of the death or maim of a man, committed in any ship riding in great rivers, beneath the bridges thereof, next the sea: but by the common law, if a man be killed upon any arm of the sea, where the land is seen on both sides, the coroner is to inquire of it, and not the *admiral;* for the county may take cognizance of it; and where a county may inquire, the lord *admiral* hath no jurisdiction. 3. *Rep.* 107.

All ports and havens are *infrà corpus comitatûs*, and the *admiral* hath no jurisdiction of any thing done in them: between high and low-water mark, the common law and *admiral* have jurisdiction by turns; one upon the water, and the other upon the land. 3 *Inst.* 113. The admiralty have no jurisdiction where a vessel is injured in the *Thames* within the body of a county. 3 *Term Rep.* 315.

By the statutes for disciplining the navy, every commander, officer, and soldier of ships of war, shall observe the commands of the *admiral*, &c. on pain of death or other punishment. See tit. *Navy.*

Under these statutes the lord *admiral* hath power to grant commissions to inferior vice-*admirals*, &c. to call courts martial, for the trial of offences against the articles of war; and these courts determine by plurality of voices, &c. See tit. *Navy.*

The *admiralty* is said not to be a court of record, by reason it proceeds by the *Civil* law. 4 *Inst.* 135. But the *admiralty* has jurisdiction where the common law can give no remedy; and all maritime causes, or causes arising wholly upon the sea, it hath cognizance of. *Vide* as to the jurisdiction of the admiralty, 1 *Com. Dig.* tit. *Admiralty.* The *admiralty* hath jurisdiction in cases of freight, mariners' wages, breach of charter-parties, though made within the realm; if the penalty be not demanded; and likewise in case of building, mending, saving, and victualling ships, &c. so as the suit be against the ship, and not against the parties only. 2 *Cro.* 216. Mariners' wages are contracted on the credit of the ship, and they may all join in suits in the *admiralty*; whereas at common law they must all sever: the master of a ship contracts on the credit of the owners, and not of the ship; and therefore he cannot prosecute in the *admiralty* for his wages. 1 *Salk.* 33. It is allowed by the common lawyers and civilians, that the lord *admiral* hath cognizance of seamen's wages, and contracts, and debts for making ships; also of things done in navigable rivers, concerning damage done to persons, ships, goods, annoyances of free passage, &c. And of contracts, and other things done beyond sea, relating to navigation and trade by sea. *Wood's Inst.* 218. But if a contract be made beyond sea, for doing of an act or payment of money within this kingdom; or the contract is upon the sea, and not for a marine cause, it shall be tried by a jury; for where part belongs to the common law, and part to the *admiral*, the common law

shall be preferred. And contracts made beyond sea may be tried in *B. R.*, and a fact be laid to be done in any place in England, and so tried here. 2 *Bulstr.* 322.

Where a contract is made in England, and there is a conversion beyond sea, the party may sue in the *admiralty*, or at common law. 4 *Leon.* 257. An obligation made at sea, it has been held, cannot be sued in the *admiral's* court, because it takes its course, and binds according to the common law. *Hob.* 12. The court of *admiralty* cannot hold plea of a matter arising from a contract made upon the land, though the contract was concerning things belonging to the ship: but the *admiralty* may hold plea for the seamen's wages, &c. because they become due for labour done on the sea; and the contract made upon land is only to ascertain them. 3 *Lev.* 60. Though where there is a special agreement in writing, by which seamen are to receive their wages in any other manner than usual; or if the agreement at land be *under seal*, so as to be more than a parol contract, it is otherwise. 1 *Salk.* 31. See *Hob.* 79.

Whether the admiralty have or have not jurisdiction depends on the *subject matter*; that court may therefore take cognizance of an hypothecation bond given in the course of a voyage, though it be executed on land and under seal. 3 *Term Rep.* 267.

If the master pawns the ship on the high sea out of necessity for tackling or provision, without the consent of the owners, it shall bind them; but it is otherwise where the ship is pawned for the master's debt: the master can have no credit abroad, but upon the security of the vessel; and the *admiralty* gives remedy in these cases. 1 *Salk.* 35. The master hath a right to hypothecate the ship for any debt incurred on her account. Vide *Co. Lit.* 134. 140. Though the agreement is made, and the money lent at land. 1 *Lord Raym.* 152. *Benzen* v. *Jefferies.* Sale of goods (taken by piracy) in open market, is not binding by the *admiralty* law, the owner may therefore retake them; but at common law the sale is binding, of which the *admiralty* must take notice. 1 *Roll. Abr.* Vide 1 *Vent.* 308.

If a ship is taken by pirates upon the sea, and the master, to redeem the ship, contracts with the pirates to pay them 50*l.* and pawns his person for it, and the pirates carry him to the isle of S. and there he pays it with money borrowed, and gives bond for the money, he may sue in the admiralty for the 50*l.* because the original cause arose upon the sea, and what followed was but accessory and consequential. *Hard.* 183.

If goods delivered on ship-board are embezzelled, all the mariners ought to contribute to the satisfaction of the party that lost his goods, by the maritime law, and the cause is to be tried in the *admiralty.* 1 *Lill.* 368. By the custom of the *admiralty*, goods may be attached in the hands of a third person, *in causa maritima et civili*, and they shall be delivered to the plaintiff, after defaults, on caution to restore them, if the debt, &c. be disproved in a year and a day; and if the party refuse to deliver them, he may be imprisoned *quousque*, &c. *March Rep.* 204.

The court of *admiralty* may cause a party to enter into bond in nature of caution or stipulation, like bail at common law; and if he render his body, the sureties are discharged; and execution shall be of the goods, or of the body, &c. not of the lands. *Godb.* 260. 1 *Shep. Abr.* 129. See 1 *Salk.* 33. *T. Ray.* 78. 2 *Lord Ray.* 1286. *Fitz.* 197.

This fidejussory caution is only an accumulative remedy the better to enable the Court of Admiralty to preserve the property, but it does not supersede the jurisdiction *in rem.* 3 *Term Rep.* 323. 342. 346.

A person in execution, on judgment in the *admiral's* court, upon a contract made on the land in New England, was discharged, being out of the *admiralty* jurisdiction. 3 *Cro.* 603. 1 *Cro.* 685. And where sailors' clothes were bought in St. Katherine's parish near the Tower, London, which were delivered in the ship; on a suit in the *admiralty* for the money, prohibition was granted, for this was within the county: so of a ship lying at Blackwall, &c. *Owen* 122. *Hughes's Abr.* 113. But the *admiralty* may proceed against a ship, and the sails and tackle, when they are on shore, although alleged to be detained at land; yet, upon alleging offer of a plea, claiming property therein, and refusal of the plea, on this suggestion a prohibition shall be had. 1 *Show.* 179.

If an English ship takes a French ship, the French being in enmity with us, and such ship is libelled against, and after due notice on the *exchange*, &c. declared a lawful prize, the king's proctor may exhibit a libel in the admiralty court, to compel the taker (who converted the lading to his own use) to answer the value of the prize to the king; although it was objected, that, by the first sentence, the property was vested in the king, and that this second libel was in nature of an action of trover, of which the court of admiralty cannot hold plea. *Carth.* 399. —[This must be understood of a capture without the authority of letters of marque or reprisal.]

If the owner of a ship victuals it, and furnishes it to sea, with letters of reprisal, and the master and mariners, when they are at sea, commit piracy upon a friend of the king, without the notice or assent of the owner, yet by this the owner shall lose his ship by the admiralty law, and our law ought to take notice thereof. 1 *Roll. Abr.* 530. But see 1 *Roll. Rep.* 285.

By the civil law and custom of merchants, if the ship be cast away, or perish through the mariners' defaults, they lose their wages; so if taken by pirates, or if they run away; for if it were not for this policy, they would forsake the ship in a storm, and yield her up to enemies in any danger. 1 *Sid.* 179. 1 *Mod.* 93. 1 *Vent.* 146.

The *admiralty* court may award execution upon land, though not hold plea of any thing arising on land. 4 *Inst.* 141. And upon letters missive or request, the *admiralty* here may award execution on a judgment given beyond sea, where an Englishman flies or comes over hither, by imprisonment of the party, who shall not be delivered by the common law. 1 *Roll. Abr.* 530. When sentence is given in a foreign *admiralty*, the party may libel for execution of that sentence here; because all courts of *admiralty* in Europe are governed by the civil law. *Sid.* 418. Sentences of any *admiralty* in another kingdom are to be credited, that ours may be credited there, and shall not be examined at law here; but the king may be petitioned, who may cause the complaint to be examined; and, if he finds just cause, may send to his ambassador where the sentence was given, to demand redress, and upon failure thereof, will grant letters of marque and reprisal. *Raym.* 473.

If one is sued in the *admiralty*, contrary to the statutes 13 *R.* 2. *stat.* 1. *c.* 5; & 15 *R.* 2. *c.* 3, he may have a *supersedeas*, to cause the judge to stay the proceedings, and also have action against the party suing. 10 *Rep.* 75. If it appear that the court of Admiralty is proceeding in a question over which it has no jurisdiction, a court of common law will grant a prohibition without imposing any terms on the party applying for it. 3 *Term Rep.* 315.

A ship being privately arrested by *admiralty* process only, and no suit, it was adjudged a prosecution within the meaning of the statutes; and double damages, &c. shall be recovered. 1 *Salk.* 31, 32.

By stat. 8 *Eliz. c.* 5, if an erroneous judgment is given in the *admiralty*, appeal may be had to delegates appointed by commission out of chancery, whose sentence shall be final. See 5 *Inst.* 339. But from the prize court (see *post*) appeal lies to commissioners consisting of the privy council. *Doug.* 614. Appeals may be brought from the inferior *admiralty* courts to the lord high *admiral:* but the lord warden of the

Cinque Ports hath jurisdiction of *admiralty* exempt from the *admiralty* of England. A writ of error doth not lie upon a sentence in the *admiralty*, but an appeal. 4 *Inst.* 135, 339. There are also vice-admiralty courts in the king's foreign dominions, from which (except in case of prizes) appeals may be brought before the courts of admiralty in England as well as to the king in council. 3 *Comm.* 69.

The admiral, of right, had anciently a tenth part of all prize goods, but which is taken away by stat. 13 *Geo.* 2. *c.* 4; which vests the property of all ships taken and condemned as prize in the admiralty courts, in the admirals, captains, sailors, &c. being the captors, according to the proportions to be settled by the king's proclamation. This statute also enables the admiralty to grant letters of marque. (See tit. *Privateers.*) For the mode of proceeding in condemning prizes, see *Doug.* 614: & 4 *Term Rep.* 382. 2 *H. B.* 533. 6 *Parl. Ca.* 203. as to the commissioners of appeal.

Prize acts are usually passed at the commencement of every war, the provisions in which vary from time to time. The last act was 55 *Geo.* 3. *c.* 160.

By the stat. 22 *Geo.* 2. *c.* 3. his majesty's commission to all the privy councillors then and for the time being, and to the lord chief baron of the court of Exchequer, the justices of the King's Bench and Common Pleas, and barons of the said court of Exchequer, then and for the time being, for hearing and determining appeals from sentences in causes of prizes pronounced in the courts of Admiralty, in any of his majesty's dominions, declared valid, although such chief baron, justices and barons are not of the privy council. But no sentence shall be valid, unless the major part of the commissioners present be of the privy council. See *Com. Dig.* tit. *Admiralty*, and this Dict. tit. *Navy*.

By stat. 39 *Geo.* 3. *c.* 37. all offences whatever committed on the high seas shall be liable to the same punishment as if committed on shore, and shall be tried and adjudged in the same manner as felonies, &c. are directed by the 28 *H.* 8. *c.* 15.

Persons tried for murder or manslaughter, and found guilty of manslaughter only, shall be entitled to the benefit of clergy, and be subject to the same punishment as if committed on land, § 2.

39, 40 *Geo.* 3. *c.* 80. § 35. offences committed upon the high seas may be prosecuted within the nearest county.

43 *Geo.* 3, *c.* 113. persons wilfully casting away any vessel, or *procuring it to be done*, declared felons without benefit of clergy; if committed within the body of the county to be tried as other felonies upon the high seas, as under 28 *H.* 8. *c.* 15.

Powers of 33 *H.* 8. *c.* 23. respecting murder, &c. extended to accessaries before the fact in murder and to the offence of manslaughter, id. § 6. See also 43 *Geo.* 3. *c.* 79.

The *admiralty* have no jurisdiction to try offenders on the stat. 11 *Geo.* 1. *c.* 29. for *procuring* the destruction of a ship, if there is no evidence of such destruction having been *procured* by the owners of such ship upon the high seas within the admiralty jurisdiction, but only *on shore* within the body of a *county*. Easterby and Macfarlane, East's Pleas of the Crown (Addenda) p. xxx. Abbot on merchant ship, 159, n. 1.

ADMISSION, *admissio.*] Is properly the ordinary's declaration that he approves of the parson presented to serve the cure of any church. *Co. Lit.* 344. *a.* When a patron of a church has presented to it, the bishop upon examination admits the clerk by saying *admitto te habilem*. *Co. Lit.* 344. *a.* Action on the case will not lie against the bishop, if he refuse to admit a clerk to be qualified according to the canons (as for any crime or impediment, illiterature, &c.) but the remedy is by writ *quare non admisit*, or *admittendo clerico* brought in that county where the refusal was. 7 *Rep.* 3. As to the causes of refusal by the ordinary to admit to a benefice, see tit. *Parson; Quare impedit.*

ADMITTANCE. See *Copyhold.*

ADMITTENDO CLERICO. Upon the right of presentation to a benefice being recovered in *quare impedit*, or on assise of *darrein presentment*, the execution is by this writ; directed, not to the sheriff, but to the bishop or his metropolitan, requiring them to *admit* and institute the clerk of the plaintiff. 3 *Comm.* 412. *Reg. Orig.* 31, 33. See tit. *Parson & Quare Impedit.*

If a person recovers an advowson, and six months pass; yet, if the church be void, the patron may have a writ to the bishop; and if the church is void when the writ comes to the bishop, the bishop is bound to *admit* his clerk. Vide *Hut.* 24. *Hob.* 152, 4. 2 *Inst.* 273, and 3 *Com. Dig.* Where a man recovers against another than the bishop, this writ shall go to the bishop; and the party may have an *alias* and a *pluries*, if the bishop do not execute the writ, and an *attachment* against the bishop, if need be. *New Nat. Br.* 84. In a *quare impedit* betwixt two strangers, if there appears to the court a title for the king, they shall award a writ unto the bishop for the king.

ADMITTENDO IN SOCIUM. A writ for associating certain persons to justices of assize, *Reg. Orig.* 206, knights and other gentlemen of the county are usually associated with judges, in holding their *assizes* on the circuits.

ADNICHILED, from the Latin *nihil*, or *nichil.*] Annulled, cancelled, or made void. Stat. 28 *Hen.* 8.

AD QUOD DAMNUM. A writ to inquire whether a grant intended to be made by the king will be to the damage of him or others, *F. N. B.* 221, 2; and it ought to be issued before the king grants certain liberties; as a fair, market, &c. which may be prejudicial to others: it is directed to the sheriff. *Termes de Ley*, 25.

Stat. 27 *Ed.* 1. *stat.* 2. § 1. ordains *that such as would purchase new parks shall have writs out of chancery to inquire concerning the same. In like manner they shall do that will purchase any fair, market, warren, or other liberty.* § 4.

This writ is likewise used to inquire of lands given in *mortmain* to any house of religion, &c. And it is a damage to the country, that a freeholder who hath sufficient lands to pass upon assizes and jury, should alien his lands in mortmain, by which alienation his heir should not have sufficient estate after the death of the father to be sworn in assizes and juries. *F. N. B.* 221.

The writ of *ad quod damnum* is also had for the turning and changing of ancient highways; which may not be done without the king's licence obtained by this writ, on inquisition found that such a change will not be detrimental to the public. *Termes de Ley*, 26. *Vaugh. Rep.* 314. Ways turned without this authority are not esteemed highways, so as to oblige the inhabitants of the hundred to make amends for robberies; nor have the subjects an interest therein to justify going there. 3 *Cro.* 267. If any one change an highway without this authority, he may stop the way at his pleasure. See tit. *Highway.*

The river *Thames is an highway*, and cannot be diverted without an *ad quod damnum;* and to do such a thing ought to be by patent of the king. *Noy*, 105.

If there be an *ancient trench or ditch coming from the sea*, by which boats and vessels used to pass to the town, if the same be *stopped* in any part by outrageousness of the sea, and a man will *sue to the king to make a new trench, and to stop the ancient trench*, &c. they ought first to sue a writ of *ad quod damnum;* to inquire what damage it will be to the king or others. *F. N. B.* 225. *E.*

And if the king will grant to any city the *assize of bread and beer*, and the keeping of weights and measures, an *ad quod damnum* shall be first awarded, and when the same is certified, &c. then to make the grant. *F. N. B.* 225. *E.*

It appears by the writs in the register, that in ancient times,

upon every grant, confirmation, &c. or licence made by the king, a writ *ad quod damnum* was to be first awarded, to inquire of the truth thereof, and what damage the king might have by the same; but now the practice is contrary, and in the patents of common grants of licence, a dispensation by *non obstante* is inserted.

ADRECTARE, *addressare*, i. e. *ad rectum ire, recto stare.*] To do right, satisfy, or make amends. *Gerve. Dorobenn. anno* 1170.

AD TERMINUM QUI PRETERIIT. A writ of entry that lay for the lessor or his heirs, where a lease has been made of lands or tenements, for the term of life or years; and after the term is expired, the lands are withheld from the lessor by the tenant, or other person possessing the same. *F. N. B.* 201.

Now by stat. 4 *Geo.* 2. *c.* 28. tenants wilfully holding over, after demand and notice in writing for delivering possession, shall *pay double* the yearly value. See tit. *Ejectment.*

ADVENT, *adventus.*] A time containing about a month preceding the feast of the nativity (the advent or arrival) of our Saviour. It begins from the Sunday that falls either upon St. Andrew's day, being the 30th of November, or next to it. and continues to the feast of Christ's nativity, commonly called Christmas. Our ancestors shewed great reverence and devotion to this time, in regard to the approach of the solemn festival; for *in* adventu *domini nulla assisa demit capi.* But the stat. *West.* 1. (3 *E.* 1.) *c.* 51. ordained that, notwithstanding the usual solemnity and times of rest, it should be lawful (in respect of justice and charity, which ought at all times to be regarded) to take assises of *novel disseisin, mort d'ancessor*, &c. in the time of *Advent, Septuagesima*, and *Lent.* This is also one of the seasons, from the beginning of which to the end of the octave of the Epiphany, the solemnizing of marriages is forbidden, without special licence, as we may find from these old verses,

*Conjugium* adventus *prohibit*, Hilarique *relaxat;*
Septuagena *vetat, sed* Paschæ octavo *reducit;*
Rogatio *vetitat, concedit* Trina *potestas.*

AD VENTREM INSPICIENDUM. See *Ventre Inspiciendo.*

ADVERTISEMENTS. Under stat. 9 *Anne, c.* 6. § 5; and 10 *Anne, c.* 26. § 109. 100*l.* penalty is imposed on all persons (the latter particularly mentioning *Printers*) *publishing* the keeping of any office for illegal insurances on marriage, &c. or offices established under the pretence of improving small sums. The several penalties also under the *lottery* acts, (see this Dictionary, tit. *Lottery*) extend to printers and publishers of news-papers in setting the advertisements of illegal lottery adventures; and to distributors of hand-bills, &c. 4 *Term. Rep.* 414; and several printers of papers who had incurred such penaltics ignorantly, were indemnified by stat. 32 *Geo.* 3. *c.* 61.

By stat. 25 *Geo.* 2. *c.* 36. § 1. any person publicly advertising a reward *with no question asked*, for the return of things stolen or lost, or making use of words in such advertisement, purporting that such reward shall be given without seizing, or making inquiry after, the person producing such thing so stolen or lost, or promising in any such advertisement to return to any person, who may have bought, or advanced money upon such thing, the money so paid or advanced, or any reward for the return of such thing; and any person (such as the printers of news-papers, &c.) printing or publishing such advertisement shall forfeit 50*l.*

By stat. 21 *Geo.* 3. *c.* 49. any person advertising or causing to be advertised any public entertainment or meeting for *debating* on the Lord's day, to which persons are to be admitted by money or tickets sold, and any person printing or publishing any such advertisement, shall forfeit 50*l.* for each offence. § 3. See *Unlawful Assemblies. Riot. Sunday.*

AD VITAM AUT CULPAM. An office is expressed to be so held, which is to determine only by the death or delinquency of the possessor; or which, in other words, is held *quamdiù se bene gesserit.* See stat. 28 *Geo.* 2. *c.* 7. on Scotch Jurisdiction.

ADULTERY, *adulterium, quasi ad alterius thorum; Anno* 1 *Hen.* 7. *cap.* 7. and in divers old authors termed *advowtry.*] The sin of incontinence between two married persons; or if but one of the persons be married, it is nevertheless *adultery:* but in this last case it is called single *adultery*, to distinguish it from the other, which is double. This crime was severely punished by the laws of God, and the ancient laws of the land: (See the laws of King Edmund, *c.* 4: laws of Canute, *par.* 2. *c.* 6. 50: *Leg. H.* 1. *c.* 12.) the Julian law, among the old Romans, made it death; but in most countries at this time the punishment is by fine, and sometimes banishment; in England it is punished ecclesiastically by penance, &c. It is a breach of the peace, and as such anciently indictable, but not now. *Salk.* 552. The usual mode of punishing adulterers at present is by action of *crim. con.* (as it is commonly expressed) to recover damages; which are assessed by the jury, in proportion to the heinousness of the crime, and are frequently very heavy and severe.

Before the stat. 22 & 23 *Car.* 2. *c.* 1. which makes malicious maiming felony, it was a question, whether cutting off the privy members of a man, taken in *adultery* with another man's wife, was felony or not? And it is now held that such provocation may justify the homicide of the adulterer by the injured husband, in the moment of injury. 1 *Hale*, 488. See tit. *Baron & Feme.* III.

ADVOCATE. The patron of a cause assisting his client with advice, and who pleads for him: it is the same in the civil and ecclesiastical law, as a counsellor at the common law. The ecclesiastical, or church *advocate*, was originally of two sorts; either an *advocate* of the causes and interest of the church, retained as a counsellor and pleader of its rights; or an *advocate, advocatus*, an *advowee* or *avowee. Blount. Fleta, lib.* 5. *c.* 14. *Britt. c.* 29. Both these offices at first belonged to the founders of churches and convents, and their heirs, who were bound to protect and defend their churches, as well as to nominate or present to them.—But when the patrons grew negligent in their duty, or were not of ability or interest in the courts of justice, then the religious began to retain law *advocates*, to solicit and prosecute their causes. Vide *Spelman.*

ADVOCATIONE DECIMARUM. A writ that lies for tithes, demanding the fourth part, or upwards, that belong to any church. *Reg. Orig.* 29.

ADVOW, or *Avow, advocare.*] To justify or maintain an act formerly done, see *Avowry;* it also signifies to call upon or produce; anciently when stolen goods were bought by one, and sold to another, it was lawful for the right owner to take them wherever they were found, and he in whose possession they were found was bound *advocare*, i. e. to produce the seller to justify the sale; and so on till they found the thief. Afterwards the word was taken for any thing which a man acknowledged to be his own, or done by him, and in this sense it is mentioned in *Fleta, lib.* 1. *cap.* 5. *par.* 4.

ADVOWSON, *Advocatio.*] The right of presentation to a church or benefice: and he who hath this right to present is stiled *patron:* because they that originally obtained the right of presentation to any church, were maintainers of, or benefactors to, the same church: it being presumed that he who founded the church will *avow* and take it into his protection, and be a patron to defend it in its just rights. When the Christian religion was first established in England, kings began to build cathedral churches, and to make bishops: and afterwards, in imitation of them, several lords of manors founded particular churches on some part of their own lands,

and endowed them with glebe; reserving to themselves and their heirs a right to present a fit person to the bishop, when the same should become void. See 2 *Comm.* 21—3, and tit. *Nomination.*

Under this head shall be considered,

I. *The several kinds of advowson.*
II. *How advowsons may lapse.*
III. *How they may be gained by usurpation.*
IV. *Of the right of presentation.*

*For the law relating to appropriation and impropriations of benefices,* see tit. *Appropriation.*

I. Advowsons are of two kinds; *appendant,* and in *gross: Appendant,* is a right of presentation dependant upon a manor, lands, &c. and passes in a grant of the manor as incident to the same; and when manors were first created, and lands set apart to build a church on some part thereof, the *advowson* or right to present to that church became *appendant* to the manor. *Advowson* in *gross* is a right subsisting by itself, belonging to a *person,* and not to a manor, lands, &c. So that when an *advowson appendant* is severed by deed or grant from the corporeal inheritance to which it was appendant, then it becomes an *advowson* in *gross.* *Co. Lit.* 121, 122.

If he that is seised of a manor, to which an advowson is appendant, grants one or two acres of the manor, together with the advowson; the advowson is appendant to such acre; especially after the grantee hath presented. *Watson's Complete Incumbent, c.* 7.

But this feoffment of the acre with the advowson ought to be by *deed,* to make the advowson appendant; and the acre of land and the advowson ought to be granted *by the same clause* in the deed; for if one, having a manor with an advowson appendant, grant an acre parcel of the said manor, and by another clause in the same deed grant the advowson; the advowson in such case shall not pass as appendant to the acre; but if the grant had been of the *entire manor,* the advowson would have passed as appendant. So if a husband, seised in right of his wife of a manor to which an advowson is appendant, doth alien the manor by acres to divers persons, saving one acre; the advowson shall be appendant to that acre. Or if a lessee for life of a manor to which an advowson belongs, alien one acre, with the advowson appendant, the advowson is thereby appendant to that acre. *Wats. c.* 7.

The right of advowson, though appendant to a manor, castle, or the like, may be severed from it in other ways, and being severed, becomes *an advowson in gross;* and this may be effected divers ways: as, 1. If a manor or other thing to which it is appendant is granted, and the advowson excepted. 2. If the advowson is granted alone, without the thing to which it was appendant. 3. If an advowson appendant is presented to by the patron, as an advowson in gross. *Gibs.* 757.

A disappendancy may also be temporary; that is, the appendancy, though turned into gross, may return; as, 1. If the advowson is excepted in a lease of a manor for life; during the lease it is in gross, but when the lease expires it is appendant again. 2. If the advowson is granted for life and another enfeoffed of the manor with the appurtenances; in such case, at the expiration of the grant, it shall be appendant; and so in other cases.

But with respect to the king, by the statute of *prærogativa regis,* 17 Ed. 2. c. 15. *When the king giveth or granteth land, or a manor, with appurtenances; without he make express mention in his deed or writing, of advowson, the king reserveth to himself such advowsons, albeit that among other persons it hath been observed otherwise.*

Yet when he *restoreth,* as in case of the restitution of a bishop's temporalties; then advowsons pass without express mention, or any words equivalent thereto. 10 *Co.* 64.

The law, in the case of a common person, is thus set down by Rolle, out of the ancient books: if a man, seised of a manor to which an advowson is appendant, aliens that manor, without saying *with the appurtenances* (and even without *naming* the advowson) yet the advowson shall pass, for it is parcel of the manor. 2 *Roll. Abr.* 60.

An advowson being an inheritance incorporeal, and not lying in manual occupation, cannot pass by *livery;* but may be granted by *deed,* or by *will,* either for the inheritance, or for the right of one or more turns, or for as many as shall happen within a time limited.

But this general rule, with regard to advowsons in gross, next avoidances, and the like, is to be understood with two limitations.

First, That it extends not to ecclesiastical persons of any kind or degree, who are seised of advowsons in the right of their churches; nor to masters and fellows of colleges, nor to guardians of hospitals, who are seised in right of their houses; all these being restrained (the bishops by the 1 *Eliz. cap.* 19. and the rest by the 13 *Eliz. cap.* 10.) from making any grants but of things *corporeal,* of which a rent or annual profit may be reserved; and advowsons and next avoidances, which are *incorporeal* and lie in grant, cannot be of that sort; and therefore such grants, however confirmed, are void against the successor; though they have been adjudged to be good against the grantors (as bishop, dean, master, or guardian) during their own times. See 45 *Geo.* 3 *c.* 101.

Secondly, A grant of the next avoidance may be assigned before the avoidance happens. 2 *Rol. Abr.* 45, &c. But an avoidance cannot be granted by a common person after it is fallen: while the church is absolutely void. *Mo.* 89. *Dy.* 129 *b.* 26 *a.* 283 *a.* & see 2 *Wils.* 197; and a grant of the *advowson* made after the church is actually fallen vacant is equally void; not as is said in the old books, because it is a chose in action; but because such grants might (indeed inevitably would) encourage simony. 2 *Burr.* 1510, 11. See tit. *Simony,* and see *Kyd's Com. Dig.* tit. *Advowson.*

If two have a grant of the next avoidance, and one releaseth all right and title to the other while the church is void: such release is void. But the king's grant of a void turn hath been adjudged to be good. 3 *Leon.* 196. *Dy.* 283 *a. Hob.* 140.

If one be seised of an *advowson* in fee, and the church doth become void, the void turn is a chattel; and if the patron dieth before he doth present, the avoidance doth not go to his heir, but to his executor. *Wats. c.* 9.

But if the incumbent of a church be also seised in fee of the *advowson* of the same church and die, his heir, and not his executors, shall present; for although the *advowson* doth not descend to the heir at the death of the ancestor, and by his death the church become void, so that the avoidance may be said in this case to be severed from the *advowson* before it descend to the heir, and vested in the executor; yet both the avoidance and descent to the heir happening at the same instant, the title of the heir shall be preferred as the more ancient and worthy. *Wats. c.* 9. *fo.* 72. See *Watkins on Descents, p.* 62. 3 *Lev.* 47.

Tenant by the courtesy may be of an advowson, when the wife dies before avoidance. 1 *Inst.* 29 *a.*

By last will and testament, the right of presenting to the next avoidance, or the inheritance of an *advowson,* may be devised to any person; and if such devise be made by the incumbent of the church, the inheritance of the *advowson* being in him, it is good, though he die incumbent; for although the testament hath no effect but by the death of the testator, yet it hath an inception in his lifetime. And so it is, though he appoint by his will who shall be presented by the executors, or that one executor shall present the other; or doth devise that his executors shall grant the *advowson* to such a man. *Wats. c.* 10.

*Advowsons* are either *presentative, collative*, or *donative.*

An advowson *presentative* is, where the patron does present or offer his clerk to the bishop of the diocese, to be instituted in his church.

This may be done either by word or writing. The king may present by word, or in writing under any seal; who, otherwise, cannot do any legal act, but by matter of record, or by letters patent under the great seal. But where a *corporation aggregate* doth present, it must be under seal. The presentation to a vicarage doth of common right belong to the parson. If a *feme covert* hath title to present, the presentation must be by husband and wife, and in both their names, except in case of the *queen* consort. *Wood's Inst.* 155, *&c.*

An advowson *collative* is that advowson which is lodged in the bishop; for *collation* is the giving of a benefice by a bishop, when he is the original patron thereof, or he gains a right by *lapse.*

Collation differs from institution in this; that institution is performed by the bishop upon the presentation of another, and *collation* is his own act of presentation; and it differeth from a common presentation, as it is the giving of the church to the parson; and presentation is the giving or offering the parson to the church. But collation supplies the place of presentation and institution; and amounts to the same as institution, where the bishop is both patron and ordinary. 1 *Lil. Ab.* 273.

A bishop may either neglect to collate, or he may make his collation without title; but such a wrongful collation doth not put the true patron out of possession; for after the *collatee* of the bishop is instituted and inducted, the patron may present his clerk; collation in this case being to be intended only as a provisional incumbency to serve the church. 1 *Inst.* 344.

Where a bishop gives a benefice as patron, he collates by writ *jure pleno;* when by lapse, *jure devoluto.* The collation by lapse is in right of the patron. *F. N. B.* 31. See *post Lapse* II.

An advowson *donative* is, when the king or other patron (in whom the advowson of the church is lodged) does, by a single donation in writing, put the clerk into possession without presentation, institution, or induction. Donatives are either of churches parochial, chapels, prebends, &c. and may be exempt from all ordinary jurisdictions, so that the ordinary cannot visit them, and consequently cannot demand procurations. If the true patron of a church or chapel *donative* doth once present to the ordinary, and his clerk is admitted and instituted, it becomes a church *presentative*, and shall never have the privilege of a *donative* afterwards. Yet if a stranger presents to such a *donative*, and institution is given, all is void. 1 *Inst.* 158. See *contra* 1 *Salk.* 541. 2 *Com.* 23.

The right of *donation* descends to the heir (the ancestor dying seised, where the church became void in his lifetime) and not to the executor; which it would had it been a *presentative* benefice. 2 *Wilson*, 150, 1.

There is not any case in the books to exclude the heir of a *donative* from his turn in this case. And a patron of a *donative* can never be put out of possession by an *usurpation.* Id. ibid.

II. A *Lapse* is a title given to the ordinary, to collate to a church by the neglect of the patron to present to it within six months after avoidance. Or a *lapse* is a devolution of a right of presenting from the patron to the bishop; from the bishop to the archbishop; from the archbishop to the king. The term in which the title by *lapse* commences, from one to the other successively, is *six* months, or half a year, according to the calendar, not accounting twenty-eight days to the month, as in other cases, because this computation is by the ecclesiastical law; and because *tempus semestre*, in the stat. of *West.* 2. *chap.* 5. is intended of half a year, the whole year containing 365 days; which being divided, the half year for the patron to present is 182 days. The day in which the church becomes void is not to be reckoned as part of the six months. *Wood's Inst.* 160. *Hob.* 30. 4 *Rep.* 17. 6 *Rep.* 62.

Where a patron presents his clerk before the bishop hath collated, the presentation is good, notwithstanding the six months are past, and shall bar the bishop, who cannot take any advantage of the *lapse:* and so if the *patron* makes his presentation before the archbishop hath collated, although *twelve* months are past; but if the *bishop* collates after twelve months, this bars not the archbishop. 2 *Rol. Abr.* 369. 2 *Inst.* 273. If a bishop doth not collate to benefices of his own gift, they lapse at the end of six months to the archbishop; and if the archbishop neglects to collate within six months to a benefice of his gift, the king shall have it by *lapse.* *Dr. & Stud. c.* 36. And if a church continues void several years by *lapse*, the successor of the king may present. *Cro. Car.* 258. But if the king hath a title to present by *lapse*, and he suffers the patron to present, and the presentee dies, or resigns before the king hath presented, if the presentation is real, and not by covin, he hath lost his presentation; for lapse is but for the first and next turn, and by the death of the incumbent a new title is given to the patron; though it hath been adjudged that the king in such case may present at any time as long as that presentee *is incumbent.* 2 *Cro.* 216. *Moor* 244. When the patronage of the church is litigious, and one party doth recover against the other in a *quare impedit*, if the bishop be not named in the writ, and six months pass while the suit is depending, lapse shall incur to the bishop: if the bishop be named in the writ, then neither the bishop, archbishop, or king can take the benefice by lapse: and yet it is said, if the patron, within the six months, brings a *quare impedit* against the bishop, and then the six months pass without any presentation by the patron, lapse shall incur to the bishop. 2 *Rol. Abr.* 365. 6 *Rep.* 52. 1 *Inst.* 344. *Hob.* 270.

Where the bishop is a disturber, or the church remains void above six months by his fault, there shall be no *lapse.* 1 *Inst.* 344. A clerk presented being refused by the bishop for any sufficient cause, as illiterature, ill life, &c. he is to give the patron *notice* of it, that another may be presented in due time, otherwise the bishop shall not collate by lapse; because he shall not take advantage of *his own wrong*, in not giving notice to the patron as he ought to do by law. *Dyer* 292. And if an avoidance is by *resignation*, which must necessarily be to the bishop, by the *act* of the *incumbent*, or by *deprivation*, which is the *act* of the *law; lapse* shall not incur to the bishop till six months after *notice* given by him to the patron: when the church becomes void by the death of the incumbent, &c. the patron must present in six months without notice from the bishop, or shall lose his presentation by *lapse.* *Dyer* 293. 327. 1 *Inst.* 135. 4 *Rep.* 75. And it is expressly provided, by stat. 13 *Eliz. c.* 12. that no title conferred by lapse shall accrue upon any deprivation *ipso facto*, but after six months' *notice* of such deprivation given by the ordinary to the patron.

In the cases of *deprivation* and *resignation*, where the patron is to have notice before the church can *lapse*, the patron is not bound to take notice from any body but the bishop himself, or other ordinary, which must be personally given to the party, if he live in the same county; and such notice must express in certain the cause of deprivation, &c. If the patron live in a foreign county, then the notice may be published in the parish church, and affixed on the church door. *Cro. Eliz.* 119. *Dyer* 328. And this notice must be given, even though the patron himself prosecute the incumbent to deprivation. 6 *Rep.* 29.

There are *avoidances by act of parliament*, wherein there

must be a judicial sentence pronounced to make the living void: if a man hath one benefice with cure, &c. and take another with cure, without any dispensation to hold two benefices, in such case the first is void by the statute 21 *H.* 8. *c.* 13. if it was above the value of 8*l.* During an avoidance, it is said that the house and glebe of the benefice are in *abeyance:* but by the stat. 28 *H.* 8. *c.* 11. the profits arising during the avoidance are given to the next incumbent towards payment of the first fruits; though the ordinary may receive the profits to provide for the service of the church, and shall be allowed the charges of supplying the cure, &c. for which purpose the churchwardens of the parish are usually appointed.

If a clerk is *instituted* to a benefice of the yearly value of 8*l.* and, before induction, accepts another benefice with cure, and is instituted, the first benefice is void by the stat. 21 *H.* 8. *c.* 13.: for he who is instituted only, is properly said to have accepted a benefice within the words of the act. 4 *Rep.* 78. See title *Cession.*

But if he is *inducted* into a second benefice, the first is void *in facto & jure*, and not voidable only, *quoad* the patron, and until he presents another; and in such case the patron ought to take notice of the avoidance at his peril, and present within the six months. *Cro. Car.* 258.

In cases where there ought to be notice, if none is given by the bishop or archbishop in a year and a half, whereby lapse would come to the king if it had been given: here the lapse arises not to the king, where no title arose to the inferior ordinary. *Dyer* 340. And it has been adjudged, that lapse is not an interest, like the patronage, but an office of trust reposed by law in the ordinary; and the end of it is, to provide the church a rector, in default of the patron; and *it cannot be granted over;* for the grant of the next *lapse* of a church, either before it falls, or after, is void. *F. N. B.* 34. Also if lapse incurs, and then the ordinary dies, the king shall present, and not the ordinary's executors, because it is rather an administration than an interest. 25 *E.* 3, 4. A lapse may incur against an infant or feme covert, if they do not present within six months. 1 *Inst.* 246. But there is no lapse against the king, who may take his own time; and plenarty shall be no bar against the king's title, because *nullum tempus occurrit regi.* 2 *Inst.* 273. *Dyer* 351 By presentation and institution a lapse is prevented; though the clerk is never inducted: and a donative cannot lapse either to the ordinary or the king. 2 *Inst.* 273. See 2 *Comm.* 276. and 4 *Conim.* 106.

III. The *usurpation* of a church benefice is when one that hath no right presents to the church; and his clerk is admitted and instituted into it, and hath quiet possession six months after institution before a *quare impedit* brought. It must commence upon a presentation, not a collation, because by collation the church is not full; but the right patron may bring his writ at any time to remove the usurper. 1 *Inst.* 227. 6 *Rep.* 30.

No one can usurp upon the king; but an usurpation may dispossess him of his presentation, so as he shall be obliged to bring a *quare impedit.* 3 *Salk.* 389. One coparcener or joint-tenant cannot usurp upon the other; but where there are two patrons of churches united, if one presents in the other's turn, it is an usurpation. *Dy.* 259. A presentation which is void in law, as in case of simony, or to a church that is full, makes no usurpation. 2 *Rep.* 93.

In this case of usurpation the patron lost, by the common law, not only his *turn* of presentment, but also the perpetual inheritance of the advowson; so that he could not present again upon the next avoidance, unless, in the mean time, he recovered his right by a real action, viz. *a writ of right of advowson.* 3 *Comm.* 243. See further tit. *Darrein Presentment. Quare impedit.*

But bishops in ancient times, either by carelessness or collusion, frequently instituting clerks upon the presentation of usurpers, and thereby defrauding the real patrons of their right of possession; it was in substance enacted by stat. *Westm.* 2. (13 *E.* 1.) *c.* 5. § 2. "that if a possessory action be brought within six months after the avoidance, the patron shall (notwithstanding such usurpation and institution) recover that very presentation;" which gives back to him the seisin of the advowson. Yet still, if the true patron omitted to bring his action within six months, the seisin was gained by the usurper, and the patron, to recover it, was driven to the long and hazardous process of a writ of right. To remedy which it was farther enacted by statute 7 *Anne*, *c.* 18. "that no usurpation shall displace the estate or interest of the patron, or turn it to a mere right; but that the true patron may present upon the next avoidance, as if no such usurpation had happened." So that the title of usurpation is now much narrowed, and the law stands upon this reasonable foundation: that if a stranger usurps my presentation, and I do not pursue my right within six months, I shall lose that turn without remedy, for the peace of the church, and as a punishment for my own negligence; but that turn is the only one I shall lose thereby. Usurpation now gains no right to the usurper, with regard to any future avoidance, but only to the present vacancy; it cannot indeed be remedied after six months are past; but during those six months it is only a species of disturbance. 3 *Comm.* 241.

IV. *Advowsons* were formerly most of them appendant to manors, and the patrons parochial barons; the lordship of the manor, and patronage of the church, were seldom in different hands till *advowsons* were given to religious houses; but of late times the lordship of the manor and the *advowson* of the church have been divided; and now not only lords of manors but mean persons have, by purchase, the dignity of patrons of churches, to the great prejudice thereof. By the common law the right of patronage is a real right fixed in the patrons or founders, and their heirs, wherein they have as absolute a property as any other man hath in his lands and tenements: for *advowsons* are a temporal inheritance, and lay fee; they may be granted by deed or will, and are assets in the hands of heirs or executors. *Co. Lit.* 119. A recovery may be suffered of an *advowson;* a wife may be endowed of it; a husband tenant by the courtesy; and it may be forfeited by treason or felony. 1 *Rep.* 56. 10 *Rep.* 55. If an *advowson* descends to coparceners, and the church after the death of their ancestors becomes void, (by stat. *Westm.* 2. (13 *E.* 1.) stat. 1. *c.* 5.) the eldest sister shall first present. And when coparceners, joint-tenants, &c. are seised of an *advowson* and partition is made, to present by turns; by stat. 7 *Anne*, *c.* 18. each shall be seised of their separate estate.

*Presentation* is properly the act of a patron *offering his clerk to the bishop of the diocese, to be instituted in a church or benefice of his gift*, which is void. 2 *Lil. Abr.* 351.

An *alien* born cannot *present* to a benefice in his *own* right; for if he purchases an advowson, and the church becomes void, the king shall present after office found that the patron is an alien. 2 *Nels.* 1290. And by stat. 7 *R.* 2. *c.* 12. no alien shall purchase a benefice in this realm, nor occupy the same, without the king's licence, on pain of a *præmunire.*

Papists are disabled to *present* to benefices, and the universities are to *present*, &c. But a popish recusant may grant away his patronage to another, who may make *presentation*, where there is no fraud. See stat. 3 *Jac.* 1. *c.* 5. § 18, 19. 1 *W. & M. c.* 26. 12 *Anne*, *c.* 14. & 1 *Jon.* 19. But by stat. 11 *Geo.* 2. *c.* 17. § 5. *grants* of *advowsons* by papists are void, unless made for a valuable consideration to a protestant purchaser, and only for the benefit of protestants; and *devises* of *advowsons* by papists are also void.

A *guardian* by socage or by nurture cannot present to a vacant living in right of the infant heir, or in his name, because he can make no benefit of it, or account for it, though it is sometimes practised, and made good by time. Therefore the infant shall present, of whatsoever age. Vide *Co. Lit.* 17 *b.* If a common patron presents first one clerk, and then *another*, the bishop may institute which he pleases; unless he revokes the presentation of one of them before he is admitted by the bishop. If there is a right of nomination in one, and a right of presentation in another, to the same benefice; he that has the right of nomination is the true patron, and the other is obliged to present the clerk which is nominated. 1 *Inst.* 156.

All persons who have ability to purchase or grant, have likewise ability to *present* to vacant benefices; but a dean and chapter cannot *present* the dean; nor may a clergyman who is patron *present* himself, though he may pray to be admitted by the ordinary, and the admission shall be good.

*Coparceners* are but as one patron, and ought to agree in the *presentation* of one person; if they cannot agree, the eldest shall *present* first alone, and the bishop is obliged to admit his clerk, and afterwards the others in their order shall prefer their clerks; *joint-tenants* and *tenants in common*, must regularly join in *presentation*, and if either *present* alone, the bishop may refuse his clerk; as he may also the clerk *presented* by the major part of them; but if there are two joint-tenants of the next avoidance, one may *present* the other, and two joint-tenants may *present* a third, but not a stranger.

If a rector is made bishop, the king shall *present* to the rectory unless he grant to the bishop, before he is consecrated, a dispensation to hold it with his bishoprick; but if an incumbent of a church is made a bishop, and the king *presents* or grants that he should hold the church *in commendam*, which is *quasi a presentation*, a grantee of the next avoidance or *presentation* hath lost it, the king having the next *presentation*. See 2 *Stra* 841. that this presentation is not confined to the life-time of the bishop *promoted*. If the king *present* to a church by *lapse*, where he ought to *present pleno jure*, and as patron of the church, such a *presentation* is not good; for the king is deceived in his grant, by mistaking his title, which may be prejudicial to him; the *presenting* by lapse entitling *only that presentation:* the lord chancellor *presents* to the king's benefices under 20*l.* &c. 2 *Rol. Ab.* 354. 3 *Inst.* 156. *Co. Lit.* 186. 2 *Nels. Ab.* 1288. 1290. 2 *Lil.* 351.

The king may repeal a *presentation* before his clerk is inducted; and this he may do by granting the *presentation* to another, which, without any farther signification of his mind, is a revocation of the first presentation. *Dyer* 290. 360.

If two patrons present their clerks to a church, the bishop is to determine who shall be admitted by a *jus patronatûs*, &c. *Moor* 499.

A clerk may be refused by the bishop, *if the patron is excommunicate,* and remains in contempt 40 days. 2 *Rol. Abr.* 355. As to refusal for the insufficiency of the clerk presented, see tit. *Parson.*

If the bishop refuses to admit the clerk presented, he must give notice of his refusal, with the cause of it, forthwith; and on such notice the patron must present another clerk, *within six months from the avoidance*, if he thinks the objection against his first clerk contains sufficient cause of refusal; but if not, he may bring his *quare impedit*, against the bishop. 2 *Rol. Abr.* 364. See *ante*, *Lapse* II.

If a defendant, or any stranger, presents a clerk pending a *quare impedit*, and afterwards the plaintiff obtains judgment, he cannot, by virtue of that judgment, remove him, who was thus presented; but he is to bring a *scire facias* against him to show cause *quare executionem non habet;* and then, if it be found that he had no title, he shall be amoved. The way to prevent such a presentation, is to take out a *ne admittas* to the bishop; and then the writ *quare incumbravit* lies, by virtue whereof the incumbent shall be amoved, and put to his *quare impedit*, let his title be what it will; but if a *ne admittas* be not taken out, and another incumbent should come in by good title *pendente lite*, he shall hold it. *Sid.* 93. *Cro. Jac.* 93.

When a bishop hath a presentation in right of his bishoprick, and dies, neither his executor, nor heir, shall have the void turn, but the king, in whose hands are the temporalties; and he hath a right to present on an avoidance after the seizure, on death of the bishop.

Tenant in tail of an advowson, and his son and heir joined in the grant of the next presentation, tenant in tail died; this grant was held void as to the son and heir, because he had nothing in the advowson at the time he joined with his father in the grant. *Hob.* 45.

If a presentation itself bears date while the church is full of another clerk, it is void; and where two or more have a title to present by turn, one of them presents, his clerk is admitted, instituted, and inducted, and afterwards deprived, he shall not present again, but that presentation shall serve his turn: though where the admission and institution of his clerk is void, there the turn shall not be served; as if after induction he neglects to read the thirty-nine articles, &c. his institution is void by the stat. 13 *Eliz.* and the patron may present again. *F. N. B.* 33. 5 *Rep.* 102.

The right of presenting to a church may pass from one seised of the same by the patron's acknowledging of a statute, &c. which being extended, if the church becomes void, *during the conusee's estate*, the conusee may present. *Owen* 49.

Where a common person is patron, he may present by parol, as well as by writing, to the bishop. *Co. Lit.* 120. A presentation doth not carry with it the formality of a deed; but it is in the nature of a *letter missive* by which the clerk is offered to the bishop; and it passeth no interest, as a grant doth, being no more than a recommendation of a clerk to the ordinary to be admitted. But where a plaintiff declared upon a grant of the next presentation, and on oyer of the deed it appeared to be only a letter written by the patron to the father of the plaintiff, that he had given his son the next presentation; adjudged that it would not pass by such letter, without a formal deed. *Owen* 47.

Right of presentation may be forfeited in several cases; as by attainder of the patron, or by *outlawry*, and then the king shall present: and if the outlawry be reversed where the advowson is forfeited by the outlawry, and the church becomes void after, the presentation is vested in the crown; but if at the time of the outlawry, the church was void, then the presentation was forfeited as *a chattel*, and on reversing the same, the party shall be restored to it. By *appropriation* without licence from the crown, right of presentation may be forfeited; though the inheritance in this case is not forfeited, only the king shall have the presentation in nature of *a distress*, till the party hath paid a fine for his contempt. By alienation in fee of the advowson by a grantee for life of the next avoidance, a presentation is forfeited; and after such alienation the grantor may present, but then he must enter for the forfeiture of the grantee, *in the life time* of the incumbent, to determine his estate before the presentation vests in him on the incumbent's death. And by simony it may be likewise forfeited and lost. *Moor* 269. *Plowd.* 299. 2 *Rol. Abr.* 352. *Stat.* 31 *Eliz. c.* 6. § 5. See *Simony*, &c.

ADVOWSON OF THE MOIETY OF THE CHURCH, *advocatio medietatis ecclesiæ.*] Is where there are two several patrons and two several incumbents in one and the same church, the one of the one moiety, the other of the other moiety thereof. *Co. Lit.* 17 *b.*——*Medietas advocationis*, a moiety of the *advowson*, is where two must join in the presentation, and there is but one incumbent: but see stat. 7 *Anne, c.* 18. mentioned in tit. *Advowson* IV.

ADVOWSON OF RELIGIOUS HOUSES. Where any persons founded any *house of religion*, they had thereby the *advowson* or patronage thereof, like unto those who built and endowed parish churches. And sometimes these patrons had the sole nomination of the abbot, or prior, &c. either by investiture or delivery of a pastoral staff: or by direct presentation to the diocesan; or if a free election were left to the *religious*, a *congé d'eslire*, or licence for election, was first to be obtained of the patron, and the elect confirmed by him. *Kennet's Paroch. Antiq.* 147. 163.

ÆGYPTIANS. See *Egyptians*.

AERIE, *aeria accipitrum.*] An *airy* of goshawks, is the proper term for hawks, for that which of other birds we call a nest. And it is generally said to come from the French word *aire*, a hawk's nest. Spelman derives it from Sax. *eghe*, an egg, softened into *eye*, (used to express a brood of pheasants) and thence *eyrie*, or, as above, *aerie*, a place or repository for eggs. The liberty of keeping these *aeries* of hawks was a privilege granted to great persons: and the preserving the *aeries* in the king's forests was one sort of tenure of lands by service.

ÆSTIMATIO CAPITIS, *pretium hominis.*] King Athelstane ordained that fines should be paid for offences committed against several persons according to their degrees and quality, by *estimation* of their *heads*. *Cress. Ch. Hist.* 834. *Leg. Hen.* 1.

ÆTATE PROBANDA. A writ that lay to inquire whether the king's tenant holding in chief by chivalry, was of full age to receive his lands into his own hands. It was directed to the escheator of the county; but is now disused, since wards and liveries are taken away by the statute. *Reg. Orig.* 294.

AFFEERERS, *afferatores*, from the Fr. *affier*, to affirm, or *affeurer*, to set the price or assize.] Are those who, in courts-leet, upon oath, settle and moderate the fines and amercements; and they are also appointed for moderating amercements in courts-baron. See tit. *Leet*.

AFFIANCE, from the Latin *affidare*, i. e. *fidem dare.*] The plighting of troth between a man and a woman, upon agreement of marriage. *Lit. sect.* 39.

AFFIDARE. To plight one's faith, or give or swear fealty, i. e. fidelity. *Affidari* to be mustered and enrolled for soldiers. *M. S. Dom. de Farendon*, 22. 55.

AFFIDATIO DOMINORUM. An oath taken by the lords in parliament, *anno* 3 *Hen.* 6. *Rot. Parl.*

AFFIDATUS. A tenant by fealty.

AFFIDAVIT. An oath in writing; and to make *affidavit* of a thing, is to testify it upon oath. An *affidavit*, generally speaking, is an oath in writing, sworn before some person who hath authority to administer such oath: and the true place of habitation, and true addition of every person who shall make an *affidavit*, is to be inserted in his *affidavit*. 1 *Lill. Abr.* 44. 46. *Affidavits* ought to set forth the matter of fact only, which the party intends to prove by his *affidavit*; and not to declare the merits of the cause, of which the court is to judge. 21 *Car.* 1. *B. R.* The plaintiff or defendant (having authority to take *affidavits*) may take *affidavit* in a cause depending; yet it will not be admitted in evidence at the trial, but only upon motions. 1 *Lill.* 44. When an *affidavit* hath been read in court, it ought to be filed that the adverse party may see it, and take a copy. *Pasch.* 1655. An *affidavit* taken before a master in Chancery will not be of any force in the court of King's Bench, or other courts, nor ought to be read there; for it ought to be made before one of the judges of the court wherein the cause is depending, or a commissioner in the country, appointed for taking *affidavits*. *Sty.* 455. By stat. 29 *Car.* 2. *c.* 5. the judges, &c. of the courts at Westminster by commission may empower persons in the several counties of England to take *affidavits* concerning matters depending in their several courts, as masters in Chancery extraordinary used to do. Where *affidavits* are taken by commissioners in the country according to the statute 29 *Car.* 2. and it is expressed to be in a cause depending between two certain persons, and there is no such depending, those *affidavits* cannot be read, because the commissioners have no authority to take them; (and for that reason the party cannot be convicted of perjury upon them;) but if there is such a cause in court, and *affidavits* taken concerning some collateral matter, they may be read. *Salk.* 461.

*Affidavits* are usually for certifying the service of process, or other matters touching the proceedings in a cause; or in support of, or against motions, in cases where the court determines matters, &c. in a summary way.

If a person exhibits a bill in equity for the discovery of a deed, and prays relief thereupon, he must annex an *affidavit* to his bill, that he has not such deed in his possession, or that it is not in his power to come at it; for otherwise he takes away the jurisdiction of the common law courts, without showing any probable cause why he should sue in equity. 1 *Chan. Ca.* 11. 231. 1 *Vern.* 59. 180. 247.

But if he seeks discovery of the deed only, or that it may be produced at a trial at law, he need not annex such *affidavit* to his bill; for it is not to be presumed that in either of these cases he would do so absurd a thing, as exhibit a bill, if he had the deed in his possession. 1 *Vern.* 180. 247.

In bills of interpleader, the party who perfers it must make *affidavit* that he does not collude with either of the other parties. 1 *New Abr.* 66.

An *affidavit* must set forth the matter positively, and all material circumstances attending it, that the court may judge whether the deponent's conclusion be just or not. 1 *New Abr.* 66.

And therefore on motion to put off a trial for want of a material witness, it must appear that sufficient endeavours were made use of to have him at the time appointed, and that he cannot possibly be present, though he may on further time given. 7 *Mod.* 121. *Comb.* 421, 422.

There being one *affidavit* against another relating to a judgment, the matter was referred to a trial at law upon a feigned issue, to satisfy the conscience of the court as to the fact alleged. *Comberb.* 399.

See stat. 17 *Geo.* 2. *c.* 7. for taking and swearing *affidavits* to be made use of in any of the courts of the county palatine of Lancaster.

The stat. 12 *Geo.* 1. *c.* 29. requires the cause of action to be 10*l.* to hold to special bail; and both the statute and the established rules of the court require a *positive affidavit* to be made of the debt; and not couched in words of reference, except in the case of executors, assignees, &c. 1 *Term Rep.* 83. 4 *Term Rep.* 176. and *they* must swear to their *belief* of the debt.

The *affidavit* must be made by a person competent to be a witness, therefore a person convicted of *felony* is not admissible. 5 *Mod.* 74. *Salk.* 261. Nor a pick-pocket returned from transportation. *Barnes* 79. Affidavits made by illiterate persons should be perfectly explained to them. See 4 *Term Rep.* 284.

Where there is a good cause of action and a proper *affidavit*, defendant may be held to bail; and the court (of K. B.) will not go out of the *affidavit* or prejudice the cause, by entering into the merits. 1 *Salk.* 100. Plaintiff therefore must stand or fall by this *affidavit*, it being the constant and uniform practice not to receive a supplemental or explanatory *affidavit* on the part of plaintiff; nor a counter or contradictory one on the part of defendant. 2 *Str.* 1157. 1 *Wils.* 335.

But in C. P. where the first *affidavit* is defective, yet it is allowed to be supplied by another, on showing cause against

a common appearance. *Barnes* 100. 2 *Wils.* 224. 2 *Black Rep.* 850.

See further tit. *Abatement; Bail; & Impey's Instructor Cler.* in *K. B. & C. P.*

AFFIDAVIT TO HOLD TO BAIL. An affidavit to hold to bail stated that the debt arose on a *bill of exchange* or order for, &c. drawn by A. upon and accepted by the defendant payable to the plaintiff; upon this affidavit alone the court refused to order the bail-bond to be delivered up. *Wills* v. *Adcock*, *T. R.* 27.

But the instrument declared upon appearing not to be a bill of exchange, the court, *on reading the affidavit* and the declaration, ordered the bail-bond to be given up upon the defendant's filing common bail. *Ibid.*

An affidavit to hold to bail upon a promissory note is insufficient, unless it state the date of the note, or that it was payable on demand, or was due or payable at a day then past. 2 *Maul. & Sel. Rep.* 148. 475.

In an affidavit to hold to bail made by the plaintiff's agent, (the plaintiff himself being abroad,) it is sufficient to negative a tender of the debt in bank notes "as the agent believes." *Munro* v. *Spinks*, 8 *T. R.* 284.

It is sufficient to state in an affidavit to hold to bail that the defendant is indebted to the plaintiff in such a sum, "for money had and received on account of the plaintiff," without adding "received for the defendant." *Copinger* v. *Beaton*, 8 *T. R.* 338.

So also an affidavit to hold to bail stating that the defendant "was justly indebted to the plaintiff in 100*l* upon and by virtue of a certain bill of exchange drawn by the defendant, and long since due and unpaid," is sufficient without stating in what character the bill was due to the plaintiff, whether as payee or indorsee. *Bradshaw* v. *Saddington*, 7 *E. R.* 94.

But such an affidavit merely stating that the defendant was "*indebted* to the plaintiff in 54*l. for goods sold and delivered*" (without adding *by the plaintiff to the defendant*) is insufficient. *Perks* v. *Severn*, 7 *E. R.* 194. *Cathrow* v. *Hagger*, 8 *E. R.* 106. *Taylor* v. *Forbes*, 11 *E. R.* 315. 2 *Mau. & Sel. Rep.* 603.

So is an affidavit stating that the debt was due for interest of money under and by virtue of *an agreement.* 10 *E. R.* 358. And so it is when it only states the goods to be *bargained and sold* without saying *delivered.* 12 *E. R.* 398. An affidavit must state *on what account* the money is due. 4 *W. P. T.* 154. To state in such an affidavit that defendant is indebted for money paid by the plaintiff for the use of the defendant is sufficient without adding, *at the defendant's request.* 5 *W. P. T.* 704.

A co-assignee of a debt arising out of bills of exchange in his possession may sue in the name of the original creditor, and hold the defendant to bail on his own affidavit, swearing positively as to all the facts required which are within his own knowledge, and to the best of his knowledge and belief as to such as are within the knowledge of his principal and co-assignees. *Cresswell* v. *Lovell*, 8 *T. R.* 418.

In an affidavit to hold to bail made by the assignee of a bankrupt, it is necessary to negative a tender of the debt in bank notes *to the bankrupt* before his bankruptcy; saying that no such tender was made to the assignee is not sufficient. *Martin* v. *Ranoe*, *ibid.* 455.

In an affidavit to hold to bail made by the plaintiff's clerk, (the plaintiff himself residing in England,) it is not sufficient to negative a tender of the debt in bank notes "to the knowledge and belief of the clerk." *Cass* v. *Levi*, *ibid.* 520.

The court will not discharge a defendant on a common appearance under 34 *Geo.* 2. *c.* 9. § 7. on the ground of the plaintiff's residing in Holland. *Pieters* and another v. *Luytjes*, 1 *B. & P.* 1.

An affidavit of debt contracted abroad, made by a plaintiff in a foreign country before a magistrate of that country, is a sufficient foundation for a judge's order to hold the defendant to special bail. *Omealy* v. *Newell*, 8 *E. R.* 364. So is such an affidavit made before the chief justice of K. B. in Ireland signed by him and properly verified here. 1 *Mau. & Sel. Rep.* 302.

It is no objection to bail that they are indemnified. *Neat* v. *Allen*, 1 *B. & R.* 21.

Where bail are opposed and rejected and the defendant is surrendered on the next day, he may justify new bail without paying the costs of the former opposition. *Holward* v. *Andrè*, *ibid.* 32.

If the principal be surrendered within four days after the return of that writ in which there is an effectual proceeding, it is sufficient. Thus if bail be served with process on his recognizance, and die before the *quarto die post*, and fresh process issue against his executors, they have till the *quarto die post* of the second writ to surrender the principal. *Meddowcroft*, one, &c. v. *Sutton* and another, 1 *B. & P.* 61.

Bail are not permitted to justify who have been indemnified by the defendant's attorney. *Reg. Gen. H.* 37 *Geo.* 3. *ibid.* 103.

The court rejected bail who had received a verbal promise of indemnity from the defendant's attorney, but gave time to put in fresh bail. *Greensill* v. *Hopley*, *ibid.*

Where bail in C. B. is taken under a judge's order, each of the bail is liable to double the sum ordered, as well as to double the sum sworn to, when taken by affidavit. *Dahl* v. *Johnson*, *ibid.* 205.

The court will not permit a defendant to justify bail after an action for an escape commenced against the sheriff, who has neglected to take a bail bond. *Webb* v. *Matthew*, *ibid.* 225.

It is unnecessary to give bail in error on a judgment in debt, unless it appear that the action was brought on a specific contract. *Ablett* v. *Ellis*, *ibid.* 249.

The court refused to discharge a defendant out of custody on the ground that the affidavit on which he had been holden to bail was entitled in the cause. *Clarke* v. *Cawthorne*, 7 *T. R.* 321.

In an affidavit to hold to bail in trover for a bill of exchange, it should be stated that the bill remains unpaid. *Ibid.*

In *E.* 37 *Geo.* 3. similar rules had been obtained in *Levi* v. *Ross*, and *Gaunt* v. *Marsh;* on a similar objection, court inquired into the practice, and consulted the other judges; and when *Clarke* v. *Cawthorne* was disposed of, the court discharged the rules in both these cases; in support of which rules were cited *R.* v. *Jones*, 2 *Str.* 704. *R.* v. *Pierson*, *And.* 313. *Bevan* v. *Bevan*, 3 *T. R.* 601. *R.* v. *Harrison*, 6 *T. R.* 642, *n.*; against the rules was cited *King*, q. t. v. *Coles*, 6 *T. R.* 640.

It is now settled that affidavits of any causes of action before process sued out must not be entitled in any *cause.* *Reg. Gen. T.* 37 *Geo.* 3. 7 *T. R.* 454.

But an affidavit not entitled in any court, and only with the words "by the court" written under the indictment is insufficient. 3 *Mau. & Sel.* 157.

If a defendant, on being informed that a bailable writ has been issued against him, voluntarily give a bail-bond, he cannot afterwards object to the insufficiency of the affidavit to hold to bail. *Norton* v. *Danvers*, *ibid.* 375.

Such an objection cannot be taken advantage of after plea. *Levy* v. *Duponte*, *ibid.* 376, *n.*

An affidavit to hold to bail sworn in Ireland, but made for the purpose of being used in this country, ought to contain all the essential requisites of such an affidavit made in England; amongst others, (according to a late act) that the defendant had not made a tender of the money in notes of the Bank of England. *Nesbitt* v. *Pym*, *ibid.* 376, *n.*

It is no objection to an affidavit to hold to bail, that it is not intitled "in the King's Bench," or that it appears to have

been taken before "A. B. commissioner, &c." without adding "of the court of King's Bench," if in fact he were a commissioner of that court. *Kennet and Avon Canal Company* v. *Jones*, *ibid.* 451.

Affidavit to hold to bail in trover, stating, "That the plaintiff's cause of action against the defendant was for converting and disposing of divers goods of the plaintiff, of the value of 250*l.* which he refused to deliver, though the plaintiff had demanded the same, and that neither the defendant, or any person on his behalf, had offered to pay to the plaintiff the 250*l.* or the value of the goods," was holden to be insufficient. *Woolley* v. *Thomas*, *ibid.* 550.

The plaintiff in an affidavit to hold to bail, must give himself an addition, otherwise the defendant will be discharged on common bail. *Jarrett* v. *Dillon*, 1 *East.* 18

An affidavit to hold to bail, made by the *agent* of the plaintiff expressly negativing a tender in bank notes of the debt to his principal as well as to himself, were not therein stated to reside abroad. *Knight* v. *Keyte*, 1 *East.* 415.

If an affidavit to hold to bail, made by the plaintiff's clerk, expressly negative a tender in bank notes, it is bad: for a clerk cannot have certain knowledge of a mere negative. *Smith* v. *Tyson*, 1 *B.* & *P.* 339.

*Affidavit to hold to bail.* By stat. 37 *Geo.* 3. *c.* 45. "No person shall be holden to special bail, unless the affidavit to hold to bail contain therein, that no offer has been made to pay the sum of money in such affidavit mentioned, &c. in notes of the Governor and Company of the Bank of England expressed to be payable on demand, (fractional parts of the sum of 20*s.* only excepted,)" and court of King's Bench held an affidavit to hold to bail for 1190*l.* 11*s.* 3*d.* defective, on the grounds, that the tender of the debt in bank notes was not properly negatived, according to the provisions of the above act. *Jennings* v. *Mitchell*, 1 *East.* 17. But see now 43 *Geo.* 3. *c.* 18. § 2. and this Dict. title *Bank of England.*

Where the principal resides here, it is not sufficient for his agent in an affidavit to hold to bail, to negative a tender of the debt in bank notes *to the best of his knowledge*, but such tender must be positively negatived. *Elliot* v. *Duggin*, 2 *East.* 24.

Affidavit to hold to bail for 16*l. and upwards*, held insufficient as *non constat*, but the tender negatived (which was that no bank notes for 16*l. and upwards* had been made,) may have been a fractional part of the sum due above 16*l.* for which no tender in bank notes *could* be made. *Ford* v. *Lover*, 3 *East.* 110. See tit. *Bail.*

AFFINAGE, Fr. *affinage.*] Refining of metal, *purgatio metalli*; hence, fine and refine.

AFFINITY, Is the tie arising from marriage betwixt the husband and the blood-relations of the wife, and betwixt the wife and the blood-relations of the husband. Thus the relations of the husband stand in the same degree of affinity to the wife in which they are related to the husband by consanguinity; but there is no affinity betwixt the kinsmen themselves; thus the husband's brother and the wife's sister have no affinity. See *Consanguinity.*

To AFFIRM, *affirmare.*] To ratify or confirm a former law or judgment: so is the substantive *affirmance* used, stat. 8 *Hen.* 6. *c.* 12. And the verb itself, by *West. Symbol.* part 2. tit. *Fines*, sect. 152. 19 *H.* 7. *cap.* 20. See also the next word.

AFFIRMATION. An indulgence allowed by law to the people called *Quakers*, who, in cases where an oath is required from others, may make a solemn *affirmation* that what they say is true. See *Oaths*, *Quakers.*

AFFORARE. To affeer (which see); to set a value or price on any thing. *Du Cange.*

AFFORATUS. Appraised or valued, as things vendible in a fair or market. *Cartular. Glaston. MS. fol.* 58.



AFFORCIAMENT, *afforciamentum.*] A fortress, strong hold, or other fortification. *Pryn. Animad. on Coke*, *fol.* 184.

AFFORCIARE. To add, to increase, or make stronger. *Bract. lib.* 4. *c.* 19. viz. in case of disagreement of the jury, let the assize be increased.

AFFOREST, *afforestare.*] To turn ground into a forest. *Chart. de Forest. c.* 1. When forest ground is turned from forest to other uses, it is called *disafforested.* Vide *Forest.*

AFFRAY, Is derived from the Fr. word *effrayer*, to *affright*, and it formerly meant no more; as where persons appeared with armour or weapons not usually worn, to the terror of others. See stat. 2 *Ed.* 3. *c.* 3. But now it signifies a skirmish or fighting between two or more, and there must be a stroke given, or offered, or a weapon drawn, otherwise it is not an *affray.* 3 *Inst.* 158. *An affray is a public offence to the terror of the king's subjects; and so called, because it affrighteth and maketh men afraid.* 3 *Inst.* 158.

From this last definition it seems clearly to follow, that there may be an *assault*, which will not amount to an affray; as where it happens in a private place, out of the hearing or seeing of any, except the parties concerned; in which case it cannot be said to be to the terror of the people.

Also it is said, that no quarrelsome or threatening words whatsoever shall amount to an affray; and that no one can justify laying his hands on those who shall barely quarrel with angry words, without coming to blows; yet it seemeth that the constable may, at the request of the party threatened, carry the person who threatens to beat him before a justice, in order to find sureties.

Also, it is certain, that it is a very high offence to challenge another, either by word or letter, to fight a duel, or to be the messenger of such a challenge; or even barely to endeavour to provoke another to send a challenge, or to fight; as by dispersing letters to that purpose, full of reflections, and insinuating a desire to fight. See, on this subject, *Leach's Hawkins*, i. *cap.* 63. & ii. *cap.* 10. § 17. *c.* 13. § 8. *c.* 14. § 8.

But admitting that bare words do not, in the judgment of law, carry in them so much terror as to amount to an affray, yet it seems certain that, in some cases there may be an affray where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people; which is said to have been always an offence at the common law, and is strictly prohibited by statute 2 *Ed.* 3. *c.* 3. See tit. *Riding Armed.* To make an affray in any of the king's inferior courts of justice is highly finable. 3 *Inst.* 141. 12 *Co.* 71.

As to the power of constables and others in cases of *affray*, see this Dictionary, tit. *Constable* III. 1.

A justice of peace may commit *affrayers*, until they find sureties for the peace. And there is no doubt but that a justice of peace may and must do all such things to that purpose, which a private man or constable are either enabled or required by the law to do: but it is said, that he cannot without a warrant authorize the arrest of any person for an affray out of his own view; yet it seems clear, that in such case he may make his warrant to bring the offender before him, in order to compel him to find sureties for the peace. See *Leach's Hawkins*, *P. C.* i. *cap.* 63.

It is requirable in the court leet; and punishable by justices of peace in their sessions, by fine and imprisonment. And it differs from assault, in that it is a wrong to the public; whereas assault is of a private nature. *Lamb. lib.* 2. Yet indictment lies, as being a breach of the public peace. See *Quarreling in a Church, &c.*

AFFREIGHTMENT, *affretamentum.*] The freight of a ship, from the French, *fret*, freight. *Stat.* 11 *Hen.* 4. See *Charter-party.*

AFFRI, vel *Afra.*] Bullocks, or horses, or beasts of the

plough.—*Mon. Angl. par.* 2. *f.* 291. And in the county of Northumberland, the people to this day call a dull or slow horse, a false *aver* or *afer*. *Spelm. Gloss.*

AFRICAN COMPANY. In the ninth year of King William III. the trade to a great portion of Africa was in the hands of *The Royal African Company*, which, under a charter from Charles II., enjoyed an exclusive trade from the port of Sallee, in South Barbary, to the Cape of Good Hope, both inclusive, with all the islands near adjoining to those coasts. A new arrangement of this trade was made by stat. 9 & 10 *W.* 3. *c.* 26. by which the trade was opened; but this act continued in force only 13 years; and not being renewed, the whole trade reverted again to the exclusive claim of the company.

This African trade was put on a new footing by stat. 23 *Geo.* 2. *c.* 31. which made it lawful for all the king's subjects freely to trade between the port of Sallee, in South Barbary, and the Cape of Good Hope. Thus was the trade taken out of the hands of the *Royal African Company*. The act then goes on to provide, that all persons trading to that coast, between Cape Blanco and the Cape of Good Hope, should be a body corporate, by the name of *The Company of Merchants trading to Africa*; the admission to which company was made very easy, namely, by the payment of only 40*s*. The trade between the port of Sallee and Cape Blanco was left open to all persons whatsoever. By stat. 25 *Geo.* 2. *c.* 40. (see stat. 24 *Geo.* 2. *c.* 49.) all the forts, castles, and factories on the coast, from the port of Sallee to the Cape of Good Hope, belonging to the old company, were transferred to, and vested in, the new company, for the like purpose of protecting and facilitating the trade. By stat. 4 *Geo.* 3. *c.* 20. the fort of Senegal, lately ceded by France to Great Britain, was in like manner vested in the new company.

The fort of Senegal had been ceded to France by the peace of 1783; and the French king guaranteed to Great Britain the possession of fort James, and the river Gambia, both lying between the fort of Sallee and Cape Rouge. On that occasion it was thought more beneficial for the trade, that the forts, settlements, and factories between those ports, which, by stat. 5 *Geo.* 3. *c.* 44. (repealing the above act of 4 *Geo.* 3. *c.* 20.) had been vested in the king, should be revested in the company; this was accordingly done by stat. 23 *Geo.* 3. *c.* 65. The same freedom of trading there was, notwithstanding, continued to all the king's subjects.

By stat. 27 *Geo.* 3. *c.* 19. § 11, 12. which regards this trade, some regulations were made as to importing from Gibraltar merchandize the produce of the emperor of Morocco's dominions.

AFRICAN SLAVE-TRADE. See this Dict. tit. *Slaves*.

AGALMA. The impression or image of any thing on a seal. *Chart. Edg. Reg. pro Westmonast. Eccles. anno* 698.

AGE, *ætas*, Fr. *age*.] In common acceptation signifies a man's life from his birth to any certain time, or the day of his death; it also hath relation to that part of time wherein men live. But in the law it is particularly used for those special times which enable persons of both sexes to do certain acts, which before, through want of years and judgment, they are prohibited to do. As for example; a man at twelve years of *age* ought to take the oath of allegiance to the king: at fourteen, which is his *age* of discretion, he may consent to marriage, and choose his guardian: and at twenty-one he may alien his lands, goods, and chattels: a woman at nine years of *age* is dowable; at twelve she may consent to marriage; at fourteen she is at years of discretion, and may choose a guardian; and at twenty-one she may alienate her lands, &c. *Co. Lit.* 78.

There are several other *ages* mentioned in our ancient books, relating to aid of the lord, wardship, &c. now of no use. *Co. Lit.* The *age* of twenty-one is the full *age* of man or woman; which enables them to contract and manage for themselves, in respect to their estates, until which time they cannot act with security to those who deal with them; for their acts are in most cases either void or voidable. *Perk.*

Fourteen is the *age* by law to be a witness; and in some cases a person of nine years of *age* hath been allowed to give evidence. 2 *Hawk. P. C. c.* 46. § 27. None may be a member of parliament under the *age* of twenty-one years; and no man can be ordained priest till twenty-four; nor be a bishop till thirty years of age. See tit. *Infant;* also tit. *Baron & Feme, Dower, Pleading.*

AGE-PRIER, *ætatem precari*, or *ætatis precatio*.] Is when an action being brought against a person under age for lands which he hath by descent, he, by petition or motion, shows the matter to the court, and prays that the action may stay till his full age, which the court generally agrees to. *Terms de Ley* 30. See *Parol Demurrer*.

AGENFRIDA. The true lord or owner of any thing. *Leg. Inæ. c.* 50. *apud Brompt. c.* 45.

AGENHINE. See *Third-Night-Awn-hinde*.

AGENT AND PATIENT. When the same person is the doer of a thing, and the party to whom done; as where a woman endows herself of the best part of her husband's possessions, this being the sole act of herself to herself, makes her *agent and patient*. Also if a man be indebted unto another, and afterwards he makes the creditor his executor, and dies, the executor may retain so much of the goods of the deceased as will satisfy his debt; and by this retainer he is *agent and patient*, that is, the party to whom the debt is due, and the person that pays the same. But a man shall not be judge in his own cause, *quia iniquum est aliquem suæ rei esse judicem*. 8 *Rep.* 118. 138.

AGILD. Free from penalties, not subject to the customary fine or imposition. Sax. *a gild, sine mulcta*. *Leges Aluredi, c.* 6.

AGILER, from the Sax. *a gilt*, (without fault) an observer or informer. *Blount*.

AGILLARIUS. Anciently an hey-ward, herd-ward, or keeper of cattle in a common field, sworn at the lord's court by solemn oath.—There were two sorts, one of the town or village, the other of the lord of the manor. *Cowel*. See *Kennet's Paroch. Antiq.* 534. 576.

AGIST, (from the Fr. *giste*, a bed or resting place.) Signifies to take in and feed the cattle of strangers in the king's forest, and to gather up the money due for the same. *Chart. de Foresta*, 9 *H.* 3. *c.* 9. The officers appointed for this purpose are called *agisters*, or *gist-takers*, and are made by the king's letters patent: there are four of them in every forest wherein the king hath any pawnage. *Manw. Forest-Laws, c.* 11 to 80. They are also called *agistators*, to take account of the cattle *agisted*.

AGISTMENT, *agistamentum*, from Fr. *geyser, gister, (jacere)*, because the beasts are *levant* and *couchant* during the time they are on the land.] Is where other men's cattle are taken into any ground, at a certain rate *per* week: it is so called, because the cattle are suffered *agiser*, that is, to be levant and couchant there: and many great farms are employed to this purpose. 2 *Inst.* 643. Our graziers call cattle which they thus take into keep *gisements;* and to *gise* or *juice* the ground, is when the occupier thereof feeds it not with his own stock, but takes in the cattle of others to *agist* or pasture it. *Agistment* is likewise the profit of such feeding in a ground or field; and extends to the depasturing of barren cattle of the owner, for which tithes shall be paid to the parson. There is *agistment of sea-banks*, where lands are charged with a tribute to keep out the sea. *Terræ agistatæ* are lands whose owners are bound to keep up the sea-banks. *Spelm. in Romney-Marsh*. See tit. *Tithes*.

AGITATIO ANIMALIUM IN FORESTA. The drift of beasts in the forest. *Leg. Forest*.

AGIUS, Gr. *i. e.* holy. *Mon. Angl. p.* 15. 17.

AGNATES, *Agnati.*] Relations by the father: as *cognates, (cognati)* are relations by the mother. *Scotch Dict.* See *Consanguinity.*

AGNUS DEI. A piece of white wax in a flat oval form, like a small cake, stamped with the figure of the lamb, and consecrated by the pope. By stat. 13 *Eliz. c.* 2. *Agnus Dei* crosses, &c. are not permitted to be brought into this kingdom on pain of *præmunire.*

AGREEMENT, *agreamentum, aggregatio mentium.*] A joining together of two or more minds in any thing done, or to be done. *Plowd.* 17. The joint consent of two or more parties to a contract or bargain; or rather, the effect of such consent.

On this subject free use has been made of "A Treatise of Equity," *vol.* 1. with the very copious and useful marginal notes and references, by Mr. *Fonblanque.* The editor of this Dictionary had only an opportunity, on the present occasion, of applying to the first volume of that very useful performance. The subject seems to divide itself in the following manner:

I. Who may be parties to, or bound by an agreement.
II. The various kinds of agreements; and of the assent and disagreement of parties.
III. Of the operation of the statute of frauds; and herein of evidence to explain agreements.
IV. Of compelling the performance of agreements; and herein of fraud in making them.

I. A person *non compos* is not capable of entering into any agreement. See tit. *Ideots and Lunatics.*

Also an infant, for the same reason, is generally incapable of contracting, except for necessaries, &c. See tit. *Infant.*

A wife during the intermarriage is incapable of entering into any *agreement* in *pais,* being under power of her husband. See tit. *Baron and Feme.*

The ancestor seised in fee may, by his *agreement,* bind his heir; therefore if A. agrees to sell lands, and receives part of the purchase money, but dies before a conveyance is executed, and a bill is brought against the heir, he will be decreed to convey, and the money shall go to the executor; especially if there are more debts due than the testator's personal estate is sufficient to pay. 2 *Vern.* 215. *Abr. Eq.* 265. But if tenant in tail agrees to convey, or bargains and sells the lands for valuable consideration, without fine or recovery, and dies before the fine or recovery be levied or suffered, the issue is not bound either in law or equity; for equity cannot set aside the statute *de donis,* which says, That *voluntas donatoris observetur;* nor can the court set up a new manner of conveyancing, and thereby supersede fines and recoveries; for thereby the king would lose the perquisites by fines, or the writs of entry and fines for alienation. *Hob.* 203. 1 *Chan. Ca.* 171. 1 *Lev.* 239. 2 *Vent.* 350. Yet

If there be tenant in tail in equity as of a trust, or under an equitable *agreement,* and he for valuable consideration bargains and sells the land without fine or recovery, this shall bind his issue, because the statute *de donis* doth not extend to it, being an entail in equity, and a creature of the court. 1 *Chan. Ca.* 234. 2 *Chan. Ca.* 64. 1 *Vern.* 13. 440. 2 *Vern.* 133. 583. 72.

II. On this head shall be considered,

1st, An *agreement* executed already at the beginning; as where money is paid for the thing agreed, or other satisfaction made. 2dly, An *agreement* after an act done by another; as where one doth such a thing, and another person *agrees* to it afterwards, which is executed also: and 3dly, An *agreement* executory, or to be performed *in futuro.* This last sort of *agreement* may be divided into two parts; one certain at the beginning, and the other when, the certainty not appearing at first, the parties *agree* that the thing shall be performed upon the certainty known. *Terms de Ley* 31. See tit. *Condition, Contract, Covenant.*

Every *agreement* ought to be perfect, full, and complete, being the mutual consent of the parties; and should be executed with a recompence, or be so certain as to give an action or other remedy thereon. *Plowd.* 5. Any thing under hand and seal, which imports an agreement, will amount to a covenant: and a *proviso,* by way of *agreement,* amounts likewise to a covenant; and action may be brought upon them. 1 *Lev.* 155.

If any estate in possession or reversion be made to me, I must *agree* to it before it will be settled; for I may refuse, and so avoid it: a release, deed, or bond is made and delivered to another to my use, this will vest in me without any *agreement* of mine; but, if I *disagree* to it, I make the deed void. *Dyer* 167. And regularly, where a man hath once *disagreed* to the party himself, he can never after *agree:* and obligation being made to my use, and tendered to me, if I refuse it, and after *agree* again and will accept it; now this *agreement* afterwards will not make the obligation good that was void by the refusal. *Co. Lit.* 79. 5 *Rep.* 119.

An *agreement* may be as well in the party's absence as in his presence; but a *disagreement* must be to the person himself to whom made. 2 *Rep.* 69. When an estate is made to a *feme covert,* it is good, till *disagreement,* without any *agreement* of the husband: though a new estate granted to the wife where she hath an estate before, as by the taking of a new lease, and making a surrender in law, will not vest till the husband *agree* to it. *Hob.* 204.

That an assent on the part of the person who takes, is also essential to all conveyances and contracts; for where a man is to be vested with an interest, his acceptance is necessary. See 2 *Ventr.* 198. 2 *Salk.* 618. 2 *Leon. p.* 72. *pl.* 97. 5 *Vin. Ab.* 508. *pl.* 1. See *Thompson* v. *Leach,* 2 *Ventr.* 108. in which this subject is very elaborately discussed by *Ventris.* J. See also *Butler* and *Baker's* case, 3 *Co.* 26.

III. Besides the bare words of an *agreement,* the common law, to prevent imposition, ordained certain ceremonies where an interest was to pass; and therefore appointed livery for things corporeal, and a deed for things incorporeal. Yet in equity, where there was a consideration, the want of ceremonies was not regarded. However, in former times, courts of equity were very cautious of relieving bare parol agreements for lands, not signed by the parties, nor any money paid; (2 *Freem.* 216.) although they would sometimes give the party satisfaction for the loss he had sustained. And now by the stat. of 29 *Car.* 2. *cap.* 3. commonly called the Statute of Frauds, if an *agreement* be by parol, and *not signed by the parties, or somebody lawfully authorized by them,* (*Pre. Ch.* 402,) if such *agreement* be not confessed in the answer, it cannot be carried into execution. But where, in his answer, the defendant allows the bargain to be complete, and does not insist on any fraud, there can be no danger of perjury; because he himself has taken away the necessity of proving it. (*Pre. Ch.* 208. 374. 1 *Vez.* 221. 441. *Amb.* 586.) So if it be carried into execution by one of the parties, (2 *Vern.* 455. *Pre. Chan.* 519. 2 *Freem.* 268. *Amb.* 586. 2 *Stra.* 783. *Bunb.* 65. 94. 9 *Mod.* 37. 1 *Vez.* 82. 221. 297. 441. 3 *Atk.* 4. 1 *Bro. Rep.* 404. 2 *Bro. Rep.* 566. *MSS.* 4th July, 1786,) as by delivering possession, and such execution be accepted by the other, he that accepts it must perform his part; for where there is a performance, the evidence of the bargain does not lie merely upon the words, but upon the fact performed. See 2 *Bro. Rep.* 566. And it is unconscionable, that the party that has received the advantage, should be ad-

mitted to say, that such contract was never made. So, if the signing by the other party, or reducing the agreement into writing, be prevented by fraud, it may be good. *Pre. Ch.* 526. 5 *Vin. Ab.* 521. *pl.* 31. 1 *Vern.* 296. And although parol agreements are bound by the statute, and agreements are not to be part parol, and part in writing; yet a deposit, or collateral security, for the performance of the written agreement, is not within the purview of the statute 2 *Vern.* 617. 1 *Bro. Rep.* 269. 19th *April*, 1785, *MSS.* See *Treatise of Equity*, i. 164—175.

It was determined, very soon after the passing of the statute of frauds, that an *agreement*, signed by one of the parties, should be binding on the party signing it. 2 *Ch. Ca.* 161. And in Sir *James Lowther* v. *Carill*, 1 *Vern.* 221. the court appears to have thought, that one of the parties making alterations in the draft, and sending it to the other to execute, who did execute it, would bring the case out of the statute. But the authority of this latter decision seems to be done away by Lord Macclesfield's decree in *Hawkins* v. *Holmes*, 1 *P. Wms.* 770.; by which his lordship held, that unless in some particular cases, where there has been an execution of the contract, by entering upon and improving the premises, the party's signing the agreement is absolutely necessary for completing it; and that to put a different construction upon it would be to repeal it; and his lordship therefore held, that the defendant having altered the draft with his own hand, was not a signing to take it out of the statute; though the vendor afterwards executed the conveyance, and caused it to be registered. But this question received more particular consideration in the case of *Stokes* v. *Moore*, at Serjeant's-Inn Hall, March 1, 1786, in which case the court delivered their opinions that the signature required by the statute is to have the effect of giving authenticity to the whole of the instrument; and where the name is inserted in such a manner as to have that effect, it did not much signify in what part of the instrument it was to be found; as in the formal introduction to a will. [Thus, "This is the last will and testament of me A. B."—written with the testator's own hand, has been deemed a sufficient signing.] But it could not be imagined, that a name inserted in the body of an instrument, and applicable to particular purposes, could amount to such an authentication as the statute required; [thus, in notes of an *agreement*, "Mr. A. to do so and so," though written by A. himself, not a sufficient signing;] upon which, as well as upon another ground, the bill was dismissed. See Mr. *Cox's* note (1) to *Hawkins* v. *Holmes*, 1 *P. Wms.* 770.

If a defendant confess the *agreement* charged in the bill, there is certainly no danger of fraud or perjury in decreeing the performance of such *agreement*. But it is of considerable importance to determine whether the defendant he bound to confess or deny a merely parol agreement, not alleged to be in any part executed; or if he do confess it, whether he may not insist on the statute, in bar of the performance of it? See *Treatise of Equity*, *p.* 168, *note* (*d*) where this subject is very accurately and ably discussed. To allow a statute, having the prevention of frauds for its object, to be interposed in bar of the performance of a parol agreement, in part performed, were evidently to encourage one of the mischiefs which the legislature intended to prevent. It is therefore an established rule, that a parol agreement, *in part performed*, is not within the provisions of the statute. See *Whitchurch* v. *Bevis*, 2 *Bro. Rep.* 566.

As to what acts amount to a part performance, the general rule is, that the acts must be such as could be done with no other view or design than to perform the *agreement*, and not such as are merely introductory, or ancillary to it. *Gunter* v. *Halsey*, *Amb.* 586. *Whitbread* v. *Brockhurst*, 1 *Bro. Rep.* 412. The giving of possession is therefore to be considered as an act of part performance. *Stewart* v. *Denton*, *MSS.* 4th July, 1786: but giving directions for conveyances, and going to view the estate, are not. *Clerk* v. *Wright*, 1 *Atk.* 12. *Whaley* v. *Bagnal*, 6 *Bro. P. C.* 45. Payment of money is also said to be an act of part performance. *Lecon* v. *Martins*, 3 *Atk.* 4. But it seems that payment of a sum, by way of earnest, is not. *Seagood* v. *Meale*, *Pre. Ch.* 560. Lord *Pengall* v. *Ross*, 2 *Eq. Ca. Ab.* 46. *pl.* 12. *Simmons* v. *Cornelius*, 1 *Ch. Rep.* 128. But see *Voll* v. *Smith*. 3 *Ch. Rep.* 16. and *Anon.* 2 *Freem.* 128.

In the case of *Seagood* v. *Meale*, *Pre. Ch.* 561. it is said, that "where a man, on promise of a lease to be made to him, lays out money in improvements, he shall oblige the lessor afterwards to execute the lease; because it was executed on the part of the lessee." This *dictum* is sanctioned by the spirit of equity, and seems to do away the decisions which require, even under the circumstance of premises being improved, an averment of its being part of the parol agreement that it should be reduced into writing.

A letter not only takes an *agreement* in consideration of marriage out of the statute, but also, *agreements* respecting lands, &c. *Ford* v. *Compton*, 2 *Bro. Rep.* 32. *Tawny* v. *Crowther*, 2 *Bro. Rep.* 318. But whenever a letter is relied on as evidence of an *agreement*, it must be stamped before it can be read. *Ford* v. *Compton*. It must also distinctly furnish the terms of the *agreement*. *Seagood* v. *Meale*, *Pre. Ch.* 560. *Stra.* 426. *Clark* v. *Wright*, 1 *Atk.* 12.; or it must at least refer to some written instrument, in which the terms are set forth. *Tawney* v. *Crowther*. It must likewise appear, that the other party accepted such terms, and acted in contemplation of them.

Where an *agreement* in writing is executed, it were not only against the express provisions of the statute of frauds, but also against the policy of the common law, to allow of parole evidence, for the purpose of adding to, or varying the terms of the *agreement*. 2 *Atk.* 383. 3 *Atk.* 8. *Bunb.* 65. 3 *Wils.* 275. But if it be alleged, that some material part of the *agreement* was omitted, by fraud, or that the intention of the parties was mistaken and misapprehended by the drawers of the deed, in such cases, it seems, evidence will be admissible, even though the *agreement* be executed. 2 *Atk.* 203. 2 *Vern.* 98. 2 *Vern.* 547. 2 *Ch. Ca.* 180. *à fortiori*, such evidence will be admissible where the *agreement* is executory. 3 *Atk.* 388. 1 *Vez.* 456. It may be material to observe, where evidence *dehors* the deed is admitted to show what was the consideration of the *agreement*, that the consideration to be proved must be consistent with the consideration stated. 3 *Term Rep.* 474. *Fulbeck's Parallel*, *p.* 9. And if the deed specify the consideration to have been a sum of money, evidence is not admissible, in order to superadd another consideration, as natural love and affection, &c. 2 *P. Wms.* 204. 1 *Vez.* 128. Nor if the consideration fail, can evidence be admitted to support the conveyance as a gift. 2 *Vez.* 627. 1 *Atk.* 294. 3 *Bro. Rep.* 156.; and though the deed specify a particular consideration and other *considerations*, generally, no consideration but that expressed shall be *intended*. *Cro. Eliz.* 343.: but *qu.* whether other considerations might not be *proved*.

An *agreement* to lease, and that the lessor would not turn out the tenant so long as he adhered to the terms of the *agreement*, will operate as a tenancy from year to year, and may be determined by either party giving the regular notice to quit. 8 *E. R.* 165. and see 5 *T. R.* 471. there cited.

If a party, entitled under an *agreement* to receive a certain thing from another, by his own act renders it impossible to the other party to supply what he was to receive, he vacates the *agreement*. 2 *W. P. T.* 150.

IV. It has been said that where the contract is good at law, equity will carry it into execution; but this proposition is too

generally stated; for though equity will enforce the specific performance of fair and reasonable contracts where the party wants the thing in specie, and cannot have it in any other way; yet, if the breach of the contract can be, or was intended to be, compensated in damages, courts of equity will not interpose. See *Errington* v. *Annesly*, 2 *Bro. Rep.* 341. *Cudd* v. *Rutter*, 1 *P. Wms.* 570. *Capper* v. *Harris*, *Bunb.* 135.

It is assuredly a general rule, that courts of equity will, under certain circumstances, enforce the specific performance of agreements, for the non-performance of which the party would be entitled to damages at law: but as the decreeing of specific performance is in the discretion of the court, it must not be considered as an universal rule; for if the plaintiff's title be involved in difficulties which cannot be immediately removed, equity will not compel the defendant to take a conveyance: though perhaps, he might at law be subject to damages for not completing his purchase. See *Marlow* v. *Smith*, 2 *P. Wms.* 198. *Shapland* v. *Smith*, 1 *Bro. Rep.* 75. *Cooper* v. *Denne*, 21st July, 1792, *MSS.*

*Qu.* Whether courts of equity will decree an *agreement* entered into by letter, if a deed appear to have been afterwards framed, (but not executed,) varying the terms expressed in the letter? See *Coke* v. *Mascall*, 2 *Vern.* 34. Or if the terms be varied by parole. See *Jordan* v. *Sawkins*, 3 *Bro. Rep.* 388. And as a letter setting forth the terms of an *agreement*, takes the *agreement* out of the statute, it being a sufficient signing; so, it seems, it is a sufficient signing, if a person, knowing the contents, subscribe the deed as a witness only. *Welford* v. *Beazely*, 3 *Atk.* 503.

In the civil law, counter-letters, and all secret acts which make any change in *agreements*, are of no manner of effect with respect to the interest of a third person. 1 *Vern.* 240. 348. 475. 2 *Vern.* 466. 1 *P. Wms.* 768. 2 *Vez.* 375. 1 *Bla. Rep.* 363. for this would be an infidelity contrary to good manners and the public interest. In cases of this nature it is not necessary that the fraud respect an article *expressly contracted for*; but any representation, misleading the parties contracting, on the subject of the contract, is within the principle which governs this class of cases. See 1 *Bro. Rep.* 543. and stated in Mr. *Cox's* note to *Roberts* v. *Roberts*, 3 *P. Wms.* 74.

The principle of the rule there laid down, though it has been most frequently applied to agreements in fraud of marriage, extends to every other species of agreements; therefore, where a tradesman compounding his debts, privately agreed with some of his creditors to pay them the whole of their debts, by which they were induced to appear to accept of the composition; such private agreement was held to be a fraud on the other creditors, 2 *Vern.* 71. 602. 1 *Atk.* 105.; and it seems that such fraud is now relievable at law, 2 *Term Rep.* 763. The case of *Lewis* v. *Chase*, 1 *P. Wms.* 620. is, however, irreconcilable with this principle; it may therefore be material to observe, that it is very much shaken, if not over-ruled, by several subsequent cases, particularly *Smith* v. *Bromley*, *Doug.* 670. But though private agreements in fraud of *third persons* be void, yet if a bond or note be given by A. the more effectually to enable B. to bring about a match, &c. such bond or note may be recovered upon at law. *Montefiori* v. *Montefiori*, 1 *Bla. Rep.* 363. And a conveyance of land for such purpose, notwithstanding a defeasance, will be sustained in equity. 13 *Vin. Ab.* 525. 2 *Bro. P. C.* 88.

AGRI. Arable lands in the common fields. *Fortescue.*

AID. See tit. *Taxes; Tenure*, I. 8. II. 6.

AID-PRAYER, *auxilium petere.*] A word made use of in pleading, for a petition in court to call in help from another person that hath an interest in the thing contested; this gives strength to the party praying in *aid*, and to the other likewise, by giving him an opportunity of avoiding a prejudice growing towards his own right. As tenant for life, by the courtesy, for term of years, &c. being impleaded, may pray in *aid* of him in reversion; that is, desire the court that he may be called by writ to allege what he thinks proper for the maintenance of the right of the person calling him, and of his own. *F. N. B.* 50.

*Aid* shall be granted to the defendant in *ejectione firmæ*, when the title of the land is in question: lessee for years shall have *aid* in trespass; and tenants at will; but tenant in tail shall not have *aid* of him in remainder in fee; for he himself hath the inheritance. *Danv. Abr.* 292. In a writ of replevin, the avowry being for a real service, *aid* is granted before issue; and in action of trespass after issue joined, if there be cause, it shall be had for the defendant, though never for the plaintiff. *Jenk. Cent.* 64. *Fitz. Abr.* 7. There ought to be privity between a person that joins in *aid* and the other to whom he is joined; otherwise joinder in *aid* shall not be suffered. *Danv.* 318. There is a prayer in *aid* of *patrons*, by parsons, vicars, &c. And between *coparcencers*, where one coparcencer shall have *aid* of the other to recover *pro rata*. *Co. Lit.* 341. *b.* And also servants having done any thing lawfully in right of their *masters* shall have *aid* of them. *Terms de Ley* 34.

AID OF THE KING, *auxilium regis.*] Is where the king's tenant prays *aid of the king*, on account of rent demanded of him by others. A city or borough, that hold a fee farm of the king, if any thing be demanded against them which belongs thereto, may pray in *aid of the king:* and the king's bailiffs, collectors, or accountants shall have *aid of the king*. In these cases the proceedings are stopped till the king's council are heard to say what they think fit, for avoiding the king's prejudice; and this *aid* shall not in any case be granted after issue; because the king ought not to rely upon the defence made by another. *Jenk. Cent.* 64. *Terms de Ley* 35. See stats. 4 *Ed.* 1. *c.* 1, 2. 14 *Ed.* 3. *st.* 1. *c.* 14. & 1 *H.* 4. *c.* 8. See also *Com. Dig.* tit. *Aide.*

AIDERS, *Aydowers*, (stat. 25 *H.* 8. *c.* 22 & 8.) from *advoyer*, an advocate, an abetter. See title *Accessary.*

AILE, or *aiel* of the French *aieul*, *avus.*] A writ which lies where a man's grandfather being seised of lands and tenements in fee simple the day that he died, and a stranger abateth or entereth the same day, and dispossesses the heir of his inheritance. *F. N. B.* 222. See tit. *Assize of Mort d'ancestor.*

AL or ALD, from Saxon, *eald*, age.] This syllable in the beginning of the names of places denotes antiquity; as *Aldborough*, *Aldworth*, &c. *Blount.*

ALÆ ECCLESIÆ. The wings or side-aisles of the church; from the French, *Les ailes de l'Esglise.*

ALANERARIUS. A manager and keeper of dogs, for the sport of hawking, from *alanus*, a dog known to the ancients. *Du Fresne.* But Mr. Blount renders it a faul-coner.

ALBA, the *alb.*] A surplice or white sacerdotal vest anciently used by officiating priests.

ALBA FIRMA. When quit-rents, payable to the crown by freeholders of manors, were reserved in silver or white money, they are anciently called *white rents* or *blanch farms*, *reditus albi;* in contradistinction to rents reserved in work, grain, &c. which were called *reditus nigri*, or *black mail.* 2 *Inst.* 19. *& vide* 2 *Inst.* 10. where it seems used for a species of tenure. See tit. *Blanch firmes.*

In Scotland this kind of small payment is called *Blench-holding*, or *reditus alba firmæ.* 2 *Comm.* 43.

In these *blanch charters*, where the duty consists of some trifling payment in acknowledgement of the right of superiority, it is usually expressed to be *nomine albæ firmæ;* and it is also usual to find the words *si petatur tantum* added, by which if the duty be not demanded within the year, the right to demand it is lost. *Scotch Dict.*

ALBERGELIUM, *halsherga.*] An habergeon; a defence for the neck. *Hoveden* 6. 1.

ALBINATUS JUS, Is the *droit d' aubaine* in France, whereby the king at the death of an alien, is entitled to all he is worth, unless he has peculiar exemption. *Com. m.* 372. *Albinatus* is derived from *alibi natus*, *Spelm. Gloss.* 24. This was repealed by the laws of France in June 1791.

ALBUM, see *Alba Firma.*

ALDER, the first; *as alder best*, is the best of all; *alder liefest*, the most dear.

ALDERMAN, Sax. *calderman*, Lat. *aldermannus.*] Hath the same signification in general as senator, or senior: but at this day, and long since, those are called *aldermen* who are associates to the civil magistrates of a city or town corporate. See *Spelm. Gloss.* 25. *An alderman* ought to be an inhabitant of the place, and resident where he is chosen; and if he removes he is incapable of doing his duty in the government of the city or place, for which he may be disfranchised. *Mob. Rep.* 36. *Alderman Langham* was a freeman of the city of London, and chosen *alderman* of a ward, and being summoned to the court of *aldermen* he appeared, and the oath to serve the office was tendered to him, but he refused to take it, in contempt of the court, &c. whereupon he was committed to Newgate; and it was held good. *March. Rep.* 179.

The *aldermen* of London, &c. are exempted from serving inferior offices; nor shall they be put upon assises, or serve on juries, so long as they continue to be *aldermen.* 2 *Cro.* 585. See tit. London.

In *Spelman's Glossary* we find that we had anciently a title of *aldermannus totius Angliæ*; mentioned in an inscription on a tomb in *Ramsey Abbey.* And this officer was in nature of Lord Chief Justice of England. *Spelm. Alderman* was one of the degrees of nobility among the Saxons, and signified an earl; sometimes applied to a place, it was taken for a general, with a civil jurisdiction as well as military power; which title afterwards was used for a judge, but it literally imports no more than elder.

There was likewise *aldermannus hundredi*, (the alderman of the hundred,) which dignity was first introduced in the reign of *Hen.* 1. Du Fresne. Cowel.

ALDERNEY. See *Jersey.*

ALECENARIUM, a sort of hawk called a *lanner.* See *Putura.*

ALEHOUSES, are to be licensed by justices of peace, who take recognizances of alehouse-keepers not to suffer disorders in their houses, and they have power to put down *alehouses*, &c. But the act is not to restrain selling of *ale* in fairs. Stat. 5 & 6 *Ed.* 6. *c.* 25. *Alehouse keepers* are liable to a penalty of 20*s.* for keeping *alehouses* without licence; not exceeding 40*s.* nor under 10*s.* for selling *ale* in short measure; and 10*s.* for permitting tippling, &c. and persons retailing *ale* or beer. *Alehouse keepers*, &c. shall sell their *ale* by a full ale quart or pint, according to the *standard* in the *Exchequer*, marked from the said standard: and sub-commissioners, or collectors, of excise, are to provide substantial ale quarts and pints in every town in their divisions; and mayors and chief officers to mark measures, or forfeit 5*l.* by statute 1 *Jac.* 1. *c.* 9. and see stat. 4 *Jac.* 1. *c.* 5. 21 *Jac.* 1. *c.* 7. 1 *Car.* 1. *c.* 4. 3 *Car.* 1. *c.* 4. 11 & 12 *W.* 3. *c.* 15. See tit. *Inns. Brewers.*

By the stat. 26 *Geo.* 2. *c.* 41. justices on granting licences are to take recognizances in 10*l.* with sureties in the like sum for the maintaining good order. Licences to be granted to none not licensed the preceding year, unless they produce certificates of their good character. Licence only to extend to that place for which it was granted. Licences to be granted on the first of *September*, or within twenty days after, yearly, and to be for one year only; penalty for selling ale, &c. without a licence, by this and subsequent acts, first offence 40*s.* second offence 4*l.* third offence 6*l.*

As to licences see the above statutes and stat. 29 *Geo.* 2. *c.* 12. 5 *Geo.* 3. *c.* 46. 30 *Geo.* 3. *c.* 38. 32 *Geo.* 3. *c.* 59. by which last act no person can sell wine by retail to be drank in his own house, who has not also an ale licence. See also 35 *Geo.* 3. *c.* 113, tit. *Drunkenness.*

Stat. 38 *Geo.* 3. *c.* 54. 9. 13. exempts persons from penalty of retailing without a licence, who sell beer or ale in casks not less than five gallons, or in reputed quart bottles not less than two dozen, and not to be drank in their houses, and 39 *Geo.* 3. *c.* 86. In any place where the corporate justices are by 6 *Geo.* 1. *c.* 21. and 26 *Geo.* 2. *c.* 13, disqualified to grant licences for retailing liquors, the justices for the county at large may grant them at the request of the chief magistrate.

By 41 *Geo.* 3. (U. K.) *c.* 86. § 11. the provisions of 29 *Geo.* 2. *c.* 12. shall from 1 Nov. 1801, be repealed, and thereafter no person shall keep an alehouse, &c. unless annually licensed.

From said 1 Nov. 1801, persons selling ale, &c. by retail in Scotland (except in fairs) without licence liable to penalty. *Id.*

ALER SANS JOUR, *Fr.*] To go without day; *viz.* to be finally dismissed the court, because there is no further day assigned for appearance. *Kitch.* 146.

ALE-SILVER. A rent of tribute annually paid to the lord mayor of London, by those that sell *ale* within the liberty of the city. *Antiq. Purvey.* 183.

ALESTAKE, A may-pole called *alestake*, because the country people drew much *ale* there; but it is not the common may-pole, but rather a long stake drove into the ground, with a sign on it, that *ale* was to be sold.

ALE-TASTER, Is an officer appointed in every court leet, sworn to look to the assise and goodness of *ale* and beer, &c. within the precincts of the Lordship. *Kitch.* 46. In London there are *ale conners*, who are officers appointed to *taste ale* and beer, &c. in the limits of the city.

ALFET, Sax. *Alfeth.*] A cauldron or furnace, wherein boiling water was put for a criminal to dip his arm in up to his elbow, and there hold it for some time. *Du Cange.* See tit. *Ordeal.*

ALIAS, A second or further writ, issued from the courts at Westminster, after a *capias*, &c. sued out without effect.

ALIAS DICTUS, Is the manner of description of a defendant, when sued on any specialty; as a bond, &c. where after his *name*, and common addition, then comes the *alias dict.* and describes him again by the very name and addition, whereby he is bound in the writing. *Dyer* 50. *Jenk. Cent.* 119. See *Misnomer.*

ALIBI, *Elsewhere.*] This term is used to express that defence in a criminal prosecution, where the party accused, in order to prove that he could not have committed the crime charged against him, offers evidence that he was in a different place at the time.

ALIEN, *Alienus*, *Alienigena.*] Generally speaking, one born in a foreign country, out of the allegiance of the king. Under this head shall be briefly introduced the present state of the law, in particular, as to I. *Aliens.* II. *Denizens.* III. *Naturalized Subjects.* IV. *Of the general effect of the Laws on Aliens.*

I. An ALIEN *born* may *purchase* lands or other estates, but not for his own use, for the king is thereupon entitled to them. 1 *Inst.* 2. and the notes there. But under the stat. 13 *Geo.* 3. *c.* 14, aliens are enabled to lend money on the security of mortgages of estates in the *West India Colonies*, and may have every remedy to recover the money lent, except foreclosing the mortgage and obtaining possession of the land; which is positively prohibited by the statute. Nor shall a woman alien, wife of a natural born subject, be endowed. 7 *Rep.* 25. *a.* 1 *Inst.* 31. *b.* but see the note there *contra.* Nor a Jewess, wife of a husband converted to the Christian religion. *Id. ib.* See this

dict. tit. *Dower.* An alien may however acquire a property in goods, money and other *personal* estate, or may hire a house for his habitation. 7 *Rep.* 17. For personal estate is of a transitory or moveable nature, and this indulgence is necessary for the advancement of trade. Aliens also may trade as freely as other people, only they are subject to certain higher duties at the *Custom House*; and there are also some obsolete statutes, (1 *Ric.* 3. *c.* 9. 14 *H.* 8. *c.* 2. 21 *H.* 8. *c.* 16. 22 *H.* 8. *c.* 13. 32 *H.* 8. *c.* 16.) prohibiting alien artificers to work for themselves in this kingdom, and making void all leases of houses or shops to aliens; [See tit. *Artificers*;] but it is generally held that these were virtually repealed by stat. 5 *Eliz. c.* 7. prohibiting the importation of some foreign manufactures; see however 1 *Inst.* 2. *in note.* Also an alien may bring an action concerning personal property; and may make a will and dispose of his personal estate. *Lutw.* 34. These rights of aliens must be understood of alien friends only; for alien enemies have no rights, no privileges, unless by the king's special favour, during the time of war. 1 *Comm.* 372. and see *Cro. Eliz.* 683. *Skin.* 370. *Anstr. Rep. Scac.* 462.

Where it is said that an alien is one born out of the king's dominions or allegiance, this must be understood with some restrictions. The common law was absolutely so, with only a very few exceptions; so that a particular act of parliament, (stat. 29 *Car.* II. *c.* 6.) was necessary after the restoration to raturalize children of English subjects born in foreign parts during the rebellion. This maxim of law proceeded on a general principle that every man owes *natural allegiance* where he is born, and cannot owe two such allegiances at once. Yet the children of the king's ambassadors born abroad were always held to be natural born subjects. 7 *Rep.* 11. § 18. the father owing no *local* allegiance to the foreign prince; and representing the king of England; and by the stat. 25 *E.* 3. *st.* 2, it is declared to be the law of the crown of England, that the king's children *wherever born* are of ability to inherit the crown. And, apparently in consistence with this principle, it is by stat. 4 *Ann. c.* 4. enacted, that all persons succeeding to the crown, as descendants of the Princess Sophia shall be considered as natural born subjects, as if the Princess and the issue of her body and all lineally descending from her, had been born within this realm. To encourage foreign commerce it is enacted by the stat. 25 *E. st.* 2, before referred to, that all children born abroad, provided *both* their parents were at the time of the child's birth in allegiance to the king, and the mother had passed the seas by her husband's consent, might inherit as if born in England. See *Cro. Car.* 601. *Mar.* 91. *Jenk. Cent.* 3.

By several more modern statutes (7 *Ann. c.* 5. 10 *Ann. c.* 5. 4 *Geo.* 2 *c.* 21. and 13 *Geo.* 3. *c* 21,) these restrictions are still further taken off; so that all children born out of the king's ligeance, whose *fathers* were natural born subjects, and the children of such children, (*i. e.* children whose *grandfathers* by the fathers side were natural born subjects,) though their mothers were aliens, are now deemed to be natural born subjects themselves to all intents and purposes, unless their said ancestor were attainted, or banished beyond sea for high treason; or were at the birth of such children in the service of a prince at enmity with Great Britain. See stat. 4 *Geo.* 2. *c.* 21. [The issue of an English *woman* by an alien born abroad is an alien. 1 *Vent.* 422. 4 *Term Rep.* 300. solemnly decided.] But *grand children* of such ancestors shall not be privileged in respect of the alien's duty, except they be protestants and actually reside within the realm; nor shall be enabled to claim any estate or interest, unless the claim be made within five years after the same shall accrue.

The children of aliens born here in England, are generally speaking, natural-born subjects, and entitled to all the privileges of such. 1 *Comm.* 373. See tit. *Descent.*

Aliens residing in any place surrendered to his majesty, may act as merchants or factors, on taking oath of allegiance. 37 *Geo.* 3. *c.* 63. §. 5. *This act does not abridge the rights of the East India company.* See also 45 *Geo.* 3. *c.* 32. All lands &c. held in Great Britain and its dependencies, by American citizens on 28 October 1795 shall be enjoyed agreeably to the 9th article of the treaty of Amity, Commerce, and Navigation. See 37 *Geo.* 3. *c.* 97. § 24.

II. A DENIZEN is an alien born, but who has obtained, *ex donatione regis*, letters patent to make him an English subject; a high and incommunicable branch of the royal prerogative. 7 *Rep.* 25. A denizen is in a kind of middle state between an alien and natural-born subject, and partakes of both of them. He may take lands by purchase or devise, which an alien may not; but could not take by inheritance. 11 *Rep.* 67; for his parent through whom he must claim, being an alien had no inheritable blood; and therefore could convey none to the son, And, upon a like defect of hereditary blood, the issue of a denizen born *before* denization could not inherit to him; but his issue born *after* might, to the exclusion of that born before. 1 *Inst.* 8. *Vaugh.* 285. But now, by stat. 11 & 12 *Wil.* 3. *c.* 6. all persons being *natural-born* subjects, may inherit as heirs to their ancestors, though those ancestors were aliens. See also stat. 25 *Geo.* 2. *c.* 39. by which this statute of *Wil.* 3. is restrained to persons in being at the death of the ancestor; and the estate is divested from daughters in favour of after-born sons. Both these acts are extended by stat. 16 *Geo.* 3. *c.* 52. to Scotland. See more particularly title *Descent.*

A Denizen is not excused from paying the alien's duty and some other mercantile burthens. See stat. 22 *H.* 8. *c.* 8. And no denizen can be of the privy council, or either house of parliament, or have any office of trust civil or military, or be capable of any grant of lands, &c. from the crown. Stat. 12 *W.* 3. *c.* 2.

III. NATURALIZATION cannot be performed but by act of parliament; for by this an alien is put in the same state as if he had been born in the king's ligeance; except only that he is (by the stat. 12 *W.* 3. *c.* 2.) incapable, as well as a denizen, of being a member of the privy council or parliament, holding offices, grants, &c. No bill for naturalization can be received without such disabling clause in it; (stat 1 *Geo.* 1. *c.* 4.) nor without a clause disabling the person from obtaining any immunity in trade thereby, in any foreign country, unless he shall have resided in Great Britain for seven years next after the commencement of the session in which he is naturalized; (stat. 14 *Geo.* 3. *c.* 84;) neither can any person be naturalized or restored in blood unless he hath received the Sacrament of the Lord's Supper within one month before the bringing in of the bill; and unless he also takes the oaths of allegiance and supremacy in the presence of the parliament. (Stat. 7 *Jac.* 1. *c.* 2.) But these provisions have been usually dispensed with by special acts of parliament previous to bills of naturalization of any foreign princes or princesses. See statutes 4 *Ann. c.* 1. 7 *Geo.* 2. *c.* 3. 9 *Geo.* 2. *c.* 24. 4 *Geo.* 3. *c.* 4. &c.

These are the principal distinctions between *Aliens*, *Denizens*, and *Natives*; distinctions which it hath been frequently endeavoured within the present century to lay almost totally aside by one general naturalization act for all foreign protestants. An attempt which was once carried into execution by stat. 7 *Ann. c.* 5.; but this, after three years' experience, was repealed by stat. 10 *Ann. c.* 5., except the clause for naturalizing the children of English parents born abroad. But in Ireland 14 & 15 *Car.* 2. (I.) *c.* 13. 4 *Geo.* 1. (I.) *c.* 9. However, every foreign seaman who, in time of war, serves two years on board a British ship, by virtue of the king's proclamation, is by stat. 13 *Geo.* 2. *c.* 3. *ipso facto* naturalized, under the like restrictions as in stat. 12 *W.* 3. *c.* 2. And all foreign Protestants and *Jews*, upon their residing seven years in any of the American colonies, without being absent above two months at a

time, and all foreign Protestants serving two years in a military capacity there, and none of these falling within the incapacities declared by stat. 4 *Geo.* 2. *c.* 21. (*viz.* attaint, &c.) shall, on taking the oath of allegiance and abjuration, or in some cases an affirmation to the same effect, be naturalized to all intents and purposes as if they had been born in this kingdom; except as to sitting in parliament or the privy council, and holding offices or grants of land, from the crown, in Great Britain or Ireland. See statutes 13 *Geo.* 2. *c.* 7. 20 *Geo.* 2. *c.* 44. 2 *Geo.* 3. *c.* 25. 13 *Geo.* 3. *c.* 25. 20 *Geo.* 3. *c.* 20. They therefore are admissible to all other privileges which Protestants or *Jews* born in this kingdom are entitled to. What those privileges are with respect to *Jews* in particular was the subject of very high debate about the time of the famous *Jew bill*, stat. 26 *Geo.* 2. *c.* 26., which enabled all *Jews* to prefer bills of naturalization in parliament without receiving the sacrament, as ordained by stat. 7 *Jac.* 1. *c.* 2.: but this act continued only a few months, and was then repealed by stat. 27 *Geo.* 2. *c.* 1.

IV. An *alien* enemy coming into this kingdom, and taken in war, shall suffer death by the martial law; and not be indicted at the common law, for the indictment must conclude *contra ligeantiam suam*, &c. and such was never in the protection of the king. *Molloy de Jur. Marit.* 417. *Aliens* living under the protection of the king, may have the benefit of a general pardon. *Hob.* 271. No *alien* shall be returned on any jury, nor be sworn for trial of issues between subject and subject, &c. but where an *alien* is party in a cause depending, the inquest of jurors are to be half denizens and half subjects; but in cases of high treason this is not allowed. 2 *Inst.* 17. See stat. 27 *E.* 3. *c.* 8. that where both parties are aliens the inquest shall be all aliens; and stat. 28 *E.* 3. *c.* 13. as to trials between denizens and aliens. See also 1 *Com. Dig.* tit. *Alien*, (C. 8.)

Though aliens are subject to the laws, and in enormous offences (as murder, &c.) are liable in the ordinary course of justice, yet it may be too harsh to punish them on a local statute. Thus, a French prisoner, indicted for privately stealing from a shop, was acquitted of that by the direction of the judge, and found guilty of the larceny only. *Forst.* 188.

A very great influx of foreigners into England having been caused in the years 1792 and 1793, by the troubles on the Continent, certain acts were passed, stat. 33 *Geo.* 3. *c.* 4. and 34 *Geo.* 3. *c.* 43. 67. commonly called the Alien Acts, compelling the masters of ships arriving from foreign parts, under certain penalties, to give an account at every port of the number and names of every foreigner on board to the custom-house officers; appointing justices and others to grant passports to such aliens; and giving the king power to restrain and to send them out of the kingdom on pain of transportation, and on their return, of death. The same act also directed an account to be delivered of the arms of aliens, which, if required, are to be delivered up, and aliens were not to go from one place to another in the kingdom without passports. These regulations were from time to time altered and amended by various acts. See 54 *Geo.* 3. *c.* 155. passed on the expiration of war, 55 *Geo.* 3. *c.* 54. on the renewal of war; and 56 *Geo.* 3. containing provisions similar to those of the act 54 *Geo.* 3. and which may be termed the *Peace Alien-Act*.

By stat. 45 *Geo.* 3. *c.* 32. aliens residing (during the war) in any place surrendered to his Majesty were empowered to act as merchants or factors taking the oath of allegiance.

By the various acts of parliament abovementioned, most, if not all, of the niceties of the old law relative to aliens are obviated, and reduced to plain and intelligible rules. See 1 *Comm.* 366—375. 1 *Inst.* 2 and 8, and the notes there; and 7 *Rep. Calvin's* case. As to descents between aliens collaterals, *Collingwood* v. *Pace*, 1 *Vent.* 413. 1 *Sid.* 193. and this Dictionary, title *Descent*. See also title *Abatement*.

ALIENATION, from *alienare*, to alien.] A transferring the property of a thing to another: it chiefly relates to lands and tenements; as to *alien* land in fee, is to sell the fee-simple thereof, &c. And to *alien* in mortmain, is to make over lands or tenements to a religious house or body politic. Fines for *alienations* are taken away by stat. 12 *Car.* 2. *c.* 24. except fines due by particular customs of manors. All persons who have a right to lands may generally *alien* them to others: but some *alienations* are forbidden: as an *alienation* by a particular tenant, such as tenant for life, &c. which incurs a forfeiture of the estate. *Co. Lit.* 118. For if lessee for life, by livery, *alien* in fee, or make a lease for the life of another, or gift in tail, it is a forfeiture of his estate: so if tenant in dower, tenant for another's life, tenant for years, &c. do *alien* for a greater estate than they lawfully may make. *Co. Lit.* 233. 251. Conditions in feoffments, &c. that the feoffee shall not *alien*, are void. *Co. Lit.* 206. *Hob.* 261. And it is the same where a man, possessed of a lease for years, or other thing, gives and sells his whole property therein, upon such condition: but one may grant an estate in fee, on condition that the grantee shall not *alien* to a particular person, &c. And where a reversion is in the donor of an estate, he may restrain an *alienation* by condition. *Lit.* 361. *Wood's Inst.* 141. Estates in tail, for life, or years, where the whole interest is not parted with, may be made with condition not to *alien* to others, for the preservation of the lands granted in the hands of the first grantee.

ALIMENT. A fund of maintenance. Parents and children are reciprocally bound to aliment each other; in like manner, life-renters are bound to aliment the heirs, and creditors their imprisoned debtors, where they are unable to support themselves. *Scotch Dict.*

ALIMONY, *alimonia*, Nourishment or maintenance.] In a legal sense, it is taken for that allowance which a married woman sues for and is entitled to, upon separation from her husband. *Terms de Ley* 38. See tit. *Baron and Feme* XI.

ALLAUNDS, *ab alanis, Scythiæ gente*, Hare-hounds.

ALLAY, Lat. *allaya*.] The mixture of other metals with silver or gold. This *allay* is to augment the weight of the silver or gold, so as it may defray the charge of coinage, and to make it the more fusile. A pound weight of standard gold, by the present standard in the mint, is twenty-two carats fine, and two carats *allay*: and a pound weight of right standard silver consists of eleven ounces two penny weight of fine silver, and eighteen-penny weight of *allay*. *Lowndes's Essay upon Coins, pag.* 19, & 9 *H.* 5. *st.* 1. *c.* 11. *st.* 2. *c.* 4.

ALLEGIANCE, *allegiantia*, formerly called *ligeance*, from the Latin *alligare*, & *ligare*; i. e. *ligamen fidei*.] The *natural* and *lawful* and *faithful obedience* which every subject owes to his prince. It is either perpetual, where one is a subject born, or where one hath the right of a subject by naturalization, &c.; or it is temporary, by reason of residence in the king's dominions. To subjects born, it is an incident inseparable; and, as soon as born, they owe by birth-right obedience to their sovereign: and it cannot be confined to any kingdom, but follows the subject wheresoever he goeth. The subjects are hence called *liege people*, and are bound by this *allegiance* to go with the king in his wars, as well within as without the kingdom. 1 *Inst.* 129 *a.* 2 *Inst.* 741. 7 *Co.* 4. *Calvin's* case.

By the common law, all persons above the age of twelve years were required to take the oath of *allegiance* in courts-leet.

And there are several statutes requiring the oath of *allegiance* and supremacy, &c. to be taken under penalties: justices of peace may summon persons above the age of eighteen years to take these oaths. 1 *Eliz. cap.* 1. 1 *W. & M. c.* 1. 8. 1 *Ann stat.* 1. *c.* 22. For the other statutes respecting allegiance, see 5 *Eliz. c.* 1. *sect.* 5. 3 *Jac.* 1. *c.* 4. 7 *Jac.* 1. *c.* 6. 25 *Car.* 2. *c.* 2. 7 & 8 *W.* 3. *c.* 24. & 27. 13 & 14 *W.* 3. *c.* 6. 1 *Ann. c.* 22. 6 *Ann. c.* 14. 8 *Ann. c.* 15. 1 *Geo.* 1. *c.* 13. 2 *Geo.* 2. *c.* 31. 6 *Geo.* 3. *c.* 53. And see title OATHS, and *Kyd's Com. Dig.* tit. *Allegiance*. By the stat. 3 *Jac.* 1. *c.* 4. § 22, 23, &c. if any na-

tural born subject be withdrawn from his allegiance, and reconciled to the Pope or see of Rome, or shall promise obedience to any *other Prince or State*, he, his procurers, counsellors, aiders, and maintainers, shall incur the guilt of *High Treason*. See titles *Foreign Service*, *Treason*.

ALLEGIARE. To defend or justify by due course of law. *Leges Alured.* cap. 4. *Spelm.*

ALLER. This word is used to make what is added to signify superlatively; as *aller good* is the greatest good. See *Alder*. *Aller sans jour*, see *Aler*.

ALLEVIARE. To levy or pay an accustomed fine. *Cowel.*

ALLOCATION, *allocatio.*] In a legal sense, an allowance made upon account in the Exchequer; or more properly a placing or adding to a thing.

ALLOCATIONE FACIENDA. A writ for allowing to an accountant such sums of money as he hath lawfully expended in his office; directed to the lord treasurer and barons of the Exchequer, upon application made. *Reg. Orig.* 206.

ALLOCATO COMITATU, A new writ of *exigent* allowed, before any other *county court* holden, on the former not being fully served or complied with, &c. *Fitz. Exig.* 14.

ALLOCATUR, It is allowed.—A practical term applied to the certificate of allowance of costs by the master on taxation, &c. See tit. *Costs* IV.

ALLODIAL. This is where an inheritance is held without any acknowledgment to any lord or superior; and therefore is of another nature from that which is feodal. *Allodial* lands are free lands, which a man enjoys without paying any fine, rent, or service to any other. *Alodium.* In Domesday book it signifies *a free manour;* and *alodarii* Lords Paramount. *Kent. Co. Litt.* 1, 5. & see 2 *Comm.* 45, &c. and this Dict. tit. *Tenure.*

ALLUMINOR, from the Fr. *allumer*, to enlighten.] One who anciently illuminated, coloured, or painted upon paper or parchment, particularly the initial letters of ancient charters and deeds. The word is used *stat.* 1 *R.* 3. *c.* 9.

ALLUVION. See tit. *Occupancy.*

ALMANACK, Is part of the law of England, of which the courts must take notice, in the returns of writs, &c. but the *almanack* to go by is that annexed to the *Book of Common Prayer.* 6 *Mod.* 41. 81. See tit. *Year.*

The diversity of fixed and moveable feasts was condemned *per tot. cur.* for we know neither the one nor the other but by the almanacks, and we are to take notice of the course of the moon. 6 *Mod.* 150. 160. *Pasch.* 3 *Ann. B. R.* in the case of *Harvey* v. *Broad*, *ibid.* 196. *S. C.* and *Holt*, *Ch. J.* said, that at the council of Nice they made a calculation moveable for Easter for ever, and that is received here in England, and become part of the law; and so in the calendar established by act of parliament.—2 *Salk.* 626. *pl.* 8. *S. C.* accordingly; *per cur.*

Whether such a day of the month was on a *Sunday* or not. and so not a *dies juridicus*, is triable by the country or the almanack. *Dyer* 182. *pl.* 55. But,

It was said that the court might judicially take notice of almanacks, and be informed by them; and cited *Robert's* case in the time of Lord *Catline;* and *Coke* said, that so was the case of *Galery* v. *Banbury*, and judgment accordingly. 1 *Leo.* 242. *pl.* 328. *Pasch.* 29 *Eliz. B. R. Page* v. *Fawcett.*——*Cro. Eliz.* 227. *pl.* 12. *S. C.* and held that examination by almanacks was sufficient, and a trial *per pais* not necessary, though error assigned, *viz.* that the 16 Feb. on which day judgment was said to be given, was on a Sunday, was an error in fact; and the judgment was reversed. Almanacks are liable to a stamp duty under several statutes.

ALMARIA, for *armaria:* The archives, or, as they are sometimes styled, *muniments* of a church or library. *Gervas. Dorob. in R.* 2.

ALMNER, or ALMONER, *eleemosynarius.*] An officer of the king's house, whose business it is to distribute the king's *alms* every day. He ought to admonish the king to bestow his alms, especially upon saints' days and holidays; and he is likewise to visit the sick, widows that are poor, prisoners, and other necessitous people, and to relieve them under their wants; for which purpose he hath the forfeitures of deodands, and the goods of *fel'os de se*, allowed him by the king. *Fleta*, *lib.* 2. *cap.* 22. The lord *almoner* has the disposition of the king's dish of meat, after it comes from the table, which he may give to whom he pleases; and he distributes four-pence in money, a two penny loaf of bread, and a gallon of beer; or instead thereof, three pence daily at the court-gate to twenty-four poor persons of the king's parish, to each of them that allowance. This officer is usually some bishop.

ALMSFEOH, or *almesfeoh*, Saxon for *alms money:* It has been taken for what we call *Peter-Pence*, first given by Ina, king of the West Saxons, and anciently paid in England on the first of August. It was likewise called *romefeoh*, *romescot*, and *heorthpening*. *Selden's Hist. Tithes* 217.

ALMUTIUM. A cap made with goats' or lambs' skins, the part covering the head being square, and the other part hanging behind to cover the neck and shoulders. *Monasticon*, tom. 3. p. 36. *W. Thorn.* 1330.

ALNAGE, Fr. *aulnage.*] A measure, particularly the measuring with an ell.

ALNAGER, or *aulnager*, Fr. *alner*, Lat. *ulniger.*] Is properly a measure by the ell; and the word *aulne* in French signifieth *an ell.* An *aulnager* was heretofore a public sworn officer of the king's, whose place it was to examine into the assise of cloths made throughout the land, and to fix seals upon them; and another branch of his office was to collect a subsidy or *aulnage* duty granted to the king on all cloths sold. He had his power by stat. 25 *Ed.* 3. *stat.* 4. *c.* 1. and several other ancient statutes; which appointed his fees, and inflicted a punishment for putting his seal to deceitful cloth, &c. *viz.* a forfeiture of his office, and the value. 27 *Ed.* 3. *stat.* 1. *c.* 4. 3 *R.* 2. *c.* 2. There were afterwards three officers belonging to the regulation of clothing, who bear the distinct names of *searcher*, *measurer*, and *aulnager;* all which were formerly comprised in one person. 4 *Inst.* 31. *Cowel.*

By 11 & 12 *W.* 3. *c.* 20. Alnage duties are taken away.

ALNETUM, A place where *alders* grow; or a grove of *alder trees.* Domesday Book.

ALODIUM. See *Allodium.*

ALOVERIUM, *A purse. Fleta*, *lib.* 2. *c.* 82. *par.* 2.

ALTERAGE, *altaragium.*] The offerings made upon the *altar*, and also the profit that arises to the priest by reason of the *altar*, *obventio altaris. Mich.* 21 *Eliz.* It was declared that by *altarage* is meant tithes of wool, lambs, colts, calves, pigs, chickens, butter, cheese, fruits, herbs, and other small tithes, with the offerings due: the case of the vicar of West Haddon, in Northamptonshire. But the word *altarage* at first is thought to signify no more than the casual profits arising to the priest from the people's voluntary oblations at the *altar;* out of which a portion was assigned by the parson to the vicar: since that, our parsons have generally contented themselves with the greater profits of glebe, and tenths of corn and hay; and have left the small tithes to the officiating priests: and hence it is that vicarages are endowed with them. *Terms de Ley* 39. 2 *Cro.* 516.

It seems to be certain that the religious, when they allotted the altarage in part, or in whole, to the vicar or chaplain, did mean only the customary and voluntary offerings at the altar, for some divine office or service of the priest, and not any share of the standing tithes, whether predial or mixt. *Kenn. Paroch. Antiq. Gloss.*

In the case of *Franklyn*, and the master and brethren of *St. Cross*, *T.* 1721, it was decreed, that where *altaragium* is mentioned in old endowments, and supported by usage, it will extend to small tithes, but not otherwise. *Bunb.* 79.

ALTERATION, *alteratio.*] Is the changing of a thing: and when witnesses are examined upon exhibits, &c. they ought to remain in the office, and not to be taken back into private hands, by whom they may be altered. *Hob.* 254.

ALTO & BASSO. *Ponere se in arbitrio in alto & basso*, means the absolute submission of all differences.

AMABYR, vel AMVABYR. A custom in the honour of Clun, belonging to the earls of Arundel: *Pretium virginitatis domino solvendum.* LL. *eccl. Gul. Howeli Dha, regis Walliæ.* This custom Henry earl of Arundel released to his tenants, *Anno* 3 & 4 *P. & M.*

AMBACTUS. A servant or client. *Cowel.*

AMBASSADOR, *legatus.*] A person sent by one Sovereign [Power] to another with authority, by letters of credence, to treat on affairs of state. 4 *Inst.* 153. And *ambassadors* are either ordinary or extraordinary; the ordinary *ambassadors* are those who reside in the place whither sent; and the time of their return being indefinite, so is their business uncertain, arising from emergent occasions; and commonly the protection and affairs of the merchants is their greatest care: the extraordinary *ambassadors* are made *pro tempore*, and employed upon some particular great affairs, as condolements, congratulations, or for overtures of marriage, &c. Their equipage is generally very magnificent; and they may return without requesting of leave, unless there be a restraining clause in their commission. *Molloy* 144.

An agent represents the affairs only of his master; but an *ambassador* ought to represent the greatness of his master, and his affairs. *Ibid.* By the laws of nations, none under the quality of a sovereign prince can send any *ambassador*; a king that is deprived of his kingdom and royalty, hath lost his right of legation. No subject, though ever so great, can send or receive an *ambassador*; and if a viceroy does it, he will be guilty of high treason: the electors and princes of Germany have the privilege of sending and reception of *ambassadors*; but it is limited only to matters touching their own territories, and not of the state of the empire. It is said there can be no *ambassador* without letters of credence from his sovereign, to another that hath sovereign authority: and if a person be sent from a king or absolute potentate, though in his letters of credence he is termed an agent, yet he is an ambassador, he being for the Public. 4 *Inst.* 153.

*Ambassadors* may, by a precaution, be warned not to come to the place where sent; and if they then do it, they shall be taken for enemies; but being once admitted, even with enemies in arms, they shall have the protection of the laws of nations, and be preserved as princes. *Moll.* 146. If a banished man be sent as an *ambassador* to the place from whence he is banished, he may not be detained or molested there. 4 *Inst.* 153. But if he be not *received* or *admitted* as ambassador, he has no privilege as such; and an ambassador may be refused in respect of him by whom sent; or in respect of the person sent; as if he is notoriously flagitious; or if he be disagreeable to the state to which he is sent. An ambassador ought not however to be refused without cause.—See *Grotius* and *Molloy*, cited *Com. Dig.* tit. *Ambassador.* The killing of an *ambassador* has been adjudged high treason. 3 *Inst.* 8. Some *ambassadors* are allowed, by concession, to have jurisdiction over their own families; and their houses permitted to be sanctuaries; but where persons, who have greatly offended, fly to their houses, after demand and refusal to deliver them up, they may be taken from thence. *Ambassadors* cannot be defended when they commit any thing against the state, or the person of the king with whom they reside. 4 *Inst.* 152. An *ambassador*, guilty of treason against the king's life, may be condemned and executed; but for other treasons he shall be sent home, with demand to punish him, or to send him back to be punished. 4 *Inst.* 152. 1 *Roll. Rep.* 185.

If a foreign *ambassador* commits any crime here, which is *contra jus gentium*, as treason, felony, &c. or any other crime against the law of nations, he loseth the privilege of an *ambassador*, and is subject to punishment as a private alien; and he need not be remanded to his sovereign, but of curtesy. *Danv. Abr.* 327. But if a thing be only *malum probibitum* by an act of parliament, private law, or custom of the realm, and it is not *contra jus gentium*, an *ambassador* shall not be bound by them. 4 *Inst.* 153. And it is said *ambassadors* may be excused of practices against the state where they reside, (except it be in point of conspiracy, which is against the law of nations) because it doth not appear whether they have it *in mandatis*; and then they are excused by necessity of obedience. *Bac. Max.* 26.

By the civil law, the person of an *ambassador* may not be arrested; and the moveable goods of *ambassadors*, which are accounted an accession to their persons, cannot be seized on, as a pledge, nor for payment of debts, though by leave of the king or state where they are resident; but on refusal of payment, letters of request are to go to his master, &c. *Molloy* 157. *Danv.* 328. The law of nations touching *ambassadors* in its full extent, is part of the law of England; and the act 7 *An. c.* 12, is only declaratory. *Barbuit's Case, Rep. temp. Ld. Talb.* 281; and see 3 *Burr.* 1748.

By our statute law, (stat. 7 *An. c.* 12.) an *ambassador*, or public minister, or his domestic servants, registered in the secretary's office, and thence transmitted to the sheriff's office of London and Middlesex, are not to be *arrested*; if they are, the process shall be void, and the persons suing out and executing it shall suffer such penalties and corporal punishments as the lord chancellor or either of the chief justices shall think fit. Also the goods of an *ambassador* shall not be distrained. *Stat. ibid.* See 1 *Comm.* 254. The persons claiming privilege as servants of an *ambassador*, must be such as are really and *bonâ fide* retained and registered in that capacity; and the act itself expressly prohibits its extension to merchants and traders liable to the statutes of bankruptcy. See *Fitzgib.* 200. *Stra.* 797. 1 *Wils.* 20, 78, 79. 3 *Wils.* 33. 2 *Stra.* 797. 2 *Ld. Raym.* 1524. 3 *Burr.* 1676. 4 *Burr.* 2016, 17. and *Com. Dig.* tit. *Ambassador.*

A resident merchant of London, who is appointed and acts as *Consul* to a foreign Prince, is not thereby exempted from arrest. 3 *Maul* and *Selw.* 284.

AMBIDEXTER, *Lat.* One that plays on both sides. In a legal sense, it is taken for a juror or embraceor, who takes money of the parties for giving his verdict; see tit. Juries. stat. 5 *Ed.* III.

AMBRA, Sax. *amber*, Lat. *amphora.*] A vessel among the Saxons; it contained a measure of salt, butter, meal, beer, &c. *Leg. Inæ West. Sax.*

AMBRY, The place where the arms, plate, vessels, and every thing which belonged to housekeeping were kept; and probably the *ambry* at Westminster is so called, because formerly set apart for that use: or rather the *aumonery*, from the Latin *eleemosynaria*, an house adjoining to an abbey, in which the charities were laid up for the poor.

AMENABLE, Fr. *amener.*] To bring or lead unto; or *amainable*, from the Fr. *Main*, a hand.] Signifies tractable, that may be led or governed: and in our books it is commonly applied to a woman, that is governable by her husband. *Cowel Interp.* It also, in the modern sense, signifies to be responsible, or subject to answer, &c. in a court of justice.

AMENDMENT, *emendatio.*] The correction of an error committed in any process, which may be *amended* after judgment; and if there be any error in giving the judgment, the party is driven to his writ of error; though where the fault appears to be in the clerk who writ the record, it may be *amended.* *Terms de Ley* 39.

At common law there was little room for amendments, which appears by the several statutes of *amendments and jeofails*, and

likewise by the constitution of the courts; for, says Britton, the judges are to record the parols [or pleas] deduced before them in judgment; also, says he, *Ed.* 1. granted to the justices to record the pleas pleaded before them, but they are not to erase their records, nor amend them, nor record against their inrollment, nor any way suffer their records to be a warrant to justify their own misdoings, nor erase their words, nor amend them, nor record against their inrollment. This ordinance of *Ed.* 1. was so rigidly observed, that when justice Hengham, in his reign, moved with compassion for the circumstances of a poor man who was fined 13*s.* 4*d.* erased the record, and made it 6*s.* 8*d.* he was fined 800 marks, with which, it is said, a clock house at Westminster was built, and furnished with a clock; but as to the clock, it has been denied by authors of credit, clocks not being in use till a century afterwards. Notwithstanding what is mentioned above, there were some cases that were amendable at common law.

Original writs are not *amendable* at common law, for if the writ be not good, the party may have another; judicial writs may and have been often *amended*. 8 *Rep.* 157.

*Whatever* at common law *might be* amended *in civil cases*, *was at* common law *amendable in criminal cases*, and so it is at this day: resolved by *Holt* Ch. J. *Powell* and *Powis* J. 1 *Salk.* 51. *pl.* 14.

Though *misawarding of process on the roll* might be amended at common law the *same term*, because it was the act of the court; yet if any clerk at common law issued out an *erroneous process on a right award of the court*, that was never amended in any case at the common law. 1 *Salk.* 51. *pl.* 14.

Anciently all pleas were *ore tenus* at the bar; and then if any error was spied in them, it was presently amended. Since that custom is changed, the motion to amend, because all in paper, succeeded in the room of it; and it is a motion that the court cannot refuse; but they may refuse it if the party desiring it *refuse to pay costs*, or the amendment desired should amount to a *new plea*. 10 *Mod.* 88.

Mistakes are now effectually helped by the statutes of amendment and *jeofails*; the latter so called, because when a pleader perceived any slip in the form of his proceeding, and acknowledges such error, (*jeo faile*, or *j'ai faillé*); he is at liberty by those statutes to amend it, which amendment is seldom actually made, but the benefit of the act is attained by the courts overlooking the exception, 2 *Stra.* 1011. These statutes are in the whole 12 in number, and are here recapitulated chronologically, by which all trifling exceptions are so thoroughly guarded against, that writs of error cannot since be maintained, but for some material mistake assigned. 3 *Comm.* 407; which see, and *Buller's Ni. Pri.* (*Ed.* 1793,) 320. and for a more extended view of the cases, in which amendments may or may not be made, See *Com. Dig.* tit. *Amendment*.

By stat. 14 *Ed.* 3. *c.* 6. no process shall be annulled or discontinued, by the misprision of the clerk in mistaking in writing one syllable or one letter too much or too little; but it shall be amended.

The judges afterwards construed this statute so favourably, that they *extended it to a word*; but they were not so well agreed, whether they could make these amendments, as well *after* as *before* judgment: for they thought their authority was determined by the judgment; therefore by stat. 9 *H.* 5. *c.* 4. it is declared that the judges shall have the same power, as well after as before judgment, as long as the record in process is before them. *Gilb. H. C. B.* 110.

This statute is confirmed by statute 4 *Hen.* 6. *c.* 3. with an exception, that it shall not extend to process on outlawry, or to records or processes in Wales. But according to 2 *Sand.* 40, this last exception, and the like exception in 8 *Hen.* 6. *c.* 15. seem to be annulled by the statute 27 *Hen.* 8. *c.* 26. by which it is enacted, that the laws of England shall be used, practised, and executed in Wales.

Though the foregoing statutes gave the judges a greater power than they had before, yet it was found that they were too much cramped, having authority to amend nothing but *process*, which they did not construe in a large signification, so as to comprehend the whole proceedings in real and personal actions, and criminal and common pleas, but confined it to the *mesne process and jury process*; 8 *Co.* 157 *a*. And therefore, to enlarge the authority of the courts, the statute 8 *Hen.* 6. *c.* 12. gives power to amend what they shall think in their discretion to be the misprision of their clerks, in any record, process, and plea, warrant of attorney, writ, pannel, or return. *Gilb. H. C. P.* 110.

There are only two statutes of amendments, viz. 14 *Ed.* 3. *stat.* 1. *c.* 6. and 8 *H.* 6. *c.* 12 & 15. the rest are reckoned to be statutes of jeofails, and not of amendments; *per Powell* J. 1 *Salk.* 51. *pl.* 14. *Mich.* 3 *Ann. B. R.* in the case of *The Queen* v. *Tutchin*.—And *ibid.* he held that the 8 *H.* 6. was only to inlarge the subject matter of 14 *Ed.* 3. and that 14 *E.* 3. extends only to process out of the roll, viz. writs that issue out of the record, and not to proceedings in the roll itself: but that the 14 *Ed.* 3. extends not to the king, because of these words, (*challenge of the party*) and that the statute 8 *H.* 6. has always been construed in limitation of the act of *Ed.* 3. and the exception in the statute of *H.* 6. was only *ex abundanti cautela*; and all judges and sages of the law in all ages have taken it not to extend to the crown; and the cases on the other side are not to be relied upon.

By stat. 8 *Hen.* 6. *c.* 15. "The king's justices. before whom any misprision shall be found, be it in any records and processes depending before them, as well by way of error as otherwise, or in the returns of the same, by sheriffs, coroners, bailiffs of franchises, or any other, by misprision of the clerks of any of the said courts, or of the sheriffs, coroners, their clerks, or other officers, clerks, or other ministers whatsoever, in writing one letter or one syllable too much or too little, shall have power to amend the same."

As these statutes only extended to what the justices should interpret the misprision of their clerks, and other officers, it was found by experience, that many just causes were overthrown *for want of form*, and other failings, not aided by this statute, though they were good in substance, and therefore the statutes of jeofail were made. *Gilb. H. C. B.* 111.

By stat. 32 *H.* 8. *c.* 30. it is enacted, "That if the jury have once passed upon the issue, though afterwards there be found a *jeofaile* in the proceedings, yet judgment shall be given according to the verdict." The stat. 18 *Eliz. c.* 14. ordains, "That after verdict given in any court of record, there shall be no stay of judgment, or reversal, for want of form in a writ, count, plaint, &c. or for want of any writ original or judicial; or by reason of insufficient returns of sheriffs, &c." By stat. 21 *Jac.* 1. *c.* 13. "If a verdict shall be given in any court of record, the judgment shall not be stayed or reversed for variance in form between the original writ or bill and the declaration, &c. or for want of averment of the party's being living, so as the person is proved to be in life; or for that the *venire facias* is in part misawarded; for misnomer of jurors, if proved to be the persons returned; want of returns of writs, so as a pannel of jurors be returned and annexed to the writs; or for that the return-officer's name is not set to the return, if proof can be made that the writ was returned by such officer, &c."

The stat. 16 and 17 *Car.* 2. *c.* 8. (called by *Twisden* J. an omnipotent act, 1 *Vent.* 100; and made perpetual by stat. 22 and 23 *Car.* 2. *c.* 4.) enacts, "That judgment shall not be stayed or reversed after verdict in the courts of record at Westminster, &c. for *default in form*; or for that there are not pledges to prosecute upon the return of the original writ, or because the name of the sheriff is not returned upon it, for default of alleging and bringing into court of any bond, bill or deed, or of alleging or bringing in letters testamentary, or of administration; or

for the omission of *vi & armis*, or *contra pacem*, mistaking the Christian name or surname of either party, or the sum of money, day, month, or year, &c. in any declaration or pleading, being rightly named in any record, &c. preceding; nor for want of the averment of *hoc paratus est verificare*, or for not alleging *prout patet per recordum*, for want of profert of deeds, (stat. 4 & 5 *Anne*), see *Willes's Rep.* 125, *n.* (*d*), for that there is no right *venire*, if the cause was tried by a jury of the proper county or place; nor shall any judgment after verdict, by confession, *cognovit actionem*, &c. be reversed for want of *misericordia* or *capiatur*, or by reason that either of them are entered, the one for the other, &c. but all such defects, *not being against the right of the matter of the suit*, or *whereby the issue or trial are altered*, shall be *amended* by the judges; though not in suits of *appeal*, of *felony*, *indictments*, and *informations*, on *penal statutes*, which are excepted out of the act.

By stat. 4 and 5 *Ann. c.* 16. all the statutes of *jeofails* shall extend to judgments entered by confession, *nil dicit*, or *non sum informatus* in any court of record, and no such judgment shall be reversed, nor any judgment or writ of inquiry of damages thereon shall be stayed for any defect which would have been aided by those statutes, if a verdict had been given, so as there be an original writ filed, &c.—By stat. 9 *Ann. c.* 20. § 7. this act, and all other statutes of *jeofails*, are extended to writs of *mandamus* and *informations* in the nature of a *quo warranto*. The statutes of amendment and jeofails not being construed to extend to criminal proceedings, or on penal statutes in general. *Bull. N. P.* 325. 2 *Mod.* 144. But a *mandamus* may not be amended after return. 4 *Term Rep.* 689. The stat. 5 *Geo.* 1. *c.* 13. ordains, That, after verdict given, judgment shall not be stayed or reversed for defect in form or substance in any bill or writ, or for variance therein from the declaration, or any other proceedings. 25 *Geo.* 3. *c.* 80. § 17. *Imp. K. B.* 173. (1).

An action for a false return of a member of parliament on the stat. 7 and 8 *W.* 3. for double damages, is remedial, though founded on a law that is penal, so within the statutes of *jeofails*. 1 *Wils.* 125.

By the foregoing statutes (from 14 *E.* 3. *c.* 6. to 8 *H.* 6. *c.* 15.) the faults and mistakes of clerks are in many cases *amendable*: the misprision of a clerk in matter of fact is *amendable*; though not in matter of law. *Palm.* 258. If there be a mistake in the legal form of the writ, it is not *amendable*: there is a diversity between the negligence and ignorance of the clerk that makes out writs; for his negligence (as if he have the copy of a bond, and do not pursue it), this shall be *amended*; but his ignorance in the legal course of original writs is not *amendable*. 8 *Rep.* 159. A party's name was mistaken in an original writ; and it appearing to the court that the cursitor's instructions were right, the writ was *amended* in court; and they *amended* all the proceedings after. 2 *Vent.* 152. *Cro. Car.* 74. If a thing, which the plaintiff ought to have entered himself, being a matter of substance, be totally omitted, this shall not be *amended*; but otherwise it is, if omitted only in part and misentered. *Danv. Abr.* 346. By the common law a writ of error, returned and filed, could not be *amended*; because it would alter the record: but now by stat. 5 *Geo.* 1. the writs of error, wherein there shall be any variance from the original record, or other defect, may be *amended*, by the court where returnable. See title. *Error*.

In an *assumpsit*, the defendant pleads *Not Guilty*, thereupon issue is joined, and found for the plaintiff, he shall have judgment, though it is an improper issue in this action; for as there is a deceit alleged, Not Guilty is an answer thereto, and it is but an issue *misjoined*, which is aided by statute *Cro. Eliz.* 407. If in debt upon a *single bill*, the defendant pleads *payment, without an acquittance*, and issue is joined and found for the plaintiff, though the payment without acquittance is no plea to a single bill, he shall have judgment, because the issue was joined upon an affirmative and a negative and a verdict for the plaintiff. *Mich.* 37 and 38 *Eliz.* 5 *Rep.* 43. An ill plea and issue may be aided by the statute of *jeofails*, after a verdict: and if an issue joined be uncertain and confused, a verdict will help it. *Cro. Car.* 316. *Hob.* 113. The statutes likewise help when there is no original, and where there is no bill upon the file, it is aided after verdict by statute, but when there is an original, which is ill, that is not aided. *Cro. Jac.* 185, 480. *Cro. Car.* 282. The statute of jeofails, 16 and 17 *Car.* 2. helps a mistrial in a proper county, but not where the county is mistaken. 1 *Mod.* 24.

When the award of a writ of enquiry on the roll is good the writ shall be *amended* by the roll. *Carth.* 70. The court cannot *amend* to make a new writ; or to alter a good writ, and adapt it to another purpose, &c. only when the writ is bad and vicious on the face of it. *Mod. Cas.* 263, 316. *Annaly* 367.

With respect to *declarations*, a declaration grounded on an original writ may not be *amended*, if the writ be erroneous: though if it be on a bill of *Middlesex* or a *latitat*, it is *amendable*. 1 *Lill. Abr.* 67.

A plaintiff may *amend* his declaration in matter of form after a general issue pleaded, before entry thereof, without payment of costs, if he *amend* in substance, he is to pay costs, or give imparlance; and if he *amend* after a special plea, though he would give imparlance, he must pay costs. 1 *Lill.* 58. 1 *Wils.* 78. *Imp. K. B.* 181. A declaration in ejectment, laid the demise before the time; this was not *amendable*, for it would alter the issue, and make a new title in the plaintiff, 1 *Salk.* 48. The plaintiff declared on the statute of *Winton* for a robbery done to himself, when it should have been of his servants; he had leave to *amend*. 3 *Lev.* 347. If a defendant pleads a plea to the right, or in abatement, the plaintiff may *amend* his declaration; but not where he demurs, for this fault may be the cause of the demurrer. 1 *Salk.* 50. A demurrer may be *amended* after the parties have joined in demurrer, if it be only in paper. *Style* 48. Where a plea shall be *amended*, when in paper, or on record, &c. see the statute 4 *Geo.* 2. *c.* 26.

As to the amendments of *records*, *&c.* an issue entered upon record, with leave of the court may be *amended*; but not in a material thing, or in that which will deface the record, 1 *Lill. Abr.* 61. A record may be *amended* by the court in a small matter, after issue joined, so as the plea be not altered. *Danv. Abr.* 338. See the stat. 8 *Hen.* 6. *cc.* 12. 15. ante. If on a writ of error a record is *amended* in another court in affirmance of the judgment, it must be *amended* in the court where judgment was given. *Hardr.* 505. Where the record of *nisi prius* does not agree with the original record, it may be *amended* after verdict, provided it do not change the issue: but a record shall not be *amended* to attaint the jury, or prejudice the authority of the judge. A general or special verdict may be *amended* by the notes of the clerk of assise in civil causes; but not in criminal actions. 1 *Salk.* 47. The issue roll shall be *amended* by the imparlance roll which is precedent; but a roll may not be *amended* after verdict, when there is nothing to *amend* it by; though surplusage may be rejected, and so make it good. *Cro. Car.* 92. 1 *Sid.* 135.

In an action on the statute of *usury*, a verdict was given for the plaintiff, and taken on one of the counts, in the declaration. —The other counts being found for defendant.—Motion in *arrest* of *judgment*.—The principal cause was, the *christian* name of one of the persons mentioned in that count (rightly named, in that count, before) was mistaken in the *issue roll*, which had been carried in, whereby the count was rendered absurd, and bad. The court gave leave to file a *right bill*, (the proceedings being by *bill*) and afterwards amended the *issue roll*, by the bill.—The *nisi prius* roll was right.—*Gardner qui tam* v. *Brown B. R. Trin. T.* 15 *Geo.* 3. This was done as an *amendment* at *common law*.

A mistake of the clerk in entering a judgment; as where it was that the defendant recovered, instead of the plaintiff, &c.

was ordered to be *amended*. *Cro. Jac.* 631. *Hutt.* 41. A judgment may be *amended* by the paper book signed by the master. 1 *Salk.* 50. At common law, the judges may *amend* their judgments of the same term; and by statute of another term. 8 *Rep.* 156. 14 *E.* 3. If judgments are not well entered, on payment of costs they will be ordered to be so: when judgments are entered 'tis said the defects therein being the act of the court, and not the misprision of the clerk, are not *amendable*. *Golsb.* 104. Mistakes in returns of writs, fines and recoveries, made by mutual assent of parties may be amended. 5 *Rep.* 45. Judgment shall not be staid after verdict, for that an original wants form, or varies from the record in point of form, which are *amendable*. 5 *Rep.* 45. After verdict given in any court of record where shall be no stay of judgment for want of form in any writ, or insufficient returns of sheriffs, variance in form between the original writ and declaration, &c. stat. 32 *H.* 8. 18 *Eliz. Vide* 5 *Geo.* 1. *c.* 13. The *postea* may be amended by the judge's notes. 1 *Wils.* 33. 2 *Stra.* 1197. *S. C.* As to amendments in informations by the attorney general. See 4 *Term Rep.* 457, 8.

*Amendments* are usually made in *affirmance* of judgments; and seldom or never to destroy them: and where *amendments* were at common law, the party was to pay a fine for leave to *amend*. 3 *Salk.* 29.

All amendments are within the discretion of the Court, and are allowed in furtherance of justice under the particular circumstances of each case. 7 *Term Rep.* 699.

A bill of Middlesex, filed of record as of 24 *Geo.* 3. when it ought to have been of the 25th, may be amended agreeable to the truth. *Green* v. *Remet*, 1 *Term Rep.* 782. There is a distinction between amending those mistakes which are occasioned by the act of the party, and those which are occasioned by the act of the clerk. As in the case of execution, if the clerk enter judgment *de bonis propriis*, instead of *de bonis testatoris*, and error is brought, the court of *K. B.* will order the entry to be amended, even if the record is sent back from the Exchequer chamber. *Ibid.* Per Buller J.

After argument on demurrer and before the court gave judgment, leave was given to amend. *Stra.* 954.

Pleas and replications may also be amended in the same manner. *Lord Raym.* 1441.

After verdict found on some issues, and demurrer argued as to others, application made to withdraw the demurrer, and plead, Court refused. 1 *Burr.* 316.

The court will not allow plea to be amended after demurrer when the plaintiff has lost a trial. *Rep.* in *Temp. Hard.* 171.

Leave given to amend the declaration by entitling it of the day on which it was actually delivered, instead of the term generally, in order to accord with an averment therein, that other defendants named in the writ were then outlawed. *Coutanche* v. *La Reuz.* 1 *East* 133.

If the award of the writ of enquiry on the roll be right, the teste of the writ, if wrong, shall be amended by it. *Johnson* v. *Toulmin.* 4 *East* 173.

AMERCIAMENT, *amerciamentum*, (from the Fr. *merci*) signifies the pecuniary punishment of an offender against the king or other lord in his court, that is found to be in *misericordia*, i. e. to have offended, and to stand at the *mercy* of the king or lord. The author of *Terms de Ley* saith, that *amerciament* is properly a penalty assessed by the peers or equals of the party *amerced*, for the offence done; for which he putteth himself at the mercy of the lord. *Terms de Ley* 40. And by the statute of *Magna Charta*, *c.* 14. a freeman is not to be *amerced* for a small fault, but proportionable to the offence, and that by his peers. 9 *H.* 3. *c.* 4. *Amerciaments* are a more merciful penalty than a fine; for which if they are too grievous, a release may be sued by an ancient writ founded on *Magna Charta*, called *moderata misericordia*. See *New. Nat. Brev.* 167. *F. N. B.* 76. The difference between *amerciaments* and fines, is this; fines are said to be punishments certain, and grow expressly from some statute; but *amerciaments* are such as are arbitrarily imposed. *Kitch.* 78. Also fines are imposed and assessed by the court: *amerciaments* by the country; and no court can impose a fine, but a court of record: other courts can only *amerce*. 8 *Rep.* 39, 41.

A court-leet can *amerce* for public nuisances only. 1 *Saund.* 135. For a fine and all *amerciaments* in a court-leet, a distress is incident of common right; but for *amerciament* in a court baron, distress may not be taken but by prescription. 11 *Rep.* 45. When an *amerciament* is agreed on, the lord may have an action of debt, or distrain for it, and impound the distress, or sell it at his pleasure; but he cannot imprison for it. 8 *Rep.* 41, 45. *Vide* the case of the *Duke of Bedford* v. *Alcock*, *B. R.* 1 *Wils.* 248. See tit. *Leet*.

There is also *amercement* in pleas in the courts of record, when a defendant delays to tender the thing demanded by the king's writs, on the first day. *Co. Lit.* 116. And in all personal actions without force, as in debt, detinue, &c. if the plaintiff be nonsuited, barred, or his writ abate for matter of form, he shall be *amerced*: but if on judicial process, founded on a judgment and record, the plaintiff be nonsuited, barred, &c. he shall not be *amerced*. 1 *Nels. Abr.* 206. And an infant, if nonsuited, is not to be *amerced*: *Jenk. Cent* 258. The *capias pro fine* is taken away by 5 *W. & M. c.* 12.

The *amerciament* of the sheriff, or other officer of the king, for misconduct, is called *amerciament* royal. *Terms de Ley. Amerciaments* are likewise in several other cases. See tit. *Fines for Offences*.

AMERICAN COLONIES. See *Plantations*.

AMESSE. See *Amictus*.

AMI. *Vide Amy*.

AMICIA. See *almutium*.

AMICTUS. The uppermost of the six garments worn by priests, tied round the neck, and covering the breast and heart —Amictus, *alba*, *cingulum*, *stola*, *manipulus et planeta*.—These were the six garments of priests.

AMICUS CURIÆ. If a judge is doubtful or mistaken in matter of law, a stander by may inform the court, as *amicus curiæ*. 2 *Co. Inst.* 178. In some cases, a thing is to be made appear by suggestion on the roll by motion; sometimes by pleading, and sometimes as *amicus curiæ*. 2 *Keb.* 548. Any one as *amicus curiæ* may move to quash a vicious indictment; for if there were a trial and verdict, judgment must be arrested. *Com-herb*, 13. A counsel urged, that he might, as *amicus curiæ*, inform the court of an error in proceedings, to prevent giving false judgment; but was denied, unless the party was present. 2 *Show. Rep.* 297.

AMITTERE LEGEM TERRÆ, or LIBERAM LEGEM. To lose and be deprived of the liberty of swearing in any court: as to become infamous, renders a person incapable of being an evidence. Vide *Ganvil, lib.* 2. And see the statute 5 *Eliz. cap.* 9. against perjury. So a man that is outlawed, &c. is said *to lose his law*, i. e. is put out of the protection of the law, at least so far as relates to the suing in any of his majesty's courts of justice, though he may be sued.

AMMOBRAGIUM. A service suggested by Spelman to be the same as Chevage; which see.

AMNESTY, *amnestia*, *oblivio*.] An act of pardon or *oblivion*, such as was granted at the restoration by king Charles II.

AMNITUM INSULÆ. Isles upon the West coast of Britain. *Blount*.

AMORTIZATION, *amortizatio*, Fr. *amortissement*.] An alienation of lands or tenements in mortmain, viz. to any corporation or fraternity, and their successors, &c. And the right of *amortization* is a privilege or licence of taking in mortmain. In the statute *de libertatibus perquirendis; an.* 27 *Ed.* 1. *st.* 2, the word *amortisement* is used.

AMORTISE, Fr. *amortir*.] To alien lands in mortmain.

AMOVEAS *manus.* See *Oustre le Main.*

AMPLIATION, *ampliatio.*] An enlargement; in law a referring of judgment, till the cause is further examined.

AMY, *amicus.*] In law *prochein amy* is the next friend to be trusted for an infant. And infants are to *sue* by *prochein amy* (i. e. next friend) or *guardian*, and *defend* by *guardian*. *Alien amy* is a foreigner here subject to some prince in friendship with us.

AN, JOUR & WASTE. See Year, Day and Waste.

ANCESTOR, *antecessor* or *predecessor.*] One that has gone before in a family: but the law makes a difference between what we commonly call an ancestor and a predecessor; the one being applied to a natural person and his ancestors, and the other to a body politic and their predecessors. *Co. Lit.* 78 *b.*

ANCESTREL. What relates to or hath been done by one's ancestors; as *homage ancestrel*, &c.

ANCHOR. Is a measure of brandy, &c. containing ten gallons. *Lex Mercat.*

ANCHORAGE, *ancoragium.*] A duty taken of ships for the use of the haven where they cast anchor. *M. S. Arth. Trevor, Arm.* The ground in ports and havens belonging to the king, no person can let any anchor fall thereon, without paying therefore to the king's officers.

ANCIENTS. Gentlemen of the *inns of court.* In Gray's Inn the society consists of *benchers, ancients, barristers, and students* under the bar; and here the *ancients* are of the oldest barristers. In the Middle Temple such as have gone through, or are past their readings, are termed *ancients:* the inns of Chancery consist of *ancients* and students or clerks; and from the *ancients* one is yearly chosen the principal or treasurer.

ANCIENT DEMESNE, or *demain; vetus patrimonium domini.*] Is a tenure whereby all the manors belonging to the crown in the days of St. Edward and William, called the Conqueror, were held. The number and names of all manors, after a survey made of them, were written in the book of Domesday; and those which by that book appear to have at that time belonged to the crown and are contained under the title *terra regis*, are called *ancient demesne. Kitch.* 98. The lands which were in the possession of Edward the Confessor, and were given away by him, are not at this day ancient demesne, nor any others, except those writ down in the book of Domesday; and therefore, whether such lands are ancient demesne or not, is to be tried only by that book. 1 *Salk.* 57. 4 *Inst.* 269. *Hob.* 188. 1 *Brownl.* 43. *F. N. B.* 16 *D.*

But if the question is, whether lands be parcel of a manor which is ancient demesne, this shall be tried by a jury. For 'parcel or not parcel' is matter of fact. 9 *Rep.* case of the Abbot of *Strata Marcella*, *Salk.* 56. 774. and see 2 *Burr.* 1046.

Fitzherbert tells us, that tenants in *ancient demesne* had their tenures from ploughing the king's lands, and other works towards the maintenance of the king's freehold, on which account they had liberties granted them. *F. N. B.* 14, 228. And there were two sorts of these tenures and tenants; one that held their lands freely by charter; the other by copy of court roll, according to the custom of the manor. *Brit. c.* 66. The tenants holding by charter cannot be impleaded out of their manor; for if they are, they may abate the writ by pleading their tenure: they are free from toll, for all things bought and sold concerning their substance and husbandry. And they may not be impanelled upon any inquest. *F. N. B.* 14. If tenants in *ancient demesne* are returned on juries, they may have a writ *de non ponendis in assisis, &c.* and attachment against the sheriff. 1 *Rep.* 105. And if they are disturbed by taking duties of toll, or by being distrained to do unaccustomed services, &c. they may have writs of *Monstraverunt*, to be discharged. See *F. N. B.* 14. *New. Nat. Br.* 32, 35. 4 *Inst.* 269. These tenants are free as to their persons; and their privileges are supposed to commence by act of parliament; for they cannot be created by grant at this day. 1 *Salk.* 57.

Lands in *ancient demesne* are extendible upon a statute merchant, staple, or elegit. 4 *Inst.* 270. No lands ought to be accounted *ancient demesne* but such as are held in socage; and whether it be *ancient demesne* or not, shall be tried by the book of Domesday. A lessee for years cannot plead in *ancient demesne:* nor can a lord in action against him plead *ancient demesne*, for the land is frank-fee in his hands. *Danv. Abr.* 660.

In real actions, ejectment, replevin, &c. *ancient demesne* is a good plea; but not in actions merely personal. *Danv.* 658. If in *ancient demesne* a writ of right close be brought, and prosecuted in nature of a *formedon*; a fine levied there by the custom, is a bar: and if this judgment be reversed in *C. B.* that court shall only adjudge that the plaintiff be restored to his action in the *court of ancient demesne*; unless there is some other cause, which takes away its jurisdiction. *Jenk. Cent.* 87. *Dyer* 373. See the statutes 9 *H.* 4. *c.* 5. & 8 *H.* 6. *c.* 26. to prevent depriving lords in *ancient demesne* of their jurisdiction by collusion.

A fine in the king's courts will change *ancient demesne* to frank-fee at common law; so if the lord enfeoffs another of the tenancy; or if the land comes to the king, &c. 4 *Inst.* 270. See *Fine.* But if the lord be not a party, he may have a writ of *disceit*, and avoid the fine or recovery; for lands in ancient demesne were not originally within the jurisdiction of the courts of Westminster; but the tenants thereof enjoy this amongst other privileges, not to be called from the business of the plough by any foreign litigation. 1 *Roll. Abr.* 327. If the lord be party, then the lands become frank-fee, and are within the jurisdiction of the courts of Westminster; for the privilege of ancient demesne being established for the benefit of lord and tenant, they may destroy it at pleasure. 2 *Rol. Abr.* 324. 1 *Salk.* 57.

With respect to *pleading*, it is to be observed, that in all actions wherein, if the demandant recover, the lands would be frank-fee, ancient demesne is a good plea. 1 *Roll. Abr.* 322.

Therefore in all actions real, or where the realty may come in question, ancient demesne is a good plea; as *assise*, writ of *ward of land*, writ of *account* against a bailiff of a manor, writ of *account* against a guardian, &c. See 4 *Inst.* 270. 1 *Roll. Abr.* 322, 323.

In *replevin* ancient demesne is a good plea, because by intendment the freehold will come in question. *Godb.* 64. 1 *Bulst.* 108.

In an *ejectione firmæ* ancient demesne is a good plea; for by common intendment the right and title of the lands will come in question; and if in this action it should not be a good plea, the ancient privileges of those tenants would be lost, inasmuch as most titles at this day are tried by *ejectment. Hob.* 47. 1 *Bulst.* 108. *Hetl.* 177. *Cro. Eliz.* 826.

But in all actions merely personal, as *debt* upon a lease, *trepass quare clausum fregit, &c.* ancient demesne is no plea. *Hob.* 47. 5 *Cro.* 105. For further matter see *Kyd's Com. Dig.* tit. *Ancient Demesne.*

ANCIENTY, Fr. *Ancienté*, Lat. *Antiquitas.*] Eldership or seniority. This word is used in the stat. of Ireland. 14 *Hen.* 3.

ANDENA. A swath in mowing: it likewise signifies as much ground as a man can stride over at once.

ANELACIUS. A short knife or dagger. *Mat. Paris*, 277.

ANFELDTYHDE, or according to Somner, *Anfealtihle*, a simple accusation; for the Saxons had two sorts of accusations, viz. *simplex* and *triplex:* that was called single, when the oath of the criminal and two more were sufficient to discharge him; but his own oath, and the oaths of five more were required to free him *à triplici accusatione. Blount.* See *Leg. Adelstani, cap.* 19. *apud Brompton.*

ANGARIA, Fr. *Angaire;* interpreted *Personal Service.*] A troublesome vexatious duty or service which tenants were

obliged to pay their lords; and they performed it in their own persons. Impressing of ships. *Blount.* See also *Spelman & Cowel;* the former of whom gives some fanciful derivations under this word, and v. *Perangaria.* It seems that it may be easily and rationally derived from *Angor*, Lat.

ANGELICA VESTIS. A monkish garment which laymen put on a little before their deaths, that they might have the benefit of the prayers of the monks. It was from them called *angelicus*, because they were called *angeli*, who by their prayers *animæ saluti succurrebant.* And the word *succurrendum*, in our old books, is understood of one who had put on the habit, and was near death. *Monasticon*, 1 *tom. p.* 632.

ANGEL. An ancient English coin value 10*s.*

ANGILD, *Angildum.*] The bare single valuation or compensation of a criminal; from the Sax. *An* one, and *gild*, payment, mulct, or fine. *Twigild* was the double mulct or fine; and *trigild* the treble, according to the rated ability of the person. *Laws of Ina, c.* 20. *Spelm.*

ANHLOTE. A single tribute or tax. The words *anhlote* and *anscot* are mentioned in the laws of William the Conqueror; and their sense is, that every one should pay according to the custom of the country his part and share, as scot and lot, &c. *Leg. W.* 1. *c.* 64.

ANIENS, Fr.] Void, being of no force. *F. N. B.* 214.

ANIENT, *Anienté*, Fr.] Made void.

ANN or ANNAT, Is half a year's stipend, over and above what is owing for the incumbency, due to a minister's relict, child, or nearest of kin after his decease. *Scotch Dict.*

ANNALES. Yearlings, or young cattle from one to two years old.

ANNATS, *Annates.*] This word has the same meaning with first fruits, stat. 25 *H.* 8. *c.* 20. The reason of the name is, because the rate of the first fruits paid for spiritual livings, is after the value of one *year's* profit.

ANNEALING OF TILE, stat. 17 *Ed.* 4. *c.* 4. From the Saxon *Onælan*, *Accendere*, signifies the burning or hardening of tile.

ANNEXATION, Is employed to express the act of uniting lands to the crown and declaring them unalienable. It is employed also to express the appropriating of church lands to the crown, and the union of lands, lying at a distance from the kirk to which they belong, to a kirk to which they are more contiguous. *Scotch Dict.*

ANNIENTED, from the Fr. *Anèantir.*] Abrogated, frustrated, or brought to nothing. *Lit. sect.* 741.

ANNIVERSARY DAYS, *Dies Aniversarii.*] Solemn days appointed to be celebrated yearly in commemoration of the death or martyrdom of saints; or the days whereon, at the return of every year, men were wont to pray for the souls of their deceased friends, according to the custom of the Roman Catholics, mentioned in the statute of 1 *Ed.* 6. *c.* 14. This was in use among our ancient Saxons, as may be seen in *Lib. Rames. sect.* 134. The *anniversary*, or yearly return of the day of the death of any person, which the religious registered in their *obitual* or *martyrology*, and annually observed in gratitude to their founders and benefactors, was by our forefathers called a *year-day* and a *mind-day*, i. e. a memorial day.

ANNI NUBILES. See tit. *Age.*

ANNO DOMINI. The computation of time from the incarnation of our Saviour; which is generally inserted in the dates of all public writings, with an addition of the year of the king's reign, &c. The Romans began their *æra* of time from the building of Rome; the Grecians computed by *Olympiads*, and the Christians reckon from the birth of *Jesus Christ.*

ANNOISANCE, ANNOYANCE, or *Noisance, Nuisance*, thus termed in stat. 22 *H.* 8. *c.* 5. Vide titles *Nuisance* and *Highways.*

ANNUA PENSIONE. An ancient writ for providing the king's chaplain unpreferred with a pension. It was brought where the king had due to him an *annual pension* from an *abbot* or prior, for any of his chaplains whom he should nominate, (being unprovided of livings,) to demand the same of such abbot or prior. *Terms de la Ley* 43. *Reg. Orig.* 165. 307.

ANNUALE, ANNUALIA. A yearly stipend, anciently assigned to a priest for celebrating an aniversary, or for saying continued masses one year, for the soul of a deceased person.

ANNUITY, *Annuus redditus.*] A yearly payment of a certain sum of money, granted to another for life, for years, or in fee, to be received of the grantor or his heirs, so that no freehold be charged therewith; whereof a man shall never have assise or other action, but a writ of *annuity. Terms de Ley* 44. *Reg. Orig.* 158. *Co. Lit.* 144 *b.*

To make a good grant of an *annuity*, no particular technical mode of expression is necessary. For if a man grants *an annuity to another, to be received out of his coffers*, or *to be received out of a bag of money*, or *to be received of a stranger*, yet this is sufficient to charge his person, and the subsequent words shall be rejected. 1 *Roll. Abr.* 227.

If a man grant a rent out of land, in which he has nothing, *proviso that he be not charged for this in a writ of annuity*, it shall be a good annuity; for the proviso, being repugnant, is void. *Co. Lit.* 146 *a.* 2 *Bulst.* 149. See 6 *Co.* 58 *b.*

If a man grant a *rent charge out of his land*, the grantee has an election to take it as a rent; or as an *annuity. Lit. sect.* 219. 2 *Bulst.* 148. 2 *Comm.* 40.

The treatise called *Doctor and Student, dial.* 1. *cap.* 8. shows several differences between a rent and an *annuity*, viz. that every rent is issuing out of land; but an *annuity* chargeth the person only, as the grantor and his heirs, who have assets by descent.

If no lands are bound for the payment of an *annuity*, a distress may not be taken for it. *Dyer* 65.

But if an *annuity* issue out of land, (which of late it often doth,) the grantee may bring a writ of *annuity*, and make it personal, or an assise, or distrain, &c. so as to make it real. *Co. Lit.* 144. And if the grantee take a distress, yet he may afterwards have a writ of *annuity*, and discharge the land, if he do not avow the taking, which is in nature of an action. 1 *Inst.* 145. But if the grantee of a rent bring an assise for it, he shall never after have writ of *annuity;* he having elected this to be a rent; so if the grantee of an *annuity* avow the taking of a distress in a court of record. *Danv. Abr.* 486. And if the grantee purchase part of the land out of which an *annuity* is issuing, he shall never after have a writ of *annuity. Co. Lit.* 148.

Where a rent charge, issuing out of lands, granted by tenant for life, &c. determines by the act of God; as an interest was vested in the grantee, it is in his election to make it a rent-charge, and so charge the lands therewith, or a personal thing to charge the person of the grantor in *annuity. 2 Rep.* 36. A. seised of lands in fee, he and B. grant an *annuity* or rent-charge to another; this *prima facie* is the grant of A. and confirmation of B. But the grantee may have a writ of *annuity* against both. If two men grant an *annuity* of 20*l. per ann.* although the persons be several, if the deed of grant be not for them severally, yet the grantee shall have but one *annuity* against them. *Co. Lit.* 144.

When a man recovers in a writ of *annuity* he shall not have a new writ of *annuity* for the arrears due after the recovery, but a *scire facias* upon the judgment, the judgment being always executory. 2 *Rep.* 37. No writ of *annuity* lieth for arrearages only when an *annuity* is determined, but for the *annuity* and arrearages. *Co. Lit.* 285. Though, if a rent-charge be granted out of a lease for years, it hath been adjudged that the grantee may bring *annuity* when the lease

is ended. *Moor, cap.* 430. Where an *annuity* is granted to one for life, during the term he shall have a writ of *annuity;* and when that is determined, then his executors may have action of debt: for the realty is resolved into the personalty. 4 *Rep.* 49. *New Nat. Br.* 287.

If the annuitant of an *annuity* payable half-yearly, since the last term of payment, die before the half year is completed, nothing is due for the time he lives. 3 *Atk.* 260. So if a grant be made to A. for life, to be paid at the feast of Easter, or within twenty days after, and he die after Easter within twenty days, it has been said his executor shall not have it, for the *last day* was the time of payment. *Dal.* 1.

Upon a rent created by way of reservation, no writ of *annuity* lies. *Danv.* 483. Writ of *annuity* may not be had against the grantor's heir, unless the grant be for him and his heirs; and there must be assets to bind the heir, by grant of *annuity* by his ancestor, when he is named. *Co. Lit.* 144. 1 *Rol. Abr.* 226. But it is otherwise in case of the grant of a rent out of land, or a grant of a rent whereof the grantor is seised, for this charges the land, but an annuity charges the person only. *Br. Charge, pl.* 54.

An *annuity* granted by a bishop, with confirmation of dean and chapter, shall bind the successor of the bishop. *New Nat. Br.* 340. If the king grant an *annuity*, it must be expressed by whose hands the grantee shall receive it, as the king's bailiff, &c. or the grant will be void; for the king may not be sued, and no person is bound to pay it, if not expressed in the patent. *New Nat. Br.* 341. If, where an *annuity* is granted *pro decimis*, the grantor is disturbed of his tithes, the *annuity* ceaseth; and so it is where any *annuity* is granted to a person *pro consilio*, and the grantee refuseth to give counsel; for where the cause and consideration of the grant amounts to a condition, and the one ceases, the other shall determine. *Co. Lit.* 204.

There are now very few, if any, grants of *annuities*, without a covenant for payment, expressed or implied; and therefore, where a distress cannot be made, or is not approved of, the grantee may bring an action of *covenant*, and recover the arrears in damages, with costs of suit. And that action is now usually brought, real actions and writs of *annuity* being much out of use.

ANNUITIES FOR LIFE. To guard against the fraudulent and oppressive practices of usurious money-lenders, exercised on young heirs and other necessitous persons entitled to property in expectancy, the legislature found it necessary to interpose by the act 17 *Geo.* 3. *c.* 26. now repealed by 53 *Geo.* 3. *c.* 141. containing more specific regulations for the same purposes.

By this latter act a memorial of every deed, bond, instrument, or other assurance, whereby any annuity or rent-charge shall be granted *for one or more life or lives, or for term of years, or greater estate determinable on lives*, shall, within thirty days of the execution [exclusive of the day of execution; 5 *Term Rep.* 283.] be enrolled in Chancery; such memorial to contain the date of the deed, the names of all the parties, and of *all* the witnesses; and to set forth the annual sum to be paid, the name of the person for whose life the annuity is granted, the consideration, &c., in the form set forth in a table in the act, otherwise every such deed and assurance shall be void. § 2, 3.

In every annuity-deed, &c. where the person to whom the annuity shall be granted or made payable, shall not be entitled thereto *beneficially*, the name of the party who is actually to take the annuity beneficially shall be described, in the same manner as is required in the enrollment. § 4.

Copies of the deeds or instruments for securing such annuities shall be given to the parties applying for the same; and on refusal may be obtained by an order of a judge of King's Bench or Common Pleas. § 5.

If any part of the consideration shall be returned to the party advancing the same, or if notes given as part of the consideration shall not be duly paid, or if the consideration is expressed to be paid in money, if any part shall be paid in goods, or if the consideration, or any part of it, be *retained*, under pretence of answering future payments, or under any other pretence; in any of the said cases the annuitant may apply to the court in which any action is brought, or judgment entered, by motion, to stay proceedings, and the court may order the assurance to be cancelled, and any judgment obtained to be vacated. § 6.

A book of enrollments shall be kept in Chancery by a clerk, whose fee for entering each enrollment is 20*s.* and 1*s.* for each certificate and search.

All contracts for the purchase of any *annuity* or rent-charge with any *infant* under 21 years of age shall be UTTERLY VOID; notwithstanding any attempt to confirm the same on the infant's coming of age. And all persons soliciting infants to grant annuities, or advancing money to them on condition of their granting annuities when of age, or engaging them by oath or promise not to plead infancy, shall be judged guilty of a misdemeanor. And solicitors or brokers demanding gratuities for procuring money (beyond *ten shillings per cent.*) shall also be judged guilty of *misdemeanors*, and all persons so guilty shall be liable to fine, imprisonment, and corporal punishment. § 8, 9.

This act does not extend to Scotland or Ireland, nor to any annuity given by will or marriage settlement, or for the advancement of a child; nor to any secured on lands of equal annual value, whereof the grantor is seised in fee-simple or fee-tail *in possession*, or which he is by law enabled to charge, or secured by actual transfer in the funds, the dividends being of equal value with the annuity; nor to any *voluntary* annuity without pecuniary consideration, nor to annuities granted by corporations, or under act of parliament. § 10.

The following determinations have been made in the courts on the act 17 *Geo.* 3. *c.* 26.

A deed, not registered according to the directions of the above act, is absolutely void, and not merely voidable. 2 *Term Rep.* 603. See also 4 *Term Rep.* 463. 494. 500. 694. 790. 824.

*Notes* given as part of the consideration (which if actually given *bonâ fide* are to be understood as *money*) must be circumstantially set out in the memorial, that the court may see whether a full consideration was given or not. 3 *Term Rep.* 288.—The redemption of a former annuity, at a higher price than it was purchased at, is a good consideration. 5 *Term Rep.* 283.

If the *security* be set aside for want of complying with the formalities of the act, the consideration, if fair and legal, may be recovered back by the grantee in action of *assumpsit*, against the person *actually* receiving such consideration-money, but not against a surety. 1 *Term Rep.* 732. 2 *Term Rep.* 366.

Where the grantee of an annuity, set aside for a defective registry, brings an action for money had and received, to recover back the consideration-money paid for it, the grantor may, under a plea of set-off, set off the payments made in respect of such annuity, though for more than six years, unless the plaintiff reply the statute of limitations. *Hicks* v. *Hicks, M.* 43 *Geo.* 3. 3 *East* 16.

Where a rule nisi is obtained in B. R. for setting aside an annuity, the several objections thereto intended to be insisted on by counsel at the time of making such rule absolute must be stated in the said rule nisi. *Reg. Gen. T.* 42 *Geo.* 3.

For further matter relative to annuities in general, as well as those for life, see *Com. Dig.* tit. *Annuity.* See stat. 33 *Geo.* 3. *c.* 14. as to the Royal Exchange Assurance Annuity Company; 39 *Geo.* 3. *c.* 83. as to Globe Insurance Company.

ANNUITIES PUBLIC. See tit. *National Debt.*

ANNUITIES OF TEINDS, (or Tithes,) are ten *shillings* out of the boll of teind wheat, eight *shillings* out of the boll of beer, six *shillings* out of the boll of rye, oats, and pease, allowed to the king yearly out of the teinds not paid to bishops, or set apart for other pious uses. *Scotch Dict.*

ANNUS DELIBERANDI, Is the year allowed by the law of Scotland to the heir to deliberate whether he will enter and represent his ancestor. The entry of an heir has very serious effects, and therefore he should have time to consider of the consequences; it is for this purpose the year is allowed to him. The *annus deliberandi* commences on the death of the ancestor, unless in the case of a posthumous heir, when the year runs from his birth. *Scotch Dict.*

ANSEL, or *Ansul.* See *Aunsel* weight.

ANSWER. See tit. *Chancery, Equity.*

ANTEJURAMENTUM, and *Præjuramentum.* By our ancestors called *juramentum calumniæ;* in which both the accuser and the accused were to make this oath before any trial or purgation, viz. the accuser was to swear that he would prosecute the criminal; and the accused was to make oath on the very day that he was to undergo the ordeal, that he was innocent of the crime of which he was charged. *Leg. Athelstan, apud Lambard* 23. If the accuser failed to take this oath, the criminal was discharged; and if the accused did not take his, he was intended to be guilty, and not admitted to purge himself. *Leg. Hen.* 1. *c.* 66.

ANTIENT DEMESNE. See *Ancient Demesne.*

ANTISTITIUM. A word used for monastery in our old histories. *Blount.*

ANTITHETARIUS, Signifies where a man endeavours to discharge himself of the fact of which he is accused, by recriminating and charging the accuser with the same fact. This word is mentioned in the title of a chapter in the laws of *Canutus, cap.* 47.

APATISATIO. An agreement or compact made with another. *Upton, lib.* 2. *c.* 12.

APORIARE. To bring to poverty. *Walsingham in R.* 2. In another sense, to shun or avoid.

APOSTARE. To violate: *apostare leges*, and *apostatare leges*, wilfully to break or transgress, to apostatise from the laws. See *Leg. Edw. Confessoris, c.* 35.

APOSTATA CAPIENDO. A writ that formerly lay against one who, having entered and professed some order of religion, broke out again, and wandered up and down the country, contrary to the rules of his order; it was directed to the sheriff for the apprehension of the offender, and delivery of him again to his abbot or prior. *Reg. Orig.* 71. 267.

APOTHECARIES, Are exempted from serving offices. See tit. *Constable, Churchwarden.* Their medicines are to be searched and examined by the physicians chosen by the college of physicians, and if faulty, shall be burnt, &c. 32 *Hen.* 8. *c.* 40. 1 *M. st.* 2. *c.* 9. See also statutes 10 *Ann. c.* 14. 10 *Geo.* 1. *c.* 20. And *apothecaries* to the army are to make up their chests of medicines at Apothecaries' Hall, there to be openly viewed, &c. under the penalty of 40*l.* See *Physicians.*

APPARATOR, or APPARITOR. A messenger that serves the process of the spiritual court. His duty is to cite the offenders to appear; to arrest them; and to execute the sentence or decree of the judges, &c. See stat. 21 *H.* 8. *c.* 5.

If a monition be awarded to an apparitor, to summon a man, and he, upon the return of the monition, avers that he had summoned him, when in truth he had not, and the defendant be thereupon excommunicated; an action on the case at common law will lie against the apparitor for the falshood committed by him in his office, besides the punishment inflicted on him by the ecclesiastical court for such breach of trust. *Ayl. Parerg.* 70. 2 *Bulst.* 264.

APPARATOR COMITATUS. An officer formerly called by this name; for which the sheriffs of Buckinghamshire had a considerable yearly allowance; and in the reign of queen Elizabeth, there was an order of court for making that allowance; but the custom and reason of it are now altered. *Hale's Sher. Acco.* 104.

APPARENT HEIR. In common language, is applied to the eldest son as the person to whom the succession will probably open. But legally speaking, an *apparent heir* is the person to whom the succession has actually opened, and who remains *apparent heir* until his regular entry in the lands by service or by infeftment on a precept of *clare constat. Scotch Dict.*

APPARLEMENT, from the Fr. *Pareillement*, i. e. in like manner.] A resemblance or likelihood; as *apparlement* of war. *Stat.* 2 *R.* 2. *st.* 1. *c.* 6.

APPARURA. Furniture and implements. *Carrucarum apparura* is plough tackle, or all the implements belonging to a plough. *Blount.*

APPEAL, *Is used in two senses.*

1. It signifies the removal of a cause from an inferior court or judge to a superior. From the French verb *neuter*, APPELLER, of the same signification. As relative to this sense see the proper titles in this Dictionary.

The term is particularly applied to the act of bringing a decision of the courts of Scotland or Ireland under a review of the House of Lords of the United Kingdom. This is done by presenting a petition of *appeal*, which states the ground of action and the judgment complained of, and prays that it may be reversed or amended.

It may be well also in this place to observe the difference between an *appeal* from a court of equity, and a writ of error from a court of law. *First*, the former may be brought upon any interlocutory matter; the latter upon nothing but only a definitive judgment. *Secondly*, that on writs of error the House of Lords pronounces the judgment; on *appeals* it gives direction to the court below to rectify its own decree. 3 *Comm.* 55. See tit. *Writ of Error, Audita Querela, &c.*

2. When spoken of as a criminal prosecution, it denotes an accusation by a private subject against another for some heinous crime; demanding punishment on account of the particular injury suffered, rather than for the offence against the public. And in this sense it is derived from the French verb *active*, APPELLER, to call upon, summon, or challenge one. 4 *Comm.* 312. Or the accusation of a felon at common law by one of his accomplices, which accomplice was then called an approver. (See tit. *Accessary.*) *Co. Lit.* 287. See also *Bract. lib.* 3. *Brit. c.* 22. 25. *Staundf. lib.* 2. *c.* 6.

CRIMINAL APPEALS are either *capital* or *not capital.*—But of the latter sort appeals *de pace, de plagis, de imprisonamento*, and of *mayhem*, are now become *obsolete*, being turned into actions of trespass long since. *Leach's Hawk. P. C.* ii. 235. of the last however a few words shall be said hereafter. Capital appeals are either of *Treason* or *Felony.* The latter may be subdivided into 1. *Appeals of Death*, or, as they are otherwise called, *Appeals of Murder.* 2. *Appeals of Larceny* or *Robbery.* 3. *Appeals of Rape.* 4. *Appeals of Arson*, which last are now entirely obsolete. 1 *Inst.* 288 *a.* and see 2 *Hawk. P. C. c.* 23.

This private process for the punishment of public crimes, probably had its original in those times when a private pecuniary satisfaction, or *weregild*, was constantly paid to the party injured, or his relations, to expiate enormous offences. As therefore, during the continuance of this custom, a process was certainly given, for recovering the weregild by the party to whom it was due; it seems that when these offences, by degrees, grew no longer redeemable, the private process was still continued, in order to insure the infliction of punishment upon the offender, though the party injured was allowed no pecuniary compensation. 4 *Comm.* 313, 314.

It was also anciently permitted (as above hinted) for one subject to appeal another of *high treason*, either in the courts of common law (*Brit. c.* 22.) or in parliament; or for treasons committed beyond the seas, in the court of the high constable and marshal. The cognizance of appeals in the latter still continues in force; and so late as 1631, there was a trial by battle awarded in the court of chivalry on such appeal of treason; [by Donald Lord Rae against David Ramsey. *Rushw.* vol. 2. part 2. p. 112.] But the cognizance of appeals for treason in the common law courts was virtually abolished by stat. 5 *E.* 3. *c.* 9. & 25 *E.* 3. [stat. 5. *c.* 4.] (1 *Hale, P. C.* 349. 359.) and in parliament expressly by stat. 1 *H.* 4. *c.* 14. See 4 *Comm.* 314.

On this subject Mr. Kyd, the ingenious editor of *Comyns's Digest*, makes the following useful remark.—It does not appear that the appeal of treason is taken away by this statute (1 *H.* 4. *c.* 14.) or any other. The stat. 5 *E.* 3. *c.* 9. only says, that none shall be attached, &c. against the form of the great charter, and the laws of the land. The stat. 25 *E.* 3. [stat. 5.] *c.* 4. goes a little farther, and says "that none shall be taken by petition or suggestion to the king or to his council, but by indictment or presentment, or by process made by *writ original* at the common law." It is conceived that a writ of appeal *is* a writ original; (2 *Hawk.* 232. 5 *Burr.* 2643.;) therefore if an appeal of treason was part of the common law, these statutes do manifestly not take it away. The stat. 1 *H.* 4. *c.* 14. applying only to appeals in parliament. See *Com. Dig.* tit. *Appeal* (A. 1.)

However, as there has been no instance of any such appeal, before any court of common law, either since the making the stat. 1 *H.* 4. *c.* 14. nor for many years before, the law relating to such appeals seems wholly obsolete at this day. *Leach Hawk. P. C.* ii. *c.* 23. § 29.

An *Appeal of Felony* may be brought for crimes committed either against the parties themselves, or their relations. The crimes against the parties themselves are *Larceny*, *Rape*, *Maihem*, and *Arson*. The *only* crime against one's relation, for which an appeal can be brought, is that of killing him, either by murder or manslaughter. 4 *Comm.* 314. (But this seems an unguarded assertion in the learned commentator, as an appeal is given to the *husband, next of kin, &c.* by stat. in case of rape. See *post.* III. *Appeal of Rape.*)

*Appeal of Death* cannot be brought by every relation, but only by the wife for the death of her husband, *Magna Charta*, *cap.* 34. or by the heir male for the death of his ancestor; which heirship was also confined by an ordinance of king Henry the First to the four nearest degrees of blood. *Mirr. c.* 2. § 7. It is given to the wife on account of the loss of her husband; therefore if she marries again before or pending her appeal, it is lost and gone; (2 *Inst.* 68. 317.) or if she marries after judgment, she shall not demand execution. (2 *Hawk. P. C.* 243. by which it seems that the *court* may award execution *ex officio—sed dubitatur.*) The heir must also be heir male, and such a one as was the next heir *by the course of the common law* at the *time* of the *killing* of the ancestor, (*H. P. C.* 182.) But this rule has three exceptions. 1st. If the person killed leaves an innocent wife, she *only* and not the heir, shall have the appeal. 2d, If there be no wife, and the heir be accused of the murder, the person who, next to him, would have been heir male, shall bring the appeal. 3d, If the wife kill her husband, the heir may appeal her of the death, (1 *Leon.* 326. 1 *Inst.* 33.) And by the stat. of Gloucester, 6 *E.* 1. *c.* 9. all appeals of death must be sued within a year and a day after the completion of the felony, by the death of the party; which seems to be only declaratory of the old common law. 4 *Comm.* 314, 315.

These several appeals may be brought previous to any indictment; and if the appellee be *acquitted* thereon, he cannot be afterwards indicted of the same offence. 2 *Hawk. P. C.* c. 35. § 15. [But if the appellant does not prosecute his appeal, or if he release to the appellant, the appellee *may* be indicted. 3 *Inst.* 131. *Staundf.* 147, 148.] But if a man be acquitted on an *indictment* for murder, or found guilty, and pardoned by the king, still he ought not (in strictness) to go at large, but be imprisoned, or let to bail, till the year and day be past, by virtue of stat. 3 *H.* 7. *c.* 1. in order to be furthering to answer an appeal for the same felony, though if he has been found guilty of manslaughter, on an indictment, and has had the benefit of clergy, and suffered the judgment of the law, he cannot afterwards be appealed. 4 *Comm.* 315. (X.)

If the defendant on an indictment is convicted of manslaughter, and allowed his clergy, some of the books say the heir may lodge an *appeal* immediately before clergy had: and others say clergy ought to be granted, and that it is unreasonable an *appeal* should interpose presently to prevent judgment. 3 *Inst.* 131. If a person, immediately after the verdict of manslaughter, put in an *appeal* of murder, and before the *appeal* is arraigned, the defendant demands his benefit of clergy; this is a good bar to *appeal*, and praying of clergy, is having of clergy, though the court delay calling the party to judgment, &c. 1 *Salk.* 60. 62. *Kel.* 93. But formerly it was held, that the court might delay the calling a convict to judgment, and thereby hinder him from his clergy, and make him liable to an *appeal*, especially if the *appeal* were depending: and where the record of a conviction of manslaughter is erroneous, or insufficient, &c. the offender cannot plead the conviction and clergy had therein, in bar of an *appeal* or second indictment, &c. 2 *Hawk. P. C. c.* 36. § 12. 14.

If the appellee be acquitted, the appellor (by stat. *Westm.* 2. 13 *E.* 1. *c.* 12.) shall suffer one year's imprisonment, and pay a fine to the king, besides damages to the party; and if the appellor be incapable to make restitution in damages, his abettors shall do it for him, and also be liable to imprisonment. This provision, as was foreseen by the author of *Fleta*, (*lib.* 1. *c.* 34. § 48.) proved a great discouragement to appeals; so that thenceforward they ceased to be in common use. 4 *Comm.* 316.

If the appellee be found guilty, he shall suffer the same judgment as if he had been convicted by indictment; but with this remarkable difference; that, on an indictment, the king may pardon and remit the execution; but on an appeal, being the suit of a private subject, to make atonement for the private wrong, the king can no more pardon it than he can remit the damages recovered in an action of battery. 4 *Comm.* 316. See 2 *Hawk. P. C. c.* 37. § 35. *Jenk.* 160. *pl.* 4. [But by the express provision of stat. 4 & 5. *W. & M. c.* 8. an accomplice convicting two others guilty of *robbery*, shall have the king's pardon, which shall be a good bar to an *Appeal of Robbery.*]

The punishment of the offender may however be remitted and discharged by the concurrence of all parties interested in the appeal. 1 *Hale P. C.* See 4 *Comm.* 316, in *n.*

Having said thus much on the subject of appeals in general, the following miscellaneous matter may serve for further elucidation on, I. Appeals of Death; II. Appeals of Maihem; III. Appeals of Rape; IV. Appeals of Robbery.—The student who wishes for the most ample information on this subject, must apply to *Hawkins, P. C.* vol. ii. and *Com. Dig.* tit. *Appeal.*

I. For the proceedings on an *Appeal of death*, see the case of *Bigby*, widow, v. *Kennedy*, 5 *Burr.* 2643.; where they are detailed much at length, and with great exactness.

At the common law, a woman as well as a man might have an *appeal of death* of any of her ancestors, and therefore the *son of a woman* shall at this day have an appeal, if he be heir at the death of the ancestor, for the son is not disabled, but the mother only; for the statute of *Mag. Ch. ch.* 34. says

*propter appellum fœminæ.* 2 *Inst.* 68. The husband shall not have appeal for the death of his wife, but the heir only. *Dany. Abr.* 1. 488.

The *judges* are so far *bound to take notice of this statute*, that if a woman brings an appeal of death of her father, or of any other besides her husband, they ought *ex officio* to abate it, though the defendant takes no exception to it. 2 *Hawk. P. C. cap.* 23. *s.* 42.

*A feme shall have appeal where she shall have no dower*, as where she *elopes* from her baron. *Br. Appeal, pl.* 17. cites 50 *E.* 3. 15. *per Ingleby.*

The wife is to be a wife *de facto*, to be intitled to *appeal.* 2 *Inst.* 68. 317. Where a woman has judgment in *appeal*, of the death of her husband, she cannot have execution if she do not personally pray it: a judge went to a woman great with child, to know if she would have execution? She said, yes, and the *appellee* was hanged. *Jenk. Cent.* 137.

An ideot, or a person born deaf and dumb, or one attainted of treason or felony, or outlawed in a personal action, so long as such attainder or outlawry continues in force, cannot bring any appeal whatsoever. *H. P. C.* 183. 2 *Hawk. P. C. c.* 23. § 30.

The *appellant* is to commence his *appeal* in person; but he may proceed by attorney, having a special warrant of attorney filed. 1 *Salk.* 60. The *appeal* must be brought in a year and a day after the death of the person murdered: and the count must set forth the fact, and the length and depth of the wound, the year, day, hour, place, where done, and with what weapon, &c. And that the party died in a year and a day. 2 *Inst.* 665. & *stat.* 6 *Ed.* 1. *c.* 9. principal and accessaries before and after are to be joined in *appeal. Danv. Abr.* 493. And this is to be observed, though the accessary is guilty in another county. *Stat.* 3 *H.* 7. *c.* 1.

An *appeal* is prosecuted two ways; either by writ or bill: *appeal* by writ is, when a writ is purchased out of Chancery by one for another, to the intent he may *appeal* a third person of some felony committed by him, finding pledges that he shall do it: *appeal* by bill is, where a man, of himself, gives up his accusation in writing, offering to undergo the burden of *appealing* the person therein named. *Bracton.*

This *appeal* may be brought by bill before the justices in the King's Bench; before justices of gaol delivery, and commissioners of oyer and terminer, &c.; or before the sheriff and coroner, in the county court: but the sheriff and coroner have only power to take and enter the *appeal* and count, for it must be removed by *certiorari* into B. R.

In *appeal* by original, principals and accessaries are generally charged alike without distinction, till the plaintiff counts: but it is otherwise in *appeals* by bill. *Danv.* 494.

There is but one *appeal* against the principal and accessary; if the principal is acquitted, it shall acquit the accessary; and both shall have damages against the appellant on a false *appeal*, or the accessary may bring a writ of conspiracy. 2 *Inst.* 383.

If the defendant in *appeal* is attaint, or acquit; or the plaintiff nonsuit after appearance, which is peremptory, no other *appeal* lies. *H. P. C.* 188. If there be an indictment and *appeal* depending at the same time against the same person, the *appeal* shall be tried first, if the appellant be ready. *Kel.* 107. Otherwise the king would destroy the suit of the party. *Jenk.* 160. *pl.* 4.

The case of other appeals than of murder, as of robbery, rape, &c. are not within stat. 3 *H.* 7. *c.* 1.; and therefore *auterfoits acquit*, upon an indictment within the year, stands at common law a good bar to an appeal of robbery, or any offence other than murder or manslaughter; and yet the judges at this day never forbear to proceed upon an indictment of robbery, rape, or other offence, though within the year, because appeals of robbery especially are very rare, and of little use, since the statute of 21 *H.* 8. *cap.* 11. gives restitution to the prosecutor as effectually as upon an appeal. 2 *Hale's Hist. P. C.* 250.

A charter of pardon is no bar of an *appeal*; and if the party be outlawed, &c. in *appeal*, and the king pardon him, a *scire facias* shall issue against the appellant, who may pray execution, notwithstanding such pardon; but if returned *sci. fec.* and he appears not, then the *appellee* shall, upon the pardon, be discharged. *H. P. C.* 251. A peer in *appeal* of murder shall not be tried by his peers, but by a common jury; though he shall upon an indictment for murder. Vide *stat.* 3 *H.* 7 *c.* 1. directing appeals before the sheriff and coroners, or at King's Bench, or gaol delivery; and stat. 1 *H.* 4. *c.* 14. (mentioned before) that no appeals are to be pursued in parliament.

And where *appeal* of death is brought, the defendant cannot justify *se defendendo*; but must plead not guilty, and the jury are to find the special matter. *Bro. App.* 122. 3 *Salk.* 37.

The court *ex officio* will quash the writ for apparent faults appearing on the face of the writ; as where the sense is defective for want of a material word, or where it wants those words of art which the law has appropriated for the description of the offence. 2 *Hawk. P. C. c.* 23. § 97.

Also the court will abate the writ when the declaration varies from the writ in some material point, either as to the reign of the king, or as to the county wherein the fact is laid, &c. 2 *Hawk. P. C. c.* 23. § 98.

A release of all manner of actions, or of all actions criminal, or of all actions concerning pleas of the crown, or of all appeals, or of all demands, is a good bar of any *appeal*; but a release of all personal actions does not bar an *appeal* of felony, being an action of an higher nature. *Cro. Jac.* 283. *Yelv.* 204. 2 *Hawk. P. C. c.* 23. § 135.

If the appellee pleads a special plea, which does not amount to a confession of the fact, he must, at the same time, plead over to the felony, except in special cases; as where such plea would be prejudicial to him, or where his plea declines the jurisdiction of the court. 2 *Hawk. P. C. c.* 23. § 137. *Carth.* 56.

In *appeal of murder* brought by the *wife* for the death of her *husband*; the appellee pleaded that she was never *lawfully married* to her husband, but did not plead *over to the felony*; adjudged, that this plea being to be tried by the *ordinary upon his certificate*, whether the marriage was *lawful or not*, in such case the defendant need not plead over to the *felony*; but where the plea is triable by the *common law*, he must plead *over to the felony. Cro. Eliz.* 224.

II. *Appeal of Maihem*, Is the accusing one that hath *maimed* another; but this being generally no felony, it is in a manner but an action of trespass; and nothing is recovered by it but damages. In an action of assault and *maiming*, the court may increase damages, on view of the *maihem*, &c. And though *maihem* is not felony, in *appeals* and indictments of *maihem*, the words *felonicè maihemaivit* are necessary. 3 *Inst.* 63. *Bracton* calls *appeal of maihem appellum de plagis & maihemio*, and writes a whole chapter upon it. *Lib.* 3. *tract.* 2. *cap.* 24. In an *appeal of maihem*, the defendant pleads that the plaintiff had brought an action of trespass against him for the same wounding, and had recovered, and damages given, &c. and this was a good plea in bar of the *appeal*; because in both actions damages only are to be recovered. 4 *Rep.* 43. And where there is a recovery in assault and battery, &c. the jury give damages according to the hurt which was done, and it shall be intended a *maihem* at that time; and therefore *appeal of maihem* doth not lie. *Hob.* 94. 1 *Leon.* 318. In *appeal of maihem*, the appellant ought not to plead in abatement of the writ, and likewise over to the *maihem*; if he doth, he will lose the benefit of

his plea to the writ. *Moor* 457. See 2 *Hawk. P. C. c.* 23. § 16—28.

III. *Appeal of Rape*, lies where a rape is committed on the body of a woman. 3 *Inst.* 30. A feme covert, without her husband, may bring *appeal of rape:* and stat. 6 *R.* 2. *c.* 6. gives power, where a woman is ravished, and afterwards consents to it, for a husband, or a father, or next of kin, there being no husband, to bring *appeal of rape:* also the criminal, in such case, may be attainted at the suit of the king. 3 *Inst.* 131. 6 *R.* 2. *cap.* 6.

If a woman be ravished by her next of kin, and consents to him, and has neither husband nor father, the next of kin to him shall have the appeal; for he has disabled himself by the rape, whereby he becomes a felon. 2 *Inst.* 434.—*Hale's Hist. P. C.* 632. S. P. cites 28 *H.* 6.—*Corone* 459.—2 *Hawk. P. C. c.* 23. *s.* 64. S. P.

If there be no husband, nor father, then the appeal is given to the heir, whether male or female. *Hale's P. C.* 186.

This statute, as to the husband, shall be construed strictly, and be intended of a husband in possession, though there be good cause of divorce; for he is her husband till a divorce be had. See *Br. Parliament, pl.* 89. cites 11 *H.* 4. 13, 14. 2 *Hawk. P. C. c.* 23. *s.* 62. says, that *ne unques accouple*, &c. is a good plea, and shall be tried by the bishop's certificate, who, if the marriage were unlawful by reason of a *pre-contract*, ought to certify against the appellant.

The statute of *Westm.* 1. *c.* 13. which reduced the crime of *rape* to a trespass, enacts that *appeal of rape* shall be brought within forty days; but by stat. *Westm.* 2. *c.* 34. which makes this offence felony, no time is limited for the prosecution; so that it may be brought in any reasonable time. *H. P. C.* 186. *Appeal of rape* is to be commenced in the county where committed: and if a woman be assaulted in one county, and ravished in another, the *appeal of rape* lies in that county where she was ravished. *H. P. C.* 186. It is held, that though formerly the defendant might have his clergy, it is taken away by the stat. 18 *Eliz. c.* 7. *Dyer* 201. See further on this subject, 2 *Hawk. P. C. c.* 23. § 58—73.

IV. *Appeal of Robbery*, or *Larceny*. A remedy given by the common law, where a person is *robbed* of his goods, &c. to have restitution of the goods stolen: as they could not be restored on indictment at the king's suit, this *appeal* was judged necessary. 3 *Inst.* 242. If a man *robbed* make *fresh pursuit* after, and apprehend and prosecute the felon, he may bring *appeal of robbery* at any time afterwards. *Staundf.* 62.

An *infant* shall have an *appeal of robbery*. *St. P. C.* 60 *b. cap.* 9.

Appeal of *felony* lies against a feme covert without her baron. *St. P. C.* 62. *cap.* 11.

So it lies against an *infant;* and so of all others who may commit felony. *St. Pl. C.* 62. *cap.* 11.

A woman at this day may have an *appeal of robbery*, &c. for she is not restrained thereof. 2 *Inst.* 68.

Adjudged that an *appeal of robbery* may be brought by the party *robbed* twenty years after the offence committed, and that he shall not be bound to bring it within a year and a day, as he must do in *appeal* of murder. 4 *Leon.* 16.

But the courts of law would now scarce permit a prosecution after such a length of time, unless good cause could be shown why it had not been sooner commenced, as that the offender had fled the kingdom, and was but just returned, &c.

If one man *robs* several persons, every one of them may have *appeal:* likewise if the *robber* be attainted at the suit of one, he shall be tried at the suit of the rest, so as their *appeals* were commenced before the attainder. *Danv. Abr.* 494. In *appeal of robbery*, the plaintiff must declare of all the things whereof he is *robbed*, or they shall be forfeited to the king; for the *appellant* can have restitution for no more than is mentioned in his *appeal*. 3 *Inst.* 227. By the year-book 21 *Ed.* 1. 16. restitution of goods was granted upon an outlawry, in *appeal of robbery:* but a person having preferred an indictment against a *robber*, and afterwards an *appeal*, on which he was outlawed, the plaintiff moved to have restitution of his goods, and it was denied. 2 *Leon.* 108.

If the count or declaration in *appeal of burglary* be sufficient, and the defendant is convicted at the suit of the party upon the *appeal;* he shall not be again impeached for the same offence at the king's suit. 4 *Rep.* 39. By stat. 21 *H.* 8. *c.* 11. the like restitution of stolen goods may be had on *indictments* after attainder, as on *appeals*, and *appeals of robbery* are now much out of use. By stat. 4 & 5 *W. & M. c.* 8. an accomplice convicting others, guilty of robbery, shall have the king's pardon which the act declares shall be good bar to an appeal. See tit. *Accessary*. See further 2 *Hawk. P. C. c.* 23. § 44—57. and this Dict. tit. *Robbery*, *Restitution*.

APPEAL TO ROME. At the reformation in the reign of *H.* 8. the kingdom entirely renounced the authority of the see of Rome; and therefore by the several statutes 24 *H.* 8. *c.* 12, and 25 *H.* 8. *c.* 19 and 21, to appeal to Rome from any of the king's courts, (which though illegal before, had at times been connived at;) to sue to Rome for any licence or dispensation; or to obey any process from thence are made liable to the pains of *præmunire*; and by stat. 5 *Eliz. c.* 1. to defend the pope's jurisdiction in this realm is a *præmunire* for the first offence, and high treason for the second. See tit. *Papists*.

Where an *appeal* in an *ecclesiastical cause* is made before the bishop, or his commissary, it may be removed to the archbishop; and if before an archdeacon, to the court of arches, and from the arches to the archbishop; and when the cause concerns the king, *appeal* may be brought in fifteen days from any of the said courts to the prelates in convocation, stat. 24. *H.* 8. *c.* 12.—And the stat. 25 *H.* 8. *c.* 19. gives *appeals* from the archbishop's courts to the king in Chancery, who thereupon appoints commissioners finally to determine the cause; and this is called the court of delegates: there is also a court of commissioners of review; which commission the king may grant as supreme head, to review the definitive sentence given on *appeal* in the court of delegates.

APPEARANCE, In the law signifieth the defendant's filing common or special bail, when he is served with copy of, or arrested on any process out of the courts at Westminster: and there can be no *appearance* in the court of B. R. but by special or common bail. There are four ways for defendants to *appear* to actions; in person, or by attorney, by persons of full age; and by guardians, or next friends, by infants. *Show.* 165.

By the common law, the plaintiff or defendant, demandant or tenant, could not appear by attorney without the king's special warrant by writ or letters patent, but ought to follow his suit in his own proper person; by reason whereof there were but few suits. *Co. Lit.* 128. 2 *Inst.* 249. But it is now the common course for the plaintiff or defendant, in all manner of actions where there may be an attorney, to appear by attorney, and put in his warrant without any writ from the king for that purpose. And therefore, generally, in all actions real, personal, and mixt, the demandant or plaintiff, tenant or defendant, may appear by attorney. *F. N. B.* 26.

But in every case, where the party stands in contempt, the court will not admit him to appear by attorney, but oblige him to appear in person. As if he comes in by a *capi corpus* upon an *exigent*. *F. N. B.* Or, if he be outlawed. 2 *Cro.* 462. 616.

But by stat. 4 & 5 *W. & M. c.* 18. Persons outlawed in any case, except for treason or felony, may *appear* by attorney to reverse the same without bail; except where special bail shall be ordered by the court.

In all cases, where process issues forth to take the party's body, if a common *appearance* only, and not special bail is required, there every such party may *appear* in court in his proper person, and file common bail. 1 *Lill. Abr.* 85. *Hill.* 22 *Car. B. R.*

In a capital criminal case the party must always appear in person, and cannot plead by attorney: also in criminal offences, where an act of parliament requires that the party should appear in person; and likewise in appeal, or on attachment. 2 *Hawk. P. C. c.* 22. § 1.

On an indictment, information, or action, for any crime whatsoever under the degree of capital, the defendant may, by the favour of the court, appear by attorney; and this he may do as well before plea pleaded, as in the proceeding after, till conviction. 1 *Lev.* 146. *Keilw.* 165. *Dyer* 346. *Cro. Jac.* 462.

If husband and wife are sued, the husband is to make attorney for her. 2 *Saund.* 213, and see *Barnes* 412.

If an ideot doth sue or defend, he cannot appear by guardian, *prochein ami*, or attorney, but must appear in proper person; but otherwise of him who becomes *non compos mentis*; for he shall appear by guardian if within age, or by attorney, if of full age. *Co. Lit.* 135 *b.* 2 *Inst.* 390. 4 *Co.* 124.

A *corporation aggregate* of many persons cannot appear in person, but by attorney, and such appearance is good. 10 *Rep.* 32, in the case of *Sutton's Hospital.*

If a man is bound to *appear* in court on the first day of the term, it shall be intended the first day in common understanding, *viz.* the first day in full term. 1 *Lill.* 83. 2 *Leon.* 4.

If the *plaintiff* files common bail for defendant, he only can deliver a declaration by the bye. *R. M. T.* 10 *Geo.* 2.

But when *defendant* has filed *common* or *special bail* for himself any person may *deliver* or *file* a declaration against him by the *bye*, at any time during the term wherein the process against the defendant is *ret. sedente curia*; and the practice has been, that the plaintiff, at whose suit the process is, might declare against the defendant, in as many actions as he thinks fit, before the end of the next term, after the ret' of the process. *Impey's Pract. K. B.* 177. 4 *Burr.* 2180.

Attornies subscribing warrants to *appear*, are liable to attachment, upon *non-appearance.* And where an attorney promises to appear for his client, the court will compel him to *appear* and put in common bail, in such time as is usual by the course of the court; and that although the attorney say he hath no warrant for *appearance:* nor shall repealing a warrant of attorney to delay proceedings, excuse the attorney for his not *appearing*, who may be compelled by the court. See *Impey's Pract. K. B.* 189. cites *R. M.* 1654. The defendant's attorney is to file his warrant the same term he *appears*, and the plaintiff the term he declares, under penalties by stat. 4 and 5 *Anne c.* 16.

An attorney is not compellable to appear for any one, unless he take his fee, or back the warrant; after which the court will compel him to appear. 1. *Salk.* 87.

If an attorney appears, and judgment is entered against his client, the court will not set aside the judgment, though the attorney had no warrant, if the attorney be able and responsible; for the judgment is regular, and the plaintiff is not to suffer when in no default; but if the attorney be not responsible or suspicious, the judgment will be set aside; for otherwise the defendant has no remedy, and any one may be undone by that means. 1 *Salk.* 86.

Attachment denied by the court against an attorney, who appeared for the plaintiff without a warrant; but said an action on the case lies. *Comb.* 2.

In actions by original, *appearances* must be entered with the filazer of the county; and if by bill, they shall be entered with the prothonotary: and by stat. 5 *Geo.* 2. *c.* 27, where defendant is served with a copy of the process *appearances* and common bail are to be entered and filed by him within eight days after the return of the process.—And if defendant does not appear, plaintiff may on affidavit of the service of process enter a common appearance for defendant and proceed thereon. stat. 12 *G.* 1. *c.* 29. and by stat. 25 *Geo.* 3. *c.* 80. *s.* 22, a common appearance may be filed by plaintiff without entering or filing of record a memorandum or minute for defendant.

An *appearance* entered by plaintiff for defendant in a wrong name may be amended after declaration. 3 *Wils.* 49.

An *appearance* by defendant cures all errors and defects in process. *Barnes* 163, 167. 3 *Wils.* 141. *Lutw.* 954. *Jenk. Cent.* 57.

In what cases common appearance will be ordered see *Impey's Pract. K. B.* 189, and this Dict. tit. *Bail, Arrest, &c.*

On two *nihils* returned upon a *scire & alias scire facias*, they amount to a *scire feci*, and the plaintiff giving rule, the defendant is to *appear*, or judgment shall be had against him by default, and where a defendant doth not plead after *appearance*, judgment may be had against him. *Style* 208.

A wife may appear without her husband. 1 *Wils.* 264. A man may appear before the return of a *capias ad respondendum. Id.* 39. For the appearance is to the suit.

Appearance in person and by attorney are very different. *Vide* 1 *Sid.* 93. 322. 392. 4 *Rep.* 71. 1 *Lev.* 80. *Ray.* 59.

As to *Appearance* by guardian and next friend, vide *Infants, &c.*

APPEARAND HEIR, Is any person who has a right to succeed in an heretable subject, but is not actually entered; though in the more strict acceptation of the word, it is understood only of descendants. *Scotch. Dict.*

APPELLANT. The party by whom an appeal is made. The other party is termed *Respondent.*

APPENDANT, *appendens.*] Is a thing of inheritance, belonging to another inheritance that is *more worthy.* As an advowson, common court, &c. may be *appendant* to a manor, common of fishing *appendant* to a freehold: land *appendant* to an office: a seat in a church to a house, &c. but land is not *appendant* to land, both being corporeal, and one thing *corporeal* may not be *appendant* to another that is *corporeal*; but an *incorporeal* thing may be *appendant* to it. *Co. Lit.* 121. 4 *Rep.* 86. *Danv. Abr.* 500. A forest may be *appendant* to an honour; and waifs and estrays to a leet. *Co. Lit.* 367. And *incorporeal* things, advowsons, ways, courts, commons, and the like, are properly parcel of and *appendant* to *corporeal* things; as houses, lands, manors, *&c. Plowd.* 170. 4 *Rep.* 38.—If one disseise me of common *appendant* belonging to my manor, and during the disseisin I sell the manor; by this the common is extinct for ever. 4 *E.* 3. 21. 11 *Rep.* 47. *Common* of *estovers* cannot be *appendant* to *land*; but to a *house* to be spent there. *Co. Lit.* 120. By the grant of a *messuage*, the *orchard* and *garden* will pass as *appendant.*

*Appendants* are ever by prescription, and this makes a distinction between appendants and appurtenances, for appurtenances may be created in some cases at this day; as if a man at this day grant to a man and his heirs, common in such a moor for his beasts, levant or couching *upon his manor*; or if he grant to another common of estovers or turbary in fee-simple, to be burnt or spent *within his manor*; by these grants these commons are appurtenant to the manor, and shall pass by the grant thereof; in the civil law it is called *adjunctum. Co. Lit.* 121 *b.*

A way may be *quasi* appendant to a *house*, &c. and as such pass by grant thereof. *Cro. Jac.* 190.

What things may be appendant. *Vide Plow. Com.* 103 *b.* 104 *b.* 170. See also tit. *Appurtenances.*

APPENDITIA, The *appendages* or pertinences of an estate. Hence our pentices or pent-houses, are called *appenditia domus, &c.*

APPENNAGE, or *apennage*, Fr.] Is derived from *appendendo*; or the German word *apanage*, signifying a portion. It is used for a child's part or portion; and is properly the portion of the king's younger children in France. *Splem. Gloss.*

APPENSURA. The payment of money at the scale or by weight. *Hist. Elien.* edit. *Gale*, l. 2. c. 19.

APPLES. A duty is granted on all *apples* imported into Great Britain. By what measure apples are to be sold, see 1 *Ann. stat.* 1. *c.* 15.

APPODIARE. A word used in old historians, which signifies to lean on, or prop up any thing, &c. *Walsingham ann.* 1271. *Mat. Paris. Chron. Aulæ Regiæ ann.* 1321.

APPONERE. To pledge or pawn. *Newbrigensis lib.* 1. *c.* 2.

APPORTIONMENT, *apportionamentum.*] Is a dividing of a rent, &c. into parts, according as the land out of which it issues is divided among two or more. If a stranger recovers part of the land, a lessee shall pay, having regard to that recovered, and what remains in his hands. Where the lessor recovers part of the land or enters for a forfeiture into part thereof, the rent shall be *apportioned*. *Co. Lit.* 148. If a man leases three acres, rendering rent, and afterwards grants away one acre, the rent shall be *apportioned*. *Co. Lit.* 144. Lessee for years leases for years, rendering rent, and after devises this rent to three persons, this rent may be *apportioned*. *Danv. Abr.* 505. If a lessee for life or years under rent surrenders part of the land, the *rent* shall be *apportioned:* but where the grantee of a rent-charge *purchases* part of the land, there all is extinct at law. *Moor* 231. But he shall have relief in equity. *Fonblanque's Treatise of Equity*, i. 379. A *rent charge*, issuing out of land, may not be *apportioned:* nor shall things *entire*, as if one holds lands by service to pay yearly to the lord, at such a feast, a horse, &c. *Co. Lit.* 149. But if part of the land, out of which a rent-charge issues, *descends* to the grantee of the rent, this shall be *apportioned*. *Danv.* 507.

A grantee of rent releases part of the rent to the grantor, this doth not extinguish the residue, but it shall be *apportioned:* for here the grantee dealeth not with the *land*, only the rent. *Co. Lit.* 148. On partition of lands out of which a rent is issuing, the rent shall be *apportioned*. *Danv. Abr.* 507. And where lands held by lease, rendering *rent*, are extended upon *elegit*, one moiety of the *rent* shall be *apportioned* to the lessor. *Ibid.* 509. If part of lands leased is surrounded by fresh water, there shall be no *apportionment* of rent; but if it be surrounded with the sea, there shall be an *apportionment* of the rent. *Dyer* 56.

The stat. 11 *Geo.* 2. *c.* 19. § 15. has, in certain cases, altered the law as to the apportioning of rents, in point of time; it being thereby enacted, "That if any tenant for life shall happen to die before, or on the day on which any rent was reserved, or made payable upon any demise or lease of any lands, tenements, or hereditaments, which determined on the death of any such tenant for life, that the executors or administrators of such tenant for life shall and may, in an action on the case, recover of and from such under-tenant or under-tenants of such lands, tenements, and hereditaments, if such tenant for life die on the day on which the same was made payable, the whole, or if before such day, then a proportion of such rent, according to the time such tenant for life lived, of the last year, or quarter of a year, or other time in which the said rent was growing due as aforesaid, making all just allowances, or a proportionable part thereof respectively."

Before this statute the rent, by the death of a tenant for life, was lost; for the law would not suffer his representative to bring an action for the use and occupation, much less if there was a lease, and the remainder-man had no right, because the rent was not due in his time; nor could equity relieve against this hardship by apportioning the rent. 1 *P. Wms.* 392. The legislature having, however, by the above statute, interposed in favour of tenants for life, its provisions have, by an equitable construction, been extended to tenants in tail. *Amb. Rep.* 198. 2 *Bro. C. Rep.* 659.

But though the executor of tenant for life is now entitled to an apportionment of the rent, yet the dividends of money directed to be laid out in lands, and in the mean time to be invested in government securities, and the interest and dividends to be applied, as the rents and profits would in case it were laid out in land, were held not to be apportionable, though tenant for life died in the middle of the half year. 3 *Alk.* 502. *Amb. Rep.* 279. 2 *Vez.* 672. and the authority of the case on the will of Lord C. J. *Holt*, 3 *Vin. Abr.* 18. *pl.* 3. was denied. But where the money is laid out in mortgage till a purchase could be made, the interest is apportionable. 2 *P. Wms.* 176. This distinction, however, may be referred to interest on a mortgage, being in fact *due* from *day to day*, and so not properly an apportionment: whereas the dividends accruing from the public funds are made payable on certain days, and therefore not apportionable; and upon the principle of this distinction the Master of the Rolls decreed an apportionment of maintenance-money, it being for the daily subsistence of the infant. 2 *P. Wms.* 501. See also Mr. *Cox's* note (1.) And the principle extending to a separate maintenance for a feme covert, such apportionment has, in such case, been allowed at law. 2 *Black. Rep.* 1016. Q. Whether equity would not apportion dividends of money in the funds, directed to be applied for the maintenance of an infant, or secured by the husband as a separate provision for his wife, as it would be difficult for them to find credit for necessaries, if the payment depended on their living to the end of a quarter? That equity will not in general apportion dividends, see 3 *Bro. Ch. Rep.* 99.

As to apportionment of fines paid on renewal of leases by tenant for life, see 1 *Bro. Ch. Rep.* 440. 2 *Bro. Ch. Rep.* 243. and the cases there referred to.

In what cases eviction of part of the land is a ground for apportionment, see *Co. Litt.* 148. See *Fonblanque's Treat. of Equity* 376.

A man *purchases* part of the land where he hath *common appendant*, the common shall be *apportioned:* of *common appurtenant* it is otherwise, and if by the act of the party, the common is extinct. 8 *Rep.* 79. *Common appendant* and *appurtenant* may be *apportioned* on alienation of part of the land to which it is appendant or appurtenant. *Wood's Inst.* 199. If where a person has *common of pasture sans number*, part of the land descends to him, this being entire and uncertain cannot be *apportioned:* but if it had been *common certain*, it should have been *apportioned*. *Co. Lit.* 149.

APPORTUM, from the Fr. [*apport.*] Signifies properly the revenue or profit which a thing brings in to the owner: and it was commonly used for a corody or pension. It hath also been applied to an augmentation given to an abbot out of the profits of a manor for his better support.

APPOSAL OF SHERIFFS, The charging them with money received upon their accounts in the exchequer. *Stat.* 22 & 23 *Car.* 2. *c.* 22.

APPRAISERS of goods, are to be sworn to make true *appraisement;* and, valuing the goods too high, shall be obliged to take them at the price *appraised*. Stat. 11 *Ed.* 1. *Stat. Acton Burnel.*—See *Auctioneers.*

APPRENDRE, [*Fr.*] A fee or profit *apprendre*, is fee or profit to be taken or received. *Stat.* 2 & 3 *Ed.* 6. *cap.* 8.

APPRENTICE, *apprenticius*, [Fr. *apprenti*, from *apprendre* to learn.] A young person bound by indentures to a tradesman or artificer, who, upon certain covenants, is to teach him his mystery or trade.

It will be proper under this head to consider,

I. *Who may be bound apprentices, and in what manner; and who are compellable to receive them.*

II. *How they are to be provided for and governed during their apprenticeship, and in what manner they are to be assigned, &c.*

III. *What trades may not be exercised without having served an apprenticeship.*

IV. *For what offences they are punishable, and how.*

Of apprentices acquiring settlement, see tit. *Settlement*.

I. It seems clearly agreed, that, by the common law, infants, or persons under the age of twenty one years, cannot bind themselves apprentices, in such a manner as to entitle their masters to an action of covenant, or other action against *them* for departing from their service, or other breaches of their indentures; which makes it necessary, according to the usual practice, to get some of their friends to be bound for the faithful discharge of their offices, according to the terms agreed on. 11 *Co.* 89 *b.* 2 *Inst.* 379. 580. 3 *Leon.* 63. 7 *Mod.* 15. And notwithstanding stat. 5 *Eliz. c.* 4. enacts, that although persons bound apprentices shall be within age at the time of making their indentures, they shall be bound to serve for the years in their indentures contained, as if they were at full age at the time of making of them; it hath been held, that although an infant may voluntarily bind himself an apprentice, and, if he continue an apprentice for seven years, he may have the benefit to use his trade; yet neither at the common law, nor by any words of the above-mentioned statute, can a covenant or obligation of an infant, for his apprenticeship, bind him; but if he misbehave himself, the master may correct him in his service, or complain to a justice of peace, to have him punished according to the statute: but no remedy lieth against an infant upon such covenant. *Cro. Car.* 179. *Cro. Jac.* 194. *S. P.*

But if any one entices an apprentice from his master's service, or harbours him after notice, the master may maintain a special action on the case against the person so doing. Vide 1 *Salk.* 380.

By the custom of London, an infant unmarried, and above the age of fourteen, may bind himself apprentice to a freeman of London, by indenture, with proper covenants; which covenants, by the *custom of London*, shall be as binding as if he were of full age. *Moor* 134. 2 *Bulst.* 192. 2 *Rol. Rep.* 305. *Palm.* 361. 1 *Mod.* 271. 2 *Keb.* 687. But a waterman's apprentice is not, within the custom of London, to bind himself, being under twenty-one. 6 *Mod.* 69.

A freeman's widow may take a maid *apprentice* for seven years, and inrol her as a youth, if she be above fourteen years old: and if an exchange woman, that hath a husband free of London, take such *apprentice*, she shall be bound to the husband; and may be made free, at the end of the *apprenticeship*, if she be then unmarried. *Lex. Londinen.* 48.

By stat. 5 *Eliz. c.* 4. *sect.* 35. the justices may compel certain persons under age to be bound as apprentices, and on refusal may commit them, &c. And by stat. 43 *Eliz. c.* 2. and 18 *Geo.* 3. *c.* 47. churchwardens and overseers of the poor may bind out the children of the poor to be *apprentices*, with the consent of two justices; if boys till 21, if girls till that age or marriage. And if any person refuse to accept a poor *apprentice*, he shall forfeit 10*l.* *Stat.* 8 & 9 *W.* 3. *c.* 30. § 5. and see 54 *Geo.* 3. *c.* 107. and this Dict. title *Settlement*. Also justices of peace and churchwardens, &c. may put out poor boys *apprentice* to the sea service. *Stat.* 2 & 3 *Ann. c.* 6. and 4 *Ann. c.* 19. And by stat. 7 *Jac.* 1. *c.* 3. apprentices bound out by public charities are regulated. See title *Chimney-sweepers*. And see 42 *Geo.* 3. *c.* 73. as to regulating apprentices' health and morals in cotton mills, &c.

As to the manner of their being bound:

Indentures must also be inrolled in all towns corporate under stat. 5 *Eliz. c.* 5. and 5 *Geo.* 2. *c.* 46. and in London, by the custom, in the chamberlain's office there.

In London, if the indentures be not inrolled before the chamberlain within a year, upon a petition to the mayor and aldermen, &c. a *scire facias* shall issue to the master, to show cause why not inrolled; and if it was through the master's default, the apprentice may sue out his indentures, and be discharged; otherwise if through the fault of the apprentice, as if he would not come to present himself before the chamberlain, &c. for it cannot be inrolled, unless the apprentice be in court and acknowledge it. 2 *Rol. Rep.* 305. *Palm.* 361. 1 *Mod.* 271.

Indentures are likewise to be stamped, and are chargeable with several duties by act of parliament.

By stat. 8 *Ann. c.* 9. made perpetual by stat. 9 *Ann. c.* 21. a duty of 6*d.* in the pound under 50*l.* and 12*d.* in the pound for sums exceeding it, given with *apprentices* (except poor *apprentices*) is granted. And if the full sum agreed be not inserted, or the duty not paid, indentures shall be void, and *apprentices* not capable of following trades; and the masters are liable to 50*l.* penalty.

See *Jackson* v. *Warwick*, 7 *Term Rep.* 121. No action can be maintained by the plaintiff, on a note given to him by the defendant, as an apprentice fee with his son, who was to be bound to the plaintiff, if it appear that the indenture executed was void by 8 *Ann. c.* 9. for want of the insertion of such premium therein, and a proper stamp in respect of the same; although the plaintiff did in fact maintain the apprentice for some time, and until he absconded.

There are several statutes allowing further time to pay the duties and stamp indentures, through neglect omitted, &c. And acts of indemnity of this nature are usually passed at intervals of two or three years.

The payment of the duties on apprentice-fees is enforced by several acts, 18 *Geo.* 2. *c.* 22. & 20 *Geo.* 2. *c.* 45. the former of which provides, that if the apprentice shall pay the duties, on the neglect of the master, he may recover back the apprentice fee; and the latter, that if no suit is commenced, and the master shall pay double duties within two years after the end of the apprenticeship, the indentures shall be valid, or the apprentice may pay them, and in such case recover double the *apprentice fee*, by action, from his master.

The stats. 5 *Eliz. c.* 4 & 5. direct who shall take apprentices, and direct that every *cloth-worker*, *fuller*, *shearman*, *weaver*, *taylor*, *or shoe-maker*, taking *three* apprentices, shall have *one* journeyman, and for every other apprentice above three, also *one* journeyman, *s.* 33.—Stat. 1 *Jac.* 1. *c.* 17. allows only *two* apprentices at a time to *hatters* and *felt-makers*; (except a son apprentice;)—and stat. 13 & 14 *Car.* 2. *c.* 5. allows only *two* to Norwich *weavers*, who must then have also two journeymen.

As by the stat. of 5 *Eliz. c.* 4. the justices of the peace have a power of imposing an apprentice on a master, in consequence thereof an indictment lies for disobedience to their orders, either in not receiving, or receiving, and after turning off, or not providing for such apprentice; for though an act of parliament prescribe an easier way of proceeding by complaint; yet that does not exclude the remedy by indictment. 6 *Mod.* 163. 1 *Salk.* 381.

By the stat. 5 *Eliz. c.* 4. so often quoted, divers rules and regulations were enacted respecting the qualifications of persons entitled to take and become apprentices, and the term of years for which they should be bound, and the mode of binding them; and all indentures, covenants, and bargains to the contrary, were declared void, and liable to a penalty of 10*l.* By 54 *Geo.* 3. *c.* 96. § 2. all these regulations are repealed, and it is declared lawful for any person to take or retain, or become an apprentice, though not according to the provisions of the said act of Elizabeth.

II. The justices of peace may discharge an apprentice not only on the default of the master, but also on his own default; for in such case it is but reasonable that the contracts, which were made by their authority, should be dissolved by the same power. *Skin.* 108. 5 *Mod.* 139. 2 *Salk.* 471.

And under the said stat. *5 Eliz. c.* 4. justices, or the sessions, may hear and determine disputes between masters and apprentices; and the sessions may discharge the apprentice, and vacate the indentures, or correct the apprentice.

An order of justices on the master to return money is good, though it is not averred that he had any with the apprentice; for the order being to *return* money, is as necessary a proof of the receipt of it, as if it had been expressly alleged: and the court held, that the justices had jurisdiction to oblige the master to refund. *Trin.* 7 *Geo.* 2. in *B. R. The King* v. *Amies;* though an order of this nature has been quashed. *Bott* (by *Const.*) i. 513.

By the stat. 20 *Geo.* 2. *c.* 19. any two justices, upon complaint of any *apprentice* put out by the *parish*, or with whom no more than *5l.* was paid, of any mis-usage, refusal of necessary provisions, cruelty, or other ill treatment by his master, may summon the master to appear before them; and upon proof of the complaint on oath, to their satisfaction, (whether the master be present or not, if service of the summons be proved,) to discharge such *apprentice* by warrant or certificate, for which no fee shall be paid: (and by stat. 33 *Geo.* 3. *c.* 55. may *fine* the master for such ill usage,) and on complaint of the master against any such *apprentice*, touching any misdemeanor, miscarriage, or ill behaviour, the justices may punish the offender by commitment to the house of correction, there to be corrected and kept to hard labour, not exceeding a calendar month; or otherwise by discharging such offender. Either party may appeal to the sessions, and the determination there is to be final. By 31 *Geo.* 2. *c.* 11. this act is extended to servants in husbandry, though hired for less than a year.

By stat. 6 *Geo.* 3. *c.* 25. apprentices (with whom less than 10*l.* premium is paid) absenting themselves during their apprenticeship, shall serve an equal time beyond their term.—In London, apprentices are all under the controul of the chamberlain, whose jurisdiction is saved in the several statutes. —The stat. 32 *Geo.* 3. *c.* 57. makes some additional regulations as to the punishing and relieving parish apprentices.

With regard to the *assigning* of apprentices, it hath been held, that an apprentice is not assignable. He cannot be bound nor discharged without deed. 1 *Salk.* 68. *pl.* 7. *Mich.* 13 *W.* 3. *B. R.*

But though an apprentice is not *assignable*, yet such assignment *amounts to a contract between the two masters*, that the child should serve the latter. 1 *Salk.* 68. *pl.* 7. *Mich.* 13 *W.* 3. *B. R. Caster* v. *Eccles Parish.*

By the custom of the city of London, also an *apprentice* may be turned over from one master to another; and if the master refuse to make the *apprentice* free at the end of the term, the chamberlain may make him free: in other corporations there must be a *mandamus* to the mayor, &c. to make him free in such case. *Danv. Abr.* 421. *Wood's Inst.* 51.

But it hath been held, that though justices of peace have a jurisdiction of discharging apprentices, and may bind them to other masters, that they cannot turn them over; and therefore an order that an apprentice, whose master was dead, should serve the remainder of his time with his master's widow's second husband, was quashed; because the justices have nothing to do about turning over an apprentice; and though he applied to them, that could not give them a jurisdiction. *Comb.* 324.

It seems agreed, that, if a man be bound to instruct an apprentice in a trade for seven years, and the master dies, that the condition is dispensed with, being a thing personal; but if he be bound further, that in the mean time he will find him in meat, drink, and clothing, and other necessaries, here the death of the master doth not dispense with the condition, but his executors shall be bound to perform it as far as they have assets. 1 *Sid.* 216. 1 *Keb.* 761. 820. 1 *Lev.* 177.

But if a person is bound apprentice by a justice of peace, and the master happens to die before the term expired, the justices have no power to oblige his executor, by their order, to receive such apprentice and maintain him; for by this method the executor is deprived of the liberty of pleading *plene administravit*, (which he may do, in case covenant be brought against him,) and must maintain the apprentice, whether he hath assets or not. *Carth.* 231. 1 *Salk.* 66. 1 *Show.* 405. It is said, however, that the executor or administrator may bind him to another master for the remaining part of his time. *Burn.*

But it is said, that in this case of the master's dying, by the custom of London the executor must put the apprentice to another master of the same trade. 1 *Salk.* 66. *per Holt*, Ch. J.

By stat. 32 *Geo.* 3. *c.* 57. in case of the *death* (§ 3,) or *insolvency* (§ 8,) of the master or mistress of a parish apprentice, (with a premium not exceeding 5*l.*) the justices, shall by indorsement on the indenture, direct the apprentice to serve another master, &c. and so *toties quoties*. And masters, &c. of apprentices under stat. 8 & 9 *W.* 3. *c.* 30. may with consent of two justices assign them.

Whatever an apprentice gains is for the use of his master; and whether he was legally bound or no, is not material, if he was an apprentice *de facto*. *Salk.* 68. For enticing an apprentice to embezzle goods, indictment will lie. 1 *Salk.* 380. A master may be indicted for not providing for, or for turning away, an apprentice. If a master gives an apprentice license to leave him it cannot afterwards be recalled. *Mod. Cas.* 70. If an apprentice marries, without the master's privity, that will not justify his turning him away, but he must sue his covenant. 2 *Vern.* 492. By the custom of the city of London a freeman may turn away his apprentice for gaming. *Ibid.* 241. Though if a master turns an apprentice away on account of negligence, &c. equity may decree him to refund part of the money given with him. 1 *Vern. Rep.* 460. As no apprentice can be made without writing; so none may be discharged by his master, but by writing under his hand, and with the allowance of a justice of peace, by statute. *Dalt.* 121.

The court of King's Bench will not discharge an apprentice from his indentures, if it appear upon the return to an *habeas corpus* that he is in execution, under the conviction of two magistrates, by virtue of the statute, for absenting himself from his master's service, although it appear by affidavit that the party had bound himself when an infant to serve till 25, but when he came of age had elected to avoid the indentures. 7 *E. R.* 376.

An apprentice, who at the age of 17 was bound by indenture (which stated him to be 14) for seven years, was discharged by the court of King's Bench, being brought up by *habeas corpus*. 5 *Term Rep.* 715.

By 42 *Geo.* 3. *c.* 73. several regulations were made for preserving the health and morals of apprentices employed in cotton and woollen mills and other manufactories, where more than 20 apprentices or other persons are employed; by which, among other things, the system of *night-work*, so destructive to every sound principle of mind and body, was abolished; a system of cleanliness and instruction is introduced; and visitors appointed by justices at the Midsummer sessions yearly, who are to report to the quarter sessions, from time to time, whether the Mills, &c. are regulated according to the act.

III. By the common law no man may be prohibited to work in any lawful trade, or in more trades than one, at his pleasure. 11 *Co.* 53.

So that without an act of parliament no man may be restrained, either from working in any lawful trade, or using divers mysteries or trades; therefore an act of parliament made to restrain any person therein, must be taken strictly, and not favourably as acts made in affirmance of the common law. *Burn.*

It was enacted by the 5 *Eliz. cap.* 4. *sect.* 31. "That it should not be lawful to any person or persons, other than such as then did lawfully use or exercise any art, mystery, or manual occupation, to set up, occupy, use, or exercise any craft, mystery, or occupation, then used or occupied within the realm of England or Wales, except he should have been brought up therein seven years, at the least, as an apprentice; nor to set any person on work in such mystery, art, or occupation, being not a workman at that day, except he should have been apprentice, as is aforesaid; or else, having served *as an* apprentice, as is aforesaid, become a journeyman, or hired by the year; upon pain that every person willingly offending, or doing the contrary, shall forfeit and lose for every default, forty shillings for every month."

By 54 *Geo.* 3. *c.* 96. § 1. this section of the act of Elizabeth is repealed; with a saving for the customs and bye laws of the city of London, and of other cities, and of corporations and companies lawfully constituted.

Previous to the passing of this act 54 *Geo.* 3. the policy of the courts of law had been in favour of the free exercising of trades, and against inforcing the penalties of the act of Elizabeth, as will appear from the following determinations.

It hath been ruled, that there are many trades within the general words and equity of this act, besides those which are particularly enumerated therein; yet it seems agreed, and hath frequently been adjudged, that in every indictment, &c. it must be alleged, that it was a trade *at the time of making the statute*, for the words thereof are, *any craft, mystery, or occupation*, now *used*, &c. from whence it seems to follow, that a new manufacture, which to all other purposes may be called a trade, is yet not a trade within this statute. 2 *Salk.* 611. *Palm.* 528. 1 *Sid.* 175.

Also it seems agreed, that the act only extends to such trades as imply mystery and craft, and *require skill and experience;* that therefore *merchants, husbandmen, gardeners,* &c. are not within the statute; and on this foundation it hath been held, that a *hemp-dresser* is not within the statute, as not requiring much learning or skill, and being what every husbandman doth use for his necessary occasions. 8 *Co.* 130. 2 *Bulst.* 190. *Cro. Car.* 499.

It is clearly agreed, that the following the common trade of a *brewer*, *baker*, or *cook*, is within the statute, as unskilfulness herein may be very prejudicial to the lives and healths of his majesty's subjects; but it is, at the same time, agreed, that the exercising of any of these trades in a man's own house or family, or in a private person's house, is not within the restraint of the statute. 11 *Co.* 54 *a. Cro. Car.* 499. *Hob.* 183. 211. *Moor* 886. 8 *Co.* 129. *Palm.* 542. *Lit. Rep.* 251. *Bridg.* 141.

It hath been held, that this statute doth not restrain a man from using several trades, so as he had been an apprentice to all; wherefore it indemnifies all petty chapmen in little towns and villages, because their masters kept the same mixed trades there before. *Carth.* 163.

A man may exercise as many trades as he hath worked at, or served as an apprentice to, for seven years. 2 *Wils.* 168.

It hath been resolved, that there is no occasion for any actual binding, but that the *following a trade* for seven years, is a sufficient qualification within the statute. 1 *Salk.* 67. 2 *Salk.* 613.

By stats. 2 & 3. *P. & M. c.* 11. and 5 *Eliz. c.* 4. aliens and denizens are restrained to use any handicraft or trade therein mentioned, unless they have served seven years apprenticeship within the realm, under the penalty of 40*s.* per month. *Hutt.* 132. But it hath been adjudged, that if an apprentice serve seven years beyond sea, he shall be excused from the penalties of the statute. 5 *Eliz. c.* 4. And so, if he serves seven years, though he was never bound. 1 *Salk.* 76.

So it hath been held, that serving five years to a trade out of England, and two in England, is sufficient to satisfy the statute; but that there must be a service of a *full time;* and therefore, serving five years in any country where, by the law of the country, more is not required, will not qualify a man to use the trade in England. *Ca. in Law and Eq.* 70.

By the statute 31 *Eliz. cap.* 5. *sect.* 7. it is enacted, "That all suits for using a trade, without having been brought up in it, shall be sued and prosecuted in the general quarter sessions of the peace, or assizes, in the same county where the offence shall be committed; or otherwise inquired of, heard, and determined in the assizes, or general quarter sessions of the peace, in the same county where such offence shall be committed, or in the leet within which it shall happen."

In the construction of this statute it hath been held, that it restrains not a suit in the King's-Bench or Exchequer, for such offence happening in the same county where these courts are sitting; for the negative words of the statute are not, that such suits shall not be brought in *any other court*, but that they shall not be brought in *any other county;* and the prerogative of these high courts shall not be restrained without express words. *Cro. Jac.* 178. *Hob.* 184. 1 *Salk.* 373.

But where the offence is in a different county, such suits in these, or any other courts out of the proper county, seem to be within the express words of the statute. *Hob.* 184. 327. *Cro. Jac.* 85.

Infants voluntarily binding themselves apprentice, and continuing seven years, shall have the benefit of their trades; but a bond for their service shall not bind them. *Cro. Car.* 179. See the several statutes enabling *soldiers* and *mariners* to exercise trades.

By 13 *Geo.* 2. *c.* 17. apprentices in the Greenland Whale Fishery (if apprenticed above the age of fourteen, and not exceeding eighteen,) are exempted from being impressed for three years of such apprenticeship. See 26 *Geo.* 3. *c.* 41. § 2. 29 *Geo.* 3. *c.* 53. § 5. 42 *Geo.* 3. *c.* 22. and *ex parte Brocke, H.* 1805. 6 *East* 238.

The court will not, at the prayer of the master, grant a habeas corpus to bring up an apprentice impressed, he being willing to enter into the king's service. *Ex parte Landsdown, E.* 44 *Geo.* 3. 5 *East* 38.

The captain of a ship of war detaining an apprentice who had been impressed, after notice by such apprentice, is liable in an action by the master to recover wages for the service of such apprentice. *Eades* v. *Vandeput, M.* 25. *Geo.* 3. *East* 39. *n.*

IV. At common law, a servant or apprentice, without any regard to age, may be guilty of felony in feloniously taking away the goods of their master, though they were goods *under their charge*, as a shepherd, butler, &c. and may, at this day, for any such offence, be indicted, as for felony, at common law; but at common law, if a man had *delivered goods to his servant to keep*, or *carry* for him, and he carried them away *animo furandi*, this was considered only a breach of trust, but not felony. 1 *Hale's Hist. P. C.* 505. 666.

But now, by the statute of 21 *H.* 8. *cap.* 7. it is enacted, that servants guilty of a breach of trust in embezzling money, goods, &c. delivered to them to the value of 40*s.* or above, are guilty of felony; with a proviso, nevertheless, that the act do not extend to apprentices, nor to persons under the age of eighteen years.

By stat. 12 *Ann. st.* 1. *cap.* 7. clergy is taken from persons stealing in any house or out-house, to the value of 40*s.* except as to apprentices under the age of *fifteen* years robbing their masters. 1 *Hale's P. C.* 666, 667. See 1 *Hawk. P. C. c.* 33. § 11—16. See tit. *Servants.*

APPROBATE and REPROBATE. A term used in the Scotch law when a person takes advantage of one part of a deed but rejects the rest. *Scotch Dict.*

APPROPRIATION, *appropriatio*, from the Fr. *approprier*.] The annexing of an ecclesiastical benefice to the proper and perpetual use of some religious house, bishoprick, college, or spiritual person, to enjoy for ever; in the same way as *impropriation* is the annexing a benefice to the use of a lay person or corporation; that which is an *appropriation* in the hands of religious persons being usually called an impropriation in the hands of the laity. See *Com. Dig.* tit. *Advowson*, (D. E.) It is computed that there are in England 3845 impropriations.

This contrivance seems to have sprung from the policy of monastic orders. At the first establishment of parochial clergy, the tithes of the parish were distributed in four parts —one for the bishop; one to maintain the fabrick of the church; a third for the poor; and the fourth for the incumbent. The sees of the bishops becoming amply endowed, their shares sunk into the others; and the monasteries inferring that a small part was enough for the officiating priests, *appropriated* as many benefices as they could by any means obtain, to their own use; undertaking to keep the church in repair, and to have it constantly served. But in order to complete such *appropriation* effectually, the king's licence and consent of the bishop must first be obtained; because they might both, some time or other, have an interest by *lapse* in the benefice; if it were not in the hands of a corporation, which never dies. The consent of the patron is also necessarily implied, because the *appropriation* could originally be made to none but to such spiritual corporation as is also the patron of the church; the whole being indeed nothing else but an allowance for the patron to retain the tithes and glebe in their own hands, without presenting any clerk. *Plowd.* 496—500.

When the *appropriation* is thus made, the appropriators and their *successors* are perpetual parsons of the church; and must sue and be sued in all matters concerning the rights of the church by the name of parsons. *Hob.* 307.—An *appropriation* cannot be granted over. *Ibid.*

This *appropriation* may be severed, and the church become disappropriate, two ways. 1st. If the patron or appropriator present a clerk, who is instituted and inducted to the parsonage; for such incumbent is to all intents and purposes complete parson; and the *appropriation* being once severed, can never be re-united again, unless by a repetition of the same solemnities. *Co. Lit.* 46. 7 *Rep.* 13. And when the clerk so presented is distinct from the vicar, the rectory thus vested in him becomes what is called a *sine-cure;* because he has no cure of souls, having a vicar under him, to whom that cure is committed; though this is not the only mode of creating *sine-cures.* See 2 *Burn's Ec. Law*, 347. Also if the corporation, to which the benefice is annexed, is dissolved, the parsonage becomes disappropriate at common law. 1 *Comm.* 386. See the note there.

In this manner may appropriations be made at this day; and thus were most, if not all, now existing, originally made. At the dissolution of the monasteries by stat. 27 *H.* 8. *c.* 28. and 31 *H.* 8. *c.* 13. the appropriations belonging to those religious houses (being more than one-third of all the parishes in England) would at common law have been disappropriated; had not a clause been inserted in those statutes to give them to *the king*, in the same manner as the alien priories had before been. 2 *Inst.* 584.—and from hence have sprung all the lay impropriations or secular parsonages in the kingdom; they having been afterwards granted out from time to time by the crown. See 1 *Comm.* 384, *&c.* 11 *Rep.* 11. *Gibs.* 719.—See also tit. *Parson, Vicar.*

APPROPRIARE COMMUNIAM. To inclose or appropriate any parcel of land that was before open common, and thus to discommon it.

APPROVE, *approbare.*] To augment a thing to the utmost; to approve land is to make the best benefit of it, by increasing the rent, &c. 2 *Inst.* 474.

APPROVEMENT, Is where a man hath common in the lord's waste, and the lord makes an inclosure of part of the waste for himself, leaving sufficient common, with egress and regress for the commoners. *Reg. Jud.* 8, 9. See tit. *Common.*

The word approvement is also used for the profits of the lands themselves. *Cromp. Jurisd.* 152. And the statute of *Merton*, 20 *H.* 3. *c.* 4. makes mention of land newly approved. *F. N. B.* 71. Approvement is also the same with improvement.

APPROVER, or PROVER, *approbator.*] One that, confessing felony committed by himself, appealed or accused others to be guilty of the same crime. See tit. *Accessary*, II. 5. He is called *approver*, because he must *prove* what he hath alleged; and that proof was anciently by battle, or the country, at the election of him appealed: and the form of this accusation may be found in *Cromp. Just.* 250. See also *Bracton, lib.* 3. *Staundf. Pl. Cor.* 52. If a person indicted of treason or felony, not disabled to accuse, upon his arraignment, before any plea pleaded, and before competent judges, confesseth the indictment, and takes an oath to reveal all treasons and felonies that he knoweth of; and therefore prays a coroner to enter his appeal, or accusation, against those that are partners in the crime contained in the indictment; such a one is an *approver.* 3 *Inst.* 129. *H. P. C.* 192.

When a person hath once pleaded not guilty, he cannot be an approver. 3 *Inst.* 129. And persons attainted of treason or felony shall not be approvers; their accusation will not then be of such credit as to put a man upon his trial. 2 *Hawk.* 205. Vide 5 *H.* 4. *cap.* 2. as to charters of pardon.

Infants under age of discretion may not be approvers: and it being in the discretion of the court to suffer one to be an approver, this method of late hath seldom been practised. See tit. *Accessary*, II. 5.; tit. *Appeal;* and *Leach's Hawk. P. C.* ii. *c.* 24. See tit. *Prover.*

APPROVERS. In old statutes, bailiffs of lords in their franchises are called their *approvers:* and approvers in the marches of Wales were such as had licence *de vendre & acheter* beasts, &c. But by the statute 2 *Ed.* 3. *c.* 12. approvers are such as are sent into counties to increase the farms of hundreds, &c. held by sheriffs. Such persons as have the letting of the king's demesnes in small manors, are called approvers of the king *(approbatores regis)* stat. 51 *H.* 3. *st.* 5. And in the stat. 1 *Ed.* 3. *st.* 1. *c.* 8. sheriffs are called the king's approvers.

APPRUARE. To take to his own use or profit. *Stat. W.* 2. *c.* 20.

APPRYSING, Is when, by letters, a debitor is charged to appear before a messenger, (who, in that case, represents the sheriff,) to hear the lands specified in the letters apprysed by an inquest, and declared to belong to the creditor for payment of his debts. *Scotch Dict.*

APPURTENANCES, *pertinentia*, derived from the French *appartenir*, to belong to.] Signify things both corporeal and incorporeal appertaining to another thing as principal; as hamlets to a chief manor; and common of pasture, piscary, &c. Also liberties and services of tenants. *Brit. cap.* 39. If a man grant common of estovers to be burnt in his manor, these are appurtenant to the manor; for things appurtenant may be granted at this day. *Co. Lit.* 121. Common appurtenant may be to a house, pasture, &c. Out-houses, yards, orchards, and gardens are appurtenant to a messuage; but lands cannot *properly* be said to be appurtenant to a messuage. 1 *Lill. Abr.* 91. And one messuage cannot be appurtenant to another. *Ibid.* Lands cannot, in the true sense of the words *cum pertinentiis*, be appurtenant to the house; but the word *pertinens* may be taken in the sense of usually letten or occupied with the house. *Plowd.* 170. See *Cro. El.* 704. *contrà;* but it

seems now settled, that lands will not pass by the word *appurtenances*, but only such things which do properly belong to the house. *Palm.* 375. *Godb.* 352. *S. C. Cro. Car.* 57. *Hutt.* 85. *S. C. Lit. Rep.* 8. *S. C.*

Lands, a common, &c. may be appurtenant to a house; though not a way. 3 *Salk.* 40. Grant of a manor, without the words *cum pertinentiis*, it is said will pass all things belonging to the manor. *Owen's Rep.* 31. Where a person hath a messuage, &c. to which estovers are *appurtenant*, and it is blown down or burnt by the act of God; if the owner re-edify it, in the same place and manner as before, he shall have the ancient appurtenances. 4 *Rep.* 86. A turbary may be appurtenant to a house; so a seat in a church, &c. but not to land; for the things must agree in nature and quality. 3 *Salk.* 40. Vide tit. *Appendant*, and see *Plo. Com.* 103 *b.* 104 *b.* 170. Also vide *Com. Dig.* (1 V.) tit. *Appendant* and *Appurtenant*.

AQUÆ DUCTUS, AQUÆ HAUSTUS.] Two servitudes, the former consists in a right of carrying a water-course through the grounds of another; the latter, of watering cattle at a river, well, or pond. *Scotch Dict.*

AQUAGE, aquagium, *quasi aquæ agium*, i. e. *aquæductus* & aquægangium.] A water-course.——In some instances used for toll paid for water-carriage. See *Ewage.*

ARACE, *angl.*] To rase or erase, from the French *arracher, evellere. Blount.*

ARAHO, *In araho conjurare*, i. e. To make oath in the church, or some other holy place; for, according to the *Ripuarian* laws, all oaths were made in the church upon the relicks of saints. *Spelm.*

ARATIA. Arable grounds. *Cowel.*

ARATRUM TERRÆ. As much land as can be tilled with one plough.—*Aratura terræ* is the service which the tenant is to do for his lord in ploughing his land. See *Arrura.* A plough gate is said to consist of eight oxgates of land, because anciently the plough was drawn with eight oxen. *Scotch Dict.*

ARBITRATION, ARBITRATOR, and ARBITRAMENT. See tit. *Award.*

ARCA CYROGRAPHICA, *sive cyrographorum Judæorum.* This was a common chest, with three locks and keys, kept by certain Christians and Jews, wherein all the contracts, mortgages, and obligations belonging to the Jews were kept, to prevent fraud; and this by order of K. Rich. I. *Hoveden's Annals, p.* 745.

ARCHBISHOP, *archiepiscopus.*] The chief of the clergy in his province. See title *Bishops.*

ARCHDEACON, *archidiaconus.*] Is one that hath ecclesiastical dignity, and jurisdiction over the clergy and laity, next after the bishop, throughout the diocese, or in some part of it only. *Archdeacons* had anciently a superintendant power over all the parochial clergy in every deanery in their precincts; they being the chiefs of the deacons; though they have no original jurisdiction, but what they have got is from the bishop, either by prescription or composition; and Sir Simon Degg tells us, that it appears an *archdeacon* is a mere substitute to the bishop; and what authority he hath is derived from him, his chief office being to visit and inquire, and *episcopo nunciare, &c.* In ancient times *archdeacons* were employed in servile duties of collecting and distributing alms and offerings; but at length, by a personal attendance on the bishops, and a delegation to examine and report some causes, and commissions to visit the remoter parts of the dioceses, they became, as it were, overseers of the church; and, by degrees, advanced into considerable dignity and power. Lanfranc, archbishop of Canterbury, was the first prelate in England who instituted an *archdeacon* in his diocese, which was about the year 1075. And an *archdeacon* is now allowed to be an ordinary, as he hath a part of the episcopal power lodged with him. He visits his jurisdiction once every year: and he hath a court, where he may inflict penance, suspend, or excommunicate persons, prove wills, grant administrations, and hear causes ecclesiastical, &c. subject to appeal to the bishop of the diocese, under stat. 24 *Hen.* 8. *c.* 12. It is one part of the office of an *archdeacon* to examine candidates for holy orders, and to induct clerks within his jurisdiction, upon receipt of the bishop's mandate. 2 *Cro.* 556. 1 *Lev.* 193. *Wood's Inst.* 30.

Archdeaconries are commonly given by bishops, who do therefore prefer to the same by collation: but if an archdeaconry be in the gift of a layman, the patron doth present to the bishop, who institutes in like manner as to another benefice; and then the dean and chapter do induct him, that is, after some ceremonies place him in a stall in the cathedral church to which he belongeth, whereby he is said to have a place in the choir. *Wats. c.* 15.

Archdeacons, by stat. 13 & 14 *Car.* 2. *c.* 4. are to read the Common Prayer and declare their assent thereunto, as other persons admitted to ecclesiastical benefices; and also must subscribe the same before the ordinary; but they are not obliged by stat. 13 *Eliz. c.* 12. to subscribe and read the thirty-nine articles; for although an archdeaconry be a benefice with cure, yet it is not such a benefice with cure as seems to be intended by that statute, which relates only to such benefices with cure as have particular churches belonging to them. *Wats. c.* 15. And they are to take the oaths at the sessions, as other persons qualifying for offices.

The judge of the archdeacon's court (where he doth preside himself) is called the official. *Wood's Inst.* 30.

Where the archdeacon hath a peculiar jurisdiction, he is totally exempt from the power of the bishop, and the bishop cannot enter there, and hold court; and in such case, if the party who lives within the peculiar be sued in the bishop's court, a prohibition shall be granted; for the statute intends that no suit shall be *per saltum;* but if the archdeacon hath not a peculiar, then the bishop and he have a concurrent jurisdiction, and the party may commence his suit either in the archdeacon's court or the bishop's, and he hath election to choose which he pleaseth: and if he commence in the bishop's court, no prohibition shall be granted; for if it should, it would confine the bishop's court to determine nothing but appeals, and render it incapable of having any causes originally commenced there. *L. Raym.* 123.

An archdeacon is a ministerial officer, and cannot refuse a churchwarden elected by the parish. *Rex* v. *Martin Rice. L. Raym.* 138.

ARCHERY. A service of keeping a bow, for the use of the lord to defend his castle. *Co. Lit. sect.* 157.

ARCHES COURT, *curia de arcubus.*] The chief and most ancient consistory court belonging to the archbishop of Canterbury for the debating of spiritual causes. It is so called from the church in London, commonly called St. Mary Le Bow, *(de Arcubus)* where it was formerly held; which church is named Bow Church from the steeple which is raised by pillars, built *archwise*, like so many bent bows. *Cowel.*

The judge of this court is stiled the Dean of the *Arches*, or Official of the *Arches court;* he hath extraordinary jurisdiction in all ecclesiastical causes, except what belong to the prerogative court; also all manner of appeals from bishops or their chancellors or commissaries, deans and chapters, archdeacons, &c. first or last are directed hither: he hath ordinary jurisdiction throughout the whole province of Canterbury, in case of appeals; so that upon any appeal made, he, without any farther examination of the cause, sends out his citation to the appellee, and his inhibition to the judge from whom the appeal was made. Of this, see more 4 *Inst.* 337. But he cannot cite any person out of the diocese of another, unless it be on appeal, &c. *Stat.* 23 *H.* 8. *c.* 9.

In another sense the dean of the *arches* has a peculiar juris-

diction of thirteen parishes in London, called a deanery, (being exempt from the authority of the bishop of London) of which the parish of Bow is the principal. The persons concerned in this court, are the judge, advocates, registers, proctors, &c. And the foundation of a suit in these courts, is a citation for the defendant to appear; then the libel is exhibited, which contains the action, to which the defendant must answer; whereupon the suit is contested, proofs are produced, and the cause determined by the judge, upon hearing the advocates on the law and fact; when follows the sentence or decree thereupon.

This court, as also the court of peculiars, the admiralty court, the prerogative court, and the court of delegates, (for the most part,) are now held in the hall belonging to the college of Civilians, commonly called Doctors Commons. *Floy.* 21.

From this court the appeal is to the king in chancery; by stat. 23 *Hen.* 8. *c.* 19.

ARCHIVES, *Archiva*, from *arca*, a chest.] The Rolls, or any place where ancient records, charters, and evidences, belonging to the crown and kingdom are kept; also the Chancery, Exchequer-office, &c. And it hath been sometimes used for repositories in libraries.—It is used in common speech for the records themselves.

ARENTARE. To rent out, or let at a certain rent. *Consuetud. Domûs de Farendon, MS. fol.* 53.

ARERIESMENT. Surprise, affrightment.—To the great *areriesment* and *estenysement* of the common law. *Rot. Parl.* 21 *Ed.* 3.

ARGENTUM ALBUM. Silver coin, or pieces of bullion that anciently passed for money. See *Alba Firma.*

ARGENTUM DEI. God's money; i. e. money given in earnest upon the making of any bargain; hence comes *arles*, earnest.

ARGIL, or ARGOIL. Clay, lime, and sometimes gravel; also the lees of wine, gathered to a certain hardness. *Law Fr. Dict.*

ARGUMENTOSUS, *ingenious*, mentioned by our historian Neubrigensis, *Lib.* 1. *c.* 14.

ARIERBAN. The edict of the ancient French and German kings, &c. commanding all their tenants to come into the army; if they refuse, then to be deprived of their estates.—See *Spelm.* in v. *Aribannum, &c.*

ARIETUM LEVATIO. An old sportive exercise, supposed to be the same with running at the *quintain*. See *Steevens's Shakspeare*, edit. 1793, vol. vi. p. 27. 175.

ARMA DARE. To dub or make a knight. Arma *capere*, or *suscipere*, to be made a knight. *Kennet's Paroch. Antiq. p.* 288. *Walsingham, p.* 507. The word *arma*, in these places, signifies only a sword; but sometimes a knight was made by giving him the whole armour. *Ordericus Vitalis, lib.* 8. *de Henrico, &c.*

ARMA LIBERA. A sword and a lance which were usually given to a servant when he was made free. *Leg. Will. cap.* 65.

ARMA MOLUTA. Sharp weapons that cut, opposed to such as are blunt, which only break or bruise. *Bract. lib.* 3. They are called *arma emolita* by *Fleta, lib.* 1. *c.* 33. *par.* 6.

ARMA REVERSATA. A punishment when a man was convicted of treason or felony: thus our historian Knighton, speaking of Hugh Spencer, tells us, *Primo vestierunt eum uno vestimento cum* armis *suis* reversatis. *Lib.* 3. *p.* 2546.

ARMARIA. Vide *Almaria.*

ARMIGER, *Esquire.* A title of dignity belonging to such gentlemen as bear arms: and these are either by *curtesy*, as sons of noblemen, eldest sons of knights, &c. Or by *creation*, such as the king's servants, &c. The word *armiger* has been also applied to the higher servants in convents. *Paroch. Antiq.* 576. See title *Esquire*, and *Spelman* in v.

ARMISCARA, Is a sort of punishment decreed or imposed on an offender by the judge. *Malmsb. lib.* 3. *p.* 97. *Walsingham, p.* 430. At first it was to carry a saddle at his back, in token of subjection. Brampton says, that, in the year 1176, the king of the Scots promised king Hen. 2. at York, *Lanceam & sellam suam super altare Sancti* Petri *ad perpetuam hujus subjectionis memoriam offerre.* See *Spelm.* in v.

ARMORIAL BEARINGS. By various acts, 38 *Geo.* 3. *c.* 53. 39 *Geo.* 3. *c.* 8. 41 *Geo.* 3. (U. K.) *c.* 69. 43 *Geo.* 3. *c.* 161. the last of which only is at present in force, a duty, (now under the management of commissioners of taxes) is imposed on *armorial bearings*, whether borne on plate or carriages, &c.

ARMOUR and ARMS. In the understanding of law, are extended to any thing that a man wears for his defence, or takes into his hands, or useth in anger, to strike or cast at another. *Comp. Just.* 65. *Arms* are also what we call in Latin *insignia*, ensigns of honour; as to the original of which, it was to distinguish commanders in war; for the ancient defensive *armour* being a coat of mail, &c. which covered the persons, they could not be distinguished, and therefore a certain badge was painted on their shields, which was called *arms;* but not made hereditary in families till the time of king Rich. I. on his expedition to regain Jerusalem from the Turks: and, besides shields with *arms*, they had a silk coat drawn over their *armour*, and afterwards a stiff coat, on which their *arms* were painted all over, now the herald's coat of *arms. Sid.* 352.

By stat. 13 *R.* 2. *st.* 1. *c.* 2. The constable (Lord High Constable) shall have cognizance of contracts touching deeds of arms done out of the realm; but it seems he cannot punish for painting coats of arms, &c. See 2 *Hawk. P. C. c.* 4. § 5—8. and this Dict. tit. *Constable.*

By the common law it is an offence for persons to go or ride *armed* with dangerous and unusual weapons: but gentlemen may wear common *armour*, according to their quality, &c. 3 *Inst.* 160.

By stat. 7 *E.* 1. *st.* 1. the king may prohibit force of *arms*, and punish offenders according to law; and herein every subject is bound to be aiding. And by stat. 2 *E.* 3. *c.* 3. enforced by stats. 7 *R.* 2. *c.* 13. and 20 *R.* 2. *c.* 1. None shall come with *force* and *arms* before the king's justices, nor ride, nor go *armed*, in affray of the peace, on pain to forfeit their *armour*, and suffer imprisonment, &c.

Under these statutes none may wear (unusual) armour publicly, upon pretence of protecting his *person;* but a man may assemble his neighbours to protect his *house* without transgressing the act. 1 *Hawk. P. C.* 267. But no wearing of arms is within the stat. unless they are such as terrify, therefore the weapons of fashion, as swords, &c. or privy coats of mail, *may* be worn. *Id. ib.* And one may arm to suppress riots or dangerous insurrections. *Id.* 268.

By the Bill of Rights, 1 *W. & M. st.* 2. *c.* 2. it is declared that "the subjects which are Protestants, may have arms for their defence suitable to their conditions, as allowed by law." See stat. 33 *H.* 8. *c.* 6. and tit. *Game* and *Constable* III. 2.

Embezzling the king's armour is felony; stat. 31 *Eliz. c.* 4. Armour may be exported, unless prohibited by proclamation; stat. 12 *Car.* 2. *c.* 4. Importing arms or ammunition prohibited; 1 *Jac.* 2. *c.* 8.

By 47 *Geo.* 3. *st.* 2. *c.* 54. *&* 50 *Geo.* 3. *c.* 109. to prevent improper persons from having arms in Ireland; all persons keeping arms shall be licensed, and when required shall deliver up their arms to be placed in the public stores. These acts are temporary. And see 36 *Geo.* 3. *c.* 42. (Irish act) and 49 *Geo.* 3. *c.* 76. as to importation and exportation of arms in Ireland.

By 53 *Geo.* 3. *c.* 115., 55 *Geo.* 3. *c.* 59.; regulations are made for insuring the careful manufacture of fire-arms in England, and making provision for proving the barrels thereof.

ARNALDIA, *Arnoldia.*] A disease that makes the hair fall off like the *alopecia*, or like a distemper in foxes. *Rog. Hoveden*, *p.* 693.

ARNALIA, *Arable grounds.* This word is mentioned in *Domesday*, tit. *Essex.*

AROMATARIUS, *Latin.*] A word often used for a *grocer*, but held not good in law proceedings. 1 *Vent.* 142.

ARPEN, or *Arpent.* An acre or furlong of ground: and according to the old French account in Domesday-book, 100 perches make an *arpent.* The most ordinary acre, called *l'arpent de France*, is one hundred perches square; but some account it but half an acre.

ARPENTATOR. A measurer or surveyor of land.

ARQUEBUSS, Fr. *Arquebuse.*] A short hand gun, a caliver, or pistol; mentioned in some of our ancient statutes. *Law Fr. Dict.*

ARRACK. A duty and excise is payable for *arrack* imported from the East Indies. See tit. *Navigation Acts.*

ARRAIATIO PEDITUM, Is used in *Pat.* 1 *Ed.* 2. for the *arraying* of foot soldiers.

ARRAIERS, *Arraitores.*] Such officers as had the care of the soldiers' *armour*, and whose business it was to see them duly accoutred. In several reigns commissioners have been appointed for this purpose.

ARRAIGN, from the Fr. *arranger*, To set a thing in order; hath the same signification in law: but the true derivation is from the French *arraisonner*, i. e. *ad rationem ponere.*] To call a man to answer in form of law. A prisoner is *arraigned*, when he is indicted and brought to trial: and to *arraign* a writ of assise, is to cause the demandant to be called to make the plaint, in such manner as the tenant may be obliged to answer. *Co. Lit.* 262. But no man is properly *arraigned* but at the suit of the king, upon an indictment found against him, or other record wherewith he is to be charged; and this *arraignment* is to take care that the prisoner do appear to be tried and hold up his hand at the bar, for the certainty of the person, and plead a sufficient plea to the indictment. *Co. Lit.* 262, 263.

The prisoner is to hold up his hand only in treason and felony; but this is merely a ceremony: if he owns that he is the person, it is sufficient without it; and then upon his *arraignment* his fetters are to be taken off; and he is to be treated with all the humanity imaginable. 2 *Inst.* 315. 3 *Inst.* 35.—A peer need not hold up his hand. 4 *St. Trials*, 211. 508.

Prisoners are now generally tried in their irons, because taking them off is usually attended with great pain and trouble.

An attainder of high treason has been reversed for the omission of an arraignment. 2 *Hawk. P. C.* 438. which see for further matter as to *Arraignment.*

If in action of slander for calling one thief, the defendant justifies that the plaintiff stole goods, and issue is thereon taken; if it be found for the defendant in B. R. and for felony in the same county where the court sits, or before justices of assise, &c. he shall be forthwith *arraigned* upon this verdict of twelve men, as on an indictment. 2 *Hale's Hist. P. C.* 151.

The pleas upon *arraignment* are either the general issue, Not guilty; plea in abatement, or in bar; and the prisoner may demur to the indictment; he may also confess the fact, but then the court has nothing more to do than to proceed to judgment against him.

For the solemnity of the *arraignment* and trial of a prisoner, see *Dalt. Chap.* 185. *p.* 515.

ARRAY, *arraya* sive *arraiamentum.*] An old French word, signifying the ranking or setting forth of a jury of men impanelled upon a cause. And when we say to *array* a panel, that is, to set forth the men impanelled one by another. *F. N. B*, 157. *To challenge the array* of the panel, is at once to except against all the persons *arrayed* or impanelled, in respect of partiality, &c. *Co. Lit.* 156. If the sheriff be of affinity to either of the parties; or if any one or more of the jurors are returned at the nomination of either party; or for any other partiality; the *array* shall be *quashed.* The word *array* also relates, in a particular manner, to military order, as to conduct persons armed, &c. *Stat.* 13 & 14 *Car.* 2. *cap.* 3.

ARREARS or ARREARAGES, *arreragia*, from the French *arriere*, *retro*, behind.] Money unpaid at the due time, as rent behind; the remainder due on an account; or a sum of money remaining in the hands of an accountant.

ARRECTATUS. One suspected of any crime. *Offic. Coronat. Spelm. Gloss.*

ARRECTED; reckoned, considered. 1 *Inst.* 173 *b.* & *n.*

ARRENATUS, *arraigned*, accused. *Rot. Parl.* 21 *Ed.* 1.

ARRENTATION, from the Spanish *arrendar*, *ad certum redditum dimittere.*] The licensing the owner of lands in the forest, to inclose them with a low hedge and small ditch, according to the assise of the forest, under a yearly rent: *saving the arrentations* is saving a power to give such licences. *Ordin. Forestæ*, 34 *Ed.* 1. *st.* 5.

ARREST, *arrestum* from the Fr. *arrêter*, to stop, or stay.] A restraint of a man's person, obliging him to be obedient to the law: and it is defined to be the execution of the command of some court of record or officer of justice. An *arrest* is the beginning of imprisonment, where a man is first taken, and restrained of his liberty, by power or colour of a lawful warrant: also it signifies the decree of a court, by which a person is *arrested.* 2 *Shep. Abr.* 299.

ARRESTS *are either in* civil or criminal *cases.*

An arrest in a *civil cause* is defined to be the apprehending or restraining one's person by process in execution of the command of some court, or officers of justice. *Wood's Inst.* 575.

There are several statutes, securing the liberty of the subject, against unlawful arrests and suits. See *Magna Charta*, *c.* 29. 3 *Ed.* 1. *c.* 35. and see tit. *Barrator.*

Some persons are also privileged from arrests, viz. peers of the realm, members of parliament, peeresses by birth, (1 *Inst.* 131. 2 *Inst.* 50. 4 *Bacon's Abr.* 228.) peers of Scotland, (2 *Stra.* 990.) a peeress by marriage, (*Co. Lit.* 16. 6 *Co.* 53. *Dyer* 79.) members of convocation actually attending thereon, (*St.* 8 *H.* 6. *c.* 1.) bishops, ambassadors, or the domestic servant of an ambassador, *really and bonâ fide in that capacity*, (*St.* 7 *Ann. c.* 12. 3 *Wils.* 32. 2 *Str.* 797. 2 *Ld. Raym.* 1521. 4 *Burr.* 2016, 17. 3 *Burr.* 1676.) the king's servants, (1 *Raym.* 152. 8 *Mod.* 12.) marshal, warden of the Fleet, (1 *Vent.* 65.) clerks, attornies, and all other persons attending the courts of justice, (4 *Inst.* 72. 2 *Inst.* 551. 12 *Mod.* 168. 11 *E. R.* 439. 1 *H. Bl. c.* 636. 1 *Mau. & Sel. Rep.* 638.) clergymen performing divine service, and not merely staying in the church with a fraudulent design, (*Stats.* 50 *E.* 3. *c.* 5. 1 *R.* 2. *c.* 16.) suitors, (*Bro. Privil.* 57.) witnesses subpœnaed, and other persons necessarily attending any court of record upon business, (*Sir T. Raym.* 101. 1 *Vent.* 11. *Rules in Chan.* 217. 3 *Inst.* 141.) A bankrupt coming to surrender, or within forty-two days after his surrender, (*St.* 5 *Geo.* 2. *c.* 30. § 5. and see *Coup.* 156. but not an extent at the suit of the crown, 2 *Bl. Rep.* 1142.) witnesses properly summoned before commissioners of bankrupt, or other commissioners under the great seal, (1 *Atk.* 54.) but not creditors coming to prove their debts, (4 *Term. Rep.* 377.) heirs, executors, or administrators, *R. M.* 1654. except on personal contracts by themselves, (1 *T. Rep.* 716.) or in cases of *devastavit*, (1 *Salk.* 98.) sailor or volunteer soldier: (unless the debt is twenty pounds,) *Stat.* 1 *Geo.* 2. *c.* 14. § 13. 31 *Geo.* 3. *c.* 13. § 65. See *Barnes* 114. 1 *Str.* 2. 7. 1 *Black Rep.* 29, 30.—Officers of courts are allowed these privileges only where they sue or are sued in their own right; not if as executors or administrators, nor in joint actions. *Hob.* 177. *Dyer* 24. *p.* 150. 2 *Sid.* 157. *Latch.* 199. *Godb.* 10. 2 *Rol. Abr.* 274. See

3 *Comm. c.* 19. *p.* 289. that no arrests can be made in the king's presence, &c.

But this privilege does not extend to Irish or other *foreign peers*, (2 *Inst.* 48. 3 *Inst.* 70.) or to *peeresses by marriage*, if they afterwards intermarry with commoners. *Co. Lit.* 16. 2 *Inst.* 50. 7 *Co.* 15, 16.

And though the *servants* of *peers necessarily employed* about their persons and estates, could not formerly be arrested; (2 *Str.* 1065. 1 *Wils.* 278.) yet this privilege seems to have been taken away by the stat. 10 *Geo.* 3. *c.* 50. § 2.

A person who has been appointed his majesty's coachman, and who is liable to be called upon to act in that quality, is not liable to be arrested, although he publicly carries on trade, and the debt was contracted in the course of such business. 2 *W. P. T.* 167.

*Members of corporations aggregate*, and *hundredors*, not being liable to a *capias*, cannot be arrested in their corporate capacity, or on the statutes of hue and cry, &c. *Bro. tit. Corp.* 43. 3 *Keb.* 126, 7. Corporations must be made to appear by *distringas*. *Finch* 353. 3 *Salk.* 46.

In an action against *husband and wife*, the husband alone is liable to be arrested, and shall not be discharged until he have put in bail for himself and wife; 1 *Vent.* 49. 1 *Mod.* 8.; and if she is arrested, she shall be discharged on common bail. 1 *Term. Rep.* 486. 1 *Salk.* 115. See tit. *Bail.*

A clerk of the court ought not to be arrested for any thing which is not criminal, because he is supposed to be always present in court to answer the plaintiff. 1 *Lill.* 94. Arrests are not to be made within the liberty of the king's palace: nor may the king's servants be *arrested* in any place without notice first given to the lord chamberlain, that he remove them, or make them pay their debts. Vide tit. *Ambassador.*

There is this difference between arrests in civil and criminal cases; that none shall be arrested for debt, trespass, &c. or other cause of action, but by virtue of a precept or commandment out of some court: but for treason, felony, or breach of the peace, any man may arrest without warrant or precept. *Terms de Ley* 54.

The abuses of gaolers and sheriffs' officers towards their prisoners are well restrained and guarded against by stat. 32 *Geo.* 2. *c.* 28.; the chief provisions of which are, that an officer shall not carry his prisoner to any tavern, &c. without his consent, nor charge him for any liquor but such as he shall freely call for, nor demand for caption or attendance any other than his legal fee, nor exact any gratuity-money, nor carry his prisoner to gaol within twenty-four hours after his arrest, unless the prisoner refuses to go to some safe house (except his own) *of his own choosing*. Nor shall any officer take for the diet, lodging, or expences of his prisoner more than shall be allowed by an order of sessions. Bailiffs to show a copy of the act to prisoners, and to permit perusal thereof; and the prisoner to send for his own victuals, bedding, &c.

Sheriffs and their officers to take no reward for doing their office but according to law. *Stats.* 3 *E.* 1. *c.* 26. 20 *E.* 3. *c.* 6. 1 *H.* 4. *c.* 11. *Co. Lit.* 368. 23 *H.* 6. *c.* 9. *Plowd.* 465.

The fees now allowed by the Master for arrests on mesne process in town are 10*s.* 6*d.* on capias, bill lattitat, &c. and 1 guinea if by original, and also in the country 1 guinea and 1*s.* per mile. *Impey's Sheriff* 122.

By stat. 29 *Car.* 2. *c.* 7. No writ, process, warrant, &c. (except in cases of treason, felony, or for breach of the peace) shall be served on a Sunday; on pain that the person serving them shall be liable to the suit of the party grieved, and answer damages, as if the same had been done without writ; an action of false imprisonment lies for arrest on a Sunday, and the arrest is void. 1 *Salk.* 78. A defendant was arrested on a Sunday by a writ out of the Marshalsea; and the court of B. R. being moved to discharge him, it was denied; and he was directed to bring action of false imprisonment. 5 *Mod. Rep.* 95. The defendant being taken upon a Sunday, without any warrant, and locked up all that day; on Monday morning a writ was got against him, by which he was arrested; it was ruled, that he might have an action of false imprisonment, and that an attachment should go against those who took him on the Sunday. *Mod. Cas.* 96. Attachments have been often granted against bailiffs for making arrests on Sunday: but affidavit is usually made, that the party might be taken upon another day. 1 *Mod.* 56. A person may be retaken on a Sunday, where arrested the day before, &c. *Mod. Cas.* 231: And a man may be taken on a Sunday on an escape warrant: or on fresh pursuit when taken the day before. 2 *Ld. Raym.* 1028. 2 *Salk.* 626. when he goes at large out of the rules of the King's Bench or Fleet prison, &c. *Stat.* 5 *Ann. c.* 9. Also bail may take the principal on a Sunday, and confine him till Monday, and then render him. 1 *Atk.* 239. 6 *Mod.* 251. A party cannot be arrested on a Sunday on an attachment for non-performance of an award, it being only in the nature of a civil execution. 1 *T. Rep.* 266. denies 1 *Atk.* 581.

By stat. 11 & 12 *W.* 3. *c.* 9. No person is to be held to bail in Wales on process out of the courts at Westminster for less than 20*l.*

By stats. 12 *Geo.* 1. *c.* 29. and 5 *Geo.* 2. *c.* 27. both made perpetual by stat. 21 *Geo.* 2. *c.* 3. No person can be arrested or held to bail, on a writ sued out of the *superior* courts, unless the cause of action be 10*l.* or upwards.

And by stat. 19 *Geo.* 3. *c.* 70. No person can be *arrested* or held to bail upon process out of any *inferior* court for less than 10*l.* but proceedings are to be had in inferior courts according to the directions of 12 *Geo.* 1. *c.* 29. extended by 19 *Geo.* 3. to debts under 10*l.* See also 38 *Geo.* 3. *c.* 1.

By § 3 of 19 *Geo.* 3. *c.* 70. so much of all acts of parliament for the recovery of debts within certain districts, as gives power to *arrest debtors* for less than 10*l.* is repealed. And by § 4. when final judgment is obtained in such suits, and defendant cannot be found within the jurisdiction, the superior courts may issue execution.

Provisions of 19 *Geo.* 3. *c.* 70. respecting actions for sums less than 10*l.* extended to sums under 15*l.* (except upon bills of exchange, &c.) and so much of acts for the recovery of debts within certain districts, as authorises arrests when the cause of action is less than 15*l.* repealed; 51 *Geo.* 3. *c.* 124. § 3.

By 43 *Geo.* 3. *c.* 46. for the more effectual prevention of frivolous and vexatious arrests, &c. no person shall be arrested (in England or Ireland) except where the case of action originally required bail, § 1. The defendant on an arrest may deposit the amount of the debt with the sheriff, and 10*l.* to answer the costs; which deposit shall be paid into court, and on the defendant's perfecting bail repaid him; or if bail is not put in shall be paid over to the plaintiff, § 2. The plaintiff shall not be entitled to costs, if he does not recover the amount of the sum for which defendant was held to bail, &c. § 3.—Nor to costs on action on the judgment, unless by order of the court, § 4. The defendant may justify bail on mesne process in vacation, § 6.

By 37 *Geo.* 3. *c.* 45. (for the restraining of payments in cash by the bank of England, and amended by 43 *Geo.* 3. *c.* 18. and continued by several subsequent acts to 5 July, 1818,) No person to be held to special bail, unless affidavit required to be made by 12 *Geo.* 1. *c.* 29. also add that there had been no offer to pay in bank notes, or partly in notes and partly in cash, otherwise proceedings to be had as if no affidavit had been made to hold to special bail.

No person shall be held to special bail or arrested (in England) when the cause of action shall not have originally amounted to 15*l.* or upwards, exclusive of costs; except upon bills of exchange, &c. 51 *Geo.* 3. *c.* 124. *s.* 1.

By 43 *Geo.* 3. *c.* 53. None shall be held to bail in the supe-

rior courts in Ireland under 10*l.* nor in the inferior courts under 40*s.*

In trover the defendant may be held to bail of course. 2 *Str.* 1122. *Comp.* 529. For this is more an action of property than a *tort*. 1 *Wils.* 23.

In an action of debt on a judgment, whether after verdict or by default, defendant cannot be arrested if he was previously held to bail in the original action. *Say.* 160.

Bail cannot be had in an action on the *second judgment*, where bail has been given on the first. 2 *Str.* 782.

In what cases special bail shall be required. See tit. *Bail.*

Formerly one great obstruction to public justice, civil as well as criminal, was the number of privileged places, such as the Mint, Savoy, &c. under pretence of their being ancient palaces; but the sanctuaries for iniquity are now abolished, and the opposing any process therein is made highly penal by stat. 8 & 9 *W.* 3. *c.* 27. § 15. 9 *Geo.* 1. *c.* 28. § 1. and 11 *Geo.* 1. *c.* 22.; by which persons opposing the execution of process, or abusing the officer, if he receives any bodily hurt, are declared guilty of felony. See title *Privileged Places.*

When a person is apprehended for debt, &c. he is said to be arrested; and writs express *arrest* by two several words *capias* and *attachias*, to take and catch hold of a man; for an officer must actually lay hold of a person besides saying he arrests him, or it will be no lawful arrest. 1 *Lill. Abr.* 96. If a bailiff be kept off from making an arrest, he shall have an action of assault: and where the person arrested makes resistance, or assaults the bailiff, he may justify beating of him. If a bailiff *touches* a man which is an *arrest*, and he makes his escape, it is a rescous, and attachment may be had against him. 1 *Salk.* 79. If a bailiff lays hold of one by the hand, (whom he had a warrant to arrest) as he holds it out at the window, this is such a taking of him, that the bailiff may justify the breaking open of the house to carry him away. 1 *Vent.* 306.

When a person has committed treason or felony, &c. doors may be broke open to arrest the offender; but not in civil cases, except it be in pursuit of one arrested; or where a house is recovered by real action, or in ejectment, to deliver possession to the person recovering. *Plowd.* 5 *Rep.* 91. Action of trespass, &c. lies for breaking open a house to make arrest in a civil action. *Mod. Cas.* 105. But if it appears a bailiff found an outer door, &c. open, he may open the inner door to make an arrest. *Comb.* 327.

In the case of *Lee* v. *General Gansel*, the court of King's Bench determined, that the chamber door of a lodger is not to be considered as his *outer* door; but that the street door being open, the officers had a right to force open the chamber door, the defendant being in the room, and refusing to open it. *Cowp.* 1.

Also it is enacted by 3 & 4 *Jac.* 1. *par.* 35. that upon any lawful writ, warrant, or process awarded to any sheriff or other officer, for the taking of any popish recusant, standing excommunicated for such recusancy, it shall be lawful, if need be, to break any house. 2 *Hawk. P. C. c.* 14. § 10.

But it hath been resolved, that where justices of peace are, by virtue of a statute, authorised to require persons to come before them to take certain oaths prescribed by such statute, the officer cannot lawfully break open the doors. 2 *Hawk. P. C. c.* 14. § 11.

An arrest in the night, as well as the day, is lawful. 9 *Rep.* 66. And every one is bound by the common law to assist not only the sheriff in the execution of writs, and making arrests, &c. but also his bailiff that hath his warrant to do it. 2 *Inst.* 193. A bailiff upon an arrest ought to show at whose suit, out of what court the writ issues, and for what cause, &c. *when the party arrested submits himself to the arrest:* a bailiff, sworn and known, need not show his warrant, though the party demands it; nor is any other special bailiff bound to show his warrant unless it be demanded. 9 *Rep.* 68, 69. *Cro. Jac.* 485. If an action is entered in one of the *compters* of London, a city serjeant may arrest the party without the sheriff's warrant. 1 *Lill. Abr.* 94. And by the custom of London, a debtor may be arrested before the money is due, to make him find sureties; but not by the common law. 1 *Nels. Abr.* 258.

If a wrong person is arrested; or one for felony, where no felony is done, &c. it will be false imprisonment.

By *Glynn*, Ch. J. *Mich.* 1658. If one be arrested by the sheriff of the county, within a liberty, without a *non omittas*, yet the arrest is good; for the sheriff is sheriff of the whole county, but the bailiff of the liberty may have his action against the sheriff, for entering of his liberty. But upon a *quo minus*, a sheriff may enter any liberty, and execute it *impunè*. *Pract. Leg.* 72.

A person superseded for want of being charged in execution within two terms after judgment, cannot be again arrested and taken in execution upon the same judgment. *Line* v. *Lowe.*—*Aliter* if superseded for want of proceeding in time before judgment. 7 *E. R.* 330.

With regard to arrests in *criminal cases*, it hath already been observed, that for *treason, felony, or breach of the peace*, any person may arrest without warrant or precept. But the king cannot command any one by word of mouth to be arrested; for he must do it by writ, or order of his courts, according to law: nor may the king arrest any man for suspicion of treason, or felony, as his subjects may; because, if he doth wrong, the party cannot have an action against him. 2 *Inst.* 186.

Arrests by *private persons* are in some cases *commanded*. Persons present at the committing of a felony must use their endeavours to apprehend the offender, under penalty of fine and imprisonment. 3 *Inst.* 117. 4 *Inst.* 177.

And for this cause, by the common law, if any homicide be committed, or dangerous wound given, whether with, or without malice, or even by misadventure or self-defence, in any town, or in the lanes or fields thereof, in the day-time, and the offender escape, the town shall be amerced, and if out of a town, the hundred shall be amerced. 3 *Inst.* 53.

And since the statute of Winchester, *c.* 5. which ordains that walled towns shall be kept shut from sun-setting to sun-rising; if the fact happen in any such town by night or by day, and the offender escape, the town shall be amerced. 3 *Inst.* 53.

And as private persons are bound to apprehend all those who shall be guilty of any of the crimes above-mentioned in their view, so also are they, with the utmost diligence, to pursue and endeavour to take all those who shall be guilty thereof, out of their view, upon a hue and cry levied against them. 3 *Inst.* 117.

Every private person is bound to assist an officer, requiring him to apprehend a felon.

As to the arresting of offenders by *private persons* of their own authority, *permitted* by law for the *prevention* of *treason* or *felony* only intended to be done; any one may lay hold of a person, whom he sees upon the point of committing treason, or felony, or doing an act which would manifestly endanger the life of another, and detain him, till it may be reasonably presumed he has changed his purpose. 2 *Hawk. P. C. c.* 12. § 19.

As to arrests for inferior offences, no private person can arrest another for a bare breach of the peace after it is over; but it is held, that a private man may arrest a night-walker, or a common cheat going about with false dice, and actually caught playing with them, in order to have him before a justice of peace; and the arrest of any other offenders, by private persons, for offences in like manner scandalous, and prejudicial to the public, seems justifiable. 2 *Hawk. P. C. c.* 12. § 20.

With regard to arrests by *public officers*, they may be made either with or without process.

Arrests without process may be made by *watchmen*, *constables*, *bailiffs of towns*, or *justices of peace*. For the power of *watchmen*, see *Stat. Winchester*, *c.* 4. It has been holden, that this statute was made in affirmance of the common law, and that every private person may by the common law arrest any *suspicious night-walker*, and detain him till he give a good account of himself. 2 *Hawk. P. C. c.* 13. § 6.

As to arrests by *Constables*, See tit. *Constable* III. 1, 2.

It is the better opinion at this day, that any constable, or even a private person to whom a warrant shall be directed from a justice of peace, to arrest a particular person for felony, or any other misdemeanor within his jurisdiction, may lawfully execute it, whether the person mentioned in it be, in truth, guilty or innocent; and whether he were before indicted of the same offence or not, and whether any felony were, in truth, committed or not: for however the justice himself may be punishable for granting such a warrant, without sufficient grounds, it is reasonable that he alone be answerable for it, and not the officer, who is not to examine or dispute the reasonableness of his proceeding. 2 *Hawk. P. C. c.* 13. § 11.

The doctrine of *general warrants* (i. e. to apprehend all the authors and publishers of libels, or generally all persons suspected of any particular crime, without mentioning the name of the person accused) seems exploded as illegal. See *Leach's Hawk. P. C.* 2. *c.* 13. § 10.; and the note there as to Wilkes's case. But it is to be observed that the term *general warrant* used by Hawkins in that place, does not seem to mean a warrant, without the name of the *party* being specified, but one which does not contain the specific *charge* against the party. See the case of *Money* v. *Leach*, and also 4 *Comm.* 65. 291.

The great point gained by these determinations, was the rescuing persons from the malice or ignorance of the *inferior* ministers of justice.

With regard to arrests by *bailiffs* of *towns*, their power is founded on the above-mentioned statute of *Winchester*, *c.* 4. And as to arrests by *justices* of *peace*, arrests by their command are either by word of mouth or by warrant.

A justice of peace may, by word of mouth, authorise any one to arrest another, who shall be guilty of an actual breach of the peace in his presence, or shall be engaged in a riot in his absence. 2 *Hawk. P. C. c.* 13. § 14. *Dalt. c.* 117.

And a justice of peace may lawfully grant a warrant for apprehending or arresting persons charged with treason, felony, premunire, or any other offence against the peace; and generally, wherever a statute gives one or more justices of peace a jurisdiction over any offence, any one justice of peace may, by his warrant, cause such offenders to be arrested and brought before him. 2 *Hawk. P. C. c.* 13. § 15.

But it is said, that, anciently, no one justice of peace could legally make out a warrant for an offence against a penal statute, or other misdemeanor; cognizable only by a sessions of two or more justices; for that one single justice of peace hath no jurisdiction of such offence, and regularly those only who have jurisdiction over a cause, can award process concerning it. Yet the long, constant, universal, and uncontroled practice of justices of peace seems to have altered the law in this particular, and to have given them an authority, in relation to such arrests, not now to be disputed. *Ibid.* § 16.

A justice of peace may justify the granting a warrant for the arrest of any person upon strong grounds of suspicion of felony, or misdemeanor, but he seems to be punishable, as well at the suit of the king, as of the party grieved, if he grant any such warrant groundlessly or maliciously, without such a probable cause as might induce a candid and impartial man to suspect the party to be guilty. *Ibid.* § 18.

Every warrant ought to be under the hand and seal of the justice of peace, and specify the day it was made out: if it be for the peace or good behaviour, it is advisable to set forth the *special cause* upon which it is granted; but if it be for treason or felony, or other offences of an enormous nature, it is said that it is not necessary to set forth the special cause, and it seems to be rather discretionary than necessary to set it forth in any case. *Ibid.* § 21—25.

The warrant may be directed to the sheriff, bailiff, constable, or to any indifferent person by name, who is no officer; for, though the justice may authorise any one to be his officer, whom he pleases to make such, yet it is most advisable to direct to the constable of the precinct wherein it is to be executed; for that no other constable, and *à fortiori* no private person, is compellable to serve it. *Ibid.* § 27.

A bailiff or constable, if they be sworn, and commonly known to be officers, and act within their own precincts, need not show their warrant to the party, notwithstanding he demand the sight of it; but that these and all other persons whatsoever, making an arrest, ought to acquaint the party with the substance of their warrant; and all private persons to whom such warrants shall be directed, and even officers, if they be not sworn and commonly known, and even these, if they act out of their own precincts, must show their warrants, if demanded. *Ibid.* § 28.

And therefore stat. 27 *Geo.* 2. *c.* 20. provides, that in all cases where a justice is empowered, by statute, to issue a warrant of distress for levying a penalty, the officer executing such warrant, if required, shall show the same to the defendant, and suffer a copy to be taken.

The sheriff, having such warrant directed to him, may authorise others to execute it; but every other person, to whom it is directed, must personally execute it; yet, it seems, that any one may lawfully *assist* him. *Ibid.* § 29.

After presentment or indictment found in felony, &c. the first process is a *capias*, to arrest and imprison the offender; and if the offender cannot be taken, an exigent is awarded in order to outlawry. *H. P. C.* 209. For further matter, see tit. *Debtors.*

ARREST OF JUDGMENT. To move in *arrest of judgment*, is to show cause why judgment should be stayed, notwithstanding verdict given. Judgment may be arrested for good cause in criminal cases, as well as civil; if the indictment be insufficient, &c. 3 *Inst.* 210.

Arrests of judgment arise from intrinsic causes appearing upon the face of the record; for a judgment can never be arrested but for that which appears on the face of the record itself. *Ld. Raym.* 232. Motions in arrest of judgment may be made at any time before judgment signed. *Dougl.* 747. *Str.* 845. Sunday is no day, 4 *Burr.* 21. 30. nor a *dies non.* It is a rule to show cause, therefore needs no notice to be given, nor yet an affidavit to ground it on, as it arises out of the record; and after judgment upon demurrer, there can be no such motion made, as the court will not suffer any one to tell them that the judgment they gave on mature deliberation is wrong. It is otherwise indeed in the case of judgment by default, for that is not given in so solemn a manner; or if the fault arises on the writ of inquiry or verdict, for then the party could not allege it before. *Str.* 425.

It may be made after motion for a new trial discharged. *Dougl.* 716. 1 *Burr.* 334. and if arrested, each party pays his own costs. *Cowp.* 407.

After verdict a man may allege any thing in the record, in arrest of judgment, which may be assigned for error after judgment. 2 *Rol. Abr.* 716. And judgment after verdict shall not be arrested for an objection that would have been good on demurrer. 3 *Burr.* 1725. For further matter, see tit. *Amendment*, *Judgment*; and for causes of arrest of judgment, see 3 *Comm.* 393, 394. tit. *Judgment.*

ARREST OF ENQUEST is to plead in arrest of taking the en-

quest, upon the former issue, and to shew cause why an enquest should not be taken. *Bro.* tit. *Repleader.*

ARRESTANDIS BONIS NE DISSIPENTUR. A writ which lay for a man whose cattle or goods are taken by another, who, during the contest, doth or is like to make them away, not being of ability to render satisfaction. *Reg. Orig.* 126.

ARRESTANDO IPSUM QUI PECUNIAM RECEPIT, &c. Is a writ that lay for apprehending a person who hath taken the king's prest-money to serve in wars, and hides himself when he should go. *Reg. Orig.* 24.

ARRESTMENT, Is the command of a judge, discharging any person, in whose hands the debitor's moveables are, to pay or deliver up the same, till the creditor, who hath procured the arrestment to be laid on, be satisfied, either by caution or payment, according to the respective grounds of arrestment. *Scotch Dict.*—It is process in the nature of an attachment, whereby the person, in whose hands any part of the personal estate of the debtor is lodged, is enjoined (*i. e.* prohibited) from delivering or paying the same, till the creditor so *arresting* is paid, or the debtor gives security to answer the demand.

ARRESTMENT *jurisdictionis fundandæ causâ.* This arrestment is used to bring a foreigner under the jurisdiction of the courts of Scotland. A foreigner it is held owes no obedience to the decisions of those courts; and therefore unless either the person or the effects of the foreigner be within the jurisdiction of that court, the judgment of the court could receive no effect; it is therefore customary to grant a warrant for attaching the person of the foreigner, or for arresting his goods to the effect of founding a jurisdiction, and these can be removed only by finding caution, *(judicio sisti)* that the foreigner shall appear at all diets of court. *Scotch Dict.*

ARRESTO FACTO SUPER BONIS MERCATORUM ALIENIGENORUM. A writ that lay for a denizen against the goods of *aliens* found within this kingdom, in recompence of goods taken from him in a foreign country, after denial of restitution. *Reg. Orig.* 129. This the ancient civilians called *clarigatio;* but by the moderns it is termed *reprisalia.*

ARRETTED, *arrectatus, quasi, ad rectum vocatus.*] Is where a man is convened before a judge, and charged with a crime. *Staundf. Pl. Co.* 45. And it is sometimes used for imputed or laid unto; as no folly may be *arretted* to one under age. Littleton, cap. *Remitter.* Chaucer useth the verb *arretteth*, that is, lays blame, as it is interpreted. Bracton says, *ad rectum habere malefactorem*, i. e. to have the malefactor forth-coming, so as he may be charged, and put to his trial. *Bract. lib.* 3. *tract.* 2. *cap.* 10. And in another place, *rectatus de morte hominis*, charged with the death of a man.

ARRHÆ, Earnest, evidence of a completed bargain. In the Scotch law *dead-earnest*, is when the earnest is given by the purchaser over and above the price; where for instance it bears so small a proportion to the price that it is not presumed to be counted on, it is deemed dead-earnest, but where it is of greater consequence it may be understood to go into the price. *Scotch Dict.*

ARRIAGE and CARRIAGE were indefinite services formerly demandable from tenants; but by act 20 *Geo.* 2. *c.* 50. § 21, 22. all indefinite services are prohibited, and none can now be demanded but such as are enumerated in the lease, or in a writing apart. Mill-services continue on the former footing. See *Thirlage.*

ARROWS. By an ancient statute, all heads for *arrows* shall be well brazed, and hardened at the point with steel, on pain of forfeiture and imprisonment: and to be marked with the mark of the maker. *Stat.* 7. *H.* 4. *c.* 7.

ARRURA. In the black book of Hereford, *De Operationibus* Arruræ, signifies days' work of ploughing; for antiently customary tenants were bound to plough certain days for their lord. *Una arrura*, one day's work at the plough: and in Wiltshire, earing is a day's ploughing. *Paroch. Antiq. p.* 41. See *Aratrum terræ.*

ARSON, from *ardeo*, to burn.] House-burning, which is feleny at common law. 3 *Inst.* 66. It must be maliciously, voluntarily, and an actual burning: not putting fire only into a house, or any part of it, without burning; but if part of the house is burnt, or if the fire doth burn, and then goeth out of itself, it is felony. 2 *Inst.* 188. *H. P. C.* 85. and it must be the house of another; for if a man burns his own house only, though with intention to burn others, it was not at common law felony, but a great misdemeanor, punishable with fine, pillory, &c. But a pauper may be guilty of this offence by burning the public workhouse. *Leach's Hawk. P. C.* i. *c.* 39. § 3. and in note.

If a house is fired by negligence or mischance, it cannot amount to *arson.* 3 *Inst.* 67. *H. P. C.* 85. Where one burns the house of another, if it be not wilful and malicious, it is not felony, but only trespass: therefore if A. shoot unlawfully in a gun at the cattle or poultry of B., and by means thereof sets another's house on fire, this is not *arson;* for though the act he was doing was unlawful, yet he had no intent to burn the house. 1 *Hale's Hist. P. C.* 569. Stat. 23 *Hen.* 8. *c.* 1. takes away benefit of clergy from principals and accomplices burning dwelling-houses or barns where corn is. By stat. 43 *Eliz. c.* 13. to burn corn in the four northern counties is felony without clergy. And the stat. 22 & 23 *Car.* 2. *c.* 7. makes it felony to set barns, stables, stacks of corn, hay, &c. on fire in the night-time, or any out-houses or buildings: but the offender may be transported for seven years.

By 9 *Geo.* 1. *c.* 22. (made perpetual by 31 *Geo.* 2. *c.* 42.) setting fire to any house, barn, or out-house, or to any hovel, cock, mow, or stack of corn, straw, hay, or wood, or to rescue any offender, is made felony without benefit of clergy. *Leach's Hawk. P. C.* i. *c.* 58. *App.* 4. § 3. *Parcel* of corn not sufficient description. 4 *Comm.* 246 *n.*

As to other *malicious burnings*; by stat. 37 *H.* 8. *c.* 6. § 4. to burn any cart loaded with fuel, incurs 10*l.* penalty, and treble damages. By stat. 4 & 5 *W. & M. c.* 23. to burn the covert for red or black game, one month's imprisonment; and by stat. 28 *Geo.* 2. *c.* 19. to burn the covert for deer or game, a penalty between 40*s.* and 5*l.* By stat. 1 *Geo.* 1. *c.* 48. to burn any wood or coppice is felony. By stat. 10 *Geo.* 2. *c.* 32. to set fire to a coal mine, felony without clergy. By stat. 9 *Geo.* 3. *c.* 29. to burn any mill, felony without clergy, if prosecuted within eighteen months. See *Burning.*

The offence of *Arson* was denied the benefit of clergy, by stat. 21 *H.* 8. *c.* 1.; but that stat. was repealed by stat. 1 *E.* 6. *c.* 12.; and arson was afterwards held to be ousted of clergy, with respect to the principal offender, only by inference from the stat. 4 & 5 *P. & M. c.* 4.; which expressly denied it to the accessory before the fact: though now it is expressly denied to the principal in all cases within the stat. 9 *Geo.* 1. *c.* 22. 4 *Comm.* 223. which see, and *Leach's Hawk. P. C.* vol. i. and ii. and tit. *Burning.*

ARSER IN LE MAIN, Burning in the hand, is the punishment of criminals that have the benefit of clergy. *Terms de Ley.*

ARSURA. The trial of money by fire, after it was coined. In *Domesday* we read, *reddit* 50*l. ad* arsuram, which is meant of lawful and approved money, whose allay was tried by fire.

ART AND PART, Is a term used in Scotland and the north of England; when one charged with a crime, in committing the same, was both a contriver of, and acted his part in it.

ARTHEL. A British word, and more truly written *arddelw*, or, according to the south Welsh, *ardhel*, signifying to avouch: as if a man were taken with stolen goods in his hand,

he was to be allowed a lawful *arthel* (or vouchee) to clear him of the felony; it was part of the law of Howel Dha; according to whose laws every tenant, holding of any other than of the prince or the lord of the fee, paid a fine *pro defensione regiâ*, which was called *arian ardhel*. The privilege of *arthel* occasioning a delay and exemption of criminals from justice, provision was made against it by stat. 28 *H.* 8. *c.* 6. *Blount.*

ARTICLES, LORDS OF; These were a committee of the Scotch parliament, which in the mode of their election, and by the nature of their powers, were calculated to increase the influence of the crown, and to confer on his majesty a power equivalent to that of a negative before debate. At the Revolution this system appeared inconsistent with the freedom of parliament, and was declared a grievance by the Convention of Estates; 1689. *c.* 18. and was accordingly suppressed by the act 1690. *c.* 3. *Scotch Dict.*

ARTICLES OF ROUP. The conditions under which property is exposed to sale by auction. *Scotch Dict.*

ARTICULATE ADJUDICATION. A term in Scotch law. This is used where there are more debts than one due to the adjudging creditor, in which case it is usual to accumulate each debt by itself, so that in case of an error in ascertaining or calculating one of the debts, the error may not reach any other debt. *Scotch Dict.*

ARTICULI CLERI, *Articles of the Clergy.* Are statutes containing certain *articles* relating to the church and clergy, and causes ecclesiastical. 9 *E.* 2. *stat.* 1.

ARTICULUS. An *article* or complaint, exhibited by way of libel, in a court Christian. Sometimes the religious bound themselves to obey the ordinary, without such formal process. *Paroch. Antiq. p.* 344.

ARTIFICERS. See tit. *Manufactures* and *Manufacturers.*

A stranger, *artificer*, in London, &c. shall not keep above two strangers servants; but he may have as many English servants and apprentices as he can get, stat. 21 *H.* 8. *c.* 16. *Artificers* in wool, iron, steel, brass, or other metal, &c. persons contracting with them to go out of this kingdom into a foreign country, shall be fined not exceeding 100*l.* and be imprisoned three months: and English *artificers* going abroad, not returning in six months after warning given by our ambassadors, &c. shall be disabled to hold lands by descent or devise, be incapable to take any legacy, &c. and deemed aliens. *Stat.* 5 *Geo.* 1. *c.* 27.

By the stat. 23 *Geo.* 2. *c.* 13. persons convicted of seducing artificers in the manufactures of Great Britain or Ireland, out of the dominions of the crown of Great Britain, to forfeit 500*l.* and to be imprisoned for twelve months; for the second offence to forfeit 1000*l.* and be imprisoned two years. See also stat. 14 *Geo.* 3. *c.* 71. 15 *Geo.* 3. *c.* 5. and 21 *Geo.* 3. *c.* 37. by which heavy penalties are inflicted on masters of ships assisting in such seduction. See more fully title *Manufacturers.*

ARUNDEL. See *Honour.*

ARUNDINETUM. A ground or place where reeds grow. 1 *Inst.* 4. And it is mentioned in the book of *Domesday.*

ARVIL-SUPPER. A feast or entertainment made at funerals in the north part of England: *arvil bread* is the bread delivered to the poor at funeral solemnities. *Cowel.* And *arvil*, *arval*, *arfal*, are used for the burial or funeral rights.

ASCESTERIUM, *Archisterium*, *arcisterium*, *acisterium*, *alcysterium*, *architrium*, from the Greek.] A monastery. It often occurs in old histories. *Du Cange.*

ASPORTATION. See *Robbery*, *Felony.*

ASSACH, or *Assath*, Was a custom of purgation used of old in Wales, by which the party accused did clear himself by the oaths of 300 men. It is mentioned in ancient MSS. and prevailed till the time of *Hen.* 5. by which it is prohibited and punished. 1 *H.* 5. *c.* 6. *Spelm.* and see stat. 27 *H.* 8. *c.* 7.

ASSART, *Assartum*, from the Fr. *Assartir*, to make plain.] Assartum *est quod redactum est ad culturam.* Fleta, lib. 4. c. 21. And the word *assartum* is by Spelman derived from *exertum*, to pull up by the roots: for sometimes it is wrote *essart.* Others derive it from *exaratum* or *exartum*, which signifies to plow or cut up. Manwood, in his Forest Laws, says it is an offence committed in the forest, by pulling up the woods by the roots, that are thickets and coverts for the deer, and making the ground plain as arable land; this is esteemed the greatest trespass that can be done in the forest to vert or venison, as it contains in it waste and more; for whereas waste of the forest is but the felling down the coverts which may grow up again, *assart* is a plucking them up by the roots, and utterly destroying them, so that they can never afterwards spring up again. See the Red Book in the Exchequer. But this is no offence if done with licence; and a man may, by writ of *ad quod damnum*, sue out a licence to *assart* ground in the forest, and make it several for tillage. *Reg. Orig.* 257. Hence are lands called *assarted:* and formerly *assart rents* were paid to the crown for forest lands *assarted.* See stat. 22 *Car.* 2. *c.* 6. *Assartments* seem to be used in the same sense in *Rot. Parl.* Of *assarts* you may read more in *Cromp. Juris. p.* 203. And *Charta de Foresta*, *anno* 9 *H.* 3. *c.* 4. *Manwood*, *part* 1. *p.* 171.

ASSASSINATION, Is the murdering of a person for hire; and so detestable is the crime, that the Scotch law, following the rule of the Canon law, punishes with death even the attempt to assassinate. *Scotch Dict.*

ASSAULT, *Assultus*, from the Fr. *Assayler.*] An *attempt* or *offer*, with force and violence, to do a corporal hurt to another; as by striking *at* him, with or without a weapon. But no words whatsoever, be they ever so provoking, can amount to an assault, notwithstanding the many ancient opinions to the contrary. 1 *Hawk. P. C. c.* 62. § 1. See also *Lamb. Eiren. lib.* 1. *c.* 3. 22 *Lib. Ass. pl.* 60.

Assault does not always necessarily imply a hitting, or blow; because, in trespass for assault and *battery*, a man may be found guilty of the assault, and excused of the battery. 1 *Hawk. P. C.* 263. But every *battery* includes an *assault;* therefore if the assault be ill laid, and the battery good, it is sufficient. *Id. ib.*

If a person in anger lift up or stretch forth his arm, and offer to strike another; or menace any one with any staff or weapon, it is trespass and assault in law: and if a man threaten to beat another person, or lie in wait to do it, if the other is hindered in his business, and receives loss thereby, action lies for the injury. *Lamb. lib.* 1. 22 *Ass. pl.* 60.

Any injury whatsoever, be it never so small, being *actually done* to the person of a man, in an angry or revengeful, or rude or insolent manner, as by spitting in his face, or any way touching him in anger, or violently jostling him, are *batteries* in the eye of the law. 1 *Hawk. P. C.* 263, 264.—from the Fr. *Battre*, to beat or strike.

In many cases a man may justify an assault; thus, to lay hands gently upon another, not in anger, is no foundation of an action of trespass and assault: the defendant may justify *molliter manus imposuit* in defence of his person or goods; or of his wife, father, mother, or master; or for the maintenance of justice. *Bract.* 9 *E.* 4. 35 *H.* 6. *c.* 51.

A servant, &c. may justify an assault in defence of a master, &c. but not *è contra.* *Ld. Raym.*

If an officer, having a warrant against one who will not suffer himself to be arrested, beat or wound him in the attempt to take him, he may justify it; so if a parent, in a reasonable manner, chastise his child, or master his servant, being actually in his service at that time, or a schoolmaster his scholar, or a gaoler his prisoner, or even a husband his wife (for reasonable and proper cause), or if one confine a friend who is mad, and bind and beat him, &c. in such manner as is proper in his circumstances; or if a man force a sword from one who offers to kill another; or if a man gently lay his hand on ano-

ther, and thereby stay him from inciting a dog against a third person; if I beat one (without wounding him, or throwing at him a dangerous weapon) who wrongfully endeavours with violence to dispossess me of my lands or goods, or the goods of another delivered to me to be kept for him, and who *will not desist upon my laying my hand gently on him*, and disturbing him; or if a man beat, wound, or maim one who makes an assault upon his person, or that of his wife, parent, child, or master; or if a man fight with or beat one who attempts to kill any stranger; if the beating was actually necessary to obtain the good end proposed, or rendered necessary in self-defence; in all these cases it seems the party may justify the assault and battery. See 1 *Hawk. P. C.* 259. and the several authorities there cited.

And on an indictment the party may plead Not guilty, and give the special matter in evidence; but in an action he must plead it specially. 6 *Mod.* 172. Supposing it matter of *justification*.—If of *excuse*, it is said it may be given in *evidence* on the *general issue*. *Bull. N. P.* 17.

Also in cases of assault, for the assault of the wife, child, or servant, the husband, father, and master may have action of trespass, *per quod servitium amisit*. In case of a *wife*, husband and wife should join in the action for the personal abuse of the wife (the husband not having sustained any damage). If the husband has been damnified, as by tearing her clothes, &c. or loss of her assistance, &c. in his domestic concerns, for that peculiar injury to himself he alone must sue.

As to *parent* and *child*, *master* and *servant*, unless injury accrues to the *parent* or *master*, the *child* or *servant* may sue.

For an assault, the wrong-doer is subject both to an action at the suit of the party, wherein he shall render damages; and also to an indictment at the suit of the king, wherein he shall be fined according to the heinousness of the offence. 1 *Hawk.* 263.

But if both are depending at one time, unless in very particular cases, the attorney-general will, on application, grant a *nolle prosequi*, if the party will not discontinue his action.

Stat. 8 & 9 *W.* 3. *c.* 11. enacts, That were there are several defendants to any action of assault, &c. and one or more acquitted, the person so acquitted shall recover costs of suit; unless the judge certify that there was a reasonable cause for making such person a defendant or defendants to such action.

If any person assault a privy counsellor in the execution of his office, it is felony. *Stat.* 9 *Ann. c.* 16.

Stat. 6 *Geo.* 1. *c.* 23. *sect.* 11. If any person shall wilfully and maliciously assault any person in the public streets or highways, with an intent to tear, spoil, cut, burn, or deface, and shall tear, spoil, cut, burn, or deface the garments, &c. of such person, it is felony; and the offender may be transported for seven years.

Assaulting persons in a forcible manner, with intent to commit robbery, is made felony and transportation by stat. 7 *Geo.* 2. *c.* 21. And assaulting or threatening a counsellor at law, or attorney, employed in a cause against a man; or a juror giving verdict against him; his adversary for suing him, &c. is punishable, on an indictment, by fine and imprisonment, for the contempt. 1 *Hawk.* 58. There are other assaults punishable in a precise peculiar manner, viz. stat. 5 *Hen.* 4. *c.* 6. & 11 *Hen.* 6. *c.* 11. render assaults on members of parliament more than usually penal, upon non-surrender on proclamation. Stat. 9 *E.* 2. *stat.* 1. *c.* 3. gives a double *criminal* process against those who assault clergymen, indictment for the temporal offence, and process in the ecclesiastical court for the spiritual one. By stat. 5 *Eliz. c.* 4. servants assaulting their master, mistress, or overseer, may be imprisoned twelve months on conviction before two justices: by stat. 9 *Ann. c.* 14. § 8. to assault, beat, or challenge another on account of money won by gaming, incurs forfeiture of goods, and two years' imprisonment. See the *King* v. *Darley*, 4 *East*, 174. where defendant was convicted on this statute. By stat. 9 *Geo.* 1. *c.* 22. to assault another by wilfully shooting *at* him, is felony without clergy. So by 43 *Geo.* 3. *c.* 58. to assault any person by wilfully shooting at him, or by drawing a trigger, is also a capital felony. By stat. 12 *Geo.* 1. *c.* 34. assaulting a master woolcomber or weaver, &c. for not complying with the demands of workmen, is felony, punishable by transportation for seven years. By stats. 54 *Geo.* 3. *c.* 171. 55 *Geo.* 3. *c.* 88. making provisions to ensure the more effectual redress for assaults in Ireland, where the damages are laid under five guineas, proceedings may be by civil bill at the quarter sessions, who may give costs; and where the defendant cannot pay them they may be levied off the barony. See title *Contempt, Striking*.

ASSAY *of weights and measures*, (from the Fr. *essay*, *i. e.* a proof or trial.) Is the examination of weights and measures by clerks of markets, &c. *Reg. Orig.* 279.

ASSAYER OF THE KING, *Assayator regis.*] An officer of the king's mint, for the trial of silver; he is indifferently appointed between the master of the mint and the merchants that bring silver thither for exchange. See tit. *Gold and Silver*; and *Money*.

ASSAYERS, Of plate made by *goldsmiths*, &c. See tit. *Goldsmiths*.

ASSAYSIARE. To associate, to take as fellow judges; a word used in old charters. *Cart. Abbat. Glast. MS.* § 57.

ASSECURARE, *Adsecurare.*] To make secure by pledges, or any solemn interposition of faith. In the charter of peace between *Hen.* 2. and his sons, this word is mentioned. *Hoveden, anno* 1174.

ASSEDATION. Possession by a tack or lease, &c. *Scotch Dict.*

ASSEMBLY GENERAL. The General Assembly of the church of Scotland is the highest ecclesiastical court; it is composed of a representation of the ministers and elders of the church; and the proportion is regulated by the act 5th Assembly, 1694. *Scotch Dict.*

ASSEMBLY UNLAWFUL. See tit. *Riot*.

ASSENT, or consent. To a legacy of goods, the *assent* of the executor is necessary. See tits. *Executor* and *Legacy*.

Assent of *Dean* and *Chapter* in making leases of church lands; *vide* Leases. Of the major part of *corporations*, in making bye-laws. Vide *Bye Laws*. Of *assents* to *agreements*. See tit. *Agreement*.—See also other proper titles.

ASSESSORS. Those that *assess* public taxes. There are assessments of parish duties, for raising money for the poor, repairing of highways, &c. made and levied by rate on the inhabitants; as well as assessments of public taxes, &c.

Assessors to judges in certain inferior courts are persons possessed of knowledge in the law, appointed to advise and direct the decision of the judge.

ASSETS, Fr. *Assez*, i. e. *Satis.*] Goods *enough* to discharge that burden which is cast upon the executor or heir, in satisfying the debts and legacies of the testator or ancestor. *Bro.* tit. *Assets*.

Assets are *real*, or *personal*; where a man hath lands in fee-simple, and dies seized thereof, the lands which come to his heir are assets *real*: and where he dies possessed of any *personal* estate, the goods which come to the executors are assets personal.

Assets are also divided into *assets per descent*, and *assets inter maines*. Assets by *descent*, is where a person is bound in an obligation, and dies seized of lands which descend to the heir, the land shall be assets, and the heir shall be charged as far as the land to him descended will extend.

*Assets inter maines*, is when a man indebted makes executors, and leaves them sufficient to pay his debts and legacies; or where some commodity or profit ariseth to them in right of the testator, which are called *assets in their hands*. *Terms de Ley.* 56. 77.

As to assets by *descent* it is to be observed, that by the common law, if an heir had sold or aliened the lands which were assets, before the obligation of his ancestor was put in suit, he was to be discharged, and the debt was lost; but by statute 3 *W. & M. c.* 14. made perpetual by 6 *W.* 3. *c.* 14. the heir is made liable to the value of the land by him sold, in action of debt brought against him by the obligee, who shall recover to the value of the said land, as if the debt was the proper debt of the heir; but the land which is sold or aliened *bonâ fide* before the action brought, shall not be liable to execution upon a judgment recovered against the heir in any such action.

And by stat. 29 *Car.* 2. *c.* 3. § 10. Lands of *cestuy que trust* shall be assets by descent; and by the same stat. § 12. Estates *pur autre vie* shall be assets in the hands of the heir, if it come to him by reason of a special occupancy; and where there is no special occupant, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands.

Where a man binds himself and his heirs in a bond; and dies leaving issue two sons, if the eldest son enters on the lands by descent as heir to the father, and die without issue; and then the youngest son enters, he shall be charged with assets as heir to the father. *Dyer* 368. Lands which come to the heir by *purchase* shall not be assets; for it is only lands by *descent* that are assets. 1 *Danv. Abr.* 577.

A reversion in fee, depending upon an estate-tail, is not assets; because it lies in the will of the tenant in tail to dock and bar it by fine, &c. 6 *Rep.* 56. But after the tail is spent, it is assets. 3 *Mod.* 257. And a reversion on an estate for life or years shall be assets. A reversion expectant upon the determination of an estate for life is assets, and ought to be pleaded specially by the heir; and the plaintiff in such case may take judgment of it *cum acciderit*. *Dyer* 371. *Carthew* 129. An advowson is assets; but not a presentation to a church actually void, which may not be sold. *Co. Lit.* 374.

And lands by descent in ancient demesne will be assets in debt. But a copyhold estate descending to an heir is not assets; nor is any *right* to an estate assets, without possession, &c. till recovered and reduced into possession. *Danv.* 577.

An *annuity* is no assets, for it is only a *chose en action*. *Br. Assets per Descent, pl.* 26.

Equity of redemption of an estate mortgaged, and a term for years to attend the inheritance are assets. 3 *Leon.* 32. An heir may plead *reins per descent*, but the plaintiff may reply that he had lands from his ancestor; and special matter may be given in evidence, &c. 5 *Rep.* 60. A special judgment against assets shall only have relation to, and bind the land from the time of filing the original writ or bill. *Carth.* 245. See tit. *Heir.*—and *Com. Dig.* tit. *Assets.*

Assets also are either legal or equitable; of the former some have been specified above; for the latter see *Com. Dig.* tit. *Chancery*, (2 G. 1.) &c.

As to assets *inter maines.* See tit. *Executor*, V. 5.

ASSEWIARE. To draw or drain water from marsh grounds. *Mon. Ang.* 2 vol. f. 334.

ASSIDERE, or *Assedare.* To tax equally; to *assess.* *Mat. Paris. anno* 1232. Sometimes it hath been used to *assign* an annual rent, to be paid out of a particular farm, &c.

*To* ASSIGN, *assignare.*] Hath various significations; one general, as to set over a right to another, or appoint a deputy, &c. another special, to set forth or point at; as to assign error, assign false judgment, waste, &c. And in assigning of error, it must be shewn where the error is committed; in false judgment, wherein the judgment is unjust; in waste, wherein especially the waste is done. *F. N. B.* 19. 112. *Reg. Orig.* 72. Also justices are said to be *assigned* to take assises. *Stat.* 11. *H.* 6. *c.* 2.

ASSIGNATION, Is when simply any thing is ceded, yielded and assigned to another; of which intimation must be made. *Scotch Dict.*

ASSIGNS or ASSIGNEES, *assignatus.* Lat.] Those who are *assigned*, deputed or appointed by the act of the party, or the operation of law, to do any act, or enjoy any benefit on their own accounts and risks—an assignee being one that possesses a thing in his own right; but a deputy, he that acts in right of another. *Perkins.* Assignee by deed is when a lessee of a term, &c. sells and assigns the same to another, that other is his assignee by deed; assignee in law is he whom the law so makes, without any appointment of the person; as an executor is assignee in law to the testator. *Dyer* 6. But if there be assignee in deed, assignee in law is not allowed: if one covenant to do a thing to J. S. or his assigns by a day, and before that day he dies; if before the day he name any assignee, the thing must be done to his assignee named; otherwise to his executor or administrator, who is assignee in law. 27 *H.* 8. 2.

He is called assignee, who hath the whole estate of the assignor: and an assignee, though not named in a condition, may pay the money to save the land; but he shall not receive any money, unless he be named. *Co. Lit.* 215. Assignees may take advantage of forfeitures on conditions, when they are incident to the reversion, as for rent, &c. 1 *And.* 82. What covenants affect or benefit assignees, see tit. *Covenant, Condition.*

Under the word *assigns* shall be included the assignee of an assignee *in perpetuum*, the heir of an assignee, or the assignee of an heir. *Co. Lit.* 384 *b.* *Plowd.* 173. 5 *Co.* 16, 17 *b.* So the assignee of an assignee's executor. 2 *Show.* 57. And a devisee. 2 *Show.* 39. *Godb.* 161. But if an obligation be, *to pay such persons as he shall name by his will, or writing*; there must be an express nomination, and his executor shall not take as assignee. *Mo.* 855.—An administrator is an assignee. *Moor* 44.

ASSIGNMENT, *Assignatio.*] The setting over or transferring the interest a man hath in any thing to another.

Herein shall be considered principally what things are assignable.—As to what covenants, &c. affect or benefit *assignees.* See tit. *Condition, Covenant.*

Assignments may be made of lands in fee, for life, or years; of an annuity, rent-charge, judgment, statute, &c.; but as to lands, they are usually of leases and estates for years, &c. And by the statute of frauds, stat. 29 *Car.* 2. *c.* 3. no estate of freehold, or term for years, shall be assigned but by deed in writing signed by the parties; except by operation of law. A possibility, right of entry, title for condition broken, a trust, or thing in action, cannot be granted or assigned over. *Co. Litt.* 214.

But though a bond being a *chose in action*, cannot be assigned over so as to enable the assignee to sue in his own name, yet he has by the assignment such a title to the paper and wax, that he may keep or cancel it. *Co. Lit.* 232. and in the assignment of bonds, &c. is always contained a power of attorney to receive and sue in the assignor's name.

Also in equity a bond is assignable for a valuable consideration paid, and the assignee alone becomes intitled to the money; so that if the obligor, after notice of the assignment, pays the money to the obligee, he will be compelled to pay it over again. 2 *Vern.* 595. In the case of a policy of insurance the court of King's Bench will so far take notice of an assignment, as to permit an action to be brought in the name of the assignor. 1 *Term Rep.* 26. And the assignor who has become a bankrupt may sue the debtor for the benefit of the assignee. *Id.* 619. 4 *Term Rep.* 690.

As to bare rights and possibilities see *Com. Dig.* tit. *Assignment* (C).

Though a possibility or contingent interest be not *grantable* at law, yet (whether in real or personal estate) it is *transmissible* and *deviseable; Cro. Jac.* 509. 1 *P. Wms.* 566. *For-*

*rester* 117. 8 *Vin. Abr.* 112. *pl.* 38. 2 *Atk.* 616. 1 *Ves.* 236. *Pollexfen* 44. 3 *Term Rep.* 88. 2 *Burr.* 1131. 1 *Bro. Rep.* 181. *Fearne's Con. Rem.* 444.—The cases in the books, (1 *C. R.* 18. 1 *Ch. Cas.* 8. *Pollex.* 31. 44. 1 *P. Wms.* 572. 3 *P. Wms.* 132. 2 *Freem.* 250. 9 *Mod.* 101. 2 *P. Wms.* 608.) abundantly prove, that interests in contingency, respecting personal estates are assignable in equity; but it may be material to observe, that in the case of assignments of such interests, Equity requires the assignee to show that he gave a valuable consideration for the interest assigned; and therefore will not interpose to assist volunteers. But courts of equity will establish assignments of contingent interests against executors, administrators, or heirs at law, even where such assignments are made, not for consideration of money, but in consideration of love and affection, and advancement of children. 1 *Ves.* 409. See *Fonblanque's Treatise of Equity*, i. 203.

An assignee must take the security assigned, subject to the same equity that it was in the hands of the obligee; as if on a marriage treaty the intended husband enters into a marriage-brokage bond, which is afterwards assigned to creditors, yet it still remains liable to the same equity, and is not to be carried into execution against the obligor. 2 *Vern.* 428.

Where there is a bond for the performance of the covenants in a lease, if the lessee assigns the lease, he may likewise assign the bond; but this must be before any of the *covenants are broken;* but if any of the covenants are broken, and the lessee afterwards assigns the lease and bond, and the assignee puts the bond in suit, for those breaches, it is maintenance. *Godb.* 81.

Statute 7 *Jac.* 1. *c.* 15. enacts, *That a debtor to the king shall not assign any debts to him, but such as did originally grow due to the debtor;* afterwards there was a debtor to the husband in 2000*l.* by a statute; the husband made his wife executrix, and died; she married again one G. D. who was indebted to the king, and then the husband and wife assigned this statute to the king, in satisfaction of the debt due to him; adjudged, that the *assignment* was good, for though the second husband had the *statute in right of his wife*, and, by consequence, the debt was not *originally* due to him; yet, because he might *release* the statute, it is the same thing as if it had been *originally* taken in his name. 2 *Cro.* 324.

An *office of trust* is not grantable or assignable to another; and therefore it was adjudged, that the office of a *filazer*, which was an office of trust, could not be assigned; nor could it be extended upon a statute. *Dyer* 7.

A *bare power* is not assignable, but where it is coupled with an interest it may be assigned. 2 *Jon.* 206. 2 *Mod.* 317.

*Arrears* of rent, &c. is a *chose in action*, and not assignable. See *Skin.* 6.

It hath been doubted if a *lease for years, before entry* and possession, be assignable. See *Show.* 291.

A lessee out of possession cannot make any assignment of his term off the land; but must first enter, and recontinue his possession; or seal and deliver the deed upon the land, which puts the assignee into actual possession. *Dalis.* 81. But it has been adjudged that where lessee *for years* of the *crown* is put out of his estate by a stranger, yet he may assign the term, though he is not in possession; because the reversion being in the crown, he cannot lawfully be put out of possession, but at his own will. *Cro. Eliz.* 275.

If lessee for years *assign* all his term in his lease to another, he cannot reserve a right in the *assignment;* for he hath no interest in the thing by reason of which the rent reserved should be paid; and where there is no reversion there can be no distress: but debt may lie upon it, as on a contract. 1 *Lill. Abr.* 99. Where the executor of a lessee *assigns* the *term*, debt will not lie against him for rent incurred after the *assignment;* because there is neither privity of contract, nor estate between the lessor and executor: but if the lessee himself *assigns* his lease, the privity of contract remains between him and the lessor, although the privity of estate is gone by the *assignment*, and he shall be chargeable during his life; but after his death the privity of contract is likewise determined. 3 *Rep.* 14. 24. Although a lessee make an *assignment* over of his term, yet *debt* lies against him by the lessor or his heir; (not having *accepted* rent from the *assignee;*) but where a lessee *assigns* his term, and the lessor his reversion, the privity is determined, and *debt* doth not lie for the reversioner against the first lessee. *Moor* 472. Vide *Barker* v. *Dormer.* 1 *Sho.* 191.

A man made a lease, provided that the lessee or his *assigns* should not alien the premises without licence of the lessor, &c. who after gave licence to the lessee to alien; by this the lessee or his assigns may alien *in infinitum.* 4 *Rep.* 119.

Adjudged, that some things in respect of their nature are not assignable, or to be granted over; as for instance, if the donee in tail holdeth of the donor by *fealty*, he cannot assign it over to another, because *fealty* is incident to, and inseparable from, the reversion; so if the *founder of a college* grant his foundation, though it be to the king, the grant is void, because it is inseparable from his blood. 11 *Rep.* 66 *b.* in *Magdalen College's* case.

Several things are assignable by acts of parliament, which seem not assignable in their own nature; as promissory notes and bills of exchange, by stat. 3 & 4 *Ann. c.* 9.; bail-bonds by the sheriff, by 4 & 5 *Ann. c.* 16.; a judge's certificate for taking and prosecuting a felon to conviction, by 10 & 11 *W.* 3. *c.* 23.; a bankrupt's effects by the several statutes of bankruptcy.

A lease was made for years of lands, excepting the woods; the lessor grants the trees to the lessee, and he assigns the land over to another; the trees do not pass by this assignment to the assignee. *Goldsb.* 188.

Where tenant for years *assigns* his estate, no consideration is necessary; for the tenant being subject to payment of rent, &c. is sufficient to vest an estate in the assignees: in other cases some consideration must be paid. 1 *Mod.* 263. The words required in assignments are, *grant, assign and set over;* which may amount to a grant, feoffment, lease, release, confirmation, &c. 1 *Inst.* 301. In these deeds the assignor is to covenant to save harmless from former grants, &c. That he is owner of the land, and hath power to assign; that the assignee shall quietly enjoy, and to make further assurance; and the assignee covenants to pay the rent, and perform the covenants, &c.

### Form *of an* Assignment *of a* Bond.

To all *to whom these presents shall come, greeting:* Whereas A. B. *of*, &c. *in and by one bond or obligation, bearing date*, &c. *became bound to* C. D. *of*, &c. *in the penal sum of*, &c. *conditioned for the payment of*, &c. *and interest at a day long since passed, as by the said bond and condition thereof may appear:* And whereas *there now remains due to the said* C. D. *for principal and interest on the said bond, the sum of*, &c. Now know ye, *That the said* C. D. *for and in consideration of the said sum of*, &c. *of lawful British money to him in hand paid by* E. F. *of*, &c. *the receipt whereof the said* C. D. *doth hereby acknowledge; he the said* C. D. Hath *assigned and set over, and by these presents* doth *assign and set over, unto the said* E. F. *the said recited bond or obligation, and the money thereupon due and owing, and all his right and interest of, in, and to the same.* And *the said* C. D. *for the consideration aforesaid,* Hath *made, constituted and appointed, and by these presents* doth *make, constitute and appoint, the said* E. F. *his executors and administrators, his true and lawful attorney and attornies irrevocable, for him and in his name, and in the name and names of his executors and administrators, but for the sole and proper use and benefit of the said* E. F. *his executors, administrators, and assigns, to ask, require, demand, and receive of the said* A. B. *his heirs, executors, and*

*administrators, the money due on the said bond; and on non-payment thereof, he the said* A. B. *his heirs, executors and administrators, to sue for and recover the same; and on payment thereof to deliver up and cancel the said bond, and give sufficient releases and discharges therefore, and one or more attorney or attornies under him to constitute; and whatsoever the said* E. F. *or his attorney or attornies, shall lawfully do in the premises, the said* C. D. *doth hereby allow and affirm.* And *the said* C. D. *doth covenant with the said* E. F. *that he the said* C. D. *hath not received, nor will receive the said money due on the said bond, or any part thereof; neither shall or will release or discharge the same, or any part thereof; but will own and allow of all lawful proceedings for recovery thereof; he the said* E. F. *saving the said* C. D. *harmless, of and from any costs, that may happen to him thereby.* In witness, &c.

ASSIMULARE. To put highways together: it is mentioned *in Leg. Hen.* 1. *c.* 8.

ASSISA CADERE. This word signifies to be nonsuited; as when there is such a plain and legal insufficiency in a suit, that the complainant can proceed no further on it. *Fleta. lib.* 4. *c.* 15. *Bracton, lib.* 2. *c.* 7.

ASSISA CADIT IN JURATAM, Is where a thing in controversy is so doubtful, that it must necessarily be tried by a jury. *Fleta, lib.* 4. *c.* 15. See post *Attaint.*

ASSISA CONTINUANDA. A writ directed to the justices of *assise* for the continuation of a cause, when certain records alleged cannot be produced in time by the party that has occasion to use them. *Reg. Orig.* 217.

ASSISA PROROGANDA, Is a writ directed to the justices assigned to take *assises*, for the stay of proceedings, by reason of the party's being employed in the king's business. *Reg. Orig.* 208.

ASSISA PANIS & CEREVISÆ (or *cervisie.*) The stat. 51 *H.* 3. for setting the price of bread and ale is so entitled.

ASSISA, Fr. *Assis.*] According to our ancient books is defined to be an assembly of knights, and other substantial men, with the justice, in a certain place, and at a certain time appointed. *Custum. Normand. cap.* 24. This word is properly derived from the Latin verb *assideo*, to sit together; and is also taken for the court, place, or time, when and where the writs and processes of assise are handled or taken. And in this signification assise is general; as when the justices go their several circuits with commission to take all assises; or special, where a special commission is granted to certain persons (formerly oftentimes done) for taking an assise upon one or two disseisins only. *Bract. lib.* 3.

Concerning the general assise, all the counties of England are divided into six circuits; and two judges are assigned by the king's commission to every circuit, who hold their assises twice a year in every county; (except Middlesex, where the king's courts of record do sit, and where his courts for his counties palatine are held;) and these judges have *five* several commissions.

1. Of *oyer and terminer*, directed to them and many other gentlemen of the county, by which they are empowered to try treasons, felonies, &c. and this is the largest commission they have.

2. *Of gaol delivery*, directed to the judges and the clerk of assise associate, which gives them power to try every prisoner in the gaol committed for any offence whatsoever, but none but prisoners in the gaol; so that one way or other they rid the gaol of all the prisoners in it.

3. *Of assise*, directed to themselves only, and the clerk of assise, to take assises, and do right upon writs of assise brought before them by such as are wrongfully thrust out of their lands and possessions; which writs were heretofore frequent, but now men's possessions are sooner recovered by ejectments, &c.

4. *Of nisi prius*, directed to the judges and clerk of assise, by which civil causes grown to issue in the courts above are tried in the vacation by a jury of twelve men of the county where the cause of action arises; and on return of the verdict of the jury to the court above, the judges there give judgment.

These causes by the course of the courts are usually appointed to be tried at Westminster in some Easter or Michaelmas Term, by a jury returned from the county wherein the cause of action arises: but with this proviso, *nisi prius, unless before* the day prefixed, the judges of assise come into the county in question.—This they are sure to do in the preceding vacation.

5. *A commission of the peace*, in every county of the circuits; and all justices of the peace of the county are bound to be present at the assises; and sheriffs are also to give their attendance on the judges, or they shall be fined. *Bacon's Elem.* 15, 16. *&c.* 3 *Comm.* 60. 269.

There is a commission of the peace, *oyer and terminer* and gaol delivery of Newgate, held eight times in a year, for the city of London and county of Middlesex, at Justice Hall in the Old Bailey, where the lord mayor is the chief judge.

In Wales there are but two circuits, North and South Wales; for each of which the king appoints two persons learned in the laws to be judges; stat. 18 *Eliz. c.* 8. If justices sit by force of a commission, and do not adjourn the commission, it is determined. 4 *Inst.* 265.

See 19 *Geo.* 3. *c.* 74. § 70. as to judges' lodgings on assises in Great Britain, made perpetual by 39 *Geo.* 3. *c.* 46. See also 41 *Geo.* 3. (U. K.) *c.* 88. providing for judges' lodgings on assises in Ireland.

The constitution of the justices of assise was begun by Hen. 2.; though somewhat different from what they now are: and by *Magna Charta* justices shall be sent through every county once a year, who, with the knights of the respective shires, shall take assises of novel disseisin, &c. in their proper shires, and what cannot be determined there shall be ended by them in some other place in their circuit; and if it be too difficult for them, it shall be referred to the justices of the bench, there to be ended. 9 *Hen.* 3. *c.* 12.

There are several statutes as to holding the assises at particular places in certain counties. See *Circuits, Nisi Prius, Judges, Justices.*

ASSISE is likewise used for a *jury*, where assises of novel disseisin are tried: the panels of assises shall be arrayed and a copy indented delivered by the sheriff, &c. to the plaintiffs and defendants six days before the sessions, &c. if demanded, on pain of 40*l.* by stat. 6 *Hen.* 6. *cap.* 2. And assise is taken for a writ for recovery of possession of things immoveable, whereof any one and his ancestors have been disseised. Likewise, in another sense, it signifies an *ordinance* or statute, as *Assisa Panis et Cervisiæ. Reg. Orig.* 279.

ASSISE OF NOVEL DISSEISIN, *Assisa novæ dissesinæ.*] See *Disseisin.*

An assise of *novel disseisin* is a remedy *maximè festinum*, for the recovery of lands or tenements, of which the party was disseised. 2 *Inst.* 410. And it is called *novel disseisin*, because the justices in *eyre* went their circuits from seven years to seven years; and no assise was allowed before them which commenced before the last circuit, which was called an *ancient* assise; and that which was upon a *disseisin* since the last circuit, an assise of *novel disseisin.* *Co. Lit.* 153 *b.*

An assise is called *festinum remedium.* 1. Because the tenant shall not be essoined. 2. Shall not cast a protection. 3. Shall not pray in aid of the king. 4. Shall not vouch any stranger, except he be present, and will enter presently into warranty; so of receit. 5. The parole shall not demur for the nonage of the plaintiff or defendant. 8 *Co.* 50. *Booth* 262.

It lies where tenant in fee-simple, fee-tail, or for term of life, is put out and disseised of his lands, or tenements, rents, common of pasture, common way, or of an office, toll, &c.

*Glanv. lib.* 10. *Reg. Orig.* 197. Assise must be of an actual freehold in lands, &c. and not a freehold in law: it lieth of common of pasture, where the commoner hath a freehold in it, and the lord or other persons feed it so hard, that all the grass is eat up: but then the plaintiff must count and set forth how long the land was fed, and alleged *per quod proficuum suum ibidem amisit, &c.* 9 *Rep.* 113. One may have an assise of land and *rent*, or of several rents, and offices and profits in his soil, all in one writ: and if it be of a rent-charge, or rent-seck, it shall be general *de libero tenemento* in such a place, and all the lands and tenements of the tenants charged ought to be named in the writ; but in assise for rent service it is otherwise. *Dyer* 31. An assise may be brought for an office held for life; but then it must be an office of profit not of charge only: of the toll of a mill, or market, assise lieth; though it may not be brought of suit to a mill. 8 *Rep.* 46, 47.

An assise was brought of the office of *filazer* of the court of Common Pleas, and the demandant counted *de libero tenemento*, and alleged seisin, by taking money for a *capias*, and the *post* was put in *view* where the officer sate. *Dyer* 114.

An assise lieth of the office of *register of the admiralty*, and the demandant laid a prescription to it, viz. *quod quilibet hujusmodi persona*, who should be named by the admiral, should be register of the admiralty for life. *Dyer* 153.

It lieth of officers of *woodward*, *park-keeper*, and *keeper of chases*, *warrener*, *&c.* but these are not at common law; but by the statute of *West.* 2. *c.* 25. because they are of profits to be taken in *alieno solo:* it likewise lieth of all other offices and bailiwicks in fee. 8 *Rep.* 47.

In an assise of a *new office*, it ought to be showed what profits belong to it; but it is otherwise of an ancient office, because it is presumed, that the profit thereof is sufficiently known. 8 *Rep.* 45. 49.

*Tenants in common* shall each have a several assise for his moiety, or part, because they are seized by *several titles;* but *twenty joint-tenants* shall have but one assise in all their names, because they have but one *joint title;* so if there are three joint-tenants, and one of them releaseth all his right to one of his companions, and then the other two are disseised of the whole, they shall have but one assise in both their names, for the two parts, because they had a *joint title* to it at the time of the deseisin, and he to whom the release was given shall have an assise in his own name, because of that part he is *tenant in common.* *Co. Lit.* 196.

If lessee for years, or tenant at will, be ousted, the lessor, or he in remainder, may have assise, because the freehold was in him at the time of the disseisin. *Kel.* 109. Assise lies for tithes, by stat. 32 *Hen.* 8. *c.* 7. *Cro. Eliz.* 559. But not for an annuity, pension, &c. In some cases an assise will lie where ejectment will not. Ejectment will not lie *de piscariâ*, by reason the sheriff cannot deliver possession of it; but an assise will lie for it, as it may be viewed by the recognitors. *Cro. Car.* 534. Assise will sometimes lie where trespass *vi & armis* doth not. Vid. 8 *Rep.* 47. 1 *Nels. Abr.* 276.

By *Magna Charta*, 9 *Hen.* 3. *cap.* 12. *assises of novel disseisin*, &c. shall be taken in the proper counties, by the king's justices: and for estovers of wood, profit taken in woods, corn to be received yearly in a certain place; and for toll, tonnage, &c. and of offices in fee, an assise shall be; also for common of turbary, and of fishing, appendant to freehold, &c.

In an assise, the plaintiff must prove his title, then his seisin and disseisin: but seisin of part of a rent is sufficient to have assise of the whole; and if a man, who hath title to enter, set his foot upon the land, and is ousted, that is a sufficient seisin.

As the writ of assise restores the party to the actual seisin of his freehold, for so are the words of the writ, viz. *facias tenementum illud seisiri, &c.* consequently the party that brings the writ must found it upon an actual seisin, which he has been divested of, for otherwise this remedy is not commensurate to his case. See 2 *Rol. Abr.* 463.

Therefore, if there be lord and tenant by rent-service, and the lord grants the services to another, and the tenant *attorns* by a penny, this being given by way of *attornment*, is not sufficient seisin to ground an assise on; *secus* if the penny had been given by way of *seisin* of the rent. *Lit. sect.* 565. *Co. Lit.* 315. 4 *Co.* 9. 10 *Co.* 127.

The first process in this action is an original writ issued out of chancery, directed to the sheriff, commanding him to return a jury, who are called the recognitors of the assise. An assise is to be arraigned on the day the writ is returnable, on which day the defendant is to count, and the tenant is to appear and plead instantly. *Style Reg.* 88.

If in an assise no tenant of the freehold be mentioned, the defendant may plead it; and where one defendant pleads, no tenant of the freehold named in the writ, if this is found, the writ shall abate *quoad* all. *Dyer* 207.

On such a plea of the defendant, the plaintiff says that he hath made a feoffment to persons unknown, and he himself hath continually taken the profits; if then they are at issue upon the taking the profits, and it be found against the defendant, it shall not be inquired of the points of the assise, for the disseisin is acknowledged. 1 *Danv. Abr.* 584. And if the deed of the ancestor of the plaintiff be pleaded in bar, and this is denied, and found for the plaintiff; the assise shall not inquire of the points of the writ, but only of the damages. *Ibid.* 585.

In this suit, if the defendant fail to make good the exception which he pleads, he shall be adjudged a disseisor, without taking the assise; and shall pay the plaintiff double damages, and be imprisoned a year. *Stat.* 13 *Ed.* 1. *cap.* 25. In assise the tenant pleads in bar, and the plaintiff makes title, but the tenant doth neither answer nor traverse the title; in this case the assise shall be awarded at large. *Cro. Eliz.* 559. And if any other title is found for the plaintiff, he shall recover. *Bro. Assi.* 281. If a tenant pleads in abatement in an assise, he must at the same time plead over in bar; and no imparlance shall be allowed without good cause: and where there are several defendants, and any of them do not appear the first day, the assise shall be taken against them by default. *Pasch.* 5 *W.* 3.

If assise be brought against a lessee, he may not plead *assisa non;* for that is the form of the plea in bar for tenant of the freehold; he ought to plead the special matter, viz. his lease, the reversion in the plaintiff, and that he is possessed, and so in without wrong. *Jenk. Cent.* 142. An assise is to be first arraigned, and the plaintiff's counsel prays the court that the defendant may be called; whereupon he is called; and if the defendant appears, then his counsel demand *oyer* of the writ of assise, and the return of it; which is granted; and then he prays leave to imparl to a short time after, and the jury is adjourned to that day: at the day given by the court, the defendant is again called, and, upon his appearance, he pleads to the assise; and upon this an issue is joined between the parties, and the jurors are sworn to try the issue, the counsel proceeding to give them their evidence: after the trial the court gives judgment, and the plaintiff recovering is to have writ of *seisin*, &c. 1 *Lill. Abr.* 105, 106.

The jurors that are to try the *assise* are to view the thing in demand; by writ of *assise* the sheriff is commanded, *Quod faciat duodecim liberos & legales homines de vicineto, &c. Videre tenementum illud, & nomina eorum imbreviari, & quod summoneat eos per bonas summonitiones, quod sint coram justitiariis, &c. parati inde facere recognitionem, &c.*

By *Westm.* 2. *cap.* 25. a certificate of assise is given, which is a writ for the party grieved, by a verdict or judgment given against him in an assise, when he had something to plead, as a record or release, which could not have been

pleaded by his bailiff; or when the assise was taken against himself by default, to have the deed tried, and the record brought in before the justices, and the former jury summoned to appear before them at a certain day and place, for a further examination and trial of the matter. See *Booth* 215. 287. 4 *Co.* 4 *b.* 2 *Inst.* 26. *F. N. B.* 181. 3 *Comm.* 389.

The plaint need not be so certain in *assise* as in other writs; the judgment being to recover *per visum recognitorum;* and if the plaint be but so certain as that the recognitors may put the demandant into possession, it is sufficient. *Dyer* 84.

To prevent frequent and vexatious disseisins, it is enacted by the statute of *Merton*, 20 *Hen.* 3. *c.* 3. that if a person disseised recover seisin of the land again, by assise of *novel disseisin*, and be again disseised of the same tenements by the same disseisor, he shall have a writ of *re-disseisin;* and, if he recover therein, the *re-disseisor* shall be imprisoned; and by the statute of *Malberge*, 52 *Hen.* 3. *c.* 8. shall also pay a fine to the king: to which the stat. *Westm.* 2. (13 *E.* 1.) *c.* 26. hath superadded double damages to the party aggrieved. In like manner, by the same statute of *Merton*, when any lands or tenements are recovered by assise of *mort d'ancestor*, or other jury, or any judgment of the court, if the party be afterwards disseised by the same person against whom judgment was obtained, he shall have a writ of *post-disseisin* against him; which subjects the *post-disseisor* to the same penalties as a *re-disseisor*. The reason of all which, as given by Sir Edward Coke, (2 *Inst.* 83, 84.) is because such proceeding is a contempt of the king's court, and in despite of the law. 3 *Comm.* 188. See *Reg. Orig.* 208. *F. N. B.* 190. *Co. Lit.* 154. 2 *Inst. Com.* on stat. *W.* 2. *New Nat. Br.* 417. 420.

For proceedings in writ of *assise of novel disseisin*, see *Plowd.* 411, 412.

The court of Common Pleas or King's Bench may hold plea of *assises* of land in the county of Middlesex, by writ out of Chancery. 1 *Lill. Abr.* 105. And in cities and corporations an *assise of fresh force* lies for recovery of possession of lands, within forty days after the *disseisin*, as the ordinary *assise* in the county. *F. N. B.* 7.

ASSISE OF MORT D'ANCESTOR, *Assisa mortis antecessoris.*] Is a writ that lay where a man's father, mother, brother, sister, uncle, aunt, &c. died seised of lands, tenements, rents, &c. that were held in fee, and after their death a stranger abated. *Reg. Orig.* 223. It is good as well against the abator, as any other in possession of the land; but it lies not against brothers or sisters, &c. where there is privity of blood between the person prosecuting and them. *Co. Lit.* 242. And it must be brought within the time limited by the statute of limitations, [50 years, 3 *Comm.* 189.] or the right may be lost by negligence.

If tenant by the curtesy alien his wife's inheritance, and dieth, the heir of the wife shall have an *assise of mort d'ancestor*, if he have not assets by descent from the tenant by the curtesy; and the same shall be as well where the wife was not seised of land the day of her death, as where she was seised thereof. *New Nat. Br.* 489. A warden of a college, &c. shall have *assise of mort d'ancestor* of rent where his predecessor was seised. And a man may have *assise of mort d'ancestor* of rents, against several persons in several counties; having, in the end of the writ, several summons against the tenants: and the process in this writ, is summons against the party; and if he makes default at the day of the *assise* returned, then the plaintiff ought to sue out a re-summons; and if he makes default again, the *assise* shall be taken, &c. *Bro. Assis.* 88. In a *mort d'ancestor*, if the tenant says, the plaintiff is not next heir, and this is found against him, the points of the writ shall be inquired of: and in this case the *assise* may find, that though the plaintiff be the next heir, yet he is not next heir as to this land; for this is in regard of their inquiry at large. *Br. Mort. d'An.* 47. 1 *Danv. Abr.* 584. Damages shall be recovered in the *assise of mort d'ancestor;* but it lieth not of an estate-tail, only where the *ancestor* was seised in demesne as of fee. *Bro. Assis.* If a man be barred in *assise of novel disseisin*, upon showing a descent, or other special matter, he may have *mort d'ancestor*, or writ of *entry sur disseisin*, &c. 4 *Rep.* 43.

If the abatement happened on the death of one's grandfather or grandmother, then an assise of *mort d'ancestor* no longer lies, but a writ of *ayle*, or *de avo;* if, on the death of the great grandfather or great grandmother, then a writ of *besayle*, or *de proavo;* but if it mounts one degree higher, to the *tresayle*, or grandfather's grandfather, or if the abatement happened upon the death of any collateral relation, other than those before mentioned, the writ is called a writ of *cosinage*, or *de consanguineo. Finch L.* 266, 267. And the same points shall be inquired of, in all these actions *ancestrel*, as in an assise of *mort d'ancestor*, they being of the very same nature. *Stat. Westm.* 2. (13 *E.* 1.) *c.* 20.; though they differ in this point of form, that these *ancestrel* writs (like all other writs of præcipe) expressly assert a title in the demandant, (viz. the seisin of the ancestor at his death, and his own right of inheritance,) the assise asserts nothing directly, but only prays an inquiry whether those points be so. 2 *Inst.* 399. There is also another ancestrel writ, denominated a *nuper obiit*, to establish an equal division of the land in question, where, on the death of an ancestor, who has several heirs, or co-heiresses, one enters and holds the others out of possession. *F. N. B.* 197. *Finch L.* 293. *Leg. Orig.* 226. *New Nat. Br.* 437, 438. *Booth on Real Actions.* But a man is not allowed to have any of these actions ancestrel for an abatement, consequent on the death of any collateral relation, beyond the fourth degree; (*Hale* on *F. N. B.* 221.) though in the lineal ascent he may proceed *ad infinitum*. (*Fitzh. Abr.* tit. *Cosinage* 15.) 3 *Comm.* 186.

It was always held to be law, that, where lands were devisable in a man's last will by the custom of the place, there an assise of *mort d'ancestor* did not lie. For, where lands were so devisable, the right of possession could never be determined by a process, which inquired only of these two points, the seisin of the ancestor, and the heirship of the demandant. And hence it may be reasonable to conclude, that when the statute of wills, 32 *Hen.* 8. *c.* 1. made all socage lands devisable, an assise of *mort d'ancestor* could no longer be brought of lands held in socage. See 1 *Leon.* 267.; and that now, since the stat. 12 *Car.* 2. *c.* 24. (which converts all tenures, a few only excepted, into free and common socage,) no assise of *mort d'ancestor* can be brought of any lands in the kingdom; but that, in case of abatements, recourse must be properly had to the writs of entry. 3 *Comm.* 187.

It is to be observed, moreover, that these writs are now almost obsolete, being in a great measure superseded by the action of ejectment, which answers almost all the purposes of real actions; except in some very peculiar cases.

ASSISE OF NUISANCE. See *Nuisance*.

ASSISE OF DARREIN PRESENTMENT. See tit. *Darrein Presentment*.

ASSISE DE UTRUM, or *assisa juris utrum.*] See tit. *Juris utrum*.

ASSISE OF THE FOREST, *Assisa de Foresta.*] Is a statute touching orders to be observed in the king's forest. *Manwood* 35. The statute of view of frank pledge, *anno* 18 *Ed.* 2. is also called the *assise of the king;* and the statute of bread and ale, 51 *H.* 3. is termed the *assise of bread and ale*. And these are so called, because they set down and appoint a certain measure, or order, in the things they contain. There is further an *assise of nusance*, *assisa nocumenti*, where a man maketh a nusance to the freehold of another; to redress the same. And besides Littleton's division of assises, there are others mentioned by other writers, viz. *assise at large*,

brought by an infant to inquire of a disseisin, and whether his *ancestor* were of full age, good memory, &c. when he made the deed pleaded, whereby he claims his right.

*Assise in point of assise; assisa in modum assisæ.*] Which is when the tenant, as it were, setting foot to foot with the demandant, without any thing further, pleads directly to the writ no wrong, no disseisin.

*Assise out of the point of assise*, is when the tenant pleadeth something by exception; as a foreign release, or foreign matter, triable in a foreign county; which must be tried by a jury, before the principal cause can proceed.

*Assise of right of damages*, is where the tenant confesseth an ouster, and referring it to a demurrer in law, whether it were rightly done or not, is adjudged to have done wrong; whereupon the demandant shall have a writ of assise to recover damages. *Bract. lib.* 4. *F. N. B.* 105. Assises are likewise awarded by default of tenants, &c.—Of the Grand Assise, see tit. *Jury*.—For further particulars relative to Assise in general, see *Com. Dig.* and *ante* tit. *Assise*.

ASSISORS, *assisores.*] *Sunt qui assisas condunt aut taxationes imponunt.*—In Scotland, (according to Skene,) they are the same with our jurors; and their oath is this:

*We shall leil suith say,*
*And na suith conceal, for nathing we may,*
*So far as we are charged upon this* assise,
*Be* [by] *God himself, and be* [by] *our part of paradise,*
*And as we will answer to God, upon*
*The dreadful day of dome.*

ASSISUS. Rented or farmed out for such an assise, or certain assessed rent in money or provisions. *Terra assisa* was commonly opposed to *terra dominica*; this last being held in domain, and occupied by the lord, the other let out to inferior tenants. And hence comes the word to assess or allot the proportion and rates in taxes and payments by *assessors*.

ASSITHMENT. A weregild or compensation, by a pecuniary mulct: from the preposition *ad*, and the Sax. *sithe, vice: quod vice supplicii ad expiandum delictum solvitur. Blount.*

ASSOCIATION, *associatio.*] Is a writ or patent sent by the king, either at his own motion, or at the suit of a party plaintiff, to the justices appointed to take assises, or of *oyer* and *terminer*, &c. to have others *associated* unto them. And this is usual where a justice of assise dies; and a writ is issued to the justices alive to admit the person associated: also where a justice is disabled, this is practised. *F. N. B.* 185. *Reg. Orig.* 201. 206. 223. The clerk of the assise is usually associate of course; in other cases, some learned serjeants at law are appointed. It hath been holden, that an association after another association allowed and admitted, doth not lie; nor are the justices then to admit other association in that writ afterwards, so long as that writ and commission stand in force. *Br. Assis.* 386. *Mich.* 32 *H.* 6. The king may make an association unto the sheriff upon a writ of *re-deseisin*, as well as upon assise of *novel deseisin*. *New Nat. Br.* 416, 417. See *ante* tit. *Assise*.

ASSOCIATION OF PARLIAMENT. In the reign of king William III. the parliament entered into a solemn association to defend his majesty's person and government against all plots and conspiracies: and all persons bearing offices, civil or military, were enjoined to subscribe the association, to stand by king William, on pain of forfeitures and penalties, &c. stat. 7 & 8 *W.* 3. *cap.* 27. made void by stat. 1 *Ann. st.* 1. *c.* 22. § 2.

ASSOILE, *absolvere.*] To deliver from excommunication. *Staundf. Pl. Cr.* 72. In stat. 1 *H.* 4. *c.* 10. mention being made of K. Ed. 3. it is added, whom God *assoil*.

ASSOILZIE, In the Scotch law; to acquit the defendant in an action, or to find a criminal not guilty. *Scotch Dict.*

ASSUMPSIT, from the Lat. *Assumo.*] Is taken for a voluntary promise, by which a man assumes or takes upon him to perform or pay any thing to another; it comprehends any verbal promise, made upon consideration, and the civilians express it diversely, according to the nature of the promise, calling it sometimes *pactum*, sometimes *promissionem*, or *constitutum*, &c. *Terms de Ley.* An action upon the case *on assumpsit*, (or as it is also expressed, *on promises*) is an action the law gives the party injured by the breach or non-performance of a contract legally entered into; it is founded on a contract either *express* or *implied* by law; and gives the party damages in proportion to the loss he has sustained by the violation of the contract. 4 *Co.* 92. *Moor* 667.

Here it is to be considered,

I. *In what cases an Assumpsit is or is not the proper action.*
II. *What words will create an Assumpsit.*
III. *What consideration is sufficient.*
IV. *Of the proceedings.*

I. In every action upon assumpsit, there ought to be a consideration, promise, and breach of promise. 1 *Leon.* 405. For

The law distinguishes between a general *indebitatus assumpsit* and a *special assumpsit*; for though they come under the denomination of *actions on the case*, and the party is to be recompensed in damages alike in both, yet the first seems to be of a superior nature, and will lie in no case but where debt will lie; but for a particular undertaking, or collateral promise to discharge the debt or duty of another, a special *assumpsit* must be brought. 1 *New Abr.* 168.

*Action on the case* on assumpsit lies, for not making a good estate of land sold, according to promise; not paying money upon a bargain and sale, according to agreement; not delivering goods upon promise, on demand; this is by express assumpsit; an implied assumpsit is where goods are sold, or work is done, &c. without any price agreed upon; in an *action on the case* by *quantum meruit*, or *quantum valebat*, the law implies a promise and satisfaction to the value.

When one becomes legally indebted to another for goods sold, the law implies a promise that he will pay this debt; and if he be not paid, *indebitatus assumpsit* lies. 1 *Danv. Abr.* 26. And *indebitatus assumpsit* lies for goods sold and delivered to a stranger, *ad requisitionem* of the defendant. *Ibid.* 27. But on *indebitatus assumpsit* for goods sold, you must prove a price agreed on, otherwise the action will not lie; though this is helped by laying a *quantum meruit*, with the *indebitatus assumpsit*, wherein if you fail in proof of the price agreed on, you may recover the value. *Wood's Inst.* 536.

*Indebitatus assumpsit* lies to recover *del credere* commissions for guaranteeing sums insured upon policies. 14 *E. R.* 578.

If A. and B., having dealings with each other, make up their accounts, and B. is found in arrear, and promises to pay the balance, an *assumpsit* lies against him, on *insimul computassent*, and A. need not bring a writ of account. *Cro. Jac.* 69. *Yelv.* 70. *S. P.* 1 *Rol. Abr.* 7. *S. P.* 1 *Rol. Rep.* 396. *Bulst.* 208. *Moor* 854.

Assumpsit lies for the balance of an account, though the items on each side be ever so numerous. 5 *W. P. T.* 431.

So if A. gives money, or delivers goods to B. to merchandize therewith, and B. promises to render an account, *assumpsit* lies on this express promise, as well as account. 1 *Salk.* 9.

So if a tenant, being in arrear for rents, settles an account of arrears with his landlord, and promises to pay him the sum in which he is found in arrear, an *assumpsit* lies on this promise. 1 *Rol. Abr.* 9. *Bro. Account* 81. *Raym.* 211. 2 *Keb.* 813. Vide *Style* 131. 283. *Cro. Jac.* 602. So, on a ba-

lanced account between two partners, though including *items* not connected with the partnership. 2 *Term Rep.* 479. 483.

But if the obligor in a bond, without any new consideration, as forbearance, &c. promises to pay the money, an assumpsit will not lie, but the obligee must still pursue his remedy by action of debt. 1 *Rol. Abr.* 8. *Hutt.* 34. *Cro. Eliz.* 240. seems *contra*.

Where a man comes to buy goods, and they agree upon a price, and a day for the payment, and the buyer takes them away, an *assumpsit* for the money is the proper action; for *trover* will not lie for the goods, because the property was changed by a lawful bargain, and by that bargain the buyer was to convert the goods before the money was due. 1 *New Abr.* 167.

If a man and a woman, being unmarried, mutually promise to marry each other, and afterwards the man marries another woman, by which he renders himself incapable of performing his contract, an *assumpsit* lies, in which the woman shall recover damages. *Carter* 233.

An *indebitatus assumpsit* lies for money by custom due for scavage; adjudged upon a special verdict, by which it was found that the sum demanded was due by custom, but that there was no express promise to pay it. 2 *Lev.* 174.

If one receives my rent, under pretence of title, I may have an *indebitatus assumpsit* against him. 2 *Mod.* 263.

If a feme sole marries a man, who, in truth, is married to another woman, and he makes a lease of her lands, and receives the rents, she may bring an *indebitatus assumpsit* against him for so much money received to her use; adjudged after verdict. 1 *Salk.* 28.

Where action is brought upon a *contract*, if the plaintiff mistakes the sum agreed upon, he fails in his action; but if he brings it upon the *promise in law*, arising from the debt there, though he mistakes the sum, he shall recover. *Alleyn* 29. Every contract made between parties, implies a mutual promise for performance: and yet an action may be brought on a reciprocal promise by one against the other, although he who brings it hath not performed on his side. *Dyer* 30. 75. When an *assumpsit* or promise is the ground of the action, it must be precisely set forth. 3 *Lev.* 319. If a promise be made without limitation of time for its performance, reasonable time shall be allowed, if there be an immediate consideration for it; and not time during life. 1 *Lill. Abr.* 112. On promise to deliver a thing such a day, the party is bound to do it without request. 1 *Lev.* 284. But if a promise be to do any thing upon request, the request is necessary to entitle the plaintiff to the action, on which it shall arise. 1 *Lev.* 48. Though in every *indebitatus assumpsit*, it is alleged the defendant promised to pay *on request*, and that he was *requested*, and *refused* payment, yet no request is ever proved. The time for the performance of the promise being elapsed, and the promise not performed, the law presumes request, unless in a particular case where a thing is not to be done until *request*. Every executory contract, and debt that is not upon record, or on a specialty, which may be turned into damage, imports in it an *assumpsit* in law, and one may have debt or action on the case upon it at his election; for when a man doth *agree* to pay money, or to deliver any thing, he thereby *promiseth* to pay or deliver it. *Plowd.* 128. 1 *Cro.* 94.

Every contract executory implies an *assumpsit* to pay money at the day agreed, or immediately, if no time be limited. *Mo.* 667.

The *assumpsit* in an agreement that will be binding and give action, must be complete and perfect, and duly pursued and observed: and if the party that makes the *assumpsit*, and he to whom it is made, agree together, and a bond is given and taken for what is promised; by this the *assumpsit* is discharged. Also where an *assumpsit* is to stand to an award, if the award made be void, it will make the *assumpsit* void.



*Yelv.* 87. 2 *Leon. ca.* 223. 1 *Leon.* 170. *Indeb. assump.* lies by a *prothonotary against an attorney*, for fees, for work done for defendant as attorney. *Holt's Rep.* 20.

*Indebitatus assumpsit* lies for a *customary fine, super mortem domini*. *Show.* 35. *Indebitatus assumpsit* lies *upon a personal contract* for a sum in gross, as *pro rebus venditis; per Holt*, Ch. J. *Show.* 36.

*Indebitatus* lies for *fees for being knighted*. *Show.* 78.

*Indebitatus assumpsit* lies for money *paid by mistake*, on an account or *deceit;* but not for money *paid knowingly on illegal consideration*, as an usurious bond. *Salk.* 22.

Assumpsit lies in many cases where *debt* lies, and in many where debt doth not lie. 2 *Burr.* 1005. which see for many cases where assumpsit will lie; as also 1 *Term Rep.* 286.

*Indebitatus assumpsit* lies on a *judgment* of a foreign court, without declaring upon, or proving the grounds or cause of action; and if the judgment was obtained unfairly, defendant must show it. *Doug.* 1. 4.

But not upon a judgment by default obtained in one of the Colonies against a party, who was summoned, according to the practice of the court there, in his absence, by nailing up a copy of the declaration at the court-house door; the defendant never having been present in the colony, or at any time subject to the jurisdiction of the colonial court. 9 *E. R.* 192.

Though *assumpsit* lies not for rent usually reserved on leases, yet if a man promise to pay, without a lease, so much a week as long as A. B. &c. permits him to enjoy a warehouse, &c. which is a special cause of promise, this action will lie. 2 *Cro.* 592. Now, by 11 *Geo.* 2. *c.* 19. § 14. where the demise is not by *deed*, the landlord may recover his rent in an *action on the case*, for *use and occupation*.

Assumpsit lies against a lessee from year to year, upon his agreement to pay rent, notwithstanding his bankruptcy, and the occupation of the premises by his assignees during part of the time for which the rent accrued. 8 *E. R.* 311.

Where a person pays money upon a mistake; or if he receives more from another in a reckoning than he ought, or more fees than should be taken, an *assumpsit* lies. 1 *Salk.* 22. *Comb.* 447. If a man receives money for the use of another person, *assumpsit* may be had against him, which supplies the place of action of account: and where money was deposited on a wager, an *indebitatus* lay for money received to a man's use. *Show.* 117.

If where a promise is made, one part of it is against law, and another part of it lawful, this is ground sufficient for *assumpsit*. 4 *Rep.* 94.

The person to whom a promise is made, shall have the *action;* and not those who are strangers, or for whose benefit it is intended. *Danv.* 64. Nor shall action be brought against one for what another receives, nor at his request &c. 1 *Salk.* 23. But if a man delivers money to A. B. to my use, I may have an *action on the case* against him for this money. If a man accounts, and, upon the account, is found in arrear to a certain sum, and presently, in consideration thereof, assumes to pay the debt at a day; *action on the case* lies for this after the day. *Yelv.* 70. And on a promise to pay a sum of money at so much a month, an *action on the case* may be brought before the whole is payable; for it is grounded upon the promise, which is broken by every non-payment, and damages may be recovered. 2 *Cro.* 504.—See title *Debt*.

II. Some agreements, though never so expressly made, are deemed of so important a nature, that they ought not to rest in verbal promise only, which cannot be proved, but by the memory of witnesses. To prevent which, the stutute of frauds and perjuries, 29 *Car.* 2. *c.* 3. enacts, that in the five following cases *no verbal promise* shall be sufficient to ground an action upon, but at the least some *note* or *memorandum* of

it shall be made *in writing*, and *signed* by the *party* to be charged therewith. 1. *Where an executor or administrator promises to answer damages out of his own estate.* 2. *Where a man undertakes to answer for the debt, default, or miscarriage of another.* 3. *Where any agreement is made, upon consideration of marriage.* 4. *Where any contract or sale is made of lands, tenements, or hereditaments, or any interest therein.* 5. *And lastly, where there is any agreement that is not to be performed within a year from the making thereof.* In all these cases a mere *verbal assumpsit* is void. See 2 *Comm.* 448, *n.*

The same statute provides that no contract for sale of goods for the price of 10*l.* or upwards shall be good, except the buyer actually receive part of the goods sold, or give earnest; or there be some note or memorandum in writing of the bargain being made by the parties or their agents.

A letter written by a party is a sufficient memorandum. 3 *Burr.* 1663. And see tit. *Agreement.*

A parol promise of marriage between parties is not within the statute. *Str.* 34. 5 *Mod.* 411. *Salk.* 24.

As to promises for the debt, &c. of another:

If a person, for whose use goods are furnished, *be liable at all*, any other promise by a third person to pay that debt must be in writing. 2 *Term Rep.* 80.

And there is no distinction between a promise to pay for goods furnished to a third person, made *before* they are delivered, and one after. 2 *Term Rep.* 80. *Cowp.* 227.

But if the credit was given to the promiser *originally*, and the party furnishing the goods cannot recover against the person for whose use they were furnished, then the person promising is liable; as if one say "let A. have goods, and I will pay you;" or, "look to me for payment." *Com. Dig.* tit. *Action upon the case on Asssumpsit.* (F. 3.)

The intent of the parties by and to whom the promise or *assumpsit* is made, is more to be regarded than the form of words, and this intent and meaning is to be followed, not in the letter, but the substance of it: if a promise be to provide wedding cloaths for a woman, this shall be taken for such cloaths to be worn on the wedding or feast-day, according to the dignity of the person. *Poph.* 182. *Yelv.* 87. 3 *Cro.* 53.

All promises and contracts are to receive a favourable interpretation; and such construction is to be made, where any obscurity appears, as will best answer the intent of the parties; otherwise a person, by obscure wording of his contract, might find means to evade and elude the force of it. Hence it is a general rule, that all promises shall be taken most strongly against the promiser, and are not to be rejected, if they can by any means be reduced to a certainty.

If a man promises another, in consideration that he will assign to him a certain term, to pay him 10*l.* this is a good *assumpsit*, though the time of assignment and payment be not appointed; for the 10*l.* shall be paid in a convenient time after the assignment, which also must be done in a convenint time, and he shall not have time during his life. 1 *Rol. Abr.* 14, 15.

If there be an agreement to enter into an obligation for performance of a thing of a certain value, without mentioning in what sum, it shall be according to the value. 1 *Sid.* 240.

A promise made after taking the benefit of an insolvent act, to pay an old debt by instalments will not raise a new assumpsit to pay it. 4 *W. P. T.* 613.

III. The consideration is the ground of the common *action on the case*: and no action on the case lieth against a man for a promise where there is no *consideration* why he should make the promise. 1 *Danv.* 53.

A consideration altogether executed and past was anciently held not to be sufficient to maintain an *assumpsit*, but this doctrine is denied by the court of K. B. 3 *Burr.* 1671. See also *Cro. Eliz.* 282. by which it appears that that though the consideration were executed, it would be sufficient if laid at plaintiff's request.

If an infant promise after full age to pay a debt incurred in his infancy, this will bind him. 1 *Term Rep.* 648.

If A. *undertakes* to do a thing *without hire*, as to take brandies out of one cellar, and to lay them down in another cellar, no action lies for the *non-feasance*; but if he *enters on the doing it*, action lies for a *mis-feasance*, if it be through his own neglect or *mismanagement*, because it is a deceit; but *not* if by *mere accident*; *per Holt*, 1 *Salk.* 26. *Vide.* 3 *Salk.* 11.

*Where* the *doing a thing will be a good consideration, a promise to do* that thing will be so too; *per Holt*, Ch. J. 12. *Mod.* 459.

*Parting with my note* to the defendant is a good consideration. 7 *Mod.* 12, 13.

An *assumpsit* may be upon a general consideration; but it doth not lie where the plaintiff has an obligation to pay the money, which is a stronger *lien* than *assumpsit*; nor when the party has a recognizance for the duty, &c. *Jenk Cent.* 293.

*Love* or *friendship* are not considerations to ground actions upon. 2 *Leon.* 30. Also idle and insignificant considerations are looked upon as none at all; for wherever a person promises without a benefit arising to the promisor, or loss to the promisee, it is looked upon as a void promise. 2 *Bulst.* 269.

Lastly, it is to be observed, that *considerations* may be *void* as being *against law*, for if they are wicked and ill in themselves, or unlawful, by being prohibited by some act of parliament, they are void; therefore if an officer, who, by the duty of his office, is obliged to execute writs, promises, in consideration of money paid him, to serve a certain process, an *assumpsit* will not lie on this promise; for the receipt of the money was extortion, and the consideration is unlawful. 1 *Rol Abr.* 16.

*Implied contracts* are such as do not arise from the express determination of any court, or the positive direction of any statute, but from natural reason, and the just construction of law; which extends to all presumptive *undertakings* and *assumpsits:* which, though never perhaps actually made, yet constantly arise, upon this general implication and intendment of the courts of judicature, *that every man hath engaged to perform what his duty or justice requires.* Thus, if I employ a person to transact any business for me, or perform any work, the law implies that I undertook, or assumed to pay him so much as his labour deserved. And if I neglect to make him amends, he has a remedy for this injury, by bringing his action on the case upon this *implied assumpsit;* wherein he is at liberty to suggest, that I promised to pay him so much as he reasonably deserved, and then to aver that his trouble was really worth such a particular sum, which the defendant has omitted to pay. But this valuation of his trouble is submitted to the determination of a jury; who will assess such a sum in damages as they think he really merited. This is called an *assumpsit* upon a *quanium meruit.* There is also an *implied assumpsit* on a *quantum valebat*, which is very similar to the former; being only where one takes up goods or wares of a tradesman, without expressly agreeing for the price. There the law concludes that both parties did intentionally agree, that the real value of the goods should be paid; and an action on the case may be brought accordingly, if the vendee refuses to pay that value.

Another species of *implied assumpsit* is, when one has *had and received* money belonging to another, without any valuable consideration given on the receiver's part; for the law construes this to be money had and received for the use of

the owner only; *and implies*, that the *person* so receiving *promised and undertook to account for it to the true proprietor:* And if he *unjustly detain it*, an *action on the case lies* against *him for the breach of such implied promise and undertaking;* and he will be made to *repair the owner in damages equivalent to what he has detained in such violation of his promise.* This is applicable to almost every case where the defendant has received money, which *ex æquo et bono*, he ought to refund. 2 *Burr.* 1012.

*This species of assumpsit* lies in numberless instances for money the defendant has received from a *third* person; which he claims title to, in opposition to the plaintiff's right, and which he had by law *authority to receive* from such third person. 2 *Burr.* 1008.

One great benefit which arises to suitors from the nature of this action, is, *that the plaintiff need not state the special circumstances*, from which he concludes, that *ex æquo et bono*, the money received by the defendant ought to be deemed as belonging to him: he may declare generally that the money was received to his use, and make out his case at the trial. 2 *Burr.* 1010.

This is equally beneficial to the defendant. It is the most favourable way in which he can be sued: he can be liable no further than the money he has received; and against that may go into every equitable defence upon the general issue; he may claim every equitable allowance; he may prove a release without pleading it; in short, he may defend himself by every thing, which shews that the plaintiff, *ex æquo et bono* is *not entitled* to the *whole* of his demand, or to any part of it.

This action will lie to recover premiums of insurance paid by the insured to the lottery-office-keeper. *Cowp.* 790. But it will not lie to recover back winnings paid by the lottery-office-keeper or insurer of lottery tickets. 4 *Burr.* 1984.

It will lie against an auctioneer selling goods to which he had reason to know there was no title, which knowledge he concealed from the buyers, and this after he had paid over the proceeds of the sale. 5 *W. P. T.* 657.

If two persons engage jointly in a stock jobbing transaction, and incur losses, and employ a broker to pay the differences, and one of them repay the broker, with the privity and consent of the other, the whole sum, he may recover a moiety from the other, in an action for *money paid* to his use. 3 *Term Rep.* 418.

But in such a case of an illegal transaction, if one partner pay money for another *without an express authority* he cannot recover it back. *Ib.*

And, generally, *assumpsit* for *money paid, laid out, and expended* will not lie when the money has been paid *against the express consent* of the party for whose use it is supposed to have been paid. 1 *Term Rep.* 20.

See title *Consideration.*

IV. The plaintiff must set forth every thing essential to the gist of the action, with such certainty, that it may appear to the court that there were sufficient grounds for the action; for if any thing material be omitted, it cannot appear to the court whether the damages given by the jury were in proportion to the demand, or whether the party was at all entitled to a verdict. And therefore, in an action upon the case the plaintiff cannot declare *quod cum* the defendant, was indebted to the plaintiff in such a sum, and that the defendant, in consideration thereof, *super se assumpsit* to pay, &c. without shewing the *cause* of the debt. 10 *Co.* 77.

If in an *assumpsit* the plaintiff declares, *quod cum* there were several reckonings and accounts between the plaintiff and defendant; and at such a day, &c. *insimul computaverunt* for all debts, reckonings, and demands; and the defendant, upon the said account, was found to be in arrear the sum of 20*l.* in consideration whereof the defendant promised to pay, &c. this is a good declaration, without shewing it was *pro mercimoniis*, or otherwise, wherefore he should have an account; for an account may be for divers causes, and several matters and things may be included and comprised therein, which *in pede computi* are reduced to a sum certain, and thereupon being indebted to the plaintiff, it is sufficient to ground an action. *Cro. Car.* 116.

If in an *assumpsit* the plaintiff declares, that the defendant did assume and promise to pay the plaintiff so much money, and also to carry away certain wood before such a day; the defendant, as to the money, cannot plead that he paid it, and as to the carriage of wood, *non assumpsit*, for the promise being entire, cannot be apportioned. *March* 100.

On an *assumpsit* in *law, payment*, or any other matter that excuses payment, may be given in evidence, on the general issue. In an *assumpsit* in *deed*, it must be pleaded. *Gilb. Evid.* 204, 205.

If the plaintiff declares upon an *indebitatus assumpsit*, and upon a *quantum meruit*, and the defendant pleads, that after the said several promises made, and before the action brought, the plaintiff and defendant came to an account concerning divers sums of money, and that the defendant was found in arrear to the plaintiff 30*l.* and thereupon, in consideration, that the defendant promised to pay the said 30*l.* the plaintiff likewise promised to release and acquit the defendant of all demands, this is a good plea; for, by the account, the first contract is merged. 2 *Mod.* 43, 44.

The defendant cannot plead that he revoked his promise; as if A. is in execution at the suit of B. and J. S. desires B. to let him go at large, and that he will satisfy him; to which B. agrees; though J. S., before any thing is done in pursuance of this promise and agreement, comes to B. and tells him, that he revokes his promise, and that he will not stand to it; yet such revocation cannot be pleaded in bar to the action. 1 *Rol. Abr.* 32.

In an action upon an *assumpsit*, if the consideration be *executory;* as if one promises to do something for me, in consideration of something to be done before by me, to or for him, if I will sue him for that he is to do for me, I must aver, that I have done that which was first to be done by me, for till that be done I may not maintain an action upon the promise. *Cro. Jac.* 583, 620. For further particulars see *Com. Dig.* tit. *Action on the Case on Assumpsit;* and see also 3 *Comm.* 158, and this Dictionary, tit. *Agreement, Consideration.*

ASSUMPTION. The day of the death of a saint so called, *Quia ejus anima in cælum* assumitur. *Du Cange.*

ASSURANCE of lands, Is where lands or tenements are conveyed by deed: and there is an *assurance* of ships, goods and merchandise, &c. See *Insurance.*

ASSYSERS, (jurors.) Those who in an inquest serve a man, heir, or judge, the probation in criminal cases. *Scotch Dict.*

ASSYTHMENT, Is the reparation made for mutilation and slaughter. *Scotch Dict.*

ASSYTH THE KING, Is to cause malefactors pay what fyne is modified. *Scotch Dict.*

ASTER, and *Homo Aster*, A man that is resident. *Britton*, 151.

ASTRARIUS HÆRES, (from *Astre*, the hearth of a chimney.) Is where the ancestor by conveyance hath set his heir apparent and his family in a house in his life-time. *Co. Lit.* 8.

ASTRICTION TO A MILL, Is that servitude by which the grain growing on certain lands (in some cases the grain brought within them) must be carried to a certain Mill, to be manufactured into flour or meal, paying a multure or price for the manufacturing of the grain, higher or lower, according to the extent of the servitude. See *Thirlage.*

ASTRUM, A house or place of habitation, also from *astre.* Placit. Hilar. 18 Ed. 1.

ATEGAR, A weapon among the Saxons, which seems to have been a hand-dart, from the Sax. *Aeton* to fling or throw, and *Gar* a weapon. *Spelm.*

ATHE, *Adda.*] A privilege of administering an oath, in some cases of right and property; from the Sax, *ath, othe, juramentum.* It is mentioned among the privileges granted by king *Hen.* 2. to the monks of Glastonbury. Cartular. Abatt. Glaston. MS. fol. 14, 37.

ATHEISM. The disbelief of a God is ranked by Scotch writers under the head of Blasphemy, which is a crime punishable with death, according as it extends to any express and serious denial of the attributes of God (see acts 1661, *c.* 21. and 1695. *c.* 11.); or by an arbitrary punishment, more or less severe, where the offence consists in uttering oaths and Imprecations. See *Blasphemy.*

ATIA. See *odio & atia.* A writ of enquiry whether a person be committed to prison on just cause of suspicion.

ATILIA. Utensils or country implements. *Blount.*

ATRIUM, A court before the house, and sometimes a church-yard.

To ATTACH, *Attachiare,* From the Fr. *attacher.*] To take or apprehend by commandment of a writ or precept. *Lamb. Eiren. lib.* 1. *cap.* 16. It differs from arrest, in that he who arresteth a man carrieth him to a person of higher power to be forthwith disposed of; but he that *attacheth* keepeth the party *attached,* and presents him in court at the day assigned; as appears by the words of the writ. Another difference there is, that arrest is only upon the body of a man; whereas an *attachment* is oftentimes upon his goods. *Kitch.* 279. A *capias* taketh hold of immoveable things, as lands or tenements, and properly belongs to real actions, but attachment hath place rather in personal actions. *Bract. lib.* 4. *Fleta, lib.* 5. *cap.* 24.

ATTACHIAMENTA BONORUM, A distress taken upon goods or chattels, where a man is sued for personal estate or debt, by the legal attachiators or bailiffs, as security to answer an action. *See title, Process.* There is likewise *attachiamenta de spinis & bosco,* a privilege granted to the officers of a forest, to take to their own use, thorns, brush, and wind-fall within their precincts. *Kennet's Paroch. Antip. p.* 209.

ATTACHMENT, Is a process from a court of record, awarded by the justices at their discretion, on a bare suggestion, or on their own knowledge; and is properly grantable in cases of *contempts,* against which all courts of record, but more especially those of Westminster hall, and above all the court of B. R. may proceed in a summary manner. *Leach's Hawk.* P. C. 2. *c.* 22; See 1 *Wils* 300.

The most remarkable instances of contempts seem reducible to the following heads,—1. Contempts of the king's writs. 2. Contempts in the face of a court. 3. Contemptuous words or writings concerning the court. 4. Contempts of the rules or awards of the court. 5. Abuse of the process of the courts. 6. Forgeries of writs and other deceipts tending to impose on the court. 2 *Hawk. P. C. c.* 22. § 33.

All courts of record have a kind of discretionary power over their own officers, and are to see that no abuses be committed by them, which may bring disgrace on the courts themselves; therefore if a sheriff or other officer shall be guilty of a corrupt practice in not serving a writ; as if he refuse to do it, unless paid an unreasonable gratuity from the plaintiff, or receive a bribe from the defendant, or give him notice to remove his person or effects, in order to prevent the service of any writ; the court which awarded it may punish such offences in such a manner as shall seem proper by attachment. *Dyer* 218. 2 *Hawk. P. C. c.* 22. § 2.

But if there be no palpable corruption, nor extraordinary circumstance of wilful negligence or obstinacy, the judgment whereof is to be left to the discretion of the court, it seems not usual to proceed in this manner; but to leave the party to his ordinary remedy against the sheriff, either by action or by rule to return the writ, or by an *alias* and *pluries,* which if he have no excuse for not executing, an attachment goes of course. *Hob.* 62, 264. *Noy* 101. *F. N. B.* 38. *Finch* 237. 5 *Mod.* 314, 315.

*Attachment* lies against attornies for injustice, and base dealing by their clients, in delaying suits, &c. as well as for contempts to the court. 2 *Hawk. c.* 22. § 11. If affidavits to ground an *attachment* are full as to the charge; yet if the party deny such charge by as plain and positive affidavits, he shall be discharged; but if he take a false oath, he may be indicted of perjury. *Mod. Cas, in L. & E.* 81.

Against sheriffs making false returns of writs, and against bailiffs for frauds in arrest, and exceeding their power, &c. *attachment* may be had. For contempts against the king's writs; using them in a vexatious manner; altering the teste, or filling them up after sealed, &c. *attachment* lies. And for contempts of an enormous kind, in not obeying writs, &c. *attachment* may issue against peers. 2 *Hawk. c.* 22. § 33, *&c.* For persuading jurors not to appear on a trial, *attachment* lies against the party, for obstructing the proceedings of the court. 1 *Lill.* 121. The court of B. R. may award *attachment* against any inferior courts usurping a jurisdiction, or acting contrary to justice. *Salk.* 207. Though it is usual first to send out a prohibition.

*Attachment* lies for proceeding in an inferior court, after a *habeas corpus* issued, and a *supersedeas* to stay proceedings. 21 *Car. B. R.* And *attachment* may be granted against justices of peace, for proceeding on an indictment after a *certiorari* delivered to them to remove the indictment. 1 *Lill.* 121. But it does not lie against a corporation, the mode of compulsion being by sequestration. *Cowp.* 377. *Attachment* lies against a lord that refuses to hold his court, after a writ issued to him for that purpose, so that his tenant cannot have right done him. *New Nat. Br.* 6, 27.

An attachment is the proper remedy for disobedience of the rules of court; as of those made in ejectment, arbitrament, &c. So where a defendant in account, being adjudged to account before the auditors, refuses to do it, unless they will allow matter disallowed by the court before; or where one refuses to pay costs taxed by the master, whose taxation the law looks upon as a taxation by the court. 1 *Mod.* 21. 1 *Salk.* 71.

But an attachment is not granted for disobedience of a rule of *Nisi prius,* unless it be first made a rule of court; nor for disobedience of a rule made by a judge at his chamber, unless it be entered; nor for disobedience of any rule without personal service. 1 *Salk.* 84.

Also an attachment is proper for abuses of the process of the court, as for suing out execution where there is no judgment; bringing an appeal for the death of one known to be alive; making use of the process of a superior court, to bring a defendant within the jurisdiction of an inferior court, and then dropping it; using such process in a vexatious, oppressive, or unjust manner, without colour of serving any other end by it. 2 *Hawk. P. C. c.* 22. § 33, *&c.* It seems also that *counsellers* are punishable by attachment for foul practices. 2 *Hawk. P. C. c.* 22. § 30. *Gaolers* are thus punishable for misbehaviour in their offices. *Id. ib. Witnesses* for non-attendance on a trial. *Leach's Hawk. P. C.* 2. *c.* 22. § 33. in an. —*Peers* are liable to attachment for certain outrageous contempts, as a disobedience to a writ of *habeas corpus,* and generally of other writs. *Id. ib.* But the court of King's Bench, will not grant an attachment against a Peer for not paying money awarded, though the defendant consent it shall issue on condition that it should lie in the office for a certain time. 7 *Term. Rep.* 171. Nor against a member of parliament. 7 *Term. Rep.* 448.

Attachments are *usually granted on a rule to shew cause,* un-

less the offence complained of be of a flagrant nature, and positively sworn to, in which last case the party is ordered to attend, which he must do in person, as must every one against whom an attachment is granted; and if he shall appear to be apparently guilty, the court in discretion, on consideration of the nature of the crime, and other circumstances, will either commit him immediately, in order to answer interrogatories to be exhibited against him concerning the contempt complained of, or will suffer him to enter into recognizance to answer such interrogatories; which if they be not exhibited within four days, the party may move to have the recognizance discharged; otherwise he must answer them, though exhibited after the four days; but in all cases, if he fully answer them, he shall be discharged as to the attachment, and the prosecutor shall be left to proceed against him for the perjury, if he thinks fit; but if he deny part of the contempts only, and confess other part, he shall not be discharged as to those denied, but the truth of them shall be examined, and such punishment inflicted as from the whole shall appear reasonable; and if his answer be evasive as to any material part, he shall be punished in the same manner as if he had confessed it. 2 *Hawk. P. C. c.* 22. § 1. 1 *Salk.* 84. 6 *Mod.* 73. 2 *Jones* 178. See *Interrogatories.*

Upon all these examinations the master is to make his report, and the party is then and not before acquitted or adjudged in contempt. *Hardw.* 23. and in the latter case is either immediately sentenced or committed to the marshal; unless the court waive giving judgment (as they sometimes do from motives of lenity) and order the recognizance to be discharged, 3 *Burr.* 1256; or the Attoney General consent that the party may continue on the recognizance to appear under a rule of court at some future time. 2 *Burr.* 797.

Attachments for non payment of costs, and for non-performance of an award, are in the nature of civil executions. 1 *Term. Rep.* 266.

*Attachments* out of *Chancery* may be had of course, upon affidavit made that the defendant was served with a *subpœna*, and appeared not, or upon non-performance of any order or decree; also after the return of this *attachment*, that the defendant *non est inventus, &c.* then *attachment* with proclamation issues against him, &c. *West. Symb.* And for contempts, when a party appears, he must upon his oath answer interrogatories exhibited against him; and if he be found guilty, he shall be fined.

On attachment the party is not obliged to answer any interrogatories tending to convict him of any other offence. *Stra.* 444; or which may subject him to a penalty. *Hardw.* 239.

ATTACHMENT OF PRIVILEGE is where a man by virtue of his privilege calls another to that court whereto he himself belongs, and in respect thereof is privileged, there to answer some action (as an attorney, &c.); or it is a power to apprehend a man in a place privileged. *Book. Entr.* 431. Corporation courts have sometimes power by charter to issue *attachments*, and some courts-baron grant *atttachments* of debt. *Kitch.* 79.

ATTACHMENT FOREIGN, is an *attachment* of the goods of foreigners, found in some liberty, to satisfy their creditors within such liberty. *Carth. Rep.* 66.

*Foreign Attachment* under the custom of *London* is thus; if a plaint be entered in the court of the mayor, or the sheriff against A. and the process be returned *nichil*, and thereupon plaintiff suggests that another person within *London* is indebted to A. the debtor shall be *warned* (whence he is called the *garnishee*,) and if he does not deny himself to be indebted to A. the debt shall be attached in his hands. *Com. Dig.* tit. *Attachment foreign*, cites 22 *E.* 4. 30.

The plaint may be exhibited in the *mayor's* or the *sheriffs'* court; but the proceeding in the former is the most advantageous. *Id. ib.*

This custom of foreign attachment is said to prevail in Exeter and other places. *Sed qu.*

But a foreign *attachment* cannot be had when a suit is depending in any of the courts at Westminster. *Cro. Eliz.* 691. And nothing is *attachable* but for a certain and due debt; though by the custom of London money may be attached before due, as a debt; but not levied before due. *Sid.* 327. 1 *Nels. Abr.* 282, 283.

*Foreign attachments* in London, upon plaint of debt, are made after this manner; *A. oweth B.* 100*l. and C. is indebted to A.* 100*l. B. enters an action against A. of* 200*l. and by virtue of that action a sergeant* attacheth 100*l. in the hands of C. as the money of A. to the use of B. which is returned upon that action.* The *attachment* being made and returned by the sergeant, the plaintiff is immediately to see an attorney before the next court, or the defendant may then put in bail to the attachment, and nonsuit the plaintiff: four court days must pass before the plaintiff can cause C. the *garnishee*, in whose hands the money was *attached*, to shew cause why B. should not condemn the 100*l. attached* in the hands of C. as the money of A. the defendant in the action (though not in the *attachment*) to the use of B. the plaintiff; and the garnishee C. may appear in court by his attorney, wage his law, and plead that he hath no money in his hands of the defendant's, or other special matter; but the plaintiff may hinder his waging of law, by producing two sufficient citizens to swear that the garnishee had either money or goods, in his hands, of *A.* at the time of the *attachment*, of which affidavit is to be made before the lord mayor, and being filed, may be pleaded by way of estoppel: then the plaintiff must put in bail, that if the defendant come within a year and a day into court, and he can discharge himself of the money condemned in court, and that he owed nothing to the plaintiff at the time in the plaint mentioned, the said money shall be forth-coming, &c. If the garnishee fail to appear by his attorney, being warned by the officer to come into court to shew cause as aforesaid, he is taken by default for want of appearing, and judgment given against him for the goods and money attached in his hands, and he is without remedy either at common law or in equity; for if taken in execution, he must pay the money condemned, though he hath not one penny, or go to prison; but the garnishee appearing to shew cause why the money or goods *attached* in his hands ought not to be condemned to the use of the plaintiff, having feed an attorney may plead as aforesaid, that he hath no money or goods in his hands of the party's against whom the attachment is made; and it will then be tried by a jury, and judgment awarded, &c. but after trial, bail may be put in, whereby the *attachment* shall be dissolved, but the garnishee, &c. and his security will then be liable to what debt the plaintiff shall make out to be due, upon the action: and an *attachment* is never thoroughly perfected, till there is a bail, and satisfaction upon record. *Privileg. Lond.*

But the original defendant must be summoned and have notice; otherwise judgment against the garnishee will be erroneous; and the money paid or levied in execution, or it will not discharge the debt from the garnishee to the defendant: (though it was alledged that the custom of the city court is to give no notice.) 3 *Wils.* 297. 2 *Black Rep.* 834. See 1 *Ld. Raym.* 727.

Where a *foreign attachment* is pleaded to an action, the custom is to set forth, that he who levied the plaint shall have execution of the debt owing by himself, and by which he was attached, if the plaintiff in the original action shall not disprove it within a year and a day; now if the plaintiff in the action below doth not set forth such conditional judgment given by the court, it is wrong because he doth not bring his case within the custom. *Vide* 2 *Lutw.* 985.

*In assumpsit, &c.* there was evidence given, that the debt was attached by the custom of *London* before the action

brought, and that it was condemned there before the plea pleaded; and this evidence was given upon the general issue *non assumpsit*; and it being insisted for the defendant, that this should relate so as to defeat the plaintiff's action, it was adjudged, that where there is an attachment and condemnation before the action brought, it may be given *in evidence* upon the general issue, because there is an alteration of the property; but if the attachment be only before the action brought; and the condemnation afterwards, the *attachment* may be pleaded in *abatement*, and the *condemnation* may be pleaded in *bar*, but shall not be given in evidence on the general issue, because by the *condemnation* the property is altered, but not before. 1 *Salk.* 280, 291.

*Action of debt, &c.* the defendant pleaded in bar, that there was a *custom in London* to attach the debt before the day of payment came; *et per curiam* such a custom may be good, but to have judgment to recover the debt before the day of payment is come, cannot be a good custom, because the debtee himself could not recover in such case, and therefore he who made the attachment shall not. This custom was pleaded, that the debtee in person, or *by his attorney*, may swear that the debt is due; but this cannot be good as to the attorney; it was agreed, that goods might be attached by a foreign attachment, and that the value thereof ought to be found before judgment; but that this plea was ill, because the defendant did not aver it, *viz. et hoc paratus est verificare. W. Jones.* 406.

A sum of money was to be paid at *Michaelmas*, and it was attached before that day; adjudged that a *foreign attachment* cannot reach a debt *before it is due*; therefore though the judgment on the attachment was after *Michaelmas*, yet the money being attached before it was due, it is for that reason void. *Cro. Eliz.* 184. For further matter See *Com. Dig.* tit. *Attachment, Foreign Attachment.*

Money due to an executor or administrator, as such cannot be attached. It would give a simple contract creditor priority over judgments, &c. *Fisher* v. *Lane and others*, 3 *Wils.* 297. Nor trust-money in the hands of the garnishee. See *Doug.* 380.

In an action on the case the plaintiff had judgment against the defendant, and he owing 60*l.* to one G. D. he entered a plaint against him in London, and attached the 60*l* in the hands of the said defendant, against whom the plaintiff had recovered as aforesaid, and had execution according to the custom; afterwards the plaintiff brought a *sci. fa.* against the defendant, to shew cause why he should not have execution upon the judgment which he had recovered, to which the defendant pleaded the *execution upon the attachment;* and upon demurrer to that plea it was adjudged against the defendant, because a duty which accrueth by matter *of record*, cannot be attached by the *custom of London*; for judgments obtained in the king's courts shall not be defeated or avoided by such particular customs, they being of so high a nature that they cannot be reached by attachment. 1 *Leon.* 29.

Debtor and creditor being both citizens of London, the debtor delivered several goods to the Exeter carrier then in London, to carry and deliver them at Exeter, and the creditor attached them in the hands of the *carrier* for the debt due to him from his debtor; adjudged, that the action should be discharged, because the *carrier* is privileged in his person and goods, and not only in the goods which are his own, but in those of other men, of which he is in possession, for he is answerable for them. 1 *Leon.* 189.

An executor submitted to an award, and the arbitrators awarded, that the defendant should pay the executor 350*l.* This money is not attachable in his hands by any creditor of his testator, though it is assets in his hands when recovered; because it was not due to the testator *tempore mortis*, and the custom of foreign attachments extends only to such debts. 1 *Vent.* 111.

Money awarded under a rule of court cannot in any case be attached. 4 *Term Rep.* 313. *n.*

Money directed to be paid by A. to B. by the Master's *allocatur* cannot be attached in A.'s hands by process out of the sheriffs' court against B. 4 *Term. Rep.* 312.

A garnishee against whom a recovery was had in the mayor's court on foreign attachment, after a summons to defendant, and *nihil* returned, may protect himself by giving such proceedings in evidence upon *assumpsit* in an action to recover the same debt brought by the defendant below without proving the debt of the plaintiff below who attached the money in his hands although by the course of proceedings in the mayor's court, bail not having been put in, the plaintiff below was not obliged to prove the debt to entitle himself to recover against the garnishee. 3 *East* 367.

ATTACHMENT OF THE FOREST, Is one of the three courts held in Forests; *Manwood* 90, 99. The lower court is called the *Attachments;* the middle one, the *Swainmote*; the highest, *the justice in Eyre's seat.* The *court of attachment* seemeth to be so called, because the *verderors* of the forest have therein no other authority, but to receive the *attachments* of offenders against *vert* and *venison*, taken by the rest of the officers, and to enroll them, that they may be presented and punished at the next *justices seat*, *Manwood* 93. And this *attaching* is by three means: 1. By goods and chattels. 2. By the body, pledges, and mainprize. 3. By the body only. This court is to be kept every forty days. See *Crompton*, in his *Court of the Forest*, and this Dict. tit. *Forest.*

ATTAINDER, *attincta* and *attinctura.*]. The *stain* or *corruption* of the blood of a criminal capitally condemned; the immediate inseparable consequence by the common law, on the pronouncing the sentence of death.

He is then called attaint, *attinctus*, stained or blackened. He is no longer of any credit or reputation; he cannot be a witness in any court: neither is he capable of performing the functions of another man: for by an anticipation of his punishment, he is already dead in law. 3. *Inst.* 213. This is after *judgment*: for there is great difference between a man *convicted* and *attainted*; though they are frequently through inaccuracy confounded together; when judgment is once pronounced, both law and fact conspire to prove him completely guilty; and there is not the remotest possibility left of any thing to be said in his favour. Upon judgment therefore of death, and not before, the attainder of a criminal commences; or upon such circumstances as are equivalent to judgment of death; as judgment of outlawry on a capital crime, pronounced for absconding or fleeing from justice, which tacitly confesses the guilt. And therefore either upon judgment of outlawry, or of death, for treason or felony, a man shall be said to be attainted. 4 *Comm.* 380, 381.

A man is *attainted* by appearance, or by process: *attainder* on appearance is by confession, or verdict, &c. Confession, when the prisoner upon his indictment being asked whether Guilty or Not Guilty, answers Guilty, without putting himself upon his country; (and formerly confession was allowed before the coroner in sanctuary; whereupon the offender was to abjure the realm, and this was called *attainder* by abjuration.) *Attainder* by verdict is when the prisoner at the bar pleaded Not Guilty, and is found guilty by the verdict of the jury of life and death. And *attainder* by process, (otherwise termed *attainder* by default or outlawry,) is when the party flieth, and is not found untill he hath been five times publickly called or proclaimed in the country, on the last whereof he is outlawed upon his default. *Staundf. Pl. Co.* 44. 122. 182. Also persons may be attainted by act of parliament.

Acts of attainder of criminals have been passed in several reigns, on the discovery of plots and rebellions, from the reign

of king Charles II. when an act was made for the *attainder* of several persons guilty of the murder of king Charles I. to this time; among which, that for *attainting* Sir John Fenwick, for conspiring against king William, is the most remarkable; it being made to *attaint* and convict him of high treason on the oath of one witness, just after a law had been enacted, That no person should be tried or *attainted* of high treason where corruption of blood is incurred, but by the oath of two lawful witnesses, unless the party confess, stand mute, *&c. Stat.* 7 *&* 8 *W.* 3 *cap.* 3. But in the case of Sir John Fenwick, there was something extraordinary; for he was indicted of treason, on the oaths of two witnesses: though but one only was produced against him on his trial. It was alleged Sir John had tampered with, and prevailed on one of the witnesses to withdraw.

The consequences of attainder are forfeiture and corruption of blood; which latter cannot regularly be taken off but by act of parliament. *Co. Lit.* 391 *b.*

As to forfeiture of lands, &c. by attainder, See this Dict. tit. *Forfeiture.* As to *Corruption of Blood*, this operates upwards and downwards, so that an attainted person can neither inherit lands or other hereditaments from his ancestors, nor retain those he is already in possession of, nor transmit them by descent to any heir; but the same shall escheat to the lord of the fee, subject to the king's superior right of forfeiture; and the person attainted shall also obstruct all descents to his posterity, wherever they are obliged to derive a title through him to a remoter ancestor. See tit. *Tenure*, *Descent*, *Forfeiture.*

This is one of those notions which our laws have adopted from the feudal constitutions, at the time of the Norman conquest, as appears from its being unknown in those tenures which are indisputably Saxon, or Gavelkind: wherein, though by treason, according to the antient Saxon laws, the land is forfeited to the king, yet no corruption of blood, no impediment of descent ensues; and, on judgment of mere felony, no escheat accrues to the lord. And therefore as every other oppressive mark of feudal tenures is now happily worn away in these kingdoms, it is to be hoped that the *corruption of blood*, with all its connected consequences not only of present escheat, but of future incapacities of inheritance even to the twentieth generation, may in process of time be abolished by act of parliament: as it stands upon a very different footing from the forfeiture of lands for high treason, affecting the king's person or government. And indeed the legislature has, from time to time, appeared very inclinable to give way to so equitable a provision; by enacting that, in certain treasons respecting the papal supremacy, *stat. 5 Eliz. c.* 1; and the public coin, *stats. 5 Eliz. c.* 11. 18 *Eliz. c.* 1. 8 *&* 9 *W.* 3. *c.* 26. 15 *&* 16 *Geo.* 2. *c.* 28; and in many of the new made felonies, created since the reign of Henry the Eighth by act of parliament, corruption of blood shall be saved. But as in some of the acts for creating felonies (and those not of the most atrocious kind,) this saving was neglected, or forgotten to be made, it seems to be highly reasonable and expedient to antiquate the whole of this doctrine by one undistinguishing law: especially as by the *stat.* of 7 *Ann. c.* 21, (the operation of which is postponed by *st.* 17. *Geo.* 2. *c.* 39,) after the death of the sons of the late Pretender, no attainder for treason will extend to the disenheriting any heir, nor the prejudice of any person, other than the offender himself; which virtually abolishes all corruption of blood for treason, though (unless the legislature should interpose,) it will still continue for many sorts of felony. 4 *Comm.* 388, 9. See 2 *Comm* 253.

By 54 *Geo.* 3. *c.* 145. it is enacted that no attainder for felony, except in cases of *high treason*, *petty treason*, or *murder*, or of abetting, procuring, or counselling the same, shall extend to the disinheriting of any heir nor to the prejudice of the right or title of any person or persons, other than the offender during his natural life only: and every person to whom the right or interest of any lands or tenements, after the death of such offender, should have appertained if no such attainder had been, may enter into the same.

In treason for counterfeiting the coin, although by the statutes corruption of blood is saved, yet the lands of the offender, are forfeited immediately to the king on *attainder*, it being a distinct penalty from corruption of blood: for the corruption may be saved, and the forfeiture remain, &c. And accordingly so it is provided by some statutes. 1 *Salk.* 85.

*Attainders* may be reversed or falsified, by a writ of error, or by plea. If by a writ of error, it must be by the king's leave, &c. and when by plea, it may be by denying the treason, pleading a pardon by act of parliament, &c. 3 *Inst.* 232.

By a king's taking the crown upon him, all *attainders* of his person are *ipso facto* purged, without any reversal. 1 *Inst.* 26. *Finch. L.* 82. *Wood* 17. This was the declaration of parliament, made in favour of Henry the 7th. See 1 *Comm.* 248.

The *stat.* 8 *W.* 3. *c.* 5. requires Sir George Barclay, major general Holmes, and other persons to surrender themselves to the lord chief justice, or secretaries of state; or to be *attainted.* By the 13 *W.* 3. *c.* 3. the pretended Prince of Wales is under *attainder* of treason, &c. And by 1 *Geo.* 1. *c.* 16. the Duke of Ormond and others are *attainted.* And besides these acts of *attainder*, *bills for inflicting pains and penalties* are sometimes past; as that against the bishop of Rochester; *stat.* 9 *Geo.* 1. *c.* 17. See title *Corruption of Blood.*

ATTAINT, *attincta.*] A writ that lieth to enquire whether a jury of twelve men gave a false verdict; (*Finch.* 484:) that so the judgment following thereupon, may be reversed; and this must be brought in the life-time of him for whom the verdict was given, and of two at least of the jurors who gave it. This lay at the common law, only upon writs of *assise*; and seems to have been coeval with that institution by king Henry II. at the instance of his chief justice *Glanvil*; being probably meant as a check upon the vast power then reposed in the recognitors of assise, of finding a verdict according to their own personal knowledge, without the examination of witnesses. And even here it extended no further than to such instances, where the issue was joined upon the very point of assise (the heirship, desseisin, &c.) and not on any collateral matter; as villainage, bastardy, or any other disputed fact. See *Viner*, title *Attaint*, and this Dict. title *Jury* IV.

In these cases the *assise* was said to be turned into an *inquest* or *jury*, (*assise vertitur in juratam*) or that the assise should be taken in *modum juratæ*, *et non in modum assisæ*; that is, that the issue should be tried by a common jury or inquest, and not by recognitors of assise: (*Bract. l.* 4. *tr.* 1. *c.* 34. § 2, 3, 4.—*tr.* 3. *c.* 17. *tr.* 5. *c.* 4. § 1, 2. *Flet. l.* 5. *c.* 22. § 8. *Co. Ent.* 61 *b. Booth.* 213.) and then it seems that no attaint lay against the inquest or jury that determined such collateral issue: *Br.* 4. 1. 34. 2. *Flet. l.* 5. *c.* 22. Neither is mention made by our ancient writers, of such a process obtaining after the trial by inquest or jury, in the old Norman or feudal actions prosecuted by writ of *entry.* Nor did any attaint lie in *trespass*, *debt*, or other action personal, by the old common law: because those were always determined by common inquests or juries. *Year B.* 28 *E.* 3. 15. 17 *Ass. pl.* 15. *Flet.* 5. 22. 16. At length the *st.* of *Westm.* 1. (1 *E.* 1.) *c.* 38. allowed an attaint to be sued upon *inquest*, as well as *assises*, which were taken upon any plea of *land* or of *freehold.* But this was at the king's discretion, and is so understood by the author of *Fleta*, (*l.* 5. *c.* 22. § 8. *and* 16.) a writer contemporary with the statute; though Sir Ed. Coke, (2 *Inst.* 130. 237.) seems to hold a different opinion. Other subsequent statutes, (1 *E.* 3. *st.* 1. *c.* 6. 5 *E.* 3. *c.* 7. 28 *Ed.* 3. *c.* 8.) introduced the same remedy in all pleas of *trespass*, and the stat. 34 *E.* 3. *c.* 7. extended to *all* pleas whatsoever, personal

as well as real; except only the writ of *right*, in such cases where the mise or issue is joined on the *more right*, and not on any *collateral* question. For though the attaint seems to have been generally allowed in the reign of Henry the Second, at the first introduction of the grand assise, (which at that time might consist of only *twelve* recognitors, in case they were all unanimous) yet subsequent authorities have holden, that no attaint lies on a false verdict given upon the mere right, either at common law or by statute; because that is determined by the grand assise, appealed to by the party himself, and now consisting of sixteen jurors. *Bract.* 290. *Flet.* 5. 227. *Britt.* 243 *b.* 12 *Hen.* 6. 6 *Bro. Abr.* tit. *Atteint* 42, 1 *Roll. Abr.* 280.

The jury who are to try this false verdict, must be twenty-four, and are called the grand jury; for the law wills not that the oath of one jury of twelve men should be attainted or set aside by an equal number, nor by less indeed than double the former. *Bract. l.* 4. *tr.* 5. *c.* 4. § 1. *Flet. l.* 5. *c.* 22. § 7. If the matter in dispute be of 40*l.* value in personals, or of forty-shilling a year in lands and tenements, then by stat. 15 *Hen.* 6. *c.* 5. each grand juror must have a freehold to the annual value of twenty pounds. And he that brings the attaint can give no other evidence to the grand jury, than what was originally given to the petit: for as their verdict is now trying, and the question is, whether or no they did right upon the evidence that appeared to them, the law adjudged it the highest absurdity to produce any subsequent proof upon such trial, and to condemn the prior jurisdiction for not believing evidence which they never knew. But those against whom it is brought are allowed, in affirmance of the first verdict, to produce new matter; (*Finch L.* 486;) because the petit jury may have formed their verdict upon evidence of their own knowledge, which never appeared in court. If the grand jury found the verdict a false one, the judgment by the common law was, that the jurors should lose their *liberam legem*, and become for ever infamous; should forfeit their goods and the profits of their lands; should themselves be imprisoned and their wives and children thrown out of doors; should have their houses rased, their trees extirpated, and their meadows ploughed; and that the plaintiff should be restored to all that he lost by reason of the unjust verdict. But as the severity of this punishment had its usual effect, in preventing the law from being executed, therefore by the stat. 11 *Hen.* 7. *c.* 24, (revived by 23 *Hen.* 8. *c.* 3; and made perpetual by 13 *Eliz. c.* 25;) an attaint is allowed to be brought after the death of the party, and a more moderate punishment was inflicted upon attainted jurors, *viz.* perpetual infamy, and, if cause of action were above 40*l.* value, a forfeiture of 20*l.* a-piece by the jurors; or if under 40*l.* then 5*l.* a-piece, to be divided between the king and the party injured. So that a man may now bring an attaint either upon the statute or at common law, at his election; (3 *Inst.* 164;) and in both of them may reverse the former judgment. But the practice of setting aside verdicts upon motion, and granting *new trials*, has so superseded the use of both sorts of attaints, that very few instances of an attaint appear in our books later than the sixteenth century. *Cro. Eliz.* 309. *Cro. Jac.* 90.

It may be matter of some curiosity however, and perhaps of use, under this head, to state so much of the old law as tends further to explain,

I. *By and against whom attaint may be brought.*
II. *In what cases it will lie.*
III. *Of the proceedings in attaint.*

The party grieved may have writ of attaint against the other party, (whether plaintiff or defendant) and against the jurors or such of them as shall be then living: it is said any one that is hurt by the false verdict may bring this writ; and if the verdict be for matter of land, the remedy commonly runs with the land, so that any party or privy, as an heir or executor may have it. *F. N. B.* 109. *Co. Lit.* 294. 1 *And.* 24, 5.

Where *trespass* is brought *against baron and feme*, and the plaintiff *recovers*, *the baron alone shall not have attaint*, for it shall be brought according to the record. *Br. Baron and Feme, pl.*. 22. *Successors of a parson* shall have error or attaint of judgment against the predecessor. *Br. Attaint, pl.* 100. *None shall have attaint but he that may be restored* to the thing lost by the judgments; *per Bramstone* Ch. J. *Mar.* 210. Reversioners may have an attaint upon a false verdict, &c. against a particular tenant who shall be restored to his possession, and the reversioner to his arrearages. *stat.* 9 *R.* 2. *c.* 3. This action must be brought against the jurors, and the parties to the first suit: or, if the parties be dead, their heirs, or executors, or any other for the most part that recovered by the first punishment. *Dyer* 201. If all the jurors but one are dead, the action is gone, and no attaint can be brought; and where any one dies depending the suit, it is gone; but not by the death of the defendant that recovered in the first action. *Dyer* 139. *Hob.* 227.

II. Attaint lies where a jury gives a verdict contrary to evidence; where a judge declares the law erroneously, judgment may be reversed; but in this case the jury shall be excused. *Vaugh.* 145. Attaint lies not for that which is not given in evidence; nor upon an inquest of office, &c. or when a thing found is impertinent to the issue, *Hob.* 53. *Co. Lit.* 355. And no attaint lieth where the king is sole party, and the jury find for him. 4 *Leon.* 46. *Aliter* where the suit is *tam pro domino rege quam pro seipso.* 4 *Leon.* 46. An atttaint may be brought where any material falsehood is found, though some truth may be found with it; as where a jury shall find a man guilty of many trespasses, who is guilty but of one trespass. So if a jury find any thing against the common or statute law, that all men are to take notice of, this may make them chargeable in attaint. *Bro.* 44. *Hob.* 227.

The jury may be attainted two ways; 1st, where they *find contrary to evidence;* 2dly, where they find *out of the compass of the allegata.* But to attaint them for finding contrary to evidence is not easy, because they may have evidence of their own conusance of the matter by them, or they may find upon distrust of the witnesses, or their own proper knowledge; but if they find upon evidence that does not prove the *allegata*, there it is easy to subject them to an attaint, because it is manifest that what is so found is an evidence not corresponding to their issue, and this was the only curb they had over the jurors; for the judge being best master of the *allegata*, if they did not follow his direction touching the proof, they were then liable to the danger of an attaint, and therefore *since the judges*, from the difficulty of attainting the jury *have granted new trials*, whereby *jurors* have been freed from the fear of attaint, they *have taken a great liberty in giving verdicts;* but since *the attaint is only disused, and not taken away*, it is necessary that a certain matter should be brought before them; and therefore in *trespass*, the quantity and value of the thing demanded must be so conveniently described, that if the jury find *damages* beyond such quantities and value, it may be *apparently excessive*, and they subject to the attaint; and so *on special contracts*, they must be set forth so precisely, that *if evidence be given of another contract*, and not in the allegations, *and yet the jury find for the plaintiff, they may be subject to an attaint;* and were it otherwise, if the plaintiff had a jury to his turn, and the judge should direct that the plaintiff be non suited, yet if the plaintiff would stand the trial, the judge must give positive directions to find for the defendant; and there would be no means of compelling the jury to find according to the direction of the judge, if they were not under the terror

of an attaint, if they did otherwise; so this is the only curb that the law has put in the hands of the judges to restrain jurors from giving corrupt verdicts. *Gilb. H. C. B.* 128.

III. The process to be issued is directed by stat. 23 *H.* 8. *c.* 3. already mentioned: and by the said statute if any of the petit jury appear at the return of the writ of attaint, the plaintiff shall assign the false oath of the verdict untruly given. And if the defendant, or any of the petit jury appear not on distress, the grand inquest shall be taken by default.

The petit jury can plead no plea, but such as may excuse them of the false oath. 1 *Rol. Abr.* 285.

In the court of King's Bench and Common Pleas, and the court of Hustings of London, *attaint* may be brought: and the plaintiff setting aside the verdict shall have restitution, &c. But if the first verdict be affirmed, the plaintiff shall be imprisoned and fined. 11 *H.* 7. *c.* 21.

In *attaint* the parties and the jury appeared and demanded *oyer* of the record upon which the *attaint* was founded, which record being in the Common Pleas, they had it, and thereupon the plaintiff assigned the false oath; the defendant pleaded, that they made a good and lawful oath; upon which they were at issue, and in the same term the record was removed by a writ of error into the King's Bench; adjudged, that notwithstanding it was thus removed, the court of Common Pleas might proceed if the process for the grand jury were returned. *Dyer* 284.

*Attaint* was brought in the Common Pleas against a jury, for a verdict given in the King's Bench, whereupon the record was removed from that court to the Common Pleas, and there the verdict was affirmed; adjudged, that the plaintiff in the action shall have execution according to the verdict, for the record is in the King's Bench, and nothing but the *tenor* thereof in the Common Pleas; but if the verdict had been set aside, and execution had been had upon it before it was set aside, then the court of Common Pleas might have awarded restitution to the party grieved. *Cro. Eliz.* 371.

A non-suit in *attaint* is peremptory: and no *supersedeas* is grantable upon *attaint*. *Co. Lit.* 227.

An *attaint* as well as a writ of error shall follow the nature of the action upon which it is founded; so that if summons and severance lies in the first action, it shall do so likewise in the *attaint*, but this is not a *supersedeas* as a writ of error is: adjudged likewise, if damages are recovered against several in an action of conspiracy, all of them must join in an *attaint*, and the non-suit of one of them shall not hurt the rest. 6 *Rep.* 25.

In an *attaint* the plaintiff shall recover against all the jurors, tenants, and defendants, the costs and damages, which he shall sustain by delay or otherwise in that suit: and if the defendant's plea in bar be found against him, the plaintiff will have judgment to be restored to what he lost, with damages. *Stat.* 11 *H.* 6. *c.* 4. and 15 *H.* 6. *c.* 5.

ATTAINTED. See ATTAINDER.

ATTAL SARISIN. The term by which the inhabitants and miners of Cornwall call an old deserted mine, that is given over, i.e. the leavings of the Sarasins, Sassins, or Saxons. *Cowel.*

ATTEGIA, from the Lat. *ad* and *tego.*] A little house. *Ethelward, lib.* 4. *Hist. Angl. cap.* 3. *Blount.*

ATTENDANT, *attendens.*] Signifies one that owes a duty or service to another, or in some sort depends on him. Where a wife is endowed of lands by a guardian, &c. she shall be attendant on the guardian, and on the heir at his full age. *Terms de Ley.*

ATTERMINING, from the Fr. *atterminer.*] The granting a time or term for payment of a debt. *Ordinatio de libertatibus perquirendis, ann.* 27 *Ed.* 1. And see *stat. West.* 2. *c.* 4.

ATTILE, *Attilium, attilamentum.*] The rigging or furniture of a ship. *Fleta. lib.* 1. *c.* 25.

ATTORNARE REM. To *atturn* or turn over money and goods, viz. to assign or appropriate them to some particular use and service. *Kennet's Paroch. Antiq. p.* 283.

ATTORNATO FACIENDO VEL RECIPIENDO. A writ to command a sheriff or steward of a county-court or hundred-court, to receive and admit an attorney, to appear for the person that owes suit of court. *F. N. B.* 156. Every person that owes suit to the county-court, court-baron, &c. may make an attorney to do his suit. *Stat.* 20 *H.* 3. *c.* 10.

ATTORNEY, *attornatus.*] Is one that is appointed by another man to do any thing in his absence. *West. Symb. Crompt. Jurisdict.* 105. An attorney is either public, in the courts of record, the King's Bench, and Common Pleas, &c: and made by warrant from his client: or private, upon occasion for any particular business, who is commonly made by letter of attorney. In ancient times, those of authority in courts had it in their power whether they would suffer men to appear or sue by any other but themselves: and the king's writs were to be obtained for the admission of attornies: but, since that, attornies have been allowed by several statutes. Attornies may be made in such pleas whereon appeal lieth not: in criminal cases there will be no attornies admitted. See stat. *Glouc.* 6 *Ed.* 1. *st.* 1. *c.* 8. An infant ought not to appear by attorney, but by guardian, for he cannot make an attorney, but the court may assign him a guardian. 1 *Lill. Abr.* 138. Infants, after they come to full age, may sue by attorney, though admitted before by guardian, &c. In action against baron and feme, the feme being within age, she must appear by guardian: but if they bring an action, the husband shall make attorney for both. 1 *Danv. Abr.* 602. Where baron and feme are sued, though the wife cannot make attorney, the husband may do it for both of them. 2 *Sand.* 213. See 3 *W. P. T.* 261. One *non compos mentis*, being within age, is to appear by guardian; but after he is of age he must do it by attorney. *Co Lit.* 135. An ideot is not to appear by attorney, but in proper person. A corporation cannot appear otherwise than by attorney, who is made by deed under the seal of the corporation. *Plowd.* 91.

ATTORNIES AT LAW, Are such persons as take upon them the business of other men, by whom they are retained.

Before the statute of *West.* 2. *c.* 10. [13 *Ed.* 1. *A. D.* 1285,] all attornies were made by letters patent under the great seal, commanding the justices to admit the person to be his attorney. These patents, where they were obtained, seem to have been enrolled by a proper officer, called the clerk of the warrants; and also the courts enrolled those patents on which any proceedings were. If such letters patent could not be obtained, the persons were obliged to appear each day in court in their proper persons. *Gilb. H. C. P.* 32, 33.

The said statute of *West.* 2. *c.* 10. gives to all persons a liberty of appearing, and appointing an attorney, as if they had letters patent; and therefore the clerk of the warrants received each person's warrant, and upon the warrant it equally appeared to the court, that he had appointed such a one his attorney to the end of the cause, unless revoked; so that on each act there is no occasion of the plaintiff's and defendant's presence, as was used before that time. This authority continues till judgment, and for a year and a day, and afterwards to sue out execution, and for a longer time, if they continue execution; but if not, the judgment is supposed to be satisfied; and to make it appear otherwise, the plaintiff must again come into court, which he either does by a *scire fac'* or an action of debt on the judgment. *Gilb. H. C. P.* 33.

The attornies of B. R. are of record as well as the attornies of C. B. 1 *Roll.* 3. And it is now the common course for the plaintiff and defendant to appear by attorney. *F. N. B.* 26. D.

But where the party stands in contempt, the court will not admit him by attorney, but oblige him to appear in person. *Ibid.* 262. Outlawry is excepted by stat. 4 *& 5 W. & M. c.* 18. unless where the court orders special bail. By stat. 13 *W.* 3. *c.* 6. attornies are to take the oaths to government under penalties and disability to practise. By stat. 1 *H.* 5. *c.* 4. "no sheriff, sheriff's clerk, receiver, nor sheriff's bailiff, shall be attorney in the king's courts, during the time he is in office with any such sheriff."

In Trinity term 31 *Geo.* 3. a rule of court was made to prevent the admission of persons under irregular articles of clerkship, &c. chiefly to prevent the clerks of attornies from acting as principals. See 4 *Term Rep.* 379.

Parties to fines, as well demandant or plaintiff as tenants or defendants, that will acknowledge their right of lands unto others in pleas of *warrantia chartæ*, *covenant*, *&c.* before the fines pass, shall appear personally, so that their age, idiotcy, or other default (if any be) may be discerned; provided that if any, by age, impotency, or casualty, is not able to come into court, one of the justices shall go to the party and receive his cognizance, and shall take with him a knight or man of good fame. Barons of the exchequer and justices shall not admit attornies, but in pleas that pass before them, and where they be assigned. Reserving to the Chancellor his authority in admitting attornies, and to the Chief Justices. *Stat.* 15 *Ed.* 2. *stat.* 1.

In respect of the several courts, there are attornies at large, and attornies special, belonging to this or that court only. An attorney may be a solicitor in other courts, by a special retainer: one may be attorney on record, and another do the business; and there are attornies who manage business out of the courts, &c. *Stat.* 4 *H.* 4. *c.* 18. was enacted, that the justices should examine attornies, and remove the unskilful; and attornies shall swear to execute their offices truly, &c. and by stat. 33 *H.* 6. *c.* 7. the number of attornies in Norfolk and Suffolk were limited.

By 3 *Jac.* 1. *c.* 7. attornies, &c. shall not be allowed any fees laid out for counsel, or otherwise, unless they have tickets thereof signed by them that receive such fees; and they shall give in true bills to their clients of all the charges of suits, under their hands, before the clients shall be charged with the payment thereof. If they delay their client's suit for gain; or demand more than their due fees and disbursements, the clients shall recover costs and treble damages; and they shall be for ever after disabled to be attornies. None shall be admitted attornies in courts of record, but such as have been brought up in the said courts, or are well practised and skilled, and of an honest disposition; and no attorney shall suffer any other to follow a suit in his name, on pain of forfeiting 20*l.* to be divided between the king and the party grieved. This statute, as to fees to counsel, doth not extend to matters transacted in inferior courts, but only to suits in the courts of Westminster Hall. *Carth.* 147.

By the stat. 12 *Geo.* 1. *cap.* 29. if any, who hath been convicted of forgery, perjury, subornation of perjury, or common barratry, shall practise as an attorney or solicitor in any suit or action in any court, the judge, where such action shall be brought, hath power to transport the offender for seven years, by such ways, and under such penalties, as felons.

The act 2 *Geo.* 2. *c.* 23. ordains, That all attornies shall be sworn, admitted, and enrolled, before allowed to sue out writs in the courts at Westminster; and after the 1st of December, 1730, none shall be permitted to practise but such as have served a clerkship of five years to an attorney, and they shall be examined, sworn, and admitted in open court; and attornies shall not have more than two clerks at one time, &c. Every writ, and copy of any process, served on a defendant, and also every warrant made out thereon, shall be indorsed with the name of the attorney by whom sued forth; and no attornies or solicitors shall commence any action for fees till a month after the delivery of their bills, subscribed with their hands; also the parties chargeable may, in the mean time, get such bills taxed, and, upon the taxation, the sum remaining due is to be paid in full of the said bills, or in default the parties shall be liable to attachment, &c. And the attorney is to pay the costs of taxation, if the bill be reduced a sixth part. A penalty of 50*l.* inflicted, and disability to practise, for acting contrary to this statute.

By stat. 6 *Geo.* 2. *cap.* 27. attornies of the courts of Westminster may practise in inferior courts.

By 12 *Geo.* 2. *c.* 13. attornies, &c. that act in any county-court, without being admitted, according to the statute 2 *Geo.* 2. *c.* 23. shall forfeit 20*l.* recoverable in the courts of record; and no attorney, who is a prisoner in any prison, shall sue out any writ, or prosecute suits; if he doth, the proceedings shall be void, and such attorney, &c. is to be struck off the roll. But suits commenced before by them may be carried on. A *quaker*, serving a clerkship, and taking his solemn affirmation instead of an oath, shall be admitted an attorney.

By the stat. 22 *Geo.* 2. *c.* 46. persons bound clerks to attornies or solicitors are to cause affidavits to be made and filed of the execution of the articles, names and places of abode of attorney or solicitor, and clerk, and none to be admitted till the affidavits be produced and read in court; no attorney having discontinued business to take any clerk. Clerks are to serve actually during the whole time, and make affidavits thereof. Persons admitted sworn clerks in Chancery, or serving a clerkship to such, may be admitted solicitors. By the stat. 23 *Geo.* 2. *c.* 26. any person duly admitted a solicitor, may be admitted an attorney, without any fee for the oath, or any stamp to be impressed on the parchment whereon his admission shall be written, in the same manner as by stat. 2 *Geo.* 2. *c.* 23. § 20. attornies may be admitted solicitors.

By stat. 49 *Geo.* 3. *c.* 28. clerks of the king's coroner and attorney in the court of King's Bench, are allowed to be admitted attornies.

By several stamp acts, every admitted attorney, solicitor, notary, proctor, agent, or procurator, shall annually take out a certificate from the courts in which they practise, on penalty of 50*l.*

Stamp duties are imposed by several acts on articles of clerkship to attornies and solicitors. Acts of indemnity are from time to time passed, allowing further time for stamping articles, and taking out certificates.

Attornies of courts, &c. shall not receive or procure any blank warrant for arrests from any sheriff, without writ first delivered, on pain of severe punishment, expulsion, &c. And no attorney shall make out a writ with a clause *ac etiam billæ*, &c. where special bail is not required by law. *Pasch.* 15 *Car.* 2. See tit. *Appearance.* Action upon the case lies for a client against his attorney, if he appear for him without a warrant; or if he plead a plea for him, for which he hath not his warrant. 1 *Lill. Abr.* 140. But if an attorney appear without warrant, and judgment is had against his client, the judgment shall stand, if the attorney be responsible: *contra*, if the attorney be not responsible. 1 *Salk.* 88.

Action lies against an attorney for suffering judgment against his client by *nil dicit*, when he had given him a warrant to plead the general issue: this is understood where it is done by covin. 1 *Danv. Abr.* 185. If an attorney makes default in a plea of land, by which the party loses his land, he may have a writ of deceipt against the attorney, and recover all in damages. *Ibid.* An attorney owes to his client secrecy and diligence, as well as fidelity; and if he take reward on the other side, or cause an attorney to appear and confess the action, &c. he may be punished. *Hob.* 9.

But action lies not against an attorney retained in a suit, though he knows the plaintiff hath no cause of action; he only acting as a servant in the way of his profession. 4 *Inst.* 117. 1 *Mod.* 209. Though, where an attorney or solicitor is found guilty of a gross neglect, the court of Chancery has in some cases ordered him to pay the costs. 1 *P. Wms.* 593. He who is attorney at one time, is attorney at all times pending the plea. 1 *Danv.* 609. And the plaintiff or defendant may not change his attorney, while the suit is depending, without leave of the court, which would reflect on the credit of attornies; nor until his fees are paid. *Mich.* 14 *Car.* A cause is to proceed notwithstanding the death of an attorney therein; and not be delayed on that account. For if an attorney dieth, the plaintiff or defendant may be required to make a new attorney. 2 *Keb.* 275.

Attornies are liable to be punished in a summary way, either by attachment, or having their names struck out of the roll for ill practice, attended with fraud and corruption, and committed against the obvious rules of justice and common honesty; but the court will not easily be prevailed on to proceed in this manner, if it appears that the matter complained of was rather owing to neglect or accident than design; or if the party injured has other remedy by act of parliament, or action at law. 12 *Mod.* 251, 318. 440. 583. 657. 4 *Mod.* 367.

If an attorney, defendant in an action, does not appear in due time, plaintiff may sign a *forejudger*, which enables him to strike the defendant off the roll, and then he may be sued as a common person, (*stat.* 2 *H.* 4. *c.* 8.) and cannot be proceeded against by bill.—On making satisfaction to the plaintiff, an attorney, so forejudged, may be restored. See *Impey's Instructor Clericalis*, *C. P.* 521.

Sometimes attornies are struck off the roll on their own application, for the purpose of being called to the bar, &c. and in this case, they must be disbarred by their inn, before they are re-admitted attornies. *Dougl.* 144.

An attorney convicted of felony struck off the roll. *Cowp.* 829.

They are also liable to be punished for base and unfair dealings towards their clients, in the way of business, as for protracting suits by little shifts and devices, and putting the parties to unnecessary expence, in order to raise their bills; or demanding fees for business that was never done; or for refusing to deliver up their client's writings with which they had been entrusted in the way of business; or money which has been recovered and received by them to their client's use, and for other such like gross and palpable abuses. 2 *Hawk. P. C.* 144. 8 *Mod.* 306. 12 *Mod.* 516.

In a *criminal* case the attorney for defendant may be his bail. *Doug.* 467. See tit. *Bail.*

Payment to the attorney, is payment to the principal. *Doug.* 623. 1 *Black. R.* 8.

An action lies against an attorney for neglecting to charge a person in execution at his client's suit, according to a rule of court; although it seems it was rather want of judgment than negligence. 3 *Wils.* 325.—But the court will not proceed against him for it in a summary way. 4 *Burr.* 2060.

An attorney has a lien on the money recovered by his client, for his bill of costs; if the money come to his hands he may retain to the amount of his bill. He may stop it *in transitu* if he can lay hold of it; if he apply to the court, they will prevent its being paid over until his demand is satisfied. If the attorney give notice to the defendant not to pay till his bill be discharged, a payment by the defendant after such notice, would be in his own wrong, and like paying a debt which has been assigned after notice. *Doug.* 238.

An attorney has a lien upon a sum awarded in favour of his client as well as if recovered by judgment; and if after notice to defendant, the latter pay it over to his plaintiff, the plaintiff's attorney may compel a re-payment of it to himself; and he shall not be prejudiced by a collusive re-



lease from the plaintiff to the defendant. *Ormerod* v. *Tate*, 1 *East.* 464.

An attorney is bound to disclose, when called as a witness, the contents of a notice which he received to produce a paper in the hands of his client. 7 *E. R.* 357.

The court, under circumstances, will entertain a summary jurisdiction over an attorney in obliging him to deliver up deeds, &c. on satisfaction of his lien, though they came into his hands as steward of a court and receiver of rents. 3 *Term. Rep.* 275. See 1 *Salk.* 87. 1 *Lill.* 148. *Mod. Cas. Law & Eq.* 306. the latter that an attorney cannot detain papers delivered to him on a special trust for money due to him in that very business.

But the court refused to compel an attorney to deliver up, on payment of his demand, a deed placed in his hands for the purpose of making an assignment of it, there being no cause in court, nor any misconduct imputable to him. 8 *E. R.* 237.

Attornies have the privilege to sue and be sued only in the courts at Westminster, where they practise: they are not obliged to put in special bail, when defendants; but when they are plaintiffs, they may insist upon special bail in all bailable cases. 1 *Vent.* 299. *Wood's Inst.* 450. But an attorney of one court, may in that court, hold an attorney of another court to bail. Attornies shall not be chosen into offices, against their wills. See tit. *Abatement*, *Privilege.*

Those who have not been attending their employment in King's Bench for one year last past, unless hindered by sickness, are not to be allowed their privilege as attornies. 2 *Mau. & Sel.* 606.

ATTORNEY OF THE DUTCHY COURT OF LANCASTER, *Attornatus curiæ ducatûs Lancastriæ.*] Is the second officer in that court; and seems for his skill in law to be there placed as *assessor* to the chancellor, and chosen for some special trust reposed in him, to deal between the king and his tenants. *Cowel.*

ATTORNEY GENERAL, Is a great officer under the king, made by letters patent. It is his place to exhibit informations, and prosecute for the crown, in matters criminal; and to file bills in the Exchequer, for any thing concerning the king in inheritance or profits; and others may bring bills against the king's attorney. His proper place in court, upon any special matters of a criminal nature, wherein his attendance is required, is under the judges, on the left hand of the clerk of the crown: but this is only upon solemn and extraordinary occasions; for usually he does not sit there, but within the bar in the face of the court.

ATTORNMENT, *Attornamentum*, from the French *tourner*, to turn,]—Sir Martin Wright and many other writers have laid it down as a general rule, that by the old feudal law the feudatory could not alien the feud without the consent of the lord; nor the lord alien or transfer his seignory without the consent of his feudatory. *Wright's Tenures*, 30, 31. It is certain that this doctrine formerly prevailed in England; if not at least to equal extent in other countries.

This necessity of the consent of the tenant to the alienation of the lord gave rise in our old law to the doctrine of *attornment;* which at common law, signified only *the consent of the tenant to the grant of the seignory*, whereby he agreed to become the tenant of the new lord. But after the statute *quia emptores terrarum*, (18 *Ed.* 1. *st.* 1.) was passed, by which subinfeudation was prohibited, it became necessary that when the reversion or remainderman after an estate for years, for life, or in tail, granted his reversion or remainder, the particular tenant should attorn to the grantee. The necessity of attornment was, in some measure, avoided by the statute of uses, (27 *H.* 8. *c.* 10.) as by that statute the possession was immediately executed to the use; and by the statute of *Wills*, (34 & 35 *H.* 8. *c.* 5.) by which the legal estate is immediately vested in the devisee.

Attornments however still continued to be necessary in many cases; but both their necessity and efficacy are now almost totally taken away; for by stat. 4 *Ann. c.* 16. *s.* 9. it is enacted, that all grants and conveyances of manors, lands, rents, reversions, &c. by fine, or otherwise, shall be good without the attornment of the tenants; but notice must be given of the grant, to the tenant, before which he shall not be prejudiced by payment of any rent to the grantor, or for breach of the condition for non-payment. And by stat. 11 *Geo.* 2. *c.* 19. attornments of lands, &c. made by tenants to strangers claiming title to the estate of their landlords shall be null and void, and their landlord's possession not affected thereby; though this shall not extend to vacate any attornment made pursuant to a judgment at law, or with consent of the landlord; or to a mortgagee on a forfeited mortgage.

Till the passing of these statutes, the doctrine of attornment was one of the most copious and abstruse points of the law. But these acts having made attornment both unnecessary and inoperative, the learning upon it may be said to have become almost entirely useless. See 1 *Inst.* 309.

AVAGE, or *Avisage.* A rent or payment by tenants of the manor of Writtle in Essex, upon St. Leonard's day, 6 November, for the privilege of pannage in the lord's woods, viz. for every pig under a year old, a halfpenny; for every yearly pig, one penny; and for every hog above a year old, twopence. *Blount.*

AVAIL of MARRIAGE. *Valor Maritagii.* See title *Tenure.*

AUCTIONARII, *Auxionarii.*] Sellers, regrators, or retailers. *Placit. Parl.* 18. *Ed.* 1. But more properly brokers.

AUCTIONS and AUCTIONEERS. Under statutes 17 *Geo.* 3. *c.* 50. 19 *Geo.* 3. *c.* 25. 56. 21 *Geo.* 3. *c.* 17. 22 *Geo.* 3. *c.* 66. 32 *Geo.* 3. *c.* 11. 42 *Geo.* 3. *c.* 93, &c. every auctioneer must take out an annual licence; paying certain duties within the bills of mortality and without; and under these statutes, and stat. 27 *Geo.* 3. *c.* 13. (explained by statutes 29 *Geo.* 3. *c.* 63. 30 *Geo.* 3. *c.* 26. 32 *Geo.* 3. *c.* 41. 41 *Geo.* 3. *cc.* 42. 91. 42 *Geo.* 3. *c.* 93. 47 *Geo* 3. *st.* 2. *c.* 65. containing certain exemptions) duties are imposed on goods sold by auction; which duties are a charge on the auctioneer, not on the purchaser.

Stats. 37 *Geo.* 3. *c.* 14. § 1. 45 *Geo.* 3. *c.* 30. impose additional duties upon auctions, according to the amount sold.

38 *Geo.* 3. *c.* 54. § 2. penalty on auctioneers not paying duties on sales in the legal time, &c.

41 *Geo.* 3. *c.* 28. § 3. exempts the sale of lands, &c. sold for the redemption of the land-tax, under the 38 *Geo.* 3. *c.* 60. § 112. from the said duty.

46 *Geo.* 3. *c.* 43. imposes a duty on appraisement where no auction takes place.

Duties have also been imposed in Ireland on auctions, and similar regulations and exemptions to those in force in Great Britain; the last act in force is 54 *Geo.* 3. *c.* 82. repealing all former acts.

The practice of *puffing*, as it is called, at auctions, was in *Bexwell* v. *Christie*, (*Cowp.* 395.) considered as illegal; but the legislature having enacted, that property put up to sale at auction shall, upon the knocking down the hammer, subject the auctioneer to the payment of certain duties, unless such property can, by the mode prescribed by the act, be shewn to have been bought in by the owner himself, or by some person by him authorised, seems indirectly to have given a sanction to this practice, which may materially affect the authority of the decision in *Walker* v. *Gascoigne*, and the opinion in *Bexwell* v. *Christie*: see 2 *Bro. C. R.* 326. and the stat. 28 *Geo.* 3. *c.* 37. § 20. *Fonblanque's Treatise of Equity*, i. 215. See 3 *T. R.* 148.

An auctioneer is an agent authorised by a buyer to sign a contract for him. 2 *W. P. T.* 38. 4 *W. P. T.* 209.

AUDIENCE COURT, *Curia audientiæ Cantuariensis.*] A court belonging to the archbishop of Canterbury, having the same authority with the court of arches, though inferior to it in dignity and antiquity. It was held in the archbishop's palace; and in former times the archbishops were wont to try and determine a great many ecclesiastical causes in their own palaces; but before they pronounced their definitive sentence, they committed the matter to be argued by men learned in the law, whom they named their auditors; and so in time it grew to one special man, who, at this day, is called *causarum negotiorumque* audientiæ *Cantuariensis auditor officialis.* And to the office of auditor was formerly joined the chancery of the archbishop, which meddleth not with any point of contentious jurisdiction, that is, deciding of causes between party and party, but only such as are of office, and especially as are *voluntariæ jurisdictionis*; as the granting the custody of spiritualties, during the vacancy of bishopricks, institutions to benefices, dispensations, &c. but this is now distinguished from the audience. The auditor of this court anciently, by special commission, was *vicar general* to the archbishop, in which capacity he exercised ecclesiastical jurisdiction of every diocese becoming vacant within the province of Canterbury. 4 *Inst.* 337. But now these three great offices of official principal of the archbishop, dean or judge of the peculiars, and official of the audience, are, and have been for a long time past, united in one person, under the general name of *Dean of the arches.* *Johns.* 254.

The archbishop of York hath, in like manner, his court of audience. *Johns.* 255. See *Arches Court.*

AUDIENDO ET TERMINANDO. See title *Oyer* and *Terminer*, *Assise*, *Justices.*

AUDITA QUERELA. A writ, whereby a defendant, against whom judgment is recovered, and who is therefore in danger of execution, or perhaps actually in execution, [or on a statute-merchant, statute-staple, or recognizance,] may be relieved upon good matter of discharge, which has happened since the judgment: as if the plaintiff hath given him a general release; or if the defendant hath paid the debt to the plaintiff, without procuring satisfaction to be entered on the record. In these and the like cases, wherein the defendant hath good matter to plead, but hath had no opportunity of pleading it, (either at the beginning of the suit, or *puis darrein continuance*, which must always be before judgment,) an *audita querela* lies, in the nature of a bill in equity, to be relieved against the oppression of the plaintiff. It is a writ directed to the court stating that the complaint of the defendant had been heard, *(auditâ querelâ defendentis,)* and then, setting out the matter of the complaint, it at length enjoins the court to call the party before them, and, having heard their allegations and proofs, to cause justice to be done between them. *Finch, L.* 488. *F. N. B.* 102. It also lies for *bail*, when judgment is obtained against them by *scire facias*, to answer the debt of their principal, and it happens afterwards, that the original judgment against their principal is reversed: for here the bail, after judgment had against them, have no opportunity to *plead* this special matter, and therefore they shall have redress by *auditâ querela*; (1 *Rol. Abr.* 308.) which is a writ of a most remedial nature, and seems to have been invented, lest in any case there should be an oppressive defect of justice, where a party, who hath good defence, is too late to make it in the ordinary forms of law. But the indulgence now shown by the courts in granting a summary relief upon motion, in cases of such evident oppression, (*Lord Raym.* 439. 1 *Salk.* 93.) has almost rendered useless the writ of *audita querela*, and driven it quite out of practice. 3 *Comm.* 406.

Some part of the old law on this subject is here stated; to give the student a general idea of this circuitous proceeding. —If necessary to enter more at large into this learning, let him look into *Viner's Abridgment* and *Comyns's Digest.*

On a statute, the conusor or his heir may bring *audita querela*, before execution is sued out; but this may not be done by a stranger to the statute, or a purchaser of the land. 1 *Danv. Abr.* 630. 3 *Rep.* 13. If a lessee covenants for him and his assigns to repair, and the lessee assign over, and the covenant is broken; if the lessor sues one of them, and recovers damages, and then sues the other, he may bring *audita querela* for his relief. *Bro.* 74. And where a man hath goods from me by my delivery, and another takes them from him, so that he is liable to both our suits; and one of us sue and recover against him, and then the other sues him, his remedy is by this writ. *Dyer* 232. One binds himself and his heirs in an obligation, if the obligee recover of the heir, and after sue the executors for the same cause, &c. they may have the writ *audita querela*. *Plowd.* 439. If two joint and several obligors are sued jointly, and both taken in execution, the death or escape of one will not discharge the other, so as to give him this action; but if such obligors be prosecuted severally, and a satisfaction is once had against one of them, or against the sheriff upon the escape of one, the other may have it. *Hob.* 58. 5 *Rep.* 87. Judgment is had against a sheriff on an escape of a person in execution, and after the first judgment is reversed for error, the sheriff shall have relief by *audita querela*. 8 *Rep.* 142.

If a plaintiff, that sues as administrator, and recovers judgment and sues out execution, has his letters of administration revoked; the defendant *must* be relieved by *audita querela*. *Style* 417.

If A., being within age, becomes bail for B., and after two *scire facias* and *nihil* returned, judgment is given against A. &c. he may have an *audita querela*, and avoid the recognizance, and so the judgment thereupon, of consequence, shall be avoided. *Yelv.* 155.

But if A., being within age, enters into a bond to B., who procures C., without any warrant, to appear for A., and confesses a judgment thereupon, yet A. shall not have an *audita querela*, but he must take his remedy by action of *disceit* against the attorney. *Cro. Jac.* 694.

The writ of *audita querela* may be had, where a recognizance or statute entered into is defective, and not good; or being upon an usurious contract, by duress of imprisonment, or where there is a defeasance upon it, &c. *Moor Ca.* 1097. 1 *Brownl.* 39. 2 *Bulst.* 320. So, upon showing an acquittance of the cognisee, on a suggestion that he had agreed to deliver up the statute. 1 *Rol.* 309. Where one enters into a statute, and after sells his lands to divers purchasers; or judgment is had against a man, who leaves land to several heirs, &c. and one of the purchasers, or one heir alone, is charged, he may have this writ against the rest to contribute to him. 3 *Rep.* 11. 2 *Bulst.* 15.

Where a statute or recognizance is acknowledged before one who hath not power to take it, and afterwards the cognisor makes a feoffment of the land to another, and the cognisee taketh out execution, in such case the feoffee may have an *audita querela*, and avoid the execution. *Dyer* 27. 35.

If A. enters into a statute to B. and pays the money at the day assigned, upon which the statute is cancelled, and after B. forges a new statute in the name of A., in this case A. may relieve himself by *audita querela*; for the forged statute having all the essentials of a true one, the court was obliged to look on it as such till the contrary appeared; which the cognisor could not set forth before execution, having no day to appear judicially in court, and therefore is put to this writ to avoid the execution founded on the injustice of the pretended conusee. *F. N. B.* 104.

If upon an *elegit* the sheriff takes an inquisition, and there are several lands found subject to the extent, and several values found, and the sheriff returns, that he has delivered some of the lands in particular for the moiety, where it appears, according to the values found, that an equal moiety is not delivered to the party who recovered, but more than a moiety; yet this is not void, nor is it a disseisin by the entry; but only voidable by *audita querela*. 1 *Rol. Abr.* 305.

If two executors sue execution for damages, recovered by the testator, where one hath released, an *audita querela* lies against both. 1 *Rol. Abr.* 312.

If A., cognisee of a statute, releases to the tenant all right, interest, and demand, together with all suits and executions, and afterwards sues execution, the turtenant shall have an *audita querela* to set aside this execution. *Cro. Eliz.* 40. 1 *And.* 133.

So in trespass or other action, if it be found for the plaintiff by *nisi prius*, and after, before the day in bank, the plaintiff releases to the defendant, and after judgment is given for the plaintiff, the defendant shall have an *audita querela* upon this matter; because he could not plead the release at the day in bank. 1 *Rol. Abr.* 307.

In an *audita querela*, the process is a *venire facias*, *distringas*, *alias*, *pluries*; and if *non est inventus* be returned, or *that he hath nothing*, the plaintiff shall have a *capias* against the defendant. *F. N. B.* 104. *Dyer* 297 *b.*

If an *audita querela* is founded on a record, or the person bringing it is in custody, the process upon it is a *scire facias*; but if founded on matter of fact, or the party is at large, then the process is a *venire*. 1 *Salk.* 92.

And if there be a default by the defendant upon a *scire feci*, or two *nihils* returned, the plaintiff shall have judgment. 1 *Salk.* 93. But, where an *audita querela* is sued *quia timet*, and the party is at large, there shall never be a *scire facias*. 1 *Salk.* 92. 1 *Inst.* 100 *a.*

An *audita querela* shall be granted out of the court, where the record, upon which it is founded, remains, or it may be returnable in the same court. *F. N. B.* 105 *b.* And therefore, if a man recover in B. R. or C. B. the defendant, having a release after judgment, and before execution, shall sue the *audita querela* out of B. R. or C. B. where the record is. *F. N. B.* 105. So, if a recognizance be acknowledged in C. B. and execution be sued upon it after release, the defendant shall sue the *audita querela* out of C. B. *F. N. B.* 105. But an *audita querela* may be by original; and, upon a judgment in C. B. it goes out of chancery returnable in C. B. *F. N. B.* 105.

The writ of *audita querela* shall be allowed only in open court. 1 *Bulst.* 140. 2 *Bulst.* 97. 2 *Show.* 240.

Upon *audita querela* brought, a *supersedeas* shall go to stay execution; and the judgment in this action is to be discharged of execution. *Hob.* 2. If an *audita querela* be unduly gotten, upon a false surmise, it may be quashed. 1 *Bulst.* 140. *This writ lies* not *after judgment upon a matter which the party might have pleaded before.* *Cro. Eliz.* 35. A bare surmise is not sufficient to avoid a judgment; but, generally, some specialty must be shown. *Cro. Jac.* 579. Upon a release or other deed pleaded, no *supersedeas* will be granted till the plaintiff, in the *audita querela*, hath brought his witnesses into court to prove the deed; and if execution be executed before, bail is to be put in by allowance of the court. 1 *Lill. Abr.* 151.

Upon a motion for an allowance of an *audita querela*, it was held, that *bail must be given in court*, and not elsewhere: unless in cases of necessity, to be allowed by the court, and then it may be put in before two judges. *Palm.* 422.

A man, nonsuited in an *audita querela*, may have a new writ. *F. N. B.* 104. When lands are extended on any statute, &c. before the time *audita querela* lieth. 22. 46 *E.* 3. A writ, in the nature of an *audita querela*, has been made out returnable in B. R. on a special pardon, setting forth the whole matter. *Jenk. Cent.* 109.

AUDITOR, Lat.] An officer of the king, or other person or corporation, who examines yearly the accounts of all

under-officers, and makes up a general book, which shows the difference between their receipts and charge, and their several allowances, commonly called *allocations:* as the *auditors* of the Exchequer take the accounts of those receivers who collect the revenues. 4 *Inst.* 1061. Receivers-general of fee-farm rents, &c. are also termed *auditors*, and hold their *audits*, for adjusting the accounts of the said rents, at certain times and places appointed. And there are *auditors* assigned by the court, to *audit* and settle accounts in actions of account, and other cases, who are proper judges of the cause, and pleas are made before them, &c. 1 *Brownl.* 24.—See tit. *Account.*

AUDITOR OF THE RECEIPTS. An officer of the Exchequer, that files the tellers' bills, and having made an entry of them, gives the lord treasurer, &c. weekly, a certificate of the money received; he makes debentures to the tellers before they pay any money; and takes their accounts: he also keeps the *black book* of receipts, and the treasurer's key of the treasury, and seeth every teller's money locked up in the treasury. 4 *Inst.* 107.

By stat. 46 *Geo.* 3. *c.* 1. the auditor of the Exchequer is empowered to constitute a trustee for the execution of the said office, whenever such auditor is a lord of the Treasury.

AUDITORES. The same with *audientes*, i. e. the catechumens, or those who are newly instructed in the mysteries of the Christian religion before they were admitted to baptism; and *auditorium* was that place in the church where they stood to hear, and be instructed, now called the *nave* of the church: and in the primitive times, the church was so strict in keeping the people together in that place, that the person who went from thence in sermon time was excommunicated. *Blount.*

AUDITORS OF THE IMPREST. Officers in the Exchequer, who formerly had the charge of *auditing* the great accounts of the king's customs, naval and military expences, &c. But who are now superseded by the commissioners for auditing the publick accounts. See title *Accounts Public.*

AVENAGE, from the Lat. *avena.*] A certain quantity of oats paid by a tenant to his landlord as a rent, or in lieu of some other duties. *Blount.*

AVENOR, *avenarius*, from the Fr. *avoine*, oats.] An officer belonging to the king's stables that provided oats for his horses; mentioned *stat.* 13 *Car.* 2. *cap.* 8.

AVENTURÆ, *Adventures* or trials of skill at arms; military exercises on horseback.—*Assisa de armis. Brady's Append. Hist. Eng.* 250. *Addit. Mat. Paris, p.* 149.

AVENTURE, (properly *adventure.*) A *mischance* causing the death of a man: as where a person is suddenly drowned, or killed by any accident, without felony. *Co. Lit.* 391.

AVERA, *quasi overa*, from the Fr. *ouvre* and *ouvrage*, *velut* operagium.] Signifies a day's work of a ploughman, formerly valued at 8*d.* It is found in *Domesday.* 4 *Inst.* 269.

AVERAGE, *averagium.*] Is said to signify service which the tenant owes to his lord by horse or carriage: but it is more commonly used for a contribution that merchants and others make towards their losses, who have their goods cast into the sea, for the safeguard of the ship, or of the other goods and lives of those persons that are in the ship, during a tempest. It is in this sense called *average*, because it is proportioned and allotted after the rate of every man's goods carried. See title *Insurance.*

*Average* is likewise a small duty, paid to masters of ships when goods are sent in another man's ship, for their care of the goods, over and above the freight.

AVERAGE OF CORN FIELDS. The stubble or remainder of straw and grass left in corn fields after the harvest is carried away. In Kent it is called the *gratten*, and in other parts the *roughings*, &c.

AVER CORN, Is a reserved rent in *corn*, paid by farmers and tenants to religious houses: and signifies, by Somner, corn drawn to the lord's granary, by the working cattle of the tenant. It is supposed that this custom was owing to the Saxon *cyriac sceat*, a measure of *corn* brought to the priest annually on St. Martin's day, as an oblation for the first-fruits of the earth; under which title the religious had corn-rent paid yearly; as appears by an inquisition of the estate of the abbey of Glastonbury. *A. D.* 1201.

AVER LAND. Seems to have been such lands as the tenants did plough and manure, *cum* averiis *suis*, for the proper use of a monastery, or the lords of the soil. *Mon. Angl.*

AVER PENNY, (or *average penny.*) Money paid towards the king's *averages* or carriages, or to be freed thereof. *Rastal.*

AVER SILVER. A custom or rent formerly so called. *Cowel.*

AVERIA, Cattle. Spelman deduces the word from the Fr. *ouvrer*, to work, as if chiefly working-cattle; though it seems to be more probably from *avoir*, to have or possess: the word sometimes including all personal estate, as *catalla* did all goods and chattels. This word is used for oxen or horses of the plough; and in a general sense any cattle.—— Averia *elongata;* see *Elongata.*

AVERIIS CAPTIS IN WITHERNAM. A writ for the taking of cattle to his use, who hath cattle unlawfully distrained by another, and driven out of the county where they were taken, so that they cannot be replevied by the sheriff. *Reg. Orig.* 82. See tit. *Distress.*

AVERMENT, *verificatio*, from the Fr. *averer*, i. e. *verificare, testari.*] Is an offer of the defendant to make good or justify an exception pleaded by him in abatement or bar of the plaintiff's action; and it signifies the act, as well as the offer, of justifying the exception; and not only the form, but the matter thereof. *Co. Lit.* 362. *Averment* is either general or particular; general, which concludes every plea, &c. containing matter affirmative, and ought to be with these words, *and this he is ready to verify*, &c. Particular *averment* is when the life of the tenant for life, or of tenant in tail, &c. is *averred. Ibid.* As to general *averments*, see tit. *Pleading.* With respect to particular *averments*, the following quotations may serve as examples.—See further *Vin. Abr.* tit. *Averment.*

He that *claims estate from tenant for life, or in tail, or from parson of a church*, ought to aver his life. *Br. Estate, pl.* 18.

Where one thing is to be done in consideration of another, on contracts, &c. there must be an *averment* of performance, but where there is promise against promise, there needs no *averment;* for each party hath his action. 1 *Lev.* 87. The use of *averment* being to ascertain what is alleged doubtfully, deeds may sometimes be made good by *averment*, where a person is not certainly named; but when the deed itself is void for uncertainty, it cannot be made good by *averment.* 5 *Rep.* 155. *Averment* cannot be made against a record, which imports in itself an uncontroulable verity. *Co. Lit.* 26. *Jenk.* 232.

Where a *statute* is recited, there one may not aver that there is no such record; for generally an averment, as this is, doth not lie against a record; for a record is a thing of solemn and high nature, but an averment is but the allegation of the party, and not so much credit in law to be given to it. *Lil. P. R.* 155.

Averment lies not against the *proceedings of a court of record.* 2 *Hawk. P. C. c.* 1. *sect.* 14. Nor shall it be admitted against a will concerning lands. 5 *Rep.* 68. And an *averment* shall not be allowed where the intent of the testator cannot be collected out of the words of the will. 4 *Rep.* 44. One may not aver a thing contrary to the condition of an obligation, which is supposed to be made upon good deliberation,

and before witnesses, and therefore not to be contradicted by a bare *averment*. 1 *Lill. Abr.* 156.

An *averment* of a wicked and unlawful consideration of giving a bond, may well be pleaded, though it doth not appear on the face of the deed: and any thing which shews an obligation to be void may well be averred, although it doth not appear on the face of the bond. Adjudged on demurrer, after two arguments in the case of Collins and Blantern, *C. B. Easter*, 7, *Geo.* 3. 2 *Wilson*, 747.

If an heir is sued on the bond of his ancestor, it must be *averred* that the heirs of the obligor were expressly bound. 2 *Saund.* 136. In declaring you shew that the obligor bound his heirs.—Another consideration than that mentioned in a deed may be *averred*, where it is not repugnant or contrary to the deed. *Dyer* 146. But a consideration may not be *averred*, that is against a particular express consideration; nor may *averment* be against a consideration mentioned in the deed, that there was no consideration given. 1 *Rep.* 176. 8 *Rep.* 155. If an estate is made to a woman that hath a husband, by fine or deed, for her life; in this case it may be *averred* to be made to her for her jointure, although there be another use or consideration expressed. 4 *Rep.* 4. *Averment* may be of a use upon any fine or common recovery; though not of any other use than what is expressed in it: it may be received to reconcile a fine, and the indenture to lead the uses. *Dyer* 311. 2 *Bulst.* 235. 1 *And.* 312.

If one has *two manors known by the name of W.* and *levies a fine*, or grants an annuity out of his manor of *W.* he shall by averment *ascertain* which of them it was; *per cur.* 6 *Mod.* 235. *Cha. Rep.* 138.

If a piece of ground was anciently called by one name, and of late is called by another, and it is granted to me by this new name, an *averment* may be taken that it is all one thing, and it will make it good. *Dyer* 37. 44. No *averment* lies against any returns of writs, that are definitive to the trial of the thing returned; as the return of a sheriff upon his writs, &c. But it may be where such are not definitive; and against certificates upon commissions out of any court: also against the returns of bailiffs of franchises, so that the lords be not prejudiced by it. *Dyer* 348. 8 *Rep.* 121. 2 *Cro.* 13.

As to *Averments* in actions on the case for words, see tit. *Action* II. 1.

A special *averment* must be made upon the pleading of a general pardon, for the party to bring himself within the pardon. *Hob.* 67. A person may *aver* he is not the same person on appeal of death in favour of life. 1 *Nels. Abr.* 305.

Where a man is to take a benefit by an *act of parliament*, there, in pleading, he must *aver, that he is not a person excepted;* but where he claims no benefit by it, but only to keep that which he had before, in such case it is not necessary to make such averment. *Plow. Com.* 87. 488.

Pleas merely in the negative shall not be *averred*, because they cannot be proved: nor shall what is against presumption of law, or any thing apparent to the court. *Co. Lit.* 362. 373. By statute 4 & 5 *Ann. c.* 16. no exception or advantage shall be taken upon a demurrer, for want of *averment* of *hoc paratus est*, &c. except the same be specially set down for cause of demurrer. See tit. *Amendment*.

AVERRARE. To carry goods in a waggon, or upon loaded horses, a duty required of some customary tenants. *Cartular. Glaston. MS. f.* 4.

AVETTING, (abetting,) signifies helping or assisting. *Scotch Dict.*

AUGEA, A cistern for water. *Reg. Eccl. Well. MS.*

AUGMENTATION, *augmentatio.*] The name of a court erected 27 *H.* 8.; for determining suits and controversies relating to monasteries and abbey lands. The intent of this court was, that the king might be justly dealt with touching the profits of such religious houses, as were given to him by act of parliament. It took its name from the *augmentation* of the revenues of the crown, by the suppression of religious houses: and the office of *augmentation*, which hath many curious records, remains to this day, though the court hath been long since dissolved. *Terms de Ley* 68.

AUGMENTATION of STIPENDS.—In order to secure a proper provision for the reformed clergy of the Church of Scotland, a commission of parliament was appointed by several acts of the legislature. The powers conferred on this commission were, by the act 1707. *c.* 9. transferred to the Court of Session. Under these powers, the court, as a commission of parliament, and as a separate court from the Court of Session, modify stipends to the Clergy out of the teinds of the parish in which the Minister officiates. See *Teinds*.

AVISAMENTUM, Advice or counsel.——*De* avisamento *& consensu concilii nostri concessimus, &c.* was the common form of our ancient kings' grants.

AULA, *i. e.* A court-baron, *aula ibidem tent' die, &c.* Aula *ecclesiæ* is that which is now termed *navis ecclesiæ*. Eadm. lib. 6. p. 141.

AULNAGE. See *Alnage*.

AUMONE. Fr. *aumosne*, alms.] Tenure in *aumone* is where lands are given in alms to such church, or religious house, upon condition that a service or prayers shall be offered at certain times for the repose of the donor's soul. *Brit.* 164. Vide *Frankalmoign*.

AUNCEL, or AUNCEL WEIGHT, *quasi hand saleweight*, or from *ansa*, the handle of the balance.] An antient manner of *weighing*, (mentioned in stat. 14 *Ed.* 3. *st.* 1. *c.* 12.) by the hanging of scales or hooks at each end of a beam or staff, which, by lifting up in the middle with one's finger or hand, discovered the equality or difference between the *weight* at one end, and the thing *weighed* at the other. This *weighing* being subject to great deceit, was prohibited by several statutes, and the even balance commanded in its stead. But, notwithstanding, it is still used in some parts of England: and what we now call the *stilliards*, a sort of hand-weighing among butchers, being a small beam with a *weight* at one end, (which shews the pounds by certain notches,) seems to be near the same with the *auncel weight*.—See tit. *Weights and Measures*.

AUNCIATUS.] Antiquated. *Brompton, lib.* 2 *cap.* 24. *par.* 6.

AVOIDANCE, In the general signification, is when a benefice is void of an incumbent; in which sense it is opposed to plenarty. Avoidances are either in *fact*, as by death of the incumbent; or in *law:* and may be by cession, deprivation, resignation, &c. See tit. *Advowson*.

AVOIRDUPOIS, or *averdupois*, Fr. *avoir du poids*, i. e. *habere pondus, aut justi esse ponderis.*] A weight different from that of troy weight, which contains but twelve ounces in the pound, whereas this hath sixteen ounces: and in this respect it is probably so called, because it is of greater weight than the other. It also signifieth such merchandizes as are weighed by this weight; and is mentioned in divers statutes. See tit. *Weights*.

AVOW. See *Advow*.

AVOWEE, Of a church benefice. *Britt. c.* 29. See *Advocate*.

AVOWRY, Is where a man takes a distress for rent or other thing, and the party on whom taken sues for a *replevin*, then the taker shall justify his plea for what cause he took it; and if in his own right, he must shew the same, and *avow* the taking; but if he took it in right of another, he must make *cognisance* of the taking, as bailiff or servant to the person in whose right he took the same. *Terms de Ley* 70. 2 *Lill.* 454. The *avowry* must contain sufficient matter for judgment to have return: but so much certainty is not required in an *avowry* as in a declaration; and the *avowant* is not obliged to allege seisin within the statute of limitations. Nor shall a

lord be required to *avow* on any person in certain; but he must allege seisin by the hands of some tenant within forty years. Stat. 21 *Hen.* 8. *c.* 19. 1 *Inst* 268. In *avowry*, seisin in law is sufficient; so that where a tenant hath done homage or fealty, it is a good seisin of all other services to make an *avowry*, though the lord, &c. had not seisin of them within sixty years. See *stat.* 32 *H.* 8. *cap.* 2. 4 *Rep.* 9. A man may distrain and *avow* for rent due from a copyholder to a lord of a manor; and also for heriots, homage, fealty, amercements, &c. 1 *Nels. Abr.* 315.

If a person makes an *avowry* for two causes, and can maintain his *avowry* but for one of them, it is a good *avowry*: and if an *avowry* be made for rent, and it appears that part of it is not due, yet the *avowry* is good for the rest: supposing sufficient rent due to justify a distress. An *avowry* may be made upon two several titles of land, though it be but for one rent; for one rent may depend upon several titles. 1 *Lill. Abr.* 157. *Saunb.* 285. If a man takes a distress for rent, reserved upon a lease for years, and afterwards accepts a surrender of the lands, he may nevertheless *avow*, because he is to have the rent due, notwithstanding the surrender. 1 *Danv. Abr.* 652. Where tenant in tail aliens in fee, the donor may *avow* upon him, the reversion being in the donor, whereunto the rent is incident. *Ibid.* 650. If there be tenant for life, remainder in fee, the tenant for life may compel the lord to *avow* upon him: but where there is tenant in tail, with such remainder, and the tenant in tail makes a feoffment, the feoffee may not compel the lord to *avow* upon him. 1 *Danv. Abr.* 648. *Co. Lit.* 268. If the tenant enfeoffs another, the lord ought to *avow* upon the feoffor for the arrearages before the feoffment, and not upon the feoffee. 1 *Danv.* 650. The lord may *avow* upon a disseisor. 20 *Hen.* 6. And if a man's tenant is disseised, he may be compelled to *avow* by such tenant, or his heir. A defendant in replevin may *avow* or justify; but if he justifies he cannot have a return. 3 *Lev.* 204. The defendant need not *aver* his *avowry* with an *hoc paratus est, &c.* By *stat.* 21 *Hen.* 8. *c.* 19. it is enacted, That if in any *replegiare* for rents, &c. the *avowry*, cognisance, or justification be found for the avowant, or the plaintiff be nonsuit, &c. the defendant shall recover such damages and costs as the plaintiff should have had if he had recovered. See *Bull. N. P.* 57. that this statute does not extend to an avowry for a *nomine pœnæ* or estray. And by *stat.* 17 *Car.* 2. *c.* 7. when a plaintiff shall be nonsuit before issue in any suit of replevin, &c. removed or depending in any of the courts at Westminster, the defendant making suggestion in the nature of an *avowry* for rent, the court, on prayer, shall award a writ to inquire of the sum in arrear, and the value of the distress, &c. upon return whereof the defendant shall recover the arrears, if the distress amounts to that value, or else the value of the distress with costs; and where the distress is not found to the value of the arrears, the party may distrain for the residue. See titles *Distress; Replevin* IV. 2., *Rent.*

AVOWTERER. An adulterer. The crime is also termed *Avowtry. Terms de Ley.*

AURUM REGINÆ. The queen's gold.—This is a royal revenue belonging to every queen-consort during her marriage, from every person who hath made a voluntary offering or fine to the king, of ten marks or upwards, in consideration of any grants, &c. by the king to him; and it is due in the proportion of one-tenth part more, over and above the entire fine to the king. 1 *Comm.* 221.

AUSCULTARE. Formerly persons were appointed in monasteries to hear the monks read, and direct them how, and in what manner they should do it with a graceful tone of accent, to make an impression on their hearers, which was required before they were admitted to read publicly in the church; and this was called *auscultare.* See *Lanfrancus in Decretis pro Ordine Benedict. c.* 5.

AUSTURCUS, and *Osturcus.* A goshawk; from whence we usually call a faulconer, who keeps that kind of hawks, an *ostringer.* In ancient deeds there has been reserved, as a rent to the lord, *unum austurcum.*

AUTER DROIT, An expression used where persons sue or are sued *in another's right*; as executors, administrators, &c.

AUTERFOITS ACQUIT, Is a plea by a criminal, that he was heretofore *acquitted* of the same treason or felony: for one shall not be brought into danger of his life for the same offence more than once. 3 *Inst.* 213. Except by appeal of death, which is a private suit. See tit. *Appeal.* There is also a plea of *auterfoits convict*, and *auterfoits attaint*; that he was heretofore convicted, or attainted, of the same felony. In appeal of death, *auterfoits acquit*, or *auterfoits attaint*, upon indictment of the same death, is no plea. *H. P. C.* 244. But in other cases where a person is attainted, it is to no purpose that he should be attainted a second time. And conviction of manslaughter, where clergy is admitted thereon, will bar any subsequent prosecution for the same death. 2 *Hawk. P. C. c.* 35, 36.

AUTHORITY, Is nothing but a power to do something: it is sometimes given by *word*, and sometimes by *writing*: also it is by writ, warrant, commission, letter of attorney, &c. and sometimes by *law.* The *authority* that is given must be to do a thing lawful; for if it be for the doing any thing against law, as to beat a man, take away his goods, or disseise him of his lands, this will not be a good *authority* to justify him that doth it. *Dyer.* 102. *Keilw.* 83. An authority given to another person, to do that which a man himself cannot do, is void: and where an authority is lawful, the party to whom given must do the act in the name of him who gave the authority. 11 *Rep.* 87. Where an authority is given by law, it must be strictly pursued; and if a person acting under such authority, exceeds it he is liable to an action for the excess.

*An authority in some cases cannot be transferred.*—Thus a person, who has an authority to do any act for another, must execute it himself, and cannot transfer it to another: for this being a trust and confidence reposed in the party, cannot be assigned to a stranger, whose ability and integrity were not so well thought of by him for whom the act was to be done. 9 *Co.* 77 *b.* 1 *Rol. Abr.* 330.

*Some authorities likewise determine with the life of the person who gave them.*

The authority given by letter of attorney must be executed during the life of the person that gives it; because the letter of attorney is to constitute the attorney my representative for such a purpose, and therefore can continue in force only during the life of me that am to be represented. 2 *Rol. Abr.* 9. *Co Lit.* 52.

But if any corporation aggregate, as a mayor and commonalty, or dean and chapter, make a feoffment and letter of attorney to deliver seisin, this authority does not determine by the death of the mayor or dean, but the attorney may well execute the power after their death: because the letter of attorney is an authority from the body aggregate, which subsists after the death of the mayor or dean, and therefore may be represented by their attorney; but if the dean or mayor be named by their own private name, and die before livery, or be removed, livery after seems not good. *Co. Lit.* 52. 2 *Rol. Abr.* 12.

It is a rule that every authority shall be countermandable, and determine by the death of him that gives it, &c. But where an interest is coupled with an authority, there it cannot be countermanded or determined. *And.* 1. *Dyer* 190. and see *Viner's Abridgment*, tit. *Authority.*

A devise to another, *to have the disposing, selling, and letting his land*; so a devise to his son, *but that his wife shall take the profits*; so a devise, that his executor shall have the *oversight and dealing of his lands*; so a devise to an infant in tail, but that G. D. shall have the *oversight* of his will, and the edu-

cation of his son till of age, and *to receive, set, and let for him*; these and such like words give the devisee an *authority*, but *no interest*. *Dyer* 26 *b*. 331. 2 *Leon*. 221. 3 *Leon*. 78. 216. *Moor* 635. *S. P. Cro. Eliz*. 674. 678. 734.

The law makes a difference where *lands are devised to executors to sell*, and where the devise is, that *his lands shall be sold by his executors*; for in the first case an *interest* passes to the executors, because the lands are expressly devised to them, but in the other case they have only an authority to sell. *Go.ds*. 2. *Dyer* 219. *Moor* 61. *Keilw*. 107 *b*. 1 *And*. 145.

The testator devised, that his executors should receive the *issues and profits* of his lands till his son came of age, *to pay his debts and legacies, and to breed up his younger children*; the testator died, so did the executor, during the minority of the son, having first made J. S. his executor; adjudged, that this executor of an executor may dispose of the *issues and profits*, for the purposes mentioned in the will, during the infancy of the son; because the first executor had not only a bare *authority*, but an *interest* vested in him. *Dyer* 210.

Where the testator gives another authority *to sell his lands*, he may sell the inheritance, because he gave him the same power he had himself, and in such case the purchaser shall be in by the devise. 2 *Rep*. 53.

An authority may be *apportioned* or *divided*, but an *interest is inseparable* from the person, and where an act, which is in its nature indifferent, will work *two ways*, the one by an *authority*, and the other by an *interest*, the law will attribute it to the *interest*. But where an *interest and authority* meet, if the party declare that the thing shall take effect by virtue of his *authority*, there it shall prevail against the *interest*. 6 *Rep*. 17.

*In many cases authorities must be strictly executed according to the power given*.

If a man devise *that his executors shall sell his land*, this gives but a naked authority; and the lands, till the sale is made, descend to the heir at law; and in this case all must join in the sale; and if one die, it being a bare authority, cannot survive to the rest. *Co. Lit*. 112 *b*. 113 *a*. 181 *b*.

But if a man by will *give land to executors to be sold*, and one of them die, the survivors may sell; for the trust being coupled with an interest, shall survive together with it. *Co. Lit*. 113 *b* 181 *b*.

If a letter of attorney be to make livery upon condition, so as to make a conditional feoffment, and the attorney delivers seisin absolutely, the livery is not good; because the attorney had no authority to create an absolute fee-simple; and therefore such absolute feoffment shall not bind the feoffor, because he gave no such authority. 2 *Rol. Abr*. 9.

If a warrant of attorney be given to make livery to one, and the attorney makes livery to two: or if the attorney had authority to make livery of *Black-Acre*, and he made livery of *Black-Acre* and *White-Acre*, though the attorney has in these cases done more, yet there is no reason that shall vitiate what he has done pursuant to his power, since what he did beyond it is a perfect nullity, and void. *Park. sect*. 189.

If a letter of attorney be given to *two jointly* to take livery, and feoffor makes livery to one in the absence of the other, in the name of both, this is void; because they being appointed *jointly* to receive livery, are to be considered but as one. *Co. Lit*. 49 *b*. 2 *Rol. Abr*. 8.

But if a letter of attorney be made to three, *conjunctim & divisim*, and two only make livery, this is not good, because not pursuant to their authority; for the delegation was to them all three, or to each of them separately; yet if the third was present at the time of the livery made by two, though he did not actually join with them in the act of livery, yet the livery is good; because, when they all three are upon the land for that purpose, and two make livery in the presence of the third, there is his concurrence to the act, though he did not join in it actually, since he did not dissent to it. *Dyer* 62. 1 *Rol. Abr*. 329. *Co. Lit*. 181 *b*. 1 *Rol. Rep*. 299. *Yelv*. 26.

If a letter of attorney be given to A. to make livery of lands already in lease, the attorney may enter upon the lessee in order to make livery; because, whilst the lessee continues in possession, the attorney cannot deliver seisin of it; and therefore, to execute the power given him by the letter of attorney, it is necessary he should have a power to enter upon the lessee. *Co. Lit*. 52. *Poph*. 103. *Dyer* 131 *a*. 340 *a*.

If a sheriff makes a warrant to four or three, or a *capias* jointly or severally to arrest one, two of them may arrest the party, for the greater expedition of justice. *Co. Lit*. 181. *Palm*. 52. 2 *Rol. Rep*. 137.

So if the lord gives licence to a copyholder for life, to lease the copyhold for five years, if the copyholder *tamdiu vixerit*, and he leases it for five years, generally without limitation, this is a good execution, and pursuant to the licence; for the lease is determinable by his death, by a limitation in law; and therefore as much is implied by law, as if he had made an actual limitation. 1 *Rol. Abr*. 330, 331. *Cro. Jac*. 436. *S. C*. —See further tit. *Power*, and *Vin. Abr*. tit. *Authority*.

AUTUMN. The decline of the summer. Some computed the years by *autumns*; but the English Saxons by winters; Tacitus says, that the ancient Germans knew the other divisions of the year, but did not know what was meant by *autumn*.

AVULSION, *Avulsio*.] Is where lands are by an inundation or current torn off from the property to which they originally belonged, and gained to the estate of another person; or where a river changes its course, and in place of continuing to run betwixt two properties, cuts of part of one and joins it to the other property. The property of the part thus separated continues in the original proprietor, in which respect the term *avulsio* stands in contradistinction to the term *alluvio*, by which an addition is insensibly made to a property by the gradual washing down of a river, and which addition becomes the property of the owner of the lands to which the addition is made. See *Alluvion*, *Occupancy*.

AUTUMNALIA. Those fruits of the earth which are ripe in *Autumn* or harvest.

AUXILIUM AD FILIUM MILITEM FACIENDUM ET FILIAM MARITANDAM. A writ formerly directed to the sheriff of every county where the king or other lord had any tenants, to levy of them an aid towards the knighting of a son, and the marrying of a daughter. F. N. B. 82. See tit. *Aid*, *Tenure*.

AUXILIUM CURIÆ, A precept or order of court for the citing or convening of one party, at the suit and request of another, to warrant some thing. *Kennet's Paroch. Antiq*. 477.

AUXILIUM FACERE ALICUI IN CURIA REGIS. To be another's friend and solicitor in the king's courts; an office undertaken for and granted by some courtiers to their dependants in the country. *Paroch. Antiq*. 126.

AUXILIUM REGIS. The king's aid, or money levied for the king's use, and the public service; as where taxes are granted by parliament. See title *Aid*, *Taxes*.

AUXILIUM VICECOMITI, A customary aid or duty anciently payable to sheriffs out of certain manors, for the better support of their offices. See *Mon. Angl. tom*. 2. *p*. 245. An exemption from this duty was sometimes granted by the king: and the manor of Stretton, in Warwickshire, was freed from it by charter. 14 *H*. 3. *M*. 4.

AWAIT, Seems to signify what we now call *waylaying*, or lying in *wait*, to execute some mischief. By stat. 13 *R*. 2. *st*. 2. *c*. 1. it is ordained that no charter of pardon shall be allowed before any justice for the death of a man slain by *await*, or malice prepensed, &c.

AWARD, from the Fr. *Agard*.] Perhaps, because it is imposed on both parties, to be *observed* by them. *Dictum quod ad custodiendum seu observandum partibus imponitur*. *Spelm*.

# AWARD I.

That act by which parties may refer any matter in dispute between them to the private decision of another party, (whether one person or more,) is called *a Submission*; the party to whom the reference is made, *an Arbitrator* or *Arbitrators*: when the reference is made to more than one, and provision made, that in case they shall disagree, another shall decide, that other is called *an Umpire*. The judgment given or determination made by an arbitrator or arbitrators, is termed *an Award*; that by an umpire *an Umpirage*, or less correctly an award.

The following system of the law on this subject is chiefly collected from, and follows the plan of *Kyd's Treatise on the Law of Awards*.

The subject may be conveniently distributed under the following heads:

I. *The Submission.*
II. *The Parties thereto.*
III. *The Subject of the Reference.*
IV. *The Arbitrators and Umpire.*
V. *The Award or Umpirage.*
VI. *The Remedy to compel Performance, on an Award or Umpirage properly made.*
VII. *Of the Means of procuring Relief against it, when improperly made. And*
VIII. *The Effect, in precluding the Parties from suing on the original Cause of Action, or subject of Reference.*

I. The Submission may be purely by the act of the parties themselves; or it may be by their act, with the interposition of a court of justice; in either case it may be either verbal or in writing; the general practice, as well as the most safe is to prefer the latter.

When the submission is in writing, it is most commonly by mutual bonds, given by the parties each to the other, in a certain sum penal, on condition to be void on performance of the award; but such bonds may be given to a third person or even to the arbitrator himself (*Coomb.* 100); and they may be given *by* other persons than the parties themselves, who will incur the forfeiture if the parties do not perform the award. The submission may also be by indenture, with mutual covenants to stand to the award. 2 *Mod.* 73.

It is usual in articles of co-partnership, to insert a provision, that all disputes between the partners shall be referred to arbitration. This has so far the effect of a submission, that one of the parties cannot sue another either at law or in equity, for any matter within the terms or meaning of the proviso, without having first had an actual reference, which has proved ineffectual, or a proposal by the plaintiff to refer, and a refusal by the defendant. See 2 *Atk.* 585, (569.) 2 *Brownl. c.* 336.

All the cases of awards reported in the books for a long series of years, appear to have been made on submissions, by the act of the parties only; but when mercantile transactions came to be frequently the subject of discussion in the courts, it was soon found, that a judge and jury were very unfit to unravel a long and intricate account; and it therefore became a practice, in cases of that kind, and others, which seemed to be proper for the same tribunal, to refer the matters, by consent of parties, under a rule of *nisi prius*; which was afterwards made a rule of that court, out of which the record proceeded, and performance of the award was enforced by process of contempt. This practice does not appear to have begun before the reign of Charles II. for the reports of that period shew, that it was not before the latter end of that reign, that the courts granted their interference without reluctance. Their utility, however, was at length so well understood, that by *stat.* 9 & 10 *W.* 3. *c.* 15. it was enacted, "That it shall and may be lawful to and for all traders and merchants, and others, desiring to end by arbitration, any controversy, suit or quarrel, for which there is no other remedy, but by personal action, or suit in equity, to agree that *their submission of their suit to the award or umpirage of any person or persons, should be made a rule of any of his Majesty's courts of record*: and to insert such their agreement in their submission, or the condition of *the bond or promise* whereby they oblige themselves respectively; which agreement being so made and inserted, may on producing an affidavit thereof, made by the witnesses thereunto, or any one of them, in the court of which the same is agreed to be made a rule, and on reading and filing the said affidavit in court, be entered of record in such court; and a rule shall thereupon be made by the said court, that the parties shall submit to, and finally be concluded by the arbitration or umpirage, which shall be made concerning them, by the arbitrators or umpire, pursuant to such submission; and in case of disobedience to such arbitrator or umpirage, the party neglecting or refusing, shall be subject to all the penalties of contemning a rule of court."—On this statute, and awards made in consequence, see 1 *Stra.* 1. 2. 2 *Stra.* 1178. 10 *Mod.* 382. 3. *Barnes*, 55. 8. 1 *Salk.* 72. *Comyns* 114. 1 *Ld. Raym.* 664. 3 *East*, 603.

*The extent of the submission* may be various, according to the pleasure of the parties; it may be of one particular matter only, or of many, or of every subject of litigation between them.

It is proper to fix a time, within which the arbitrators shall pronounce their award: but where the submission limits no time for the making of the award, that shall be understood to be within convenient time; and if in such a case the party request the arbitrators to make an award, and they do not, a revocation of the authority afterwards will be no breach of the submission. 2 *Keb.* 10. 20.

The submission being the voluntary agreement of the parties, the words of it must be so understood, as to give a reasonable construction to their meaning, and to make their *intention* prevail: and where there is a repugnancy in the words of the submission, the latter part shall be rejected, and the former stand. *Poph.* 15. 16.

It has been said that as all authority is in its nature revocable, even though made irrevocable, therefore a *submission* to an award may be *revoked* by either of the parties; such at least was the determination under the old law as reported in the year-books, and ancient reporters, but now it may reasonably be supposed, that the courts would sustain an action on the case, for countermanding the authority of the arbitrator. A case is reported in two books, one being evidently nothing more than a loose note; 1 *Sid.* 281; the other report is at length, and the manner of the pleadings distinctly given; the breach being assigned in a discharge by the defendant of the arbitrators from making any award; and the judgment of the court without much hesitation in favour of the plaintiff. 2 *Keb.* 10. 20. 24.

This applies only, however, to the case of an *express* revocation; not to that which must necessarily be implied by construction of law from another act of the party. Thus, if a woman while sole, submit to arbitration, and marry before the making of the award, or before the expiration of the time for making it, the marriage operates as a revocation. *W. Jones*, 388. 3 *Keb.* 9. 745.

The court have no authority by 9 & 10 *W.* 3. *c.* 15. to make a parol submission to an award a rule of court. *Ansell* v. *Evans*. 7 *T. R.* 1.

The court will not presume that the matters in difference submitted to arbitration, arose subsequent to the indenture of assignment and power of attorney from the principals to the plaintiff; but such matter may be pleaded by way of defence to the action. *Ib.* 517.

It is not necessary for the plaintiff, in setting the assignment to him from his principals, (by virtue of which he was

authorized to submit their demands to arbitration,) to make a profert of the same in his declaration. 7 *T. R.* 517.

The court will not make a submission to an award a rule of court, where part of the matter agreed to be referred has been made the subject of an indictment; the statute 9 & 10 *W.* 3. *c.* 15. for regulating "controversies, suits, or quarrels" by arbitration, being confined to civil disputes. *Watson* v. *M'Cullum.* *Ib.* 520.

Where parties, by an indorsement in general terms on the bonds of submission to arbitration, agree that the time for making the award shall be enlarged, such agreement virtually includes all the terms of the original submission to which it has reference, amongst others, that the submission for such enlarged time shall be made a *rule of court*, and consequently the party is liable to an attachment for non-performance of an award made within such enlarged time after the stat. 9 & 10 *W.* 3. *c.* 15. *Evans* v. *Thomson*, 5 *East*, 189.

II. Every one who is capable of making a disposition of his property, or a release of his right, may make a submission to an award; but no one can, who is either under a natural or civil capacity of contracting. Therefore a *married woman* cannot be *party* to a submission, whatever may be the subject of dispute, whether arising before or after her marriage; but the husband may submit for himself and his wife. *Str.* 351.

On the principle that an *infant* cannot bind himself for any thing but necessaries, it is clear he cannot be party to a submission; whether the matter in dispute be an injury done to him, or an injury done by him to another; but a guardian may submit for an infant, and bind himself that he shall perform the award. See *Comb.* 318. *Roberts* v. *Newbold;* which established this principle, in contradiction to former determinations.

An *executor* or administrator may submit a matter in dispute between another and himself, in right of his testator and intestate; but it is at his own peril; for if the arbitrator do not give him the same measure of justice as he would be entitled to at law, he must account for the deficiency to those interested in the effects. See *Dyer*, 216 *b.* 217 *a. Com. Dig.* Admin. (l. i.) 3 *Leon.* 53. and *Barry* v. *Rush*, 1 *Term Rep.* 691.

So the *assignees of a bankrupt* may submit to arbitration any disputes between their bankrupt and others, provided they pursue the directions of the stat. 5 *Geo.* 2. *c.* 30. § 34; on the construction of which, see 1 *Atk.* 91.

Those only who are actually parties to the submission shall be *bound* by the award.—For the case of partners see 2 *Mod.* 228.—Of co-parishioners, *Mudy* v. *Osam*, *Lit.* 30.

So, in general, a man is bound by an award, to which he submits for another, *Alsop* v. *Senior*, 2 *Keb.* 707. 718. And see *Bacon* v. *Dubarry*; the case of an attorney submitting for his principal without authority from him. 1 *Ld. Raym.* 246. See *Kyd on Awards*, *p.* 27. and *Colwell* v. *Child.* 1 *Rep. Ch.* 104. 1 *Ca. Ch.* 86.

But if a man *authorise* another on his behalf, to refer a dispute, the award is binding on the principal alone. *Dyer*, 216 *b.* 217. unless the agent *binds* himself for the performance of the principal. 1 *Wils.* 28. 58.

When there are several claimants on one side, and they *all agree* to submit to arbitration, and *some only enter into a bond* to perform the award, the award shall bind the rest. *Wood & al.* v. *Thomson & al.* *M.* 24 *Car. B. R. Rol. Abr.* tit. *Arbitr.* F. 11.

Where there are two on one side, though they will not be bound the one for the other, yet if the award be general, that they shall do one entire thing, both shall be bound to the performance of the whole. *Cro. Car.* 434.

If the husband and wife submit to arbitration, any thing in right of the wife, the wife shall, after the death of the husband, be bound by the award. *Lumly* v. *Hutton*, 1 *Rol. Rep.* 268. 9.

An award creates a duty which survives to executors of administrators; they shall therefore on the one hand be compelled to the performance if made against their testator or intestate; and on the other may take advantage of it, if made in his favour. 2 *Vent.* 249. 1 *Ld. Raym.* 248.

And it is a general rule, that all those who would be *bound* by an award may take advantage of it.

Generally speaking a submission of *all* matters *between the parties*, when there are more persons than one, either on one or both sides, is the same as a submission of all matters between the parties, *any or either of them*; *Comyns*, 328.; and therefore on submission by A. and B. on the one side, and C. and D. on the other, the award may be of matters between A. and C. alone, or between A. and B. together, with C. alone, or *vice versâ*; and money may be awarded to be paid accordingly. This rule however may be controlled by the words of the submission, in which it is in this case more particularly requisite to be very exact. See *Kyd on Awards*, 121. 8 *Co.* 98 *a.* *Hardr.* 599. 1 *Vern.* 259. *Com.* 547. *Rol. Abr.* tit. *Arbitr. D.* 5. *and O.* 8.

III. Though the courts have at all times manifested a general disposition to give efficacy to awards, yet there are some cases in which they have refused them their protection, because the subjects on which they were made were not the proper *objects of such reference.*

The only motive which can influence a man to refer any subject of dispute to the decision of an arbitrary judge, is, to have an amicable and easy settlement of something which in its nature is *uncertain.* An award therefore is of no avail when made of debt on a bond for the payment of a sum *certain*, whether it be single, or with a condition to be void on the payment of a less sum; nor if made of debt for arrears of rent ascertained by a lease; nor of covenant to pay a certain sum of money; *Blake's Case*, 6 *Co.* 43. 44.; nor of debt on the arrears of an account, as formerly taken before auditors in an action of account; 1 *Lev.* 292.; nor of damages recovered by a judgment; *Gouldsh.* 91. 92. for in all these cases the demand is ascertained. But see *Lumley* v. *Hutton*, *Rol. Abr.* tit. *Arbitr.* B. 8. and *Coxal* v. *Sharp*, 1 *Keb.* 937.; as it seems that when joined with other demands of an uncertain nature, those which are certain may also be submitted; even in the case of a verdict and judgment.

But in general, where the party complaining could recover by action only *uncertain* damages, the subject of complaint may be the object of a reference to arbitration; as any demand *not ascertained* by the agreement or contract of the parties, though the claimant *demands* a sum certain; as a claim of 5*l.* for different expences in the service of the other party. *Sower* v. *Bradfield*, *Cro. Eliz.* 422. So an action of account may be submitted; for, till the account be taken, the sum remains uncertain. *Rol. Abr.* tit. *Arbitr. R.* 4.

It is said, and it appears justly, that all kinds of personal wrong, the compensation for which is always uncertain, depending on the verdict of a jury, may be submitted to arbitration; where the injury done to the individual is not considered, by the policy of the state, as merged in the publick crime, which latter can never be the subject of arbitration.

In the case of deeds, when no certain duty accrues by the deed alone, but the demand arises from a wrong or default subsequent, together with the deed, as in the case of a bond to perform covenants, or covenant to repair a house, there the demand being for *damages* for a breach may be submitted to award, *Blake's Case*, 6 *Co.* 43. 44. *Cro. Jac.* 99. However, in all cases, where the demand arises on a deed,

the submission ought also to be by deed; because a specialty cannot be answered but by a specialty. *Lumley* v. *Hutton*, before quoted.

Much doubt and uncertainty seems anciently to have prevailed on a question, "How far a dispute concerning *land* could be referred to an arbitrator; and how far, on an actual reference, the parties were bound by his award." But it appears that the real difficulty was how to enforce an award made on a reference of a dispute concerning land; for whenever the submission was by bond, it was almost universally held, that the party who did not perform the award forfeited the bond. *Keilway* 43. 45.

The present rule of law therefore is that "Where the parties might *byeir own th act* have transferred real property, or exercised any act of ownership with respect to it, they may refer any dispute concerning it to the decision of a third person, who may order the same acts to be done, which the parties themselves might do by their own agreement." *Knight* v. *Burton*, 6 *Mod.* 231. *Trusloe* v. *Aseware*, *Cro. El.* 233. *Dy.* 183. *in marg.*

As real property cannot be transferred by the parties themselves without deed, wherever that makes a part of the dispute, the submission as well as the award, [and whatever act, is by the award, directed to be performed by the parties, as to real property,] must also be by deed.

IV. Every one whom the law supposes free, and capable of judging, whatever may be his character for integrity or wisdom, may be *an arbitrator* or umpire; because he his appointed by the choice of the parties themselves, and it is their folly if they choose an improper person.

An infant cannot be an arbitrator; nor a married woman; nor a man attainted of treason or felony. But an unmarried woman may be an arbitratrix. *Dutchess of Suffolk's case*, 8 *E.* 4. 1. *Br.* 37.

It is a general rule of law, founded on the first principles of natural justice, that a man cannot take on himself to be judge in his own cause; but should he be nominated an arbitrator, by or with the consent of the opposite party the objection is waived; and the award shall be valid. *Matthew* v. *Allerton*, *Comb.* 281. 4 *Mod.* 226. *Hunter* v. *Benison*. *Hardr.* 43.

The nomination of the *umpire* is either made by the parties themselves, at the time of their submission, or left to the discretion of the arbitrators. Where two arbitrators (as is most frequently the case) have this power, the law provides that the choice shall be fair and impartial, and that it shall not even be left to *chance*, *election* being an act of the will and understanding. 2 *Vern.* 483.

But see 16 *E. R.* 51. where the court of King's Bench determined that it was an objection to an *award* that the umpire was chosen by lot out of two persons named by the Arbitrators.

There is no part of the law relative to awards in which so much uncertainty and confusion appear in the reported cases, as on this respecting the umpire. The time when the power of the arbitrators ceases, and that of the umpire begins: the time when the umpire may be nominated; and the effect of his nomination, have each in its turn proved questions of sufficient magnitude to exercise and distract the genius of the lawyers. The time limited for the umpire to make his umpirage, has sometimes been the same with that limited for the arbitrators to make their award. It is now however most usual, and certainly more correct to *prolong* the time beyond that period.

In this case of a prolongation of time, the authority of the arbitrators is determined, and that of the umpire immediately begins *on the expiration of the* time specified to be allowed to the arbitrators. *Lumley* v. *Hutton*.

The point on which, on all the forms of submission, the greatest difficulty has been felt, has been to decide whether any conduct of the arbitrators can authorise the umpire to make his umpirage *before* the expiration of the time limited for making their award.

On this head the following seems to be undeniable the clearest and most accurate opinion. If the arbitrators do in fact make an award within the time allowed to them, that shall be considered as the real award; if they make none, then the umpirage shall take place; and there is here no confusion as to the concurrence of authority with respect to the time. The umpire has no concurrences absolutely, but only conditionally, if the arbitrators make no award within their time. This applies equally to the case where the umpire is confined to the same time with the arbitrators, and to that where a further time is given to him. *Chase* v. *Dare*, Sir *T. Jones* 168. see also *Godb.* 241. 1 *Lev.* 174, 285. 1 *Ld. Raym.* 671. 12 *Mod.* 512. *Lutw.* 541. 4. *Cro. Car.* 263. 1 *Mod.* 274. Sir *T. Raym.* 205, 1 *Salk.* 71.

It is now finally determined that the arbitrators may nominate an umpire *before* they proceed to consider the subject referred to them; and that this is so far from putting an end to their authority that it is the *fairest* way of choosing an umpire. 2 *Term Rep.* 645. And it is in fact not unusual for the parties to make it a condition in the submission that the umpire *shall* be chosen by the arbitrators, before they do any other act. They may also, when a further day is given to the umpire, and the choice left to them in general terms, choose him at any time *after* the expiration of their own time, provided it be before the time limited for *him*. 3 *Keb.* 387. *Freem.* 378. 2 *Mod.* 169. 15 *E. R.* 556.

From the opinion that the arbitrators having *once elected* an umpire had executed their authority, it has been thought to follow as a necessary consequence, that if they elected one who refused to undertake the business they could not elect another. This opinion has been supported by two Chief Justices, but over-ruled (surely with propriety) by determinations of the Court. 3 *Lev.* 263. 2 *Vent.* 113. *Palm.* 289. 2 *Saund.* 129. 1 *Salk.* 70. 1 *Ld. Raym.* 222. 12 *Mod.* 120.

When the person to whom the parties have agreed to refer the matters in dispute between them has consented to undertake the office, he ought to appoint a time and place for examining the matter, and to give notice of such appointment to the parties or to their attornies; if the submission be by rule of reference at *nisi prius*, the witnesses should be sworn at the bar of the court, or afterwards, (if neglected) before a judge.

The parties must attend the arbitrators, according to the appointment, either in person or by attorney, with their witnesses and documents. The arbitrators may also, if they think proper, examine the parties themselves, and call for any other information.

Where a time is limited for making the award, it cannot be made after that time, unless it be prolonged. When the submission is by the mere act of the parties, that prolongation may be made by their mutual consent; otherwise a rule of court is necessary for the purpose.

The law has secured each of the parties against the voluntary *procrastination* of the other, by permitting the arbitrator on due notice given to proceed without his attendance. *Waller* v. *King*, 9 *Mod.* 63. 2 *Eq. Ab.* 92. *c.* 3: or the willing party may press his opponent by rule of the court to attend the arbitrator, who on failure may make this award without such attendance. *Hetley* v. *Hetley*, *in Scac: Mich.* 1789.

It has been formerly held that an *umpire* cannot proceed on the report of the arbitrators, but must hear the whole matter anew; but there seems to be no good reason why the umpire, if he think proper, may not take those points *on*

*which the arbitrators agree* to be as they report them. The nature of his duty is only to make a final determination on the *whole subject* of dispute, where the arbitrators cannot do it, and by adopting their opinion as far as they agree, and incorporating it with his own on the other points, he effectually makes that final determination. And in this manner umpires do usually act: and they are justified in so doing unless *requested* to re-examine the witnesses. 4 *Term Rep.* 589.

Though the words in the submission which regulate the appointment of an umpire, be not perfectly correct; but might from the grammatical order seem to imply that the *arbitrators* and the *umpire* should *all join* together to make an award, yet an award made by the arbitrators without the participation of the umpire, will be considered as satisfying the terms of the submission. *Rol. Abr.* tit. *Arbitr. p.* 6.—And on the other hand, an umpirage made by the umpire jointly with the arbitrators is good; their approbation, shewn by joining with him, being mere surplusage, does not render the instrument purporting to be *his* umpirage in any degree less the act of *his* judgment. *Soulsby* v. *Hodson.* 2 *Blackst.* 463.

Unless it be expressly provided in the submission, that a *less number than all* the arbitrators named may make the award, the concurrence of all is necessary; and where such a proviso *is* made all must be present, unless those who do not attend had proper and sufficient notice, and are wilfully absent. *Barnes* 57.

As to the necessity imposed on the arbitrators or umpire of *giving notice of* their award, the following are the clearest determinations. If the award be made before the day limited in the submission, the parties shall not be bound by any thing awarded to be done before that day, unless they have notice; but they must take notice at their peril of any thing ordered *at* the day. 8 *E.* 4. 1. *Br.* 37. *Keilway* 175. see *Cro. El.* 97. *Cro. Car.* 132. 3.

It has long been the practice to guard against the consequences of the want of notice, by inserting a proviso in the condition of the arbitration-bond not only that the award shall be *made*, but that it shall be *delivered* to the parties by a certain day; and then the bond will not be forfeited by non-performance, unless the party not performing had notice; and the award ought to be delivered to *all* the persons who are parties on either side. *Hungate's Case*, 5 *Co.* 103. *Cro. El.* 885. *Mo.* 642.

The object of every reference is a *final* and certain *determination* of the controversies referred. A *reservation* of any point for the *future decision* of the arbitrator, or of a power to *alter* the award, is inconsistent with that object; and therefore it is established as a general rule that such a reservation is void: but the reservation of a *mere ministerial act*, as the measuring of land, the calculation of interest at a rate settled, &c. does not vitiate the award. 12 *Mod.* 139. 2 *Ro. Rep.* 189. 214. 215. *Palm.* 110. 146. *Cro. Jac.* 315. *Hob.* 218. *Lutw.* 550. *Hardr.* 43.

The submission to the decision of an individual arises from the confidence which the parties repose in his integrity and skill; and is merely personal to him; it is therefore inconsistent that the arbitrators or umpire should *delegate* any part of their authority to another; and such delegation is absolutely void. But it was settled in the case of *Lingood* v. *Eade*, 2 *Atk.* 501. (515.) that arbitrators where they award the *substance* of things to be done, may refer it to another to settle the *manner* in which it shall be put in execution.

Since the introduction of references at *nisi prius*, there can be no question, but the arbitrator has a jurisdiction over the *costs* of the action, as well as over the subject of the action itself; unless some particular provision is made to the contrary by the form of the submission. Instead of ascertaining the costs, the arbitrator may refer them to be taxed by the proper officer of the court, but to no one else. 2 *Atk.* 504. (519). 1 *Salk.* 75. 6 *Mod.* 195. *Hardw.* 181. *Barnes* 56. 8. 1 *Sid.* 358. *Str.* 737. 1033. *Com.* 330. When it is agreed that costs shall abide the event, it means the *legal* event. See 3 *Term Rep.* 139. And also as to awarding the costs *of the arbitration*, 2 *Term Rep.* 645. And the arbitrators may award damages to either party, though in point of law there was no cause of action. 2 *Vent.* 213. If the arbitrator takes no notice of the costs, but awards mutual releases, it shall be presumed to be meant that each party shall pay his own costs. See *Kyd.* 143.

V. EVERY AWARD should be consistent with the terms of the submission; the whole authority of the arbitrators being derived from thence.—Therefore,

1. The award must not extend to *any matter not comprehended* in the submission; thus, if the submission be confined to a *particular* subject of dispute, while there are other things in controversy between the parties, an award which extends to any of these other things is void as far as it respects them. 2 *Mod.* 309.

If two submit to the award of a third person all *demands* between them; without more; the word, *demands*, implies all matters between them concerning the lands of both parties which are the subjects of variance. 1 *Ld. Raym.* 115. *Keilw.* 99.

If the submission be, "of all causes of action, suits, debts, reckonings, accounts, sums of money, claims and demands," an award, "to release all bonds, specialties, judgments, executions and extents," is within the submission; for as all *debts* are submitted, of course a release may be awarded of the *securities* for them. 2 *Saund.* 190.

Where the submission is, "of all debts, trespasses and injuries," an award "to release all actions, debts, duties and demands," does not exceed the submission; the word *injuries* comprehending demands. 3 *Bulst.* 312.

The rule however is not so strictly interpreted as to extend to every thing *literally* beyond the submission; if the award be of any thing depending on the principal, it is good. *Roll. Abr. B.* 2. C. 4. 5. 6.

Thus if the submission be of all trespasses, and the award be, "that one shall pay to the other 10*l.* and that he shall *enter into a bond* for the sum;" this is good, because it only renders the award more effectual. *Kyd.* 96.

In like manner if it can reasonably be presumed that nothing is in reality awarded beyond the submission, it has in general been supported. 10 *Co.* 131. 2. *Jenk.* 264. *Rol. Arb.* 21. See 6 *Mod.* 232.

On the submission of a *particular* difference when there are other matters in controversy, though an award of a *general release* is void; yet the proof of such other disputes existing is thrown on the party objecting. 2 *Mod.* 309. 1 *Sid.* 154. *Vide Hob.* 190. (See *post. Div.* 3. of this head.)

If in a similar case the arbitrators award "that all suits shall cease," this shall be confined to suits relating to the subject of the submission, and void only for the residue. 1 *Ro. Rep.* 362. 2 *Ro. Rep.* 192. *Cro. Jac.* 663.

On a dispute between a parson and one of his parishioners, whether the tithes should be paid in kind or not; the arbitrator awarded that the parson should have 7*l.* for the tithes due before the submission, and that the parishioner should pay 4*l.* annually for the *future* tithes. This was held to be a good award, because the submission comprehended a question concerning the future rights. *Rol. Abr.* D. 8. But an award made on the 23d of June, ordering so much rent to be paid, which by the award itself appeared not to be due till the 24th, was held bad. 10 *Mod.* 204.

If partners refer all matters in difference between them,

the arbitrators may dissolve the partnership. 1 *Black. Rep.* 475.

Where the submission is by reference at *nisi prius*, the order in which the words are placed in the rule of reference gives no material distinction with respect to the power of the arbitrator. If the reference be "of all matters in dispute in the cause between the parties," the power of the arbitrator is confined solely to the matters in dispute in that suit. If it be "of all matters in difference between the parties in the suit," his power is not confined to the subject of that particular cause, but extends *to every matter* in dispute between them. 2 *Black.* 1118. 2 *Term. Rep.* 644. 5. 3 *Term Rep.* 626.

As an award of a thing out of the submission cannot be enforced by an action at law, so neither shall a man by such an award be precluded from claiming his right in equity. *Finch. Rep.* 141.

2. The award should *not extend to* any one who is a *stranger* (that is, not a party) to the submission. Thus if two submit to arbitration concerning the title to certain lands, and the arbitrators award that all controversies touching the land shall cease; and that one of the parties, *his wife and son, his heir apparent*, by his procurement shall make to the other such assurance of the land as the other shall require, this is void; because the wife and son are strangers to the submission. *Rol. Arb.* N. 9: and see *Samon's Ca.* 5 *Rep.* 77 *b.*

*Lord Coke* (10 *Rep.* 131 *b.*) says, that an award is void, which directs money to be paid by one of the parties to a third person not included in the submission; but this must be understood to hold good only when such payment *can be of no benefit* to the other party; for an award that one of the parties shall pay so much to the *creditor* of the other, in discharge of a debt is unquestionably good. 1 *Ld. Raym.* 123. *Rol. Arb.* E. 6. F. 8.

And in general a distinction is taken between the case of an act awarded to be done *by* a stranger, and that of an act awarded to be done *to* him, by a party to the submission: in the latter case the award is said to be good; and if the stranger will not accept the money awarded to be paid to him the party's obligation is saved. 3 *Leon.* 62.

So where a stranger is only an *instrument* to the performance of the award, no objection shall be allowed on that account: as if it be, that one of the parties shall surrender his copyhold into the hands of two tenants of the mansion who shall present the surrender; this award is good. *Rol. Arbitr.* E. 7. 8. 1 *Keb.* 569. and see Division 4 of this head.

If the persons comprehended in the award were *in contemplation* of the submission, though they were not directly parties to it, yet the award is good. *Lutw.* 530. 571. 1 *Mar.* 78. *Comyns* 183. *Rol. Arb.* B. 18.

An award shall not affect the *rights* of persons not parties to the submission. *Finch.* 180. 4. and see *Id.* 141.

3. The award ought not to be of *part only* of the things submitted. This however must be understood with a considerable degree of limitation; for though the words of the submission be more comprehensive than those of the award, yet if it do not appear that any thing else was in dispute between the parties, beside what *is* comprehended in the award, it will be good. 8 *Co.* 98. *Rol. Arb.* L. 5.

If a submission be "of all the premises *or of any part of them*," in this case the arbitrator may undoubtedly make an award of part only. *Rol. Arb.* L. 6.

Upon a reference of all actions, controversies, &c. and also of two distinct matters in difference, if the arbitrator omit to decide one of such distinct matters, that vitiates the whole award. 7 *E. R.* 81.

If an award be made of all matters except a bond, and of this it be awarded that it shall stand, the award is good; for it shall be presumed there was no cause to discharge the bond. *Cro. Jac.* 277. 400. *Bridg.* 91.

If arbitrators award for one thing, and say that *they will not meddle with the rest*, all is void; because they have not pursued their authority. *Cro. El.* 858. see *Dy.* 216. 217.

Where a submission is of certain matters specifically named, with a provisional clause "so that the award be made *of and upon the premises*," the arbitrator ought to make his award of all, otherwise it will be void. 8 *Co.* 98. *Goldsh.* 125. *Rol. Arbitr.* L. 9.

But where the submission is general of *all matters in difference* between the parties; though there should happen to be many subjects of controversy between them, if only one be *signified* to the arbitrator, he may make his award of that: he is, in the language of *Lord Coke*, in the place of a judge, and his office is to determine according to what is alledged and proved. It is the business of the parties grieved, who knew their own particular grievances, to signify their causes of controversy to the arbitrator; for he is a stranger, and cannot know any thing of their disputes but what is laid before him. 8 *Co.* 98 *b.* 1 *Brownl.* 63. 2 *Brownl.* 309.

In the case of such a general submission, if an an award concerning one thing only be made, it shall be presumed (till the contrary be shown by the party objecting) that nothing else was referred. *Cro. Jac.* 200. 355. 1 *Burr.* 274. *et seq.* 8 *E. R.* 445. But the arbitrators ought to decide on all matters *laid before them*, or they cannot do complete justice. And it is said that on a reference by rule of a court of equity, the award ought to comprehend all the matters referred. 1 *C. C.* 87. 186.

It is however no valid objection to an award that the arbitrator had notice of a certain demand, and that he made no award of that, if in other respects the award be good; as though the sum in question may not be mentioned in the award, the arbitrator may have shown his opinion that the demand was unfounded; as, by ordering general releases, &c. See 1 *Saund.* 32.

An award of one particular thing for the ending of an hundred matters in difference is sufficient, provided it concludes to them all. 1 *Keb.* 738. 1 *Lev.* 132. 3.

4. If an award be to do any thing which is *against law*, it is *void*, and the parties are not bound to perform it. *Rol. Arbitr.* G. 1 *Sid.* 12. 2 *Vent.* 243. So also is an award of a thing which is *not* physically or morally *possible*, or in the power of the party to perform; as that he shall deliver up a deed which is in the custody or power of a person, over whom he has no controul. 12 *Mod.* 585. and see *Rol.* tit. *Arbitr.* And an award that the defendant shall be bound with sureties such as the plaintiff shall approve is void, for it may be impossible to force the approbation of the plaintiff. 3 *Mod.* 72. 23. But in this case the party should enter into a bond himself and tender it to the plaintiff.

An award between a lessee and a neighbour, awarding an act to be done for the benefit of the latter, by the lessee, which would be waste upon the estate of the lessor is bad. 5 *W. P. T.* 454.

Where an award is that one of the parties shall procure a stranger to do a thing, there is a distinction taken between the case where he has no power over the stranger, to compel him, and where he *has* power either by the common law or by bill in equity. In the former case the award is void, for so much as concerns the stranger. In the latter it is good, *Rol. Arbitr.* F. 1. 248 *n.* 11. *March.* 18. 1 *Mod.* 9.—(See ante Division 2.)

Neither must an award be to do a thing *unreasonable*; nor by the performance of which the party awarded to do the acts may subject himself to an action from another. *Rol. Arbitr.* E. 2. 3. F. 10. 2 *Bulst.* 39. 1 *Keb.* 92. 1 *Ro. Rep.* 6. *Cro. Car.* 226. 3 *Lev.* 153.

What shall or shall not be unreasonable, is however matter of construction in which the cases differ considerably. See *Rol. Arb.* B. 12; J. 4, 5. 2 *Mod.* 304.

An award must not be of a thing which is merely *nugatory*, without any advantage to the parties. *Rol. Arb.* J. 10—15. And if a man and a woman submit to arbitration, and it be awarded that they shall intermarry, this is said not to be binding (*Id. ib.*) for one reason among others, that it cannot be presumed to be advantageous to them. Mutual releases are advantageous, and therefore an award of them is good. *Freem.* 51.

5. The award must be *certain* and *final*. As the intention of the parties in submitting their disputes to arbitration is to have something ascertained which was uncertain before, it is a positive rule that the award ought to be so plainly exprest, that the parties may certainly know what it is they are ordered to do. 5 *Co.* 77 *b.* 78 *a.*

On the construction of certainty and uncertainty the cases are multifarious; and it may be observed, that they principally depend on such circumstances as are peculiar to each case, and very seldom form any general precedent. The *rule* therefore serves better to regulate the conduct of arbitrators than the numerous *exceptions*: as it is the interest of the party against whom the award is made to be ingenious in finding out objections, an award cannot be too particular or precise in laying down what is to be done by the parties, and the *manner time* and *place* of their doing it. Though the two latter have been deemed immaterial (*Stra.* 905,) yet it is safest to specify them.

Awards are now so liberally construed, that trifling objections are not suffered to prevail against the manifest intent of the parties. See 1 *Burr.* 277. and post *Division* 6. In favour of the equitable jurisdiction of the arbitrators, if that, to which the objection of uncertainty is made, can be *ascertained* either by the context of the award, or from the nature of, and circumstances attendant on the thing awarded, or by a manifest reference to something connected with it, the objection shall not prevail. See 2 *Ld. Raym.* 1076. 12 *Mod.* 585. *Lutw.* 545. *Stra.* 903. Where there is no *date* to the award, it shall be taken as dated from the day of the delivery, which may be ascertained by averment; and all other uncertainties may be helped by proper averments in pleading. 1 *Ld. Raym.* 246. 612. *Cro. Eliz.* 676. *Sty.* 28. 2 *Saund.* 292.

As an award must be certain, so also must it be *final*; (at the time of making it; see 1 *Sid.* 59. *Lutw.* 51. *Comb.* 456.) in order to prevent any future litigation on the subject of the submission.

On this principle, an award that each party shall be *nonsuited* in the action which he has brought against the other, is not good; because (amongst other reasons) a nonsuit does not bar them from bringing a new action: but an award that a party shall *discontinue* his action, or enter a *retraxit*, is good. 2 *Godb.* 276. *Rol. Arbitr.* F. 7.

An award—that all suits shall cease—or, that a bill in chancery shall be dismissed—or, that a party shall not commence or prosecute a suit—is final: for it shall be taken to mean, that the *debt* and *action* shall *cease for ever*; that alone being a substantial performance of the award. 6 *Mod.* 33. 232. 2 *Ld. Raym.* 961. 4. 1 *Salk.* 74. 5. *Rol. Arb.* O. 7. But see 2 *Stra.* 1024. 9 *E. R.* 497.

*Lastly*, the award must be *mutual*; not giving an advantage to one party without an equivalent to the other.

The principal requisite, however, to form that mutuality, about which so much is said in all the cases usually classed under this rule, is nothing more than that the thing awarded to be done should be a final *discharge*, and *satisfaction* of all debts and claims by the party in whose favour the award is made, against the other, for the matters submitted; and therefore the present rule amounts to nothing more than a different form of expression of that which requires that an award should be final. See *Comb.* 439. 1 *Ld. Raym.* 246. *Cro. Eliz.* 904. *Comyns.* 328.

6. The rules which at present govern *the construction of awards* are, that they shall be interpreted, as deeds, according to the intention of the arbitrators. That they shall not be taken strictly, but liberally, according to the intent of the parties submitting, and according to the power given to the arbitrators. 1 *Burr.* 277. 2 *Atk.* 504. (519)—That all *actions* mentioned in the award shall be construed to mean, all actions over which the arbitrators have power by the submission—That if there be any contradiction in the words of an award, so that the one part cannot stand consistently with the other, the first part shall stand and the latter be rejected; but that if the latter be only an explanation of the former, both parts shall stand. *Palm.* 108. 3 *Bulst.* 66. 7.—And that where the words of an award have any ambiguity in them, they are always to be construed in such a manner as to give effect to the award. 6 *Mod.* 35.

Much unnecessary difficulty occurs in all the old reports on the construction that ought to be put on the award of a *Release*; but it is clearly settled, that an award of releases *up to the time of making the award*, is not altogether void; but that it shall be construed so as to support the award; and that for two reasons. 1st. That it shall be presumed that no difference has arisen since the time of the submission, unless it be specially shewn that there has: 2d. That a release to the time of the *submission* is a good performance of an award, ordering a release to the time of the *award*; not because the meaning of the arbitrators is so, but because their meaning must be controuled so far as it is void, by construction of law. 10 *Mod.* 201. 6 *Mod.* 33. 5. 2 *Ld. Raym.* 964. 5. 1 *Ld. Raym.* 116. see 12 *Mod.* 8. 116. 589. *Godb.* 164. 5. 2 *Keb.* 431. 1 *Sid.* 365.

Formerly, if one part of an award was void, the whole was considered so: now however, it is the rule of the courts, in many cases, to enforce the performance of that, which had it stood by itself, would have been good, notwithstanding another part may be bad. 12 *Mod.* 534. But if that part of the award, which is void, be so connected with the rest, as to affect the justice of the case between the parties, the award is void for the whole. *Cro. Jac.* 584.

When, from the tenor of the award, it appears that the arbitrator has intended that his award should be mutual, awarding something in favour of one of the parties as an equivalent for what he has awarded in favour in the other; if then that which is awarded on the one side be *void*, so that performance of it cannot be enforced, the award is void *for the whole*, because that mutuality, which the arbitrator intended, cannot be preserved. *Yel.* 98. *Brown.* 92. *Rol. Arb. K.* 15. *Cro. Jac.* 577. 8.

If one entire act awarded to be done on one side, comprehend several things, for some of which it would be good, and for others not, the award is bad for the whole, because the act cannot be divided. *Cro. Jac.* 639.

When it appears clearly that both parties have the full effect of what was intended them by the arbitrator, though something be awarded which is void; yet the award shall stand for the rest. 1 *Ld. Raym.* 114. *Lutw.* 545. and see 12 *Mod.* 588.

An award ought regularly to be made *in writing*, signed and sealed by the arbitrators, and the execution properly witnessed: it may however be made by parol, if it is so expressly provided in the submission.

7. It is not in all cases absolutely necessary that *performance* should be exactly according to the words of the award; if it be substantively and effectually the same, it is sufficient. 3 *Bulst.* 67. And if the party, in whose favour the award is made, accept of a performance differing in circumstances from

the exact letter of the award, that is sufficient; for *consensus tollit errorem.* 3 *Bulst.* 67.

Where the concurrence and presence of both parties is not absolutely necessary to the performance, each ought to perform his part *without request* from the other. 1 *Ld. Raym.* 233. 234. and see *Rol. Arb.* Z. 6.—If an award order that the defendant shall re-assign to the plaintiff certain mortgaged premises, it will be a breach if he do not re-assign *without request.* 1 *Ld. Raym.* 234.

If the award be to pay *at, on* or *before* a particular day, payment before the day is equivalent to payment on the day. 3 *Keb.* 675. 676.

A considerable number of years having elapsed since the making of the award, is no objection to the parties being called upon to perform it. *Finch, Rep.* 384.; nor can the statute of Limitations (28 *Jac.* 1. *c.* 16. § 3.) be pleaded in bar. 2 *Saund.* 64.

On an award, that one party shall enter into a security for money, (note, bond, &c.) the giving the security is a performance of the award; and on non-payment, the person to whom it is given can only proceed against the other on that security, and not on the submission or arbitration-bond. *Bendl.* 15. *Stra.* 903. 1082.

An award that the defendant shall pay to the plaintiff such a sum of money, unless within twenty-one days (which was after the time limited for making the award) the defendant shall exonerate himself by affidavit from certain payments and receipts, in which case he was only to pay a less sum, is illegal and void, because uncertain and inconclusive. 7 *Term Rep.* 73.

If an award be made on an improper stamp, and no application be made to enforce it, the court will not set it aside. *Preston* v. *Eastwood*, 7 *Term Rep.* 95.

Two several tenants of a farm agreed with the succeeding tenant to refer certain matters in difference respecting the farm to arbitration, and jointly and severally promised to perform the award; the arbitrator awarded each of the two to pay a certain sum to the third; held that they were jointly responsible for the sum awarded to be paid by each. *Mansell* v. *Burredge*, 7 *Term Rep.* 352.

VI. The remedy *to compel performance of an award* is various, according to the various forms of the submission.

Though the submission be verbal, an action may be maintained on the award, whether it be for the payment of money, or for the performance of a collateral act. 1 *Ld. Raym.* 122. and see *ante Division* 1.

Where the award is either verbal, or in writing, *for the payment of money*, and made on a submission, either by parol or by deed, the action on the award may be an action of *debt:* it may also be an action of *assumpsit:* and in all other cases on a parol submission, an *assumpsit* is the *only* species of action that can be maintained. 1 *Leon.* 72. *Cro. Jac.* 354.

In all actions on the award, it must necessarily be shown, in direct unequivocal terms, that the parties *submitted*, before the award can be properly introduced; 2 *Stra.* 923. the submission too must be so stated as to correspond with the award, and to support it. 2 *Lev.* 235. 2 *Show.* 61.

When the action is on a mutual *assumpsit*, to pay a certain sum *on request*, if the defendant should not stand to the award, an *actual* request to pay that sum, before the action brought, must be positively stated. 1 *Saund.* 33. 2 *Keb.* 126.

When the submission is by bond, if the award be for payment of money, an action of *debt* on the award lies, as well as an action on the *bond;* but the latter is the action most usually brought; in this the order of pleading commonly observed is, that the plaintiff declares on the bond, as in ordinary cases of action on a bond; the defendant then prays oyer of the condition, which being set forth, he pleads that the arbitrators, or the umpire, made *no award;* then the plaintiff replies, not barely alleging that they did, but setting forth the award at large, and assigning the breach by the defendant: (as to which see *post* and *Winch.* 121. *Yelv.* 24. 78. 153. 1 *Ld. Raym.* 114. 123. 2 *Vent.* 221. 3 *Lev.* 293.) and on that the whole question arises as on an original declaration.—The defendant then either rejoins, that they made "no *such* award," (*Jenk.* 116. *Cro. Jac.* 200. *Palm.* 511.) on which the plaintiff takes issue—or, he demurs, and the plaintiff joins in demurrer. Vid. *Stra.* 923. *Freem.* 410. 415. 1 *Sid.* 370. 3 *Burr.* 1729, 1730. 5 *E.* 4. 108. *Brooke, pl.* 33. *Cro. Eliz.* 838.

Every thing necessary to show that the award was made according to the terms of the submission, must be stated by the plaintiff. *Lutw.* 536. 2 *Ld. Raym.* 989. 1076. Where also, by the terms of the award, performance on the part of the plaintiff is a *condition precedent* to that on the part of the defendant; there the plaintiff must show that he has done every thing necessary to entitle him to call on the opposite party.—But tender by the plaintiff, and refusal by the defendant, will be sufficient, unless the thing to be done by the plaintiff can be done without the concurrence of the other. *Hardr.* 43. 44.

A *material* variance between the real award, and that set forth in the pleadings, will be fatal to the plaintiff; and if on the trial the jury doubt whether the variance is material or not, a special verdict may be taken for the opinion of the court. 1 *Salk.* 72. 1 *Ld. Raym.* 715. *S. C.* 1 *Burr.* 278.

In an action on the *award*, the defendant may plead 'that he did not submit;' but in an action on the bond such a plea is not good. 1 *Sid.* 290. 2 *Stra.* 923.

More exactness is required in setting forth a written than a verbal award—in the former nothing must be alleged by inducement. 2 *Vent.* 242. The breach must also be assigned with such precision, as to show that the award was made of the thing in which the breach was alleged. 1 *Rol. Rep.* 8. *Cro. Jac.* 339. 2 *Bulst.* 93. and in an action on the assumpsit, to perform the award, the plaintiff may assign several breaches. *Jenk.* 264. and see *Yelv.* 35. But in an action on the arbitration bond, where several things are ordered to be done by the defendants, it is not necessary to assign breaches of every matter, because the breach of any one is a forfeiture of the penalty of the bond; and when the plaintiff has once recovered, then he can never maintain another action on the same bond, to recover the penalty again on a second breach. 2 *Wils.* 276. 9. and vide *Id.* 293. *S. P.*

If the *defendant* set forth the award, and allege the performance generally, and then on a breach being assigned in the replication, he rejoin, and show a *special* performance, this will be a departure. 1 *Ld. Raym.* 234.

It has several times happened that the defendant, by setting forth an award partially, has imposed considerable difficulty on the plaintiff how to answer him. (See 1 *Keb.* 568. 1 *Saund.* 326. 3 *Lev.* 165. *Lutw.* 525.) In this case, if the plaintiff demand oyer of the award, and have it set forth at full length, assigning a breach in the same manner as if the defendant had pleaded *no award*, he will be secure against any objection from the manner of pleading. *Lutw.* 451. and see *Godb.* 255. 1 *Rol. Rep.* 6.

If, from the default of the defendant, no award has been made within the time limited, the plaintiff may, to the plea of *no award*, reply that default of the defendant. See 8 *Co.* 81.—On a submission by bond, providing that the award shall be made within a limited time, though that time is enlarged *by mutual consent*, and the award made within the enlarged time, an action cannot be maintained on the bond to recover the penalty for non-performance. 3 *Term Rep.* 529 *n.*—And as to such enlargement of time, see 2 *Term Rep.* 643. 644. 3 *Term Rep.* 601.

On the practice obtaining, of references at *Nisi Prius*, performance of the award was consequently enforced by means

of an *attachment*, and the following is the present course of proceeding to obtain that remedy.—The award must be tendered to the party bound to perform it, and on his refusal to accept it, affidavit must be made of the due execution of the award, and of such tender and refusal; and on that, application made to the court to make the order of *Nisi Prius* a rule of court; a copy of this rule must be personally served on the party; and if he still refuse to accept the award, an affidavit must be made of such service and refusal; on which the court will grant an attachment of course. 1 *Crompt. Pract.* 264. When the award is accepted, but the money being demanded is not paid, an affidavit must be made of such refusal, and of the due execution of the award. 2 *Black. Rep.* 990, 991.—Where there is any dispute as to the proper performance of an award, it is discretionary in the court to grant or refuse an attachment. 1 *Stra.* 695. 1 *Burr.* 278.

When an award is not for the payment of money, but for the performance of any collateral act, it may sometimes be enforced by a *bill in equity*, on which the court will decree a specific performance. See 1 *Atk.* 74. (62.) 1 *Eq. Ab.* 51. 1 *C. R.* 46. 3 *C. R.* 20. 2 *Vern.* 24. 3 *P. Wms.* 187. 189. 190. But though a court of equity may assist a plaintiff to procure the execution of an award, it will not compel a defendant to discover a breach by which he may charge himself with the penalty of a submission-bond. *Bishop* v. *Bishop*, 1 *C. R.*

Upon an application for an attachment for non-performance of an award, for any illegality apparent on the award, though the time for applying to set aside the award is expired. *Pedley* v. *Goddard*, 7 *T. Rep.* 73. But the court will not set aside an award for any defect after the time limited by the stat. 9 & 10 *W.* 3. *c.* 15. *Ib.*

If an arbitrator, under a reference between A. and B., administrator, award that B. shall pay a certain sum, as the amount of A.'s demand, B. cannot afterwards object that he had no assets, but may be attached for non-payment. *Worthington* v. *Barlow*, administratrix. 7 *T. R.* 453.

An agreement to enlarge the time for making an award must contain a consent that it shall be made a rule of court, otherwise no attachment will be granted for not performing an award made under it. *Jenkins* v. *Law*, 8 *T. R.* 87.

To covenant in a deed, (made for the performance of several matters,) the defendant cannot plead that, in the deed, there is a covenant that in case any difference should arise between the parties respecting any part of the agreement, it should be settled by three arbitrators, to be chosen, &c. and that he offered to refer the matter in dispute, &c. but the plaintiff refused, &c. *Thompson* v. *Charnock*, 8 *T. R.* 139.

A. and B. in 1797, assigned to the plaintiff all debts due to them, and gave him a power of attorney to receive and compound for the same; under which the plaintiff, in 1799, submitted to arbitration the matters in difference *then* subsisting between his principals and the defendants; and the plaintiff and defendants promised to each other to perform the award. The arbitrators having awarded a sum to be paid to the plaintiff as such attorney, he may maintain an action for it in his own name. *Banfill* v. *Leigh*, 8 *T. R.* 571.

Applications to set aside awards, though for objections appearing on the face of them, must be made within the time limited by the 9 & 10 *W.* 3. *c.* 15. *Lowndes* v. *Lowndes*, 1 *East* 276.

Where a verdict is taken, *pro formâ*, at the trial for a certain sum, subject to the award of an arbitrator, the sum afterwards awarded is to be taken as if it had been originally found by the jury; and the plaintiff is entitled to enter up judgment for the amount, without first applying to the court for leave so to do. *Lee* v. *Lingard*, 1 *East* 401.

If an arbitrator profess to decide upon the law, and he mistakes it, the court will set aside the award, although the arbitrator's reasons do not appear upon the face of the award, but only upon another paper delivered therewith. So it seems it would be if such reasons appeared in any other authentic manner to the court. *Kent* v. *Eistob & al.* 3 *East* 18.

A. declared in covenant against B. and her husband, for that B., before her intermarriage, covenanted with A., by deed, to leave certain accounts in difference between them to arbitration, and to *abide* and perform the award, provided it were made during their lives; and A. protesting that B. had not, before her intermarriage, performed her part of the covenant, averred that, *after* the making the indenture, *and the intermarriage of the defendants*, the arbitrator awarded B. to pay a certain sum, and then alleged a breach for non-payment of such sum. After verdict on *non est factum* pleaded; held that, upon this declaration, it must be taken that B. *intermarried after* the submission, and *before* the *award* made; in which case, although the plaintiff could not recover upon the breach assigned *for non-payment of the sum awarded*, because the marriage was a *countermand* to the *authority of the arbitrator;* yet as, by the marriage itself, B. had by her own act put it out of her power to perform the award, the covenant to *abide* the award was broken, and therefore the judgment could not be arrested on the ground that the marriage was a revocation of the arbitrator's authority, and that so the plaintiff could not recover *as for a breach of non-performance of the award*. *Charnley* v. *Winstanley & Ux.*, 5 *East* 266.

Where a verdict is taken for a certain sum, subject to the award of an arbitrator, to whom all matters in difference are referred by a rule of *Nisi Prius*, he cannot award a *greater* sum than that for which the verdict was taken; and if he do, no assumpsit by implication will arise to pay even to the extent of the verdict so taken. *Bonner* v. *Charlton*, 5 *East* 139.

VII. RELIEF may be obtained *against an award*, made contrary to the prescribed rules of law, when the award is put in suit. But when the submission is by the mere act of the parties, the defendant is not permitted to impeach the conduct of the arbitrators at law; so as to make it a defence to an action on the award or submission-bond. See 1 *Saund.* 327. 2 *Wils.* 149. In such case the only relief is in equity. 2 *Vezey* 315. But a court of equity will not interfere to set aside an award, where the submission is voluntary, (or by order of *Nisi Prius*, 1 *C. C.* 140. 1 *Vern.* 157.) except for corruption or improper conduct in the arbitrators; or where the award appears on the face of it to be contrary to the rules of equity; as, to the prejudice of an infant, &c. 1 *C. C.* 276. 279, 280. 3 *Atk.* 529. (496.) 2 *Eq. Ab.* 63. 64. 3 *C. R.* 49. *Amb.* 245.

In bills to have an award set aside for corruption or partiality, it is usual to make the arbitrators defendants; together with the party in whose favour the award is made. *Finch. Rep.* 141. 3 *Atk.* 644. 397. The arbitrators may plead the award in bar; but they must show themselves impartial, or the court will make them pay costs. 2 *Atk.* 396. (412.)

Where the submission is by order of *Nisi Prius*, or under the stat. 9 & 10 *W.* 3. a court of equity will not entertain a bill to relieve against an award for corruption or partiality, unless the court of law has not afforded that relief on application; or the time for complaining at law, under the statute, is elapsed. 2 *Atk.* 155. (162.) 396. (412.) 2 *Vez.* 316. 317. See *Bunb.* 265.

By the stat. 9 & 10 *W.* 3. *c.* 15. it is enacted, that "any arbitration or umpirage, procured by corruption or undue means, shall be void; and be accordingly set aside by any court of law or equity, so as complaint be made to the court, where the rule for submission is made, before the last day of the next term after such arbitration made and published to the parties." See 1 *Stra.* 301. 2 *Burr.* 701. *Barnes* 55. 57. But it seems that a court of equity may relieve, on manifest grounds, after the time required by the act for complaint at

law, though no such complaint is made at all in the common law courts. *Bunb.* 265. 1 *Barn. K. B.* 75. 152.

Even since the above statute, it is competent to either party *before the submission is made a rule of court*, to revoke by deed his submission, and notify the same to the arbitrators before the authority is executed. 7 *E. R.* 608. 5 *W. P. T.* 452.

Where the submission is by reference at *Nisi Prius*, there is no time limited for making an application to set aside an award for any cause. 2 *Atk.* 155. (162.) *Str.* 301. 2 *Burr.* 701. 8 *E. R.* 466.—When the submission is according to the statute, no application can be made to have the award set aside till the *submission* be actually made a rule of court, which may be either before or after making the award. 1 *Stra.* 301. 2 *Vez.* 317. 2 *Str.* 1178. 3 *P. Wms.* 362.

The most frequent subject of complaint against an award, arises from some imputed *misconduct* of the arbitrators, and when the complaint is made out, it is generally successful: as if one of the arbitrators unjustly exclude the rest from the award; or hold private meetings with one of the parties, 2 *Vern.* 515. or appoint an umpire by lot. *Id.* 485.: or manifest any other undue partiality. *Id.* 101. 251. 3 *P. Wms.* 262. 2 *Vez.* 216. 18. 1 *Vez.* 317.

If it appear that the arbitrators went on a plain *mistake*, either as to the law, or in a point of fact, that is an error appearing on the face of the award, and sufficient to set it aside. 2 *Vern.* 705.—So if the arbitrators appear to have an *interest* in the subject of reference. 2 *Vern.* 251. So also where any circumstance is *suppressed* or concealed from either of the arbitrators, and the arbitrator declares that had he known the circumstance, he would have made a different award. 1 *Atk.* 77. (64.)

Where the submission is under the statute, or by reference at *Nisi Prius*, the court will on some occasions send back the award to be re-considered, on suggestion that the arbitrator had not sufficient materials before him, and perhaps too to rectify any trifling or apparent mistake; but such application must be made in the former case within the time prescribed by the statute. 2 *Term Rep.* 781.

VIII. An Award *may be pleaded in bar* to every action brought, for a cause or complaint which had been previously referred to the arbitrators, on which the award was made. See 4 *T. R.* 146.

The award thus pleaded, must have all the qualities necessary to constitute a good award; and must be such, if it be pleaded without performance, that the plaintiff may have a remedy to compel performance: but if performance be alleged, as it may be, (see 1 *Ro. Rep.* 7. 8. *Cro. Jac.* 339. 2 *Bulst.* 98. *Rol. Arbitr.* F. 2. *Al.* 86. 3 *Leon.* 62.) even a void award may frequently be a good bar. An award however, which is in itself uncertain, and cannot be ascertained by averment, cannot be pleaded in bar. 2 *Saund.* 292. 2 *Keb.* 736.

The cases which have determined an award not to be pleadable in bar, where it does not create a new duty, seem irreconcileable to the present state of the law on the subject—particularly as they allow that an action may be maintained on the submission, whether that is by bond or otherwise. 1 *Ld. Raym.* 248. 12 *Mod.* 130. *Comb.* 440. 1 *Salk.* 69. *Lutw.* 56. 57.

An award however, which does not extend to *the whole* of the thing demanded is reasonably not a good plea to an action on the demand. *Al.* 5. 1 *Ld. Raym.* 612. See *Lutw.* 51. And in order to make an award a good plea, it must appear that both parties were equally bound by it.

Where the plaintiff lays several counts in his declaration, and the award, from the terms of it, can only be a bar to one of them; if in reality they are all for the same cause, the best way of pleading seems to be, to plead the award to that count to which it is answerable in terms; and the general issue to the rest. *Kyd.* 245.

There were anciently some distinctions in the manner of pleading an award, with respect to the necessity of alleging performance of the thing awarded, which are not now essential; for since it has been held that an action will lie on the mere submission, it is in no case necessary for the defendant in pleading an award in bar of an action, to allege performance of the thing awarded, unless where the award is void, and consequently the plaintiff could not enforce it. 1 *Ld. Raym.* 122.

Where the lessor of the plaintiff, and the defendant in ejectment had before referred their right to the land to an arbitrator, who had awarded in favour of the lessor, the award excludes the defendant from disputing the lessor's title in an action of ejectment. *Doe* d. *Morris & al.* v. *Prosser*, 3 *East* 15.

### Form of an Award, on a Submission.

To all people *to whom this present writing indented of* Award *shall come, greeting.* Whereas *there are several accounts depending, and divers controversies and disputes have lately arisen between A. B. of, &c. Gent. and C. D. of, &c. all which controversies and disputes are chiefly touching and concerning &c.* And whereas, *for the putting an end to the said differences and disputes, they the said A. B. and C. D. by their several bonds or obligations bearing date, &c. are become bound each to the other of them in the penal sum of, &c. to stand to and abide the* award *and final determination of us E. F. G. H. &c. so as the said* award *be made in writing, and ready to be delivered to the parties in difference on or before, &c. next, as by the said obligations, and the condition thereof may appear.* Now Know ye, *That we the said Arbitrators whose names are hereunto subscribed, and seals affixed, taking upon us the burthen of the said* award, *and having fully examined and duly considered the proofs and allegations of both the said parties, do, for the settling amity and friendship between them, make and publish this our* award, *by and between the said parties, in manner following, that is to say,* First, *We do* award *and order, that all actions, suits, quarrels, and controversies whatsoever had, moved, arisen or depending between the said parties in law or equity, for any manner of cause whatsoever, touching the said, &c. to the day of the date hereof, shall cease and be no further prosecuted, and that each of the said parties shall pay and bear his own costs and charges, in anywise relating to or concerning the said premisses.* And *we do also* award *and order that the said A. B. shall pay, or cause to be paid to the said C. D. the sum of, &c. within the space of, &c. And also at his own costs and charges do, &c.* And *we do* award *and order that, &c.* And lastly, *we do* award *and order that the said A. B. and C. D. on payment of the money above-mentioned, shall in due form of law execute each to the other of them general releases, sufficient for the releasing by each to the other of them his executors and administrators, of all actions, suits, arrests, quarrels, controversies and demands whatsoever touching or concerning the premisses aforesaid, or any matter or thing thereunto relating, from the beginning of the world until the day of, &c. last.* In witness, &c.

The Reader is thus presented with a complete abridgment of the law on this subject. Were it accurately attended to, and were the arbitrators uninfluenced by motives of partiality, *arbitration* would be a very desirable way to put an end to many suits, instead of affording grounds of new proceedings, as they now too frequently do.—As it is, the subjects most proper for arbitration seem to be (in the words of the author, to whom we have confessed ourselves so much indebted on this subject) "Long and intricate accounts—Disputes of so trifling a nature, that it is of little importance to the parties in

whose favour the decision may be given, provided at all events there be a decision—and—questions on which the evidence is so uncertain, that it is much better to have a decision, whether right or wrong, than that the parties should be involved in continual litigation."

AWM, or *aume*, (Teut. *ohm. i. e. cadus vel mensura*) A measure of Rhenish wine, containing forty gallons; mentioned in some statutes. This word is otherwise written *awame*.—The rood of Rhenish wine of *Dordreight* is ten *awmes*, and every *awme* 50 gallons: The rood of *Antwerp* is fourteen *awmes*, and every *awme* 35 gallons.

AWNHINDE. See *Third-night-awn-hinde.*

AYLE. See *Aile.*

AZALDUS, A poor horse or jade. *Claus.* 4 *Ed.* 3.

# B.



BACA. A hook, or link of iron, or staple. *Consuetudin. domûs de Farendon. MS. f.* 20.

BACINNIUM, or *Bacina*. A bason or vessel to hold water to wash the hands. *Simeon Dunelme, anno* 1126. *Mon. Angl. tom.* 3. *p.* 191. *Petrus filius Petri Picot tenet medietatem Heydenæ per serjantiam serviendi de bacinis.*—This was a service of holding the *bason*, or waiting at the *bason*, on the day of the king's coronation. *Lib. Rub. Scaccar. f.* 137.

BACHELERIA. The commonalty or yeomanry, as distinguished from the baronage. *Annal. Burton, p.* 426. *sub. an.* 1259.

BACHELOR, *Baccalaureus*, from the Fr. *bachelier*, viz. *tyro*, a learner:] In the universities there are *bachelors of arts*, &c. which is the first degree taken by students, before they come to greater dignity. And those that are called *bachelors* of the companies of London, are such of each company as are springing towards the estate of those that are employed in council, but as yet are inferiors; for every of the twelve companies consists of a *master*, two *wardens*, the *livery*, (which are assistants in matters of council, or such as the assistants are chosen out of,) and the *bachelors*, in other companies, called the *yeomanry*. The word *bachelor* is also used, and signifies the same with *knight bachelor*, a simple knight, and not knight banneret, or *knight of the Bath*. The name of bachelor was also applied to that species of esquire, ten of whom were retained by each knight banneret on his creation. *Anno* 28 *E.* 3. a petition was recorded in the Tower, beginning thus; *A nostre Seigneur le Roy monstrent votre* simple bachelor, *Johan de Bures, &c. Bachelor* was anciently attributed to the admiral of England, if he were under the degree of a baron. In *Pat.* 8 *R.* 2. we read of a *baccalaureus regis*. Touching the further etymology of this word, see *Spelman.*

The term bachelor also denotes in law a man who has never been married; and as such, taxes have at times been levied, or the taxes laid on others increased, if paid by bachelors: as in the case of the duty on servants, under stat. 25 *Geo.* 3. *c.* 43.

BACKBERINDE, *Sax.*] Bearing upon the back, or about a man. Bracton useth it for a sign or circumstance of theft apparent, which the civilians call *furtum manifestum*. Bract. lib. 3. tract. 2. cap. 32. Manwood remarks it as one of the four circumstances or cases, wherein a forester may arrest the body of an offender against vert or venison in the forest: by the assise of the forest of Lancaster, (says he,) *taken with the manner*, is when one is found in the king's forest in any of these four degrees, *stable-stand, dog-draw, backbear*, and *bloody-hand*. Manw. 2. part, Forest Laws.

BACK-BOND. A term in Scotch Law, meaning a deed which in conjunction with an absolute disposition constitutes a trust. It expresses the nature of the right actually had by the person to whom the disposition is made. It is equivalent to the English deed of declaration of trust.

BACO. A bacon hog, used in old charters. *Blount.*

BACTILE. A candlestick properly so called, when formerly made *ex baculo*, of wood, or a stick. *Clodingham Hist. Dunelm. apud Wartoni, Ang. Sac. p.* 1723.

BADGER, From the Fr. *baggage*, a bundle, and thence is derived *bagagier*, a carrier of goods.] One that buys corn or victuals in one place, and carries them to another to sell and make profit by them: and such a one was exempted in the stat. 5 & 6 *Ed.* 6. *c.* 14. from the punishment of an ingrosser within that statute. But by 5 *Eliz. c.* 12. *Badgers* are to be licensed by the justices of peace in the sessions; whose licences will be in force for one year, and no longer: and the persons to whom granted must enter into a recognizance that they will not by colour of their licences forestal, or do any thing contrary to the statutes made against forestallers, ingrossers, and regrators. If any person shall act as a *Badger* without licence, he is to forfeit 5*l.* one moiety to the king, and the other to the prosecutor, leviable by warrant from justices of peace, &c. *Vide* 13 *El. c.* 25. *sect.* 20.

BAG. An uncertain quantity of goods and merchandize, from three to four hundred. *Lex Mercat'.*

BAGA. A bag or purse. *Mon. Angl. tom.* 3. *p.* 237.

BAGAVEL. The citizens of Exeter had granted to them by charter from K. Edw. I. the collection of a certain tribute or toll upon all manner of wares brought to that city to be sold, towards the paving of the streets, repairing of the walls, and maintenance of the city, which was commonly called in old English *begavel, bethugavel*, and *chippinggavel*. Antiq. of Exeter.

BAHADUM. A chest or coffer. Fleta, lib. 2. *c.* 21.

BAJARDOUR, Lat. *bajulator.*] A bearer of any weight or burthen. *Petr. Bles. Contin. Hist. Croyland, p.* 120.

BAIL, *ballium*, from the Fr. *bailler*, which comes of the *Greek* Βαλλω, and signifies to deliver into hands.] Is used in our common law for the freeing or setting at liberty of one arrested or imprisoned upon any action, either civil or criminal, on surety taken for his appearance at a day and place certain. *Bract. lib.* 3. *tract.* 2. *cap.* 8. The reason why it is called *bail*, is because, by this means, the party restrained is delivered into the hands of those that bind themselves for his forth coming, in order to a safe keeping or protection from prison: and the end of *bail* is to satisfy the condemnation and costs, or render the defendant to prison.

With respect to bail in *civil cases* it is to be observed, that

there is both *common* and *special bail*: common *bail* is in actions of small concernment, being called common, because any sureties in that case are taken; whereas, in causes of greater weight and value, special *bail* or surety must be taken, and they according to the value. 4 *Inst.* 179. See tit. *Appearance.*

By stat. 23 *Hen.* 6. *c.* 9. Sheriffs, &c. are to let to bail persons by them arrested by force of any writ, in any personal action, &c. upon reasonable sureties, having sufficient within the county to keep their day's in such place, &c. as the writs require.

*Bail* and *mainprize* are often used promiscuously in our law books, as signifying one and the same thing, and agree in this notion, *that they save a man from imprisonment in the common gaol*; his friends undertaking for him, before certain persons for that purpose authorized, that he shall appear at a certain day, and answer whatever shall be objected to him in a legal way. 2 *Hawk. P. C. c.* 15. § 29. 4 *Inst* 180. The chief difference is, that a man's *mainpernors* are barely his *sureties*, and cannot imprison him themselves to secure his appearance, *as his bail may*, who are looked upon as his gaolers, to whose custody he is committed, and therefore may take him upon a *Sunday, and confine until the next day, and then render him.* 6 *Mod.* 231. *Ld. Raym.* 706. 12 *Mod.* 275.

*Special bail*, are two or more persons who undertake *generally*, or in a *sum certain* that if the defendant be convicted, he shall satisfy the plaintiff, or render himself to the custody of the marshal; generally there are but *two persons* who become bail for a defendant.

Where the defendant has been arrested or discharged out of custody, upon giving a bail bond to the sheriff, he must, at the return of the writ, to discharge such bond, appear thereto, namely, by putting in *special bail*, or, as it is termed, bail *above*, so called, in contradistinction to the sheriff's bail, or bail *below*; nor can he render himself, in discharge of such bond, without *first putting in bail above.* 5 Burr. 2683.

By rule M. 1654, no attorney shall be bail for a defendant in any action, nor his clerk. *Cowp.* 228. *n. Vide Dougl. Rep.* 466. that an attorney may be admitted as bail in a criminal case.

No sheriff's officer, bailiff, or other persons concerned in the execution of process, shall be permitted to be bail in any action or suit depending in K. B. nor persons outlawed after judgment. R. M. 14 *Geo.* 2. The keeper of the *Poultry Compter* was rejected. *Dougl.* 466.

I. Of Bail in Civil Cases. As to the form and requisites of affidavits to hold to bail, see title *Affidavit, Arrest.*] In actions of battery, trespass, slander, &c. though the plaintiff is likely to recover large damages, special bail is not to be had, unless by order of court, and the process is marked for special bail: nor is it required in actions of account, or of covenant, except it be to pay money; nor against heirs or executors, &c. for the debt of the testator, unless they have wasted the testator's goods. 1 *Danv. Abr.* 681.

If baron and feme are sued, the husband must put in bail for both; but if the husband does not appear upon the arrest, the wife must file common bail before she can be discharged: for otherwise the plaintiff could not proceed to obtain judgment. *Golds.* 127. *Cro. Eliz.* 370. *Cro. Jac.* 445. *Style* 475. 1 *Mod.* 8. 6 *Mod.* 17. 105. *Tidd Pract.*

A feme covert was discharged out of custody, because she was arrested without her husband; though the writ was sued against both, and *non est inventus* returned as to the husband. 1 *Term Rep.* 486. See tit. *Arrest.*

In all actions brought in B. R. upon any penal law, the defendant is to put in but common bail. *Yelv.* 53. In actions where damages are uncertain, bail is to be at the discretion of the court: on a dangerous assault and battery, upon affidavit of special damages, a judge's hand may be procured for allowance of an *ac etiam* in the writ: and in action of *scandalum magnatum*, the court, on motion, ordered special bail. *Raym.* 74. When bail is taken by the chief justice, or other judge, on a *habeas corpus*, the bail taken in the inferior court is dismissed, though the last bail be not filed presently, nor till the next term. *Yelv.* 120. 121. Yet it has been held, where a cause is removed out of an inferior court by *habeas corpus*, if the bail below offer themselves to be bail above, they shall be taken, not being excepted against below, unless the cause comes out of London. For the sufficiency of the bail there is at the peril of the clerk, and he is responsible to the plaintiff: so that the plaintiff had not the liberty of excepting against them, and the clerk is not responsible for their deficiency in the court above, though he was in London. 1 *Salk.* 97.

In London, it is said, special bail is to be given in action of account, &c. But on removal by *habeas corpus* into B. R. that court will accept common bail. 2 *Keb.* 404.

There is not only bail to appear, &c. on writs of error; but also in *audita querela*, a recognisance of bail must be acknowledged; and upon a writ of *attaint*, to prosecute, &c. *Jenk. Cent.* 129.

By the stat. 3 *Jac.* 1. *c.* 8. No execution shall be delayed by any writ of *error* or *supersedeas* thereupon, unless bail shall be given in double the sum adjudged, to prosecute the writ of error with effect; and also to satisfy the debt, damages, and costs adjudged, &c.

If a cause, removed from an inferior court, be remanded back by *procedendo* the same term, the original bail in the inferior court are chargeable, but not if remanded in another term. *Cro. Jac.* 363. One taken on a writ of execution is not bailable by law; except an *audita querela* be brought; but where a writ of error is brought and allowed, if the defendant be not in execution, there shall not be an execution awarded against him at the request of the bail, though he be present in court. 1 *Nels. Abr.* 331. The bail ought not to join with the principal, nor the principal with the bail, in a writ of error to reverse the judgment against either. *Cro. Jac.* 384.

On *capias ad satisfaciendum* against the defendant returned *non est inventus*, *scire facias* is to issue against the bail, or an action may be brought. Where a defendant renders his body in discharge of the bail, the plaintiff is, by the rules of the court, to make his choice of proceeding in execution, whether he will charge body, goods, or lands. 1 *Lill.* 183. And if the principal, after judgment, renders not himself in discharge of his bail, it is at the election of the plaintiff to take out execution either against him, or proceed against his bail: but if he takes the bail in execution, though he hath not full satisfaction, he shall never after take the principal; and if the principal be taken, he may not after meddle with the bail.

Where two are bail, although one be in execution, the plaintiff may take the other. *Cro. Jac.* 320. 2 *Bulst.* 68. If a principal render himself, and there is none to require his commitment, the court is *ex officio* to commit him; and if the plaintiff refuse him, he shall be discharged, and an entry made of it upon the record. *Moor, Cas.* 1249. 1 *Leon.* 59. See *Hob.* 210.

There must be an *exoneretur* entered, to discharge the bail. If the defendant dies before a *capias ad satisfac.* against him returned and filed, the bail will be discharged. 1 *Lill.* 177.

The Bail upon a writ of error cannot render the party in their discharge; because they are bound in a recognisance that the party shall prosecute the writ of error with effect, or pay the money if judgment be affirmed. 1 *Lill. Abr.* 173. 2 *Cro.* 402. 3 *Mod.* 87. Nor can the bail in such case surrender the principal, though he become a bankrupt pending the writ of error. 1 *Term Rep.* 624. See *Scire facias.*

Before a *scire facias* taken out against bail, the principal may render his body in discharge of the bail: and if the bail bring in the principal before the return of the second *sci. fac.* against them, they shall be discharged. 1 *Rol. Abr.*

230. 1 *Lill.* 471. Anciently the bail were to bring in the principal upon the first *scire fac.* or it would not be allowed. 3 *Bulst.* 182.

If the bail mean to acquit themselves of their recognisance entirely, and run *no hazard* of the death of the defendant, then they must render him in their discharge, *before* the return of the *ca sa.*; as the death of the principal afterwards will not discharge them. 2 *Wils.* 67. 2 *Cro.* 165. *Jon.* 139. *Str.* 511. But if they do not, then they have until the return day, (if the proceedings be by bill) *sedente curiâ*, of the first *scire facias*, if it be returned *scire feci*, but if a *nihil* is returned thereon, then until the return day, *sedente curiâ* of the second *sci. fa. N. on R. E. 5. Geo. 2.* And if the proceedings be by original, they have till the *quarto die post* of the return of the first *sci. fa.* if returned *scire feci*; if not then till the *quarto die post* of the return day of the second. 4 *Burr.* 2134. 1 *Wils.* 270. If an action be brought, then eight days in full term after the return. *R. Trin.* 1 *Ann.*—See further *Impey's* and the other books of practice.

If bail furrender the principal at or before the return of the second *scire facias*, it is good, although there be not immediate notice of it to the plaintiff; and if, through want of notice, he is at further charge against the bail, that shall not vitiate the surrender, but the bail shall not be delivered till they pay such charges; if at any time, after the return of the *capias*, the bail surrender the principal at a judge's chamber, and he thereupon is committed to the tipstaff, from whom he escapes, &c. this will not be a good surrender; but if it be before or on a *capias* returned, it is otherwise, the one being an indulgence, and the other matter of right. *Mod. Cas.* 238. When a person makes his escape out of prison, and is retaken and bailed; the bail shall be discharged on writ to the sheriff commanding him to keep the prisoner in discharge of the bail. *Stat.* 1 *Ann. st.* 2. *c.* 6. § 3.

The judges of the courts at Westminster have power by statute to appoint commissioners in every county to take recognizances of bail, in causes depending in their courts: and to make such rules for justifying the bail as they shall think fit, &c. *Stat.* 4 *& 5 W. & M. c.* 4.

The *commissioners* are to take bail, but are obliged by rule of court to *keep a book* wherein are the names of the plaintiff, defendant, and bail, and the person who transmits the same, and who makes affidavit that the recognizance was duly acknowledged in his presence: on such affidavit the judges make a conditional *allocatur*, and the bail are to stand absolute, unless the plaintiff excepts against them within twenty days, and if he excepts, the bail may *justify by affidavit before commissioners* in the country. *Gilb. H. C. B.* 32.

If a defendant puts in bail by a wrong name, the proceedings shall nevertheless be good; for otherwise every man impleaded may give a false name to his attorney by which he will be bailed, and then plead it in arrest of judgment. *Goldsb.* 138. But it hath been held, that if the bail be entered in one name, and the declaration and all the proceedings are by a contrary name, it will be erroneous. *Cro. Eliz.* 223. So if there is bail, and the bail be taken off the file, the plaintiff is without remedy; though where a *habeas corpus* and *bail-piece* were lost in B. R. new ones were ordered to be made out. *Style* 261.

*Stat.* 21 *Jac.* 1 *cap.* 26. enacts, That it is felony without benefit of clergy to acknowledge, or procure to be acknowledged, any bail in the name of another person not privy or consenting thereto; provided that it shall *not corrupt* the blood, or take away dower.

*Stat.* 4 *& 5 W. & M. cap.* 4. *s.* 4. enacts, That any person representing or personating another *before commissioners* appointed to take bail, shall be adjudged guilty of *felony*.

*Special bail*, which is taken before a judge, or by commissioners in the country, when accepted, is to be filed: after *twenty* days notice given of putting in special bail before a judge, on a *cepi corpus*, if there be no exception the bail shall be filed in four days. 1 *Lill. Abr.* 174. Upon a *cepi corpus* twenty days are allowed to except against the bail; so on a writ of error; and you need not give notice; but you cannot take out execution without giving a four days rule to put in better bail: in all other cases, notice must be given. Upon a *habeas corpus* eight and twenty days are appointed to except against the bail, and after that if it be not excepted against it shall be filed in four days. 1 *Salk.* 98. *R. M.* 8 *An.*

The exception to bail put in before a judge, must be entered in the bail-book, at the judge's chambers at the side of the bail there put in, after this manner: *I do except against this bail, A. B. attorn. for the plaintiff.* And if there be no such exception, the defendant's attorney may take the *bail-piece* from the judge's chamber, and file it. Bail is not properly such until it is filed, when it is of record: but it shall be accounted good, till the same is questioned and disallowed.

Bail cannot be justified *before a judge in his chamber*, except it be by consent, or for necessity in vacation; but in the latter case they ought to be justified *again in term*, and upon that the defendant is compelled to accept a declaration to go to trial at the assises, if it be an issuable term; and upon putting in bail, it is not enough to give *notice* of their being put in, but it *ought to be of their names, places of abode, and trade or vocation*, that the plaintiff may know how to inquire after them. 6 *Mod.* 24. 25.

It being doubtful whether Sunday should be reckoned as one day in notice to justify bail, it was determined *per cur.* that for the future Sunday shall not be counted one, (it not being a proper day to inquire after bail); but *two days notice must be given, of which* Sunday *shall not be one*; upon motion for defendant to justify bail, notice was served Saturday, June 23, to justify bail, Monday 25; the notice being insufficient, the bail was not suffered to justify. *Notes in C. B.* 200.

After the plaintiff has entered his exception, and given notice thereof to the defendant, the bail, (to discharge the bond) must personally appear in court within the time limited by the rules thereof, and justify themselves; [or by affidavit, if taken before commissioners in the country,] and the plaintiff may oppose them by his counsel: if it appear they are insufficient, the court will reject them, and leave the plaintiff at liberty to proceed upon the bail-bond, or against the sheriff.

Bail coming to justify and not being present at the sitting of the court, must wait until the rising.

Generally, bail are opposed *on five* grounds with effect: 1st, That there is some mistake in the notice to justify; namely, that it should have been given *two days* previous, instead of one; 2dly, That the bail have assumed *names* that are either *feigned, or belong to other persons*, contrary to the *stats.* 21 *Jac.* 1. and 4 *& 5 W. & M.* But the court will not vacate the proceedings against the party personated, until the offender be convicted. 1 *Vent.* 301; nor can a conviction take place, until the bail-piece be filed. 2 *Sid.* 90. 3dly, A *third* ground of opposing bail is, that they are not housekeepers; if they be, the rent paid is immaterial, though under 10*l.* *Loft.* 148; nor is it necessary they should have been assessed to the poor's rate. *Ibid.* 328. 4thly, They may be opposed on the ground of their not being worth *double the sum sworn to*, after payment of all their *debts*. Under this head may be ranked *bankrupts*, who have not obtained their certificates; or such as have been *twice bankrupts*, and not paid 15*s.* in the pound. *M.* 24. *Geo.* 3. *Lastly*, after the *expiration* of the rule to bring in the body. *Loft.* 438. *M.* 20. *Geo.* 3.

If the bail do not justify at the day given (being the last day they have) they are out of court. Nor can they justify after the rule upon the sheriff to bring in the body is expired; without leave of the court. *Loft.* 88.

In case the defendant by neglect has suffered the plaintiff

to take an assignment of the bond, and he *has lost a trial*; if he would wish to try the cause, he must move the court for that purpose on a special affidavit containing merits, if it be in term time, if *in vacation*, he may apply and obtain a judge's order, which will be granted upon *putting in and perfecting bail, paying the costs incurred, receiving a declaration in the original action, pleading issuably, and taking short notice of trial, so as not to delay the plaintiff, and consenting that the bond stand as a security.* But the court of K. B. has not yet said, that the plaintiff shall take judgment on the actions upon the bond, although the practice in Common Pleas is so.

If the bond be irregularly assigned, defendant may move the court to set the proceedings aside for irregularity, upon an affidavit, stating the particular facts.

If the court stay the proceedings on the bond, the defendant is not at liberty to plead in *abatement*, but in *chief. Salk.* 519; nor will the court order the bond to be delivered up to be cancelled, on the ground of a *misnomer*. 3 *Term. Rep.* 572.

Pending a rule to set aside proceedings for irregularity, and to stay the proceedings, plaintiff took an assignment of the bond in the mean-time; the court agreed that the proceedings were totally *suspended, by* an act of the court, and made the rule absolute to set aside the assignment of the bond, as having been made *too soon*. 4 *Term. Rep.* 176.

The court may adjudge bail sufficient, when the plaintiff will not accept of it. Also the court on motion, or a judge at his chamber, will order a common appearance to be taken, when special bail is not required, on affidavit made by the defendant of the smallness of the debt due, &c. The putting in of a declaration, and the acceptance of it by the defendant's attorney with the privity of the plaintiff's attorney, is an acceptance of the bail.

When the sheriff hath taken good bail of the defendant, he will on a rule return a *cepi*, and assign the bail-bond to plaintiff, which may be done by indorsement without stamp; so as it be stampt before action brought thereupon; and then the defendant and bail may be sued on the bond, by the plaintiff in his own name, *i. e.* as assignee of the sheriff. *Stat.* 4 *&* 5 *Ann. c.* 16. The action must be brought in the same *court*, where the original writ was sued out. 3 *Burr.* 1923. 1 *Burr.* 642. The *venue* may be laid in any county. *Str.* 727. 2 *Ld. Raym.* 1455. But if the plaintiff takes an assignment of the bail-bond, though the bail is insufficient, the court will not amerce the sheriff. 1 *Salk.* 99.

In case the defendant doth not put in bail, the attorney for the plaintiff is to call on the sheriff for his return of the writ; and so proceed to an attachment against the sheriff. If on a *cepi corpus* no bail is returned, a rule will be made out to bring in the defendant's body. Though a defendant, with leave of the court, may deposit money in court instead of bail; and in such case the plaintiff shall be ordered to waive other bail. *Lill. Abr. Trin.* 23 *Car. B. R.*

If more damages, &c. are recovered than mentioned in the plaint, or than the sum wherein the bail is bound, the bail will not be liable for the surplus. 1 *Salk.* 102.

A bail cannot be witness for the defendant at the trial; but the court, on motion, will discharge the bail, upon giving other sufficient bail. *Wood's Inst.* 582. Bail-pieces are written on a small square piece of parchment, with the corners cut off at the bottom.—For further matter see the books of practice.

Bail are not regularly put in, unless the name of the proper county be inserted in the bail-piece. *Smith* v. *Miller*, 7 *T. R.* 96.

If a sheriff's officer on an arrest take an undertaking for the appearance of the party instead of a bail-bond without the plaintiff's assent, and bail above is not duly put in, the sheriff is liable to an action for an escape, and the court will not relieve him by permitting him to put in and justify bail afterwards. *Fuller* v. *Prest. Ibid.* 109.

But if the sheriff permit the defendant to go at large without taking a bail-bond, he may retake him before the return of the writ. 7 *T. R.* 109.

Where a bail-bond has been taken, it may be cancelled if the defendant return into the sheriff's custody before the return of the writ. *Stamper* v. *Milbownce, Ib.* 122.

The court on the application of the defendant's bail, granted a habeas corpus to the sheriff of H. in whose custody the defendant was under a charge of felony to bring him up in order that he might be surrended by his bail. *Sharp* v. *Sheriff, Ib.* 226.

If an action be brought here against bail on a recognizance of bail taken in C. B. they have the same indulgence (of eight days in full term after the return of the writ against them) to render the principal as if the recognizance had been taken in this court. *Fisher* v. *Branscombe*, 7 *T. R.* 355.

It is not necessary to give bail in error on a judgment in debt, for goods sold and delivered, and on an account stated. *Alexander* v. *Biss, Ib.* 449.

If a defendant be sent out of the kingdom under the alien bill after he has given a bail-bond and before the return of the writ, the court will order the bail-bond to be cancelled. *Postel* v. *Williams, Ib.* 517.

Bail to the sheriff are liable for the plaintiffs whole debt (without regard to the sum sworn to) and costs, provided they do not exceed the penalty of the bail-bond. *Stevenson* v. *Cameron*, 8 *T. R.* 28.

But bail in the *action* are not liable beyond the sum sworn to and the costs. *Ib.*

Bail in the original action after judgment recovered against them on the bail-bond, may be holden to bail in an action on such judgment. *Prendergast* v. *Davis. Ib.* 85.

But bail to the sheriffs, cannot themselves be holden to bail in an action on the bail-bond. *Ib.*

An action on the bail-bond must be brought in the court where the original action was brought. *Donatty* v. *Barclay, Ib.* 152.

Bail have eight days to render the principal from the return of that writ on which there is an effectual proceeding against them. *Wilkinson* v. *Vass, Ib.* 422.

Bail may surrender the principal before the return of a rule against the sheriff to bring in the body, before they have justified, giving a proper notice. *Reg. Gen. K. B.* 5 *T. R.* 638. 1 *H. B.* 368.

And so they may after the assignment of the bail-bond though they have not justified. 5 *T. R.* 491.

Therefore where the plaintiff sued the bail on their recognizance, who did not render the principal within eight days, and then the plaintiff died, and his executors brought another action against the bail, it was ruled that the bail had eight days from the return of the process in the second action in which to render the principal. *Ib.*

A defendant who has given a bail-bond cannot be holden to bail in an action brought by the sheriff on that bond. *Mellish* v. *Patherich, Ib.* 450.

Bail above may be put in *before* the return of the writ; and consequently the plaintiff cannot afterwards proceed on the bail-bond. *Hyde* v. *Wishard, Ib.* 456.

When the rule to bring in the body expires the last day of a Term, the bail have the whole of the first day of the next Term to justify; and if the defendant surrender in discharge of the bail on any part of that day, the sheriff cannot be attached for not bringing in the body. *R.* v. The sheriff of *Middlesex. Ib.* 264.

The plaintiff may sue out a writ against the bail on their recognizance, on the return day of the *ca. sa.* against the principals. *Shivers* v. *Brooks. Ib.* 628.

The same persons who were bail in B. R. may justify again

or bail upon a writ of error returnable in Parliament. *Martin* v. *Justice*, *Ib.* 639.

If a defendant be arrested by process of K. B. and removed by *habeas corpus* to C. B. he may put in and justify bail in either court. *Knowlys & al.* v. *Reading*, *C. B.* 1 *B. & P.* 311.

Bail were allowed to justify after the rule to bring in the body had expired, on payment of the costs of the opposition. *Weddall* v. *Berger*, *Ib.* 325.

If a man carry on business at a lodging in one place, and keep a house at another notice of bail describing him as of the former place is sufficient. *Ib.*

The court allowed the defendant to justify bail after an attachment had issued against the sheriff, but gave leave to the plaintiff to oppose them without prejudice. *Williams* v. *Waterfield*, *Ib.* 334.

Where bail are regularly put in and excepted to, the defendant need not describe them in his notice of justification. *England* v. *Kerwan*, 8 *T. R.* 335.

The court will not discharge a defendant on a common appearance on the ground of infancy. *Madox* v. *Eden*, *Ib.* 480.

A defendant cannot enter into the recognizance of bail. *Reg. Gen. Ib.* 530.

But each bail shall bind himself in double the sum sworn to. *Ibid.*

In C. B. two days notice of justification must be given whether the bail originally put in, or added bail be brought up. *Nation* v. *Barret*, *C. B.* 2 *B. & P.* 30. *Secus* in *B. R.* *Wright* v. *Ley*, *Ib.* 31.

It is not a sufficient ground for rejecting a person as bail, that he is described to be "of A. in the county of B. gaol keeper." *Faulkner* v. *Wise*, *Ibid.* 150.

The court will not discharge a defendant on common appearance on the ground of his having obtained his certificate as a bankrupt and of the debt being thereby barred, if the validity of the certificate is meant to be disputed. *Stacy* v. *Federici*, *Ib.* 390.

If a defendant in error (the plaintiff in an action) upon judgment being affirmed, take in execution the body of the plaintiff in error, for the debt, damages and costs in error, he does not thereby discharge the bail in error, but may sue them upon their recognizance. *Perkins* v. *Petit* and *Gale*, *Ib.* 440.

A recognizance entered into by the bail in error without the principal is good. *Dixon* v. *Dixon*, *Ib.* 443.

If on a bond debt, double the sum secured by the bond be the sum for which the bail bind themselves in the recognizance in error, it is sufficient, though a further sum be due for interest and costs, and nominal damages have been recovered. *Ib.*

If bail be put in with the *filazer* of the county in which the defendant is arrested on a *Testatum Capias*, the bail may be treated as a nullity and an attachment issue. *Clompson* v. *Knox*, *Ibid.* 516.

But if the plaintiff appear to have been aware that the bail were actually put in, though with the wrong *filazer*, the court will relieve against the attachment. *Id. Ib.*

An indorser of a bill of exchange may be bail for the drawer, in an action against him on the same bill. *Harris* v. *Manley*, *Ib.* 526.

An attorney's clerk, though not clerks to the defendant's attorney cannot become bail above. *Redit* v. *Broomhead*, *Ib.* 564.

Court will stay proceedings against both the bail on payment of the sum sworn to and costs although less than the damages recovered or than the sum named in the process. *Clark* v. *Bradshaw*, 1 *East* 86.

*Scire facias* against bail must lie 4 days in the office as well where *scire feci* is returned as *nihil*. *Williams* v. *Mason*, cited in above case.

Where defendant was sued by original in London, the *scire facias* against the bail must be sued there also; and it does not help the plaintiff who sued out the *scire facias* in Middlesex that bail had by mistake been put in there. *Harris* and another v. *Calvart* and another, 1 *East.* 603.

A writ of error though not returned is of itself a supersedeas and may be pleaded by bail to have been issued and allowed after issuing, and before the return of the *ca. sa.* against the principal, so as to avoid proceedings against them in *scire facias*, upon the recognizance of bail prosecuted after a return by the sheriff of *non est inventus* made pending such writ of error. *Sampson* v. *Brown*, 2 *East* 439.

Bail in error are not required by stat. 3 *Jac.* 1. *c.* 8. on error brought on a judgment by default in debt on a count for a promissory note any more than on counts for goods sold and delivered and on an account stated; though if there were one count on which judgment was entered up for which bail in error were not required, it seems sufficient to excuse the plaintiff in error. *Trier* v. *Bridgman*, 2 *East* 359.

An omission in the *ac etiam* part of the writ of the sum for which the defendant is arrested, or bailable process is irregular, and he cannot be holden to special bail thereon. *Davison* v. *Frost*, *Ibid.* 305.

Time enlarged for bail to surrender a bankrupt under examination. *Maude* v. *Jouett*, 3 *East* 145.

B. R. have power to bail in discretion in all cases of felony, as well as other offences. *Rex* v. *Marks*, *Ibid.* 163.

One, who was committed to Newgate by commissioners of bankrupt for not answering satisfactorily to certain questions, must, for the purpose of being surrendered by his bail in a civil suit, be brought up by *habeas corpus* issued on the crown side of the court, on which side also must be taken the subsequent rule of his surrender in the action, his commitment *pro forma* to the marshal, and his recommitment to Newgate charged with the several matters. *Taylor's Case*, *Ibid.* 232.

After notice of surrender, all proceedings against bail shall cease (*T.* 1 *Ann.*) *Byrne* v. *Aguilar*. *Ibid.* 306.

Upon a writ of error sued out by the principal after the bail are fixed and proceedings against them in *scire facias*, the court will only stay proceedings against the bail pending the writ of error on the terms of the bails undertaking to pay the condemnation money and the costs of the *scire facias* and (if it be a case in which there is no bail in error) to pay the costs also of the writ of error if judgment should be affirmed. *Buchanan* v. *Alders* and another. *Ibid.* 546.

If the second writ of *scire facias* be in proper time on the file in the sheriff's office, that is sufficient to warrant proceedings against the bail, though it were not entered in the *scire facias* book in the sheriff's office, which is merely a private book for his own convenience. *Heywood* v. *Rennard & al.* *Ibid.* 570.

If bail apply to stay proceedings upon the bail-bond, or against the sheriff, they need not swear to merits, though a trial has been lost. 1 *B. & P.*

II. As to Bail *for* Crimes. At common law, bail was allowed for all offences except murder. 2 *Inst.* 109. And if the party accused could find sureties, he was not to be committed to prison; for all persons might be bailed till convicted of the offence. 2 *Inst.* 186. But by statute it was after enacted, that in case of homicide the offender should not be bailed; and by our statutes, murderers, out-laws, house-burners, thieves openly defamed, &c. are not bailable; but where persons are accused of larceny, as accessaries to felony, or under light suspicion, they may be admitted to bail. *Stat.* 3 *Ed.* 1. *c.* 15.

One indicted and found guilty of the *death of a man by misadventure*, as by casting a stone over a house, and by chance killing a man, woman, or child, is not bailable. 3 *Ed.* 3. *Corone* 354.

One indicted of *conspiracy*, viz. that he with others conspired falsely to *indict another of murder or felony*, by means whereof he was indicted, and afterwards convicted, shall not be bailed. The resolution of all the judges, upon the question demanded by King Ed. III. himself, as appears, 27 *Ass.* 1.

One indicted for *burglary* may be bailed. 29 *Ass.* 44.

One indicted on *suspicion of robbery* was outlawed, and *taken on outlawry*, and *brought writ of error*, and being brought to B. R. by *habeas corpus*, prayed to be bailed and took two exceptions to the indictment; 1st, that he was in prison, and knew nothing of the outlawry; 2dly, that the charge is too general, and no body prosecutes; but *per Roll.* Ch. J. He cannot be bailed. *Sty.* 418. But see stat. 4 & 5 *W. & M. c.* 18. which enacts that persons *outlawed*, except for *treason* or *felony*, may appear by attorney and reverse the same without bail; except special bail shall be ordered by the court; and that persons arrested upon any *capias utlagatum*, except for *treason* or *felony*, may be discharged by an attorney's engagement to appear: and in cases where special bail is required, the sheriff may take bond with sureties.

By the common law the sheriff might *bail* persons arrested on suspicion of felony, or for other offence *bailable;* but he hath lost this power by the stat. 1 *Ed.* 4. *c.* 2. Justices of peace may let to *bail* persons suspected of felony, or others *bailable*, until the next sessions: though where persons are arrested for manslaughter or felony, being *bailable* by law, they are not to be let to *bail* by justices of peace but in open sessions, or where two justices (*quorum unus*) are present; and the same is to be certified with the examination of the offender, and the accusers bound over to prosecute, &c. 3 *H.* 7. *c.* 3. 1 & 2 *P. & M. c.* 13. § 3. not to restrain justices in London and Middlesex, and towns corporate. 1 & *P. & M. c.* 13. § 6. If a person be dangerously wounded, the offender may be *bailed* till the person is dead; but it is usual to have assurance from some skilful surgeon, that the party is like to do well. 2 *Inst.* 186. A man arrested and imprisoned for felony, being *bailable*, shall be *bailed* before it appears whether he is guilty or not; but when convicted, or if on examination he confesseth the felony, he cannot be *bailed.* 4 *Inst.* 178.

It is to be observed, that the *stat. West.* 1. 3 *Ed.* 1. *c.* 15. above-mentioned, doth not extend to the judges of B. R. &c. only to *sheriffs* and other *inferior officers. H. P. C.* 98. 99.— Likewise, justices of gaol delivery not being within the restraint of the statute of *Westm.* 1. may bail persons convicted before them of homicide by misadventure, or self defence, the better to enable them to purchase their pardon. *Cromp.* 154 *a. H. P. C.* 101. *F. N. B.* 246. *S. P. C.* 15.

Also it seems that in discretion they may bail a person convicted before them of manslaughter, upon special circumstances: as if the evidence against him were slight, or if he had purchased his pardon. *H. P. C.* 101. *Cromp.* 153.

The court of B. R. has power to bail in all cases whatsoever, and will exercise their discretion in all cases not capital; in capital cases where innocence may be fairly presumed, and in every case where charge is not alleged with sufficient certainty. *Leach's Hawk. P. C.* ii. *c.* 15. § 80. in *note*, where several cases are enumerated.

It is to be observed that with respect to the nature of the offence, although this court is not tied down by the rules prescribed by the stat. of *Westm.* 1.; yet it will in discretion pay a due regard to those rules, and not admit a person to bail who is expressly declared to be irreplevisable, without some particular circumstances in his favour. 2 *Inst.* 185. 186. 189. *H. P. C.* 104. 1 *Salk.* 61. 3 *Bulst.* 113. 2 *Hawk. P. C. c.* 15. § 80. 5 *Mod.* 454.

And therefore if a person be attainted of felony, or convicted thereof by verdict general or special, or notoriously guilty of treason or manslaughter, &c. by his own confession or otherwise, he is not to be admitted to bail; without some special motive to induce the court to grant it. *Kelynge* 90. *Dyer* 79. 1 *Bulst.* 87. 2 *Hawk. P. C. c.* 15. § 80.

Upon a commitment of either house of parliament, when it stands indifferent on the return of the *habeas corpus*, whether it be legal or not, the court of B. R. ought not to *bail* a prisoner. *Leach's Hawk. P. C.* ii. *c.* 15. § 73. But if it be demanded in case a subject should be committed by either of the Houses, for a matter manifestly out of their jurisdiction, what remedy can he have? I answer (says the learned and cautious Serjeant Hawkins) as this is a case which I am persuaded will never happen, it seems needless over nicely to examine it. See *Leach's* notes, 2 *Hawk. P. C. cap.* 15. § 72. From the cases cited there (viz. the Hon. *Alex. Murray's*, 1 *Wils.* 229. *John Wilkes's*, 2 *Wils.* 158. *Entick* v. *Carrington*, 11 *St. Tr.* 317. *Brass Crosby's*, 3 *Wils.* 188. 2 *Blackst.* 755.) it appears that the courts in Westminster Hall have been positively of opinion, "that they have no power to decide on the privileges of parliament; that the rights of the House of Commons are paramount to the jurisdiction of those courts; that the Commons are the exclusive arbiters of their own peculiar privileges; that their power of commitment is inherent in the very nature of their constitution; and finally that their adjudication is tantamount to a conviction, and their commitment equal to an execution; and that no court can discharge a prisoner committed in execution by another court."

However, a person committed for a contempt, by order of either House of Parliament, may be discharged by B. R. after a dissolution or prorogation, which determine all orders of parliament; also it is said on an impeachment, when the parliament is not sitting, and the party has been long in prison, B. R. may *bail* him. The court of B. R. hath *bailed* persons committed to the Fleet Prison by the Lord Chancellor; when the crime of commitment was not mentioned, or only in general terms, &c. 2 *Hawk. P. C. c.* 15. § 76.

And B. R. having the controul of all inferior courts, may at their discretion *bail* any person unjustly committed by any of those courts. In admitting a person to *bail* in the court of B. R. for felony, &c. a several recognisance is entered into to the king in a certain sum from each of the *bail*, that the prisoner shall appear at a certain day, &c. And also that the *bail* shall be liable for the default of such appearance, body for body. And it is at the discretion of justices of the peace, in admitting any person to *bail* for felony, to take the recognisance in a certain sum, or body for body: but where a person is *bailed* by any court, &c. for a crime of an inferior nature, the recognisance ought to be only in a certain sum of money, and not body for body. 2 *Hawk. c.* 15. § 83. And the *bail* are to be bound in double the sum of the criminal. Where persons are bound body for body, if the offender doth not appear, whereby the recognisance is forfeited, the *bail* are not liable to such punishment to which the principal would be adjudged if found guilty, but only to be fined, &c. *Wood's Inst.* 618. If *bail* suspect the prisoner will fly, they may carry him before a justice to find new sureties; or to be committed in their discharge. 1 *Rep.* 99.

The courts of King's Bench, Common Pleas and Exchequer, in term time, and the Chancery in the term or vacation, may *bail* persons by the *habeas corpus* act; see title *Habeas Corpus.*

To refuse *bail* when any one is *bailable* on the one hand; or on the other to admit any to *bail* who ought not by law to be admitted, or to take slender *bail*, is punishable by fine, &c. 2 *Inst.* 291. *H. P. C.* 97. And see farther, 3 *Edw.* 1. *c.* 15. 27 *Edw.* 1. *st.* 1. *c.* 3. 4 *Edw.* 3. *c.* 2. 1 & 2 *P. & M. c.* 13. & 31 *Car.* 2. *c.* 2.

No person shall be *bailed* for felony by less than two; and it is said not to be usual for the King's Bench to *bail* a man on

a *habeas corpus*, on a commitment for treason or felony, without four sureties; the sum in which the sureties are to be bound ought to be never less than 40*l.* for a capital crime; but it may be higher in discretion, on consideration of the ability and quality of the prisoner, and the nature of the offence; and the sureties may be examined on oath concerning their sufficiency, by him that takes the bail; and if a person be *bailed* by insufficient sureties, he may be required either by him who took the *bail*, or by any other who hath power to *bail* him, to find better sureties, and on his refusal may be committed; for insufficient sureties are as none. 2 *Hawk. P. C. c.* 15. § 4. *H. P. C.* 97.

But justices must take care, that under pretence of demanding sufficient surety, they do not make so excessive a demand as in effect amounts to a denial of *bail*; for this is looked upon as a great grievance, and is complained of as such by 1 *W. & M. st.* 2. *c.* 2. (the bill of rights) by which it is declared, that excessive bail ought not to be required. 2 *Hawk. P. C. c.* 15.

If where a felony is committed, one is brought before a justice on suspicion, the person suspected is to be *bailed*, or committed to prison; but if there is no felony done, he may be discharged. *H. P. C.* 98. 106.

Persons committed for treason or felony, and not indicted the next term, are to be bailed. 31 *Car.* 2. *c.* 2. § 7.

Where bail may have writ of detainer against the prisoner. See 1 *Ann. st.* 2. *c.* 6. § 3.

Justices of peace are required to bail officers of customs and excise, who kill persons resisting. 9 *Geo.* 2. *c.* 35. § 35.

The court of King's Bench and Justiciary in Scotland not restrained from bailing persons committed for felonies, against the laws of customs or excise. 9 *Geo.* 2. *c.* 35. § 38. 19 *Geo.* 2. *c.* 34. § 12.

For further particulars relative to bail in criminal cases, see *Leach's Hawk. P. C.* ii. *c.* 15. very much at large.

BAILIE. See *Bailiff.*

BAILS signify bon-fires. *Scotch Dict.*

BAILIFF, *ballivus.*] From the French word *bayliff*, that is *præfectus provinciæ*, and as the name, so the office itself was answerable to that of France; where there were eight parliaments, which were high courts from whence there lay no appeal, and within the precincts of the several parts of that kingdom which belonged to each parliament there were several provinces to which justice was administered by certain officers called *bailiffs:* and in England we have several counties in which justice hath been, and still is, in small suits, administered to the inhabitants by the officer whom we now call *sheriff* or *viscount;* (one of which names descends from the Saxons, the other from the Normans;) and though the sheriff is not called *bailiff*, yet it is probable that was one of his names also, because the county is often called *balliva:* as in the return of a writ, where the person is not arrested, the sheriff saith, *Infra-nominatus* A. B. *non est inventus in* balliva *mea, &c. Kitch. Ret. Brev. fol.* 285. And in the statute of *Magna Charta, cap.* 28. and 14 *Ed.* 3. *c.* 9. the word *bailiff* seems to comprise as well sheriffs, as *bailiffs* of hundreds.

Bailies in Scotland are magistrates of burghs, possessed of certain jurisdictions, having the same power within their territory as sheriffs in the county.—The term is also there applied to any officer or person named by a proprietor to give infefftment.

As England is divided into counties, so every county is divided into hundreds; within which in ancient times the people had justice administered to them by the several officers of every hundred, which were the *bailiffs.* And it appears by Bracton (*lib.* 3. *tract.* 2. *cap.* 34.) that *bailiffs* of hundreds might anciently hold plea of appeal and approvers: but since that time the hundred courts, except certain franchises, are swallowed in the county-courts; and now the *bailiff's* name and office is grown into contempt, they being generally officers to serve writs, &c. within their liberties. Though in other respects, the name is still in good esteem; for the chief magistrates in divers towns are called *bailiffs:* and sometimes the persons to whom the king's castles are committed are termed *bailiffs*, as the *bailiff* of Dover Castle, &c.

Of the ordinary *bailiffs* there are several sorts, viz. *bailiffs* of liberties; sheriffs' *bailiffs; bailiffs* of lords of manors; *bailiffs* of husbandry, &c.

*Bailiffs of liberties* are those *bailiffs* who are appointed by every lord within his liberty, to execute process and do such offices therein, as the *bailiff errant* doth at large in the county; but *bailiffs* errant or itinerant, to go up and down the county to serve process, are out of use.

*Bailiffs* of liberties or franchises, are to be sworn to take distresses, truly impanel jurors, make returns by indenture between them and sheriffs, &c. and shall be punished for malicious distresses by fine and treble damages, by ancient statutes. Vide 12 *Ed.* 2. *st.* 1. *c.* 5. 14 *Ed.* 3. *st.* 1. *c.* 9. 20 *Ed.* 3. *c.* 6. 1 *Ed.* 3. *st.* 1. *c.* 5. 2 *Ed.* 3. *c.* 4. 5 *Ed.* 3. *c.* 4. 11 *H.* 7. *c.* 15. 27 *H.* 8. *c.* 24. 3 *Geo.* 1. *c.* 15. § 10.

The *bailiff* of a *liberty* may make an inquisition and extent upon an *elegit.* The sheriff returned on a writ of *elegit*, that the party had not any lands but within the liberty of St. Edmund's Bury, and that J. S., *bailiff* there, had the execution and return of all writs, and that he inquired and returned an extent by inquisition, and the *bailiff* delivered the moiety of the lands extended to the plaintiff, who, by virtue thereof, entered, &c. This was held a good return. *Cro. Car.* 319. These *bailiffs* of liberties cannot arrest a man without a warrant from the sheriff of the county: and yet the sheriff may not enter the liberty himself, at the suit of a subject, (unless it be on a *quo minus*, or *capias utlagatum*,) without clause in his writ, *Non omittas propter aliquam libertatem, &c.* If the sheriff, &c. enters the liberty without such power, the lord of the liberty may have an action against him; though the execution of the writ may stand good. 1 *Vent.* 406. 2 *Inst.* 453.

*Sheriffs' bailiffs* are such who are servants to sheriffs of counties, to execute writs, warrants, &c. Formerly *bailiffs* of hundreds were the officers to execute writs; but now it is done by special *bailiffs*, put in with them by the sheriff. A *bailiff* of a liberty is an officer which the court takes notice of; though a sheriff's *bailiff* is not an officer of the court, but only the sheriff himself. *Pasch.* 23 *Car.* 1. *B. R.* The arrest of the sheriff's *bailiff* is the arrest of the sheriff; and if any rescous be made of any person arrested, it shall be adjudged done to the sheriff; also if the *bailiff* permit a prisoner to escape, action may be brought against the sheriff. *Co. Lit.* 61. 168. Sheriffs are answerable for misdemeanors of their *bailiffs;* and are to have remedy over against them. 2 *Inst.* 19. The latter are therefore usually bound in an obligation for the due execution of their offices, and thence are called *bound bailiffs;* which the common people have corrupted to a more humble appellation.

There are thirty-six serjeants at mace in London who may be termed bailiffs, and they each give security to the sheriffs.

By stat. 14 *E.* 3. *c.* 9. Sheriffs shall appoint such bailiffs, for whom they will answer; and by stat. 1 *H.* 5. *c.* 4. no sheriff's bailiff shall be attorney in the king's court. *R. M.* 1654.

*Bailiffs of lords* of manors, are those that collect their rents, and levy their fines and amercements: but such a *bailiff* cannot distrain for an amercement without a special warrant from the lord or his steward. *Cro. Eliz.* 698. He cannot give licence to commit a trespass, as to cut down trees, &c. though he may license one to go over land, being a trespass to the possession only, the profits whereof are at his disposal. *Cro. Jac.* 337. 377. A *bailiff* may by himself, or by command of another, take cattle damage-feasant upon the land. 1 *Danv. Abr.*

685. Yet amends cannot be tendered to the *bailiff*, for he may not accept of amends, nor deliver the distress when once taken. 5 *Rep.* 76. These *bailiffs* may do any thing for the benefit of their masters, and it shall stand good till the master disagrees; but they can do nothing to the prejudice of their masters. *Lit. Rep.* 70.

*Bailiffs of courts-baron* summon those courts, and execute the process thereof; they present all pound-breaches, cattle-strayed, &c.

*Bailiffs of husbandry* are belonging to private men of good estates, and have the disposal of the under-servants, every man to his labour; they also fell trees, repair houses, hedges, &c. and collect the profits of the land for their lord and master, for which they render account yearly, &c.

Besides these, there are also *bailiffs of the forest*, of which see *Manwood, part* 1. *page* 113.

An Appointment of a *Bailiff* of a Manor.

KNOW all men *by these presents, That I W. B. of, &c. Esq. lord of the manor of D. in the county of G.* Have *made, ordained, deputed, and appointed, and by these presents* do *make, ordain, depute, and appoint J. G. of, &c. my* bailiff, *for me, and in my name, and to my use, to collect and gather, and to ask, require, demand, and receive of all and every my tenants, that have held or enjoyed, or now do, or hereafter shall hold or enjoy, any messuages, lands, or tenements, from, by, or under me, within my said manor of D. all rents, and arrears of rent, heriots, and other profits, that now are, or hereafter shall become payable, due, owing, or belonging to me within the said manor; and, in default of payment thereof, to distrain for the same from time to time, and such distress or distresses to impound, detain, and keep, until payment be made of the said rents and profits, and the arrears thereof. And I do also further impower and authorize the said J. G. to take care of and inspect into all and every my messuages, lands, and woods within the said manor, and to take an account of all defects, decays, wastes, spoils, trespasses, or other misdemeanors, committed or permitted within my said manor, or in any messuages, lands, or woods there; and from time to time, to give me a just and true account in writing thereof: and further to act and do all other things that to the office of a* bailiff *of the said manor belongs and appertains, during my will and pleasure.* In Witness, &c.

BAILIS, are letters to raise fire and sword. *Scotch Dict.*

BAILIWICK, *balliva.*] Is not only taken for the county, but signifies generally that liberty which is exempted from the sheriff of the county, over which the lord of the liberty appointeth a *bailiff*, with such powers within his precinct, as an under-sheriff exerciseth under the sheriff of the county; such as the *bailiff* of Westminster, &c. *Stat.* 27 *Eliz. cap.* 12. *Wood's Inst.* 206.

BAILMENT, from *bailler*, Fr. to deliver.] "A delivery of goods in trust, upon a contract expressed or implied that the trust shall be faithfully executed on the part of the *bailee:*" [the person to whom they are delivered,] 2 *Comm.* 451. which see; to which Sir W. Jones adds, "and the goods re-delivered as soon as the time or use, for which they are bailed, shall have elapsed or be performed." *Law of Bailments, p.* 117.

It is to be known that there are six sorts of *bailments*, which lay a care and obligation on the party to whom goods are bailed; and which, consequently, subject him to an action, if he misbehave in the trust reposed in him.

1. A bare and naked bailment, to keep for the use of the bailor, which is called *depositum;* and such bailee is not chargeable for a common neglect, but it must be a gross one to make him liable. 2 *Str.* 1099.

2. A delivery of goods which are useful to keep, and they are to be returned again in specie, which is called *accommodatum*, which is a lending *gratis;* and in such case the borrower is strictly bound to keep them: for if he be guilty of the least neglect, he shall be answerable, but he shall not be charged where there is no default in him. See *post.*

3. A delivery of goods for hire, which is called *locatio*, or *conductio;* and the hirer is to take all imaginable care, and restore them at the time; which care, if he so use, he shall not be bound.

4. A delivery by way of pledge, which is called *vadium;* and in such goods the pawnee has a special property; and if the goods will be the worse for using, the pawnee must not use them; otherwise he may use them at his peril; as jewels pawned to a lady, if she keep them in a bag, and they are stolen, she shall not be charged; but if she go with them to a play, and they are stolen, she shall be answerable. So if the pawnee be at a charge in keeping them, he may use them for his reasonable charge; and if notwithstanding all his diligence he lose the pledge, yet he shall recover the debt. But if he lose it after the money tendered, he shall be chargeable, for he is a wrong-doer; after money paid (and tender and refusal is the same) it ceases to be a pledge, and therefore the pawnor may either bring an action *of assumpsit*, and declare that the defendant promised to return the goods upon request; or trover, the property being vested in him by the tender.

5. A delivery of goods to be carried for a reward, of which enough is said under title *Carrier.* It may here be added, that the plaintiff ought to prove the defendant used to carry goods, and that the goods were delivered to him or his servant to be carried. And if a price be alleged in the declaration, it ought to be proved the usual price for such a stage; and if the price be proved there need no proof, the defendant being a common carrier: but there need not be a proof of a price certain.

6. A delivery of goods to do some act about them (as to carry) without a reward, which is called by Bracton, *mandatum*, in English, an acting by commission; and though he be to have nothing for his pains, yet if there were any neglect in him, he will be answerable, for his having undertaken a trust is a sufficient consideration; but if the goods be misused by a third person, in the way, without any neglect of his, he would not be liable, being to have no reward.

The above is taken from Lord Chief Justice Holt's opinion, in the case of *Coggs* v. *Bernard*, 2 *Ld. Raym.* 909. as abridged, *Bull. N. P.* 72. See also Sir W. Jones's Essay on the Law of Bailment, p. 35. *Com. Rep.* 133. with Mr. Rose's notes; and on this subject, 2 *Inst.* 89. 4 *Rep.* 83. 1 *Rol. Ab.* 338. 1 *Inst.* 89 *b.* *Doct. & St.* 129. 1 *New Ab.* 243.

Having mentioned Sir W. Jones's Essay on the Law of Bailment, we cannot help recommending it to the attention of the rational student; and for the use of such, extracting the following analysis, which will in general be found to be consonant with the determinations in the books, and convey much knowledge in a short compass. Sir W. Jones differs in a few points from Lord Holt and Lord Coke, and his reasons are deserving of much attention.

"I. DEFINITIONS.—1. *Bailment*, as before at the beginning of this article.—2. *Deposit* is a bailment of goods to be kept for the bailor without recompence.—3. *Mandate* is a bailment of goods, *without reward*, to be carried from place to place, or to have some act performed about them.—4. *Lending for use* is a bailment of a thing for a certain time to be used by the borrower without paying for it.—5. *Pledging*, is a bailment of goods by a debtor to his creditor, to be kept till the debt be discharged.—6. *Letting to hire* is, (1) a bailment of a thing to be used by the hirer for a compensation in money; or (2) a letting out of work and labour to be done, or care and attention to be bestowed, by the bailee on the goods bailed, and that

for a pecuniary recompence; or (3) of care and pains in carrying the things delivered from one place to another, for a stipulated or implied reward.—7. *Innominate bailments* are those where the compensation for the use of a thing, or for labour and attention is not pecuniary; but either (1) the reciprocal use or the gift of some other thing; or (2) work and pains reciprocally undertaken; or (3) the use or gift of another thing in consideration of care and labour; and conversely.—8. *Ordinary neglect*, is the omission of that care, which every man of common prudence, and capable of governing a family, takes of his own concerns.—9. *Gross neglect*, is the want of that care which every man of common sense, how inattentive soever, takes of his own property. See *post* II. 8.—10. *Slight neglect* is the omission of that diligence which very circumspect and thoughtful persons use in securing their own goods and chattels.—11. *A naked contract* is a contract made without consideration or recompence.

"II. The Rules which may be considered as axioms flowing from natural reason, good morals, and sound policy, are these:—1. A bailee who derives no benefit from his undertaking, is responsible only for gross neglect.—2. A bailee who alone receives benefit from the bailment, is responsible for slight neglect.—3. When the bailment is beneficial to both parties, the bailee must answer for ordinary neglect.—4. A special agreement of any bailee to answer for more or less, is in general valid.—5. All bailees are answerable for actual fraud, even though the contrary be stipulated.—6. No bailee shall be charged for a loss by inevitable accident or irresistible force, except by special agreement.—7. Robbery by force is considered as irresistible; but a loss by private stealth is presumptive evidence of ordinary neglect.—8. Gross neglect is a violation of good faith.—9. No action lies to compel performance of a naked contract.—10. A reparation may be obtained by suit for every damage occasioned by an injury.—11. The negligence of a servant acting by his master's express or implied order, is the negligence of the master.

"III. From these rules the following Propositions are evidently deducible.—1. A depositary is responsible only for gross neglect; or in other words for a violation of good faith. 2. A depositary whose character is known to his depositor, shall not answer for mere neglect, if he take no better care of his own goods, and they also be spoiled or destroyed.—3. A mandatary to carry is responsible only for gross neglect, or a breach of good faith.—4. A mandatary to perform a work is bound to use a degree of diligence adequate to the performance of it.—5. A man cannot be compelled by action to perform his promise of engaging in a deposit or mandate; but,—6. A reparation may be obtained by suit for *damage* occasioned by the non-performance of a promise to become a depository, or a mandatary.—7. A borrower for use is responsible for slight negligence.—8. A pawnee is answerable for ordinary neglect.—9. The hirer of a thing is answerable for ordinary neglect.—10. A workman for hire must answer for ordinary neglect of the goods bailed, and must apply a degree of skill equal to his undertaking.—11. A letter to hire of his care and attention, is responsible for ordinary negligence.—12. A carrier for hire by land or by water is answerable for ordinary neglect.

"IV. Exceptions to the above rules and propositions.—1. A man who spontaneously and officiously engages to keep or to carry the goods of another, though without reward, must answer for slight neglect.—2. If a man through strong persuasion and with reluctance undertake the execution of a mandate, no more can be required of him than a fair exertion of his ability.—3. All bailees become responsible for losses by casualty or violence, after their refusal to return the things bailed; on a lawful demand.—4. A borrower and a hirer are answerable on all events, if they keep the things borrowed or hired after the stipulated time, or use them differently from their agreement.—5. A depositary and a pawnee are answerable in all events if they *use* the things deposited or pawned.—6. An innkeeper is chargeable for the goods of his guest within his inn, if the guests be robbed by the servants or inmates of the keeper.—7. A common carrier by land or by water must indemnify the owner of the goods carried if he be robbed of them.

"V. It is no exception but a Corollary from the rules that every bailee is responsible for a loss by accident or force, however inevitable or irresistible; if it be occasioned by that degree of negligence for which the nature of his contract makes him generally answerable."

The cases cited and commented on by Sir Wm. Jones, besides the above of *Coggs* v. *Bernard*, and which lead to the whole law on this subject, are 1 *Str.* 128. 145. 2 *Stra.* 1099. *Allen* 93. *Fitz. Detinue*, 59. (Bonion's case, the earliest on the subject). 8 *Rep.* 32. 1 *Wils.* 281. *Burr.* 2298. 1 *Vent.* 121. 190. 238. *Carth.* 485. 7. 2 *Bulst.* 280. 1 *Ro. Ab.* 2. 4. 10. 2 *Ro. Ab.* 567. 12 *Mod.* 480. 2 *Raym.* 220. *Moor* 462. 543. *Owen* 141. 1. *Leon.* 224. 1 *Cro.* 219. *Bro. Ab.* tit. *Bailment*. *Hob.* 30. 2 *Cro.* 339. 667. *Palm.* 548. *W. Jo.* 159. 4 *Rep.* 83 *b.* (Southcote's case). 1 *Inst.* 89 *a.* Many of them however more peculiarly applicable to carriers.

The following cases may serve to illustrate the above principles.

A man leaves a chest locked up with another to be kept and doth not make known to him what is therein; if the chest and goods in it are stolen, the person who received them shall not be charged for the same, for he was not trusted with them. And what is said as to stealing is to be understood of all other inevitable accidents: but it is necessary for a man that receives goods to be kept, to receive them in a special manner, viz. to be kept as his own, or at the peril of the owner. 1 *Lill. Abr.* 193. 194. And vide 1 *Rol. Abr.* 338. 2 *Show. pl.* 166.

If I deliver 100*l.* *to* A. *to buy cattle*, and he bestows 50*l.* of it in cattle, and I bring an action of debt for all, I shall be barred in that action for the money bestowed and charges, &c. but for the rest I shall recover. *Hob.* 207.

If one deliver his goods to another person, to deliver over to a stranger, the deliverer may countermand his power, and require the goods again; and if the *bailee* refuse to deliver them, he may have an action of account for them. *Co. Litt.* 286.

If A. delivers goods to B., to be delivered over to C., C. hath the property, and C. hath the action against B., for B. undertakes for the safe delivery to C., and hath no property or interest but in order to that purpose. 1 *Rol. Abr.* 606. see 1 *Bulst.* 68. 69. where it is said that, in case of conversion to his own use, the bailee shall be answerable to *both*.

But if the bailment were not on valuable consideration, the delivery is countermandable; and in that case, if A. the bailor bring trover, he reduces the property again in himself, for the action amounts to a countermand; but if the delivery was on a valuable consideration, then A. cannot have trover, because the property is altered; and in trover the property must be proved in the plaintiff. 1 *Bulst.* 68. see 1 *Leon.* 30.

And where a man delivers goods to another, to be re-delivered to the deliverer at such a day, and before that day the *bailee* doth sell the goods in market overt; the *bailor* may at the day seize and take his goods, for the property is not altered. *Godb.* 160.

If A. borrows a horse to ride to Dover, and he rides out of his way, and the owner of the horse meets him, he cannot take the horse from him; for A. has a special property in the horse

till the journey is determined; and being in lawful possession of the horse, the owner cannot violently seize and take it away; for the continuance of all property is to be taken from the form of the original bargain, which, in this case, was limited till the appointed journey was finished. *Yelv.* 172. But the owner may have an action on the case against the bailee for exceeding the purposes of the loan; for so far it is a secret and fallacious abuse of his property; but no general action of trespass, because it is not an open and violent invasion of it. 1 *Rol. Rep.* 128.

As to borrowing a thing perishable, as corn, wine, or money, or the like, a man must, from the nature of the thing, have an absolute property in them; otherwise it could not supply the uses for which it was lent; and therefore he is obliged to return something of the same sort, the same in quantity and quality with what is borrowed. *Dr. & Stud.* 129.

But if one lend a horse, &c. he must have the *same* restored. If a thing lent for use be used to any other end or purpose than that for which it was borrowed, the party may have his action on the case for it, though the thing be never the worse; and if what is borrowed be lost, although it be not by any negligence of the borrower, as if he be robbed of it; or where the thing is impaired or destroyed by his neglect, admitting that he put it to no more service than that for which borrowed, he must make it good: so where one borrows a horse, and puts him in an old rotten house ready to fall, which falls on and kills him, the borrower must answer for the horse. But if such goods borrowed perish by the act of God, (or rather, as Sir Wm. Jones says it ought more reverentially to be termed, by *inevitable accident*,) in the right use of them; as where the borrower puts the horse, &c. in a strong house, and it falls and kills him, or it dies by disease, or by default of the owner, the borrower shall not be charged. 1 *Inst.* 89. 29 *Ass.* 28. 2 *H.* 7. 11.

If one delivers a ring to another to keep, and he breaks and converts the same to his own use; or if I deliver my sheep to another to be kept, and he suffers them to be drowned by his negligence; or if the *bailee* of a horse, or goods. &c. kill or spoil them, in these cases action will lie. 5 *Rep.* 13. 15 *E.* 4. 20 *b.* 12 *E.* 4. 13.

If a man deliver goods to another, the *bailee* shall have a general action of tresspass against a stranger, because he is answerable over to the *bailor*; for a man ought not to be charged with an injury to another, without being able to retire to the original cause of that injury, and in amends there to do himself right. 13 *Co.* 69. 14 *Hen.* 4. 28. 25 *H.* 7. 14.

BAIRMAN. A poor insolvent debtor, left *bare* and naked. *Stat. Wil. Reg. Scot. cap.* 17.

BAIRNS' PART, (Childrens' part,) Is a third part of the defunct's free moveables, debts deduced, if the wife survived; and a half (if there be no relict) due to the children. *Scotch Dict.*

BAKERS. See *Bread.*

BALANCE OF TRADE. A computation of the value of all commodities which we buy from foreigners, and on the other side the value of our own native products, which we export into neighbouring kingdoms; and the difference or excess between the one side and the other of such account or computation is called the *balance of trade.*

BALCANIFER, or *baldikinifer*, *i. e.* A standard bearer. *Matt. Paris. Anno* 1237.

BALCONIES to houses in London are regulated by the Building Act, 14 *Geo.* 3. *c.* 78. § 48. &c.

BALE, (*Fr.*) A pack, or certain quantity of goods or merchandize; as a *bale* of silk, cloth, &c. This word is used in the statute 16 *R.* 2. *c.* 3. and is still in use.

BALENGER. By the stat. 28 *H.* 6. *c.* 5. seems to have been a kind of *barge*, or water vessel. But elsewhere it rather signifies a man of war. *Walsing. in R.* 2.

BALEUGA. A territory or precinct. *Chart. Hen.* 2. See *Bannum.*

BALISTARIUS. A *balister* or cross-bowman. *Gerrard de la War* is recorded to have been balistarius *domini regis*, &c. 28 & 29 *Hen.* 3.

BALIVA. A bailiwick or jurisdiction. See tit. *Bailiwick.*

BALIVO AMOVENDO. A writ to remove a *bailiff* from his office, for want of sufficient land in the bailiwick. *Reg. Orig.* 78. See tits. *Bailiff*, *Sheriff.*

BALKERS. Are derived from the word *balk*, because they stand higher, as it were on a balk or ridge of ground, to give notice of something to others. *Shep. Epitom.* vide *Conders.*

BALLARE, To dance, *Spelm.* Perhaps, in this sense, it may be understood in *Fleta*, *lib.* 2. *c.* 87. *de cascatrice*; Anglicè *Dairy-maid.*

BALLAST, Is gravel or sand to poise ships, and make them go upright; and ships and vessels taking in *ballast* in the river Thames, are to pay so much a ton to Trinity House, Deptford; who shall employ *ballast-men*, and regulate them, and their lighters to be marked, &c. on pain of 10*l.* *Stat.* 6 *Geo.* 2. *c.* 29. continued by several acts. See *Harbours.*

BALLIUM. A fortress or bulwark. *Matt. West. An.* 1265.

BAN, or *bans*, from the Brit. *ban. i. e. clamor.*] A proclamation or public notice; any public summons, or edict, whereby a thing is commanded or forbidden. It is a word ordinary among the feudists; and for its various significations, see *Spelman* v. *bannum.* The word *bans*, in its common acceptation, is used for the publishing matrimonial contracts, which is done in the church before marriage; to the end that if any man can speak against the intention of the parties, either in respect of kindred, pre-contract, or for other just cause, they may take their exception in time, before the marriage is consummated: and in the canon law, Bannæ *sunt proclamationes sponsi et sponsæ in ecclesiis fieri solitæ.* But there may be a faculty or licence for the marriage, and then this ceremony is omitted. See tit. *Marriage.*

BANCALE. A covering of ease and ornament for a bench, or other seat. *Monasticon, tom.* 1. *p.* 222.

BANE, from the Sax. *bana*, a murderer.] Signifies destruction or overthrow: as, I will be the *bane* of such a man, is a common saying; so when a person receives a mortal injury by any thing, we say it was his *bane:* and he who is the cause of another man's death, is said to be *le bane*, i. e. malefactor. *Bract. lib.* 2. *tract.* 8. *cap.* 1.

BANERET, banerettus, *miles vexillarius.*] Sir Thomas Smith, in his *Repub. Angl. cap.* 18. says, is a knight made in the field, with the ceremony of cutting off the point of his standard, and making it, as it were, a *banner*, and accounted so honourable that they are allowed to display their arms in the king's army, as barons do, and may bear arms with supporters. See *Camden* and *Spelman*, from whom it appears *Banerets* are the degree between *barons* and knights. *Spel.* in v. *Banerettus.* It is said that they were anciently called by summons to parliament: and that they are next to the barons in dignity, appears by the stats. 5 *R.* 2. stat. 2. *cap.* 4.; and 14 *R.* 2. *c.* 11. William de la Pole was created *baneret* by King Edward the Third by letters patent, *Anno Regni sui* 13. And those *banerets*, who are created *sub vexiliis regis, in exercitu regali, in aperto bello, et ipso rege personaliter præsente, explicatis*, take place of all *baronets*; as we may learn by the letters patent for creation of baronets. 4 *Inst.* 6. Some maintain that knights *banerets* ought not to be made in a civil war; but Henry VII. made divers *banerets* upon the Cornish commotion in the year 1495. See *Selden's Titles of Honours, f.* 799.

BANISHMENT, Fr. *banissement*; *Exilium abjuratio.*] Is a forsaking or quitting the realm; and a kind of civil death inflicted on an offender: there are two kinds of it, one volun-

tary and upon oath, called *abjuration*, and the other upon compulsion for some offence. *Staundf. Pl. Cr. f.* 117. See tits. *Abjuration, Transportation.*

BANK, Lat. *bancus*, Fr. *banque.*] In our common law is usually taken for a seat or bench of judgment; as *Bank le Roy*, the King's Bench, *Bank le Common Pleas*, the Bench of Common Pleas, or the Common Bench; called also in Latin, *Bancus Regis*, and *Bancus Communium Placitorum*. Cromp. Just. 67. 91. *Jus Banci*, or the privilege of the Bench, was anciently allowed only to the king's judges, *qui summam administrant justitiam;* for inferior courts were not allowed that privilege.

There are, in each of the terms, stated days, called *days in bank, dies in banco*, that is, days of *appearance* in the court of Common Pleas. They are generally at the distance of about a week from each other, and regulated by some festival of the church. On some one of these days in bank all original writs must be made returnable; and therefore they are generally called the returns of that term. See tit. *Day.*

A *bank*, in common acceptation, signifies a place where a great sum of money is deposited, returned by exchange, or otherwise disposed of to profit.

The Bank of England is managed by a governor and directors, established by parliament, with funds for maintaining thereof, appropriated to such persons as were subscribers; and the capital stock, which is enlarged by divers statutes, is exempted from taxes, accounted a personal estate assignable over, not subject to forfeiture; and the Company make dividends of the profits half-yearly, &c. The funds are redeemable by the parliament, on paying the money borrowed: and the Company of the Bank is to continue a corporation, and enjoy annuities till redeemed, &c. During the continuance of the Bank, no body politick, &c. other than the Company, shall borrow any sums on bills payable at demand; and forging the *seal* of the Bank, and forging or altering *Bank-notes*, or tendering such forged notes in payment, demanding to have them exchanged for money, &c. and forging the names of cashiers of the Bank, are all capital felonies. See the several statutes 5 & 6 *W. & M. c.* 20. 8 & 9 *W.* 3. *c.* 20. 11 *Geo.* 1. *c.* 9. 12 *Geo.* 1. *c.* 32. 15 *Geo.* 2. *c.* 13. And officers or servants of the Company, that embezzle any *Bank notes*, &c. wherewith they are intrusted, being duly convicted, shall suffer death as felons.

By stat. 13 *Geo.* 3. *c.* 79. persons not authorised by the Bank, making or using moulds, for the marking of paper, with the words *Bank of England*, visible in the substance, or having such moulds in their possession, are guilty of felony without benefit of clergy: And persons issuing notes and bills engraved to resemble those of the Bank, or having the sum expressed in white characters on a black ground, may be punished by imprisonment, not exceeding six months. But innocent persons possessed of such notes, carrying them for payment, not affected.

See stat. 34 *Geo.* 2. *c.* 4. to regulate the holding general courts, and courts of directors.

See the several statutes 21 *Geo.* 3. *cc.* 14. 60. 22 *Geo.* 3. *c.* 8. 23 *Geo.* 3. *c.* 35. 24 *Geo.* 3. *ses.* 2. *cc.* 10. 39. 25 *Geo.* 3. *c.* 32. 29 *Geo.* 3. *c.* 37. 39 & 40 *Geo.* 3. *c.* 28. and a vast variety of previous statutes, as to the continuance of the Bank charter, which is also regularly continued by every Loan act, till the stock created by such act is paid. By 39 & 40 *Geo.* 3. *c.* 28. § 14. the Bank is continued a corporation till the end of twelve months notice after 1st August, 1833.

By stat. 31 *Geo.* 3. *c.* 33. the Bank is to keep in hand only 600,000*l.* above the sum necessary to pay the current dividends—the remaining surplus to be applied to the use of the public.

Persons making, or assisting in making, transfers of stock in any other name than that of the owner, or forging transfers or dividend warrants, or making false entries in the Bank books, are made guilty of felony without clergy.—Persons making out false dividend warrants transportable for seven years. 33 *Geo.* 3. *c.* 30. 35 *Geo.* 3. *c.* 66.

See the acts 41 *Geo.* 3. (U. K.) *c.* 39. and 45 *Geo.* 3. *c.* 89. for preventing forgery of Bank notes, Bank bills of exchange, and Bank post bills.—By these acts, persons not authorized making paper with the Bank water-mark, &c. or publishing same, or engraving plates, &c. or having such in their possession, shall be transported for fourteen years.—[There is an inaccuracy in the act 45 *Geo.* 3. *c.* 89. § 7.]

Persons engraving, cutting, etching, &c. upon any plate any words, figures, or characters, the impression of which shall resemble, or be apparently intended to resemble, Bank notes or Bank post bills, or using or having same in custody, or knowingly uttering any paper containing such words, figures, or characters, or knowingly having such paper in their possession, shall be transported for fourteen years. *Stat.* 52 *Geo.* 3. *c.* 138. *s.* 5.

36 *Geo.* 3. *c.* 90. § 1. When trustees, in whose name stock stands in the Bank, shall be out of the kingdom, &c. or become bankrupts, the courts may order such stock to be transferred, or the dividends paid, &c.

By 37 *Geo.* 3. *c.* 28. Notes issued by the Bank for sums under 5*l.* are declared valid.

By 37 *Geo.* 3. *c.* 28. and afterwards by 37 *Geo.* 3. *c.* 45. continued and amended by 37 *Geo.* 3. *c.* 91. 38 *Geo.* 3. *c.* 1. 42 *Geo.* 3. *c.* 40. 43 *Geo.* 3. *c.* 18. 44 *Geo.* 3. *c.* 1. 54 *Geo.* 3. *c.* 99. 55 *Geo.* 3. *c.* 18. and 56 *Geo.* 3. *c.* 40. (in force to 5th July, 1818,) the Bank of England was restrained from making payments in cash: and if the amount of any debt were tendered in Bank notes, or bank notes and cash, the party tendering could not be arrested.—[Like provisions were made as to the Bank of Ireland by the Irish act, 37 *Geo.* 3. *c.* 51. amended since the Union by 43 *Geo.* 3. *c.* 44. and continued by 55 *Geo.* 3. *c.* 41. 56 *Geo.* 3. *c.* . until three months after the expiration of the restriction on the Bank of England.]

Bank of Scotland. This bank was erected by an act of the Scots parliament, in 1695, with a capital of 1,200,000*l.* Scots, (100,000*l.* sterling.)—By British acts, 14 *Geo.* 3. *c.* 32. 24 *Geo.* 3. *c.* 12. 32 *Geo.* 3. *c.* 25. 34 *Geo.* 3. *c.* 19. and 44 *Geo.* 3. *c.* xxiii. (local and personal,) this capital has been increased to the amount, in the whole, of 1,500,000*l.* sterling.

Bank of Ireland. This was established by an act of the Irish parliament, 21 & 22 *Geo.* 3. *c.* 16. amended and the charter continued by 31 *Geo.* 3. *c.* 22. 37 *Geo.* 3. *c.* 50. and 48 *Geo.* 3. *c.* 103.—Payments in cash by this Bank are restrained during the war, in the same manner as by the Bank of England. *See that title.*—By 42 *Geo.* 3. *c.* 87. this Bank was enabled to purchase the Parliament-house in Dublin; rendered useless by the Union.—See title *Ireland.*

BANK-CREDITS. Credits peculiar to Scotch banking, by which on proper security given to the Bank, a person receives liberty to draw to a certain extent agreed on, and for which, with the interest on the sum drawn, previous security is given. See the act 33 *Geo.* 3. *c.* 74. § 12. for securing such credits by granting securities on lands of the debtor.

BANKERS. The monied goldsmiths first got the name of *bankers* in the reign of King Charles the Second; but *bankers* now are those private persons in whose hands money is deposited and lodged for safety, to be drawn out again as the owners have occasion for it. See the preceding title.

*St.* 41 *Geo.* 3. (U. K.) *c.* 57. imposes a penalty on persons unauthorized making paper with name, &c. of any banker appearing in the substance of the paper, or vending the same—first offence six months imprisonment, and for second offence, transportation for seven years. § 1.

Like punishment for engraving any bill, &c. of any banker, or using any engraved plate, &c. or knowingly having such plate, &c. § 2.

Penalty for engraving, &c. on any plate, any subscriptions to any bill, &c. of any person, or banking company, payable to bearer on demand, or having such in possession, for first offence, imprisonment from three years to twelve months; second offence, transportation for seven years. § 3.

By statute *52 Geo.* 3. *c.* 63. if any person with whom (as banker, broker, merchant, attorney, or agent,) any ordnance debenture, exchequer, navy, victualling, or transport bill, warrant, or order for payment of money, lottery ticket, certificate, seaman's ticket, bank receipt, bond, deed, note, or other security for money, power of attorney, plate, jewels, or other personal effects, shall have been deposited, or remain for safe custody for any special purpose, without any authority to sell or pledge the same, or to sell or transfer the stock, share, or interest to which such security shall relate, shall sell, transfer, pledge, secrete, embezzle, or apply the same to his own use, in violation of good faith, and contrary to the special purpose for which such things shall have been deposited, with intent to defraud the owner, every person so offending shall be guilty of a misdemeanour, and, being convicted thereof, shall be sentenced to be transported for any term not exceeding fourteen years, or to receive such other punishment as may be inflicted on persons guilty of a misdemeanour.

Like punishment on such persons guilty of embezzling any money, bill, note, draft, cheque, or order for payment of money entrusted to them to invest in any government or other securities. *s.* 2.

Nothing in the act shall lessen any remedy at law or equity to the party grieved. *s.* 3. 5.

Nor to affect trustees or mortgagees. *s.* 6.

Bankers and others may dispose of securities on which they have a lien. *s.* 8.

BANKRUPT. A Trader, who secretes himself, or does certain other acts, tending to defraud his creditors. 2 *Comm.* 285. 471. The word itself is derived from *bancus* or *banque*, the table or counter of a tradesman; (*Dufresne*, i. 969.) and *ruptus*, broken, denoting thereby one whose shop or place of trade is broken or gone; though others rather choose to adopt the French word *route*, a trace or track—a bankrupt, say they, being one who has removed his *banque*, leaving but a trace behind. *Cowel*: 4 *Inst.* 277.—It is observable that the title of the first English statute concerning this offence, stat. 34 *H.* 8. *c.* 4. "against such persons as do *make* bankrupt," is a literal translation of the French idiom, *qui font banque route*. 2 *Comm.* 472. *n.*

The Bankrupt-law is a system of positive regulations by various statutes, the construction of which have produced the multiplied cases on the subject, from whence the following principles and rules are extracted.—These statutes are,—*Stat.* 13 *Eliz. c.* 7. (which almost totally altered the old stat. 34 *Hen.* 8. *c.* 4., mentioned above.) 1 *Jac.* 1. *c.* 15. 21 *Jac.* 1. *c.* 19. 10 *An. c.* 15. 7 *Geo.* 1. *c.* 31. 5 *Geo.* 2. *c.* 30. (made perpetual by 37 *Geo.* 3. *c.* 124.) 46 *Geo.* 3. *c.* 135.

On this subject recourse has chiefly been had to *Cooke's Bankrupt Laws;* together with the *Commentaries*, and the modern reported determinations.

The matter, to suit the present purpose, has thus been arranged.

I. *Who may be a Bankrupt.*
II. *By what* Acts *a Person may become so.*
III. *A general View of the Proceedings on, and Effects of a Commission of Bankruptcy.*
  1. As they relate to the Bankrupt himself.
  2. As they transfer his Estate and Property.
IV. *To this it has seemed necessary to add some more minute Particulars as to the following Parts of the Subject:*



1. Of the petitioning Creditor's Debt.
2. Of the Proof of Debts.
3. Of Creditors by Marriage Articles.
4. Of contingent Debts.
5. Of Annuitants, and certain other peculiar Creditors.
6. Of the Misconduct of the Assignees.
7. Of Partners.

V. *Practical Notes and Forms.*

I. The statute 13 *Eliz. c.* 7. enacts "That any merchant or other person, being subject or denizen, using or exercising the trade of merchandize, by way of bargaining, exchange, rechange, bartery, chevisance, or otherwise, in gross or by retail, or seeking his or her trade or living by buying *and* selling"—may become bankrupts.—Drawing and redrawing *bills of exchange may*, in certain cases, be considered as trading. 1 *Atk.* 128. See *Cowp.* 745.

Every person being a trader, and capable of making binding contracts, is liable to become a bankrupt.—As a *nobleman, member of parliament, clergyman*, &c. And where it is said, that *farmers, innkeepers*, &c. cannot be bankrupts, it means, *in respect to that particular description;* and not as affording protection, if in any other shape they come within the bankrupt laws.—But *Infants* and *Married women* cannot be bankrupts. As to the latter, however, there are exceptions; for a *feme covert* in London, being a sole trader according to the custom, is liable to a commission of bankruptcy; and, as repeated determinations have settled that a feme covert, living apart from her husband as a feme sole, is liable to *execution* for debts contracted by her, there seems no doubt that such a married woman is equally liable to a commission of bankruptcy.—But if a *feme sole* trader commit an act of bankruptcy, and afterwards marry, and live with her husband, she cannot be made a bankrupt. *Ex parte Mear*, see *Cooke B. L. c.* 3. § 1. 4 *Term Rep.* 362. and this Dictionary, tit. *Baron and Feme.*

Buying only, or selling only, will not qualify a man to be a bankrupt; but he must be both buying *and* selling, and thereby attempting to get a livelihood. 2 *Comm.* 476. 2 *Wils.* 171.

There can be no such thing as an equitable bankruptcy; it must be a legal one; and the party must be a trader in his own right; for if a person that is a trader, makes another his executor, who only disposes of the stock of his trade, it will not make the executor a trader, and liable to a commission of bankruptcy. 2 *P. Wms.* 429. 1 *Atk.* 102.

Any person trading to England, whether native, denizen, or alien, though never resident as a trader in England, may be a bankrupt, if he occasionally come to this country, and commit an act of bankruptcy. *Cowp.* 398. 402. *Raym.* 375. *Salk.* 110.

If a merchant gives over his trade, and some years after become insolvent for money he owed while a merchant, he may be a *bankrupt: but if it be for new debts,* or old debts continued on new security, it is otherwise. 1 *Vent.* 5. 29.

To enumerate every trade sufficient to make a man a Bankrupt would be tedious. The following seem now settled; and some others are enumerated which have afforded cause of dispute, chiefly from the particular facts of the case.—It is to be premised that a chapman, or one that buys *and* sells *any thing*, though his dealing does not come under the denomination of any particular trade, may become a bankrupt.

* Bankers, brokers, coal-dealers, factors, scriveners, vintners, brick-makers, butchers, bakers, brewers, clothiers, goldsmiths, dyers, iron-manufacturers, who buy iron, and work it into wares, lock-smiths, milliners, nailors, plumbers, sales-men, shoe-makers, smiths, and farriers. 2 *Wils.* 170. 172. 4 *Burr.* 2148. 3 *Mod.* 330. *Cro. Jac.* 585. 2 *Ld. Raym.* 1480. 2 *Comm.* 476. 3 *Mod.* 330. 1 *Ro. Ab.* 60. *pl.* 11.

For the probable principle why the legislature has subjected *traders* to the bankrupt laws, and not suffered other people to be included in them, see *Port* v. *Turton*, 2 *Wils.* 172.

More particularly, who may or may not be Bankrupts.

Alehouse-keepers, *not.* *Cooke* 53. *Cro. Car.* 395.
Alum-manufacturers, *not.* *Cooke* 34. 46.
Artificers, Labourers, &c. *not.* *Cro. Car.* 21. *Cro. Jac.* 585. 3 *Mod.* 330. 2 *Wils.* 171. 2 *Com.* 476. 4 *Burr.* 2148.
Bankers, *may.* *Stat.* 5 *Geo.* 2. *c.* 30.
Bakers, *may.* See ante*.
Brewers, *may.* See ante*.
Brokers, *may.* *Stat.* 5 *Geo.* 2. *c.* 30.
Brick-makers, *may.* 2 *Wils.* 172. *Brown Ch. Ca.* 173. See the case of *Parker* v. *Wells*, 1 *Brown* 494. 1 *Term Rep.* 34. *Cooke's B. L. c.* 3. § 2. &c.

[In this case, and that of alum-manufacturers, though they seem to differ, the same principle is recognized, viz. "If a man exercises a manufacture upon the produce of his own land, as a necessary or usual mode of reaping and enjoying that produce, and bringing it advantageously to market, he shall not be considered as a trader, though he buys materials or ingredients—as in the case of cheese, cyder, alum, and coal-mines, and the like.—But where the produce of land is merely the raw materials of a manufacture, and used as such, and not as the mode of raising the produce of the land; in short, where the produce of the land is an insignificant article, compared with the expence of the whole manufacture, there in truth he is, and ought to be, considered as a trader. —As this distinction turns on the nature and manner of exercising the manufacture, and the motive with which it is carried on, it depends so much upon the light in which a *jury* sees the whole transaction, the law and the fact are so blended together, that it is hardly possible to distinguish them."]

Butchers, *may.* See ante*. 4 *Burr.* 2148.
Carpenters; not merely workmen, but buying timber and materials to carry on trade, *may.* 3 *Mod.* 155. *Ld. Raym.* 741.
Clergymen trading, *may.* *Cowp.* 745.
Clothiers, *may.* See ante*.
Coal-dealers, *may.* See ante*.—But not owners or lessees of coal-mines. 2 *Wils.* 169, 170.
Companies or Corporations, proprietors of shares in, generally—*not*.—Except perhaps in the Stationers' company. See 2 *Ld. Raym.* 851.—And by statute, "no member of the Bank of England: of the East India or English Linen company; no person circulating Exchequer bills; no adventurer in the Royal fishing trade, or Guinea company; no member of the London Assurance, Royal Exchange, or South-sea companies, shall be deemed a bankrupt, on account of their stock in those companies." —*Stats.* 3 *Geo.* 1. *c.* 3. § 43. 13 & 14 *Car.* 2. *c.* 24. 4 *Geo.* 3. *c.* 37. 6 *Geo.* 1. *c.* 18. 8 *Geo.* 1. *c.* 21.
Contractors, public, and such other public officers, *not.* 3 *Keb.* 451.—Butlers and stewards of Inns of courts; farmers of customs, receivers-general, excisemen, &c. *not*, all on the same principle.
Drovers of cattle, *not.* *Stat.* 5 *Geo.* 2. *c.* 30.
Dyers, *may.* See ante*.
Factors, *may.* *Stat.* 5 *Geo.* 3. *c.* 30.
Farmer, *not.* *Cooke* 21.—But as a potatoe-merchant he *may.* 573.
Funds or Stocks, public, dealers in, *not.* 2 *P. Wms.* 308. and see ante Companies.
Goldsmith, *may.* See ante*.
Graziers, *not.* *Stat.* 5 *Geo.* 2. *c.* 30.
Inn-keepers, *not.* 3 *Mod.* 329. *Cro. Car.* 395.
Iron-manufacturers, *may.* See ante*.
Labourers, *not.* See ante Artificers.
Land-jobber, *not.* 2 *Wils.* 169.
Members of Parliament, *may.* See *Stat.* 4 *Geo.* 3. *c.* 33. 45 *Geo.* 3. *c.* 124. 52 *Geo.* 3. *c.* 144. and *post* II. and title *Parliament*.
Milliners, *may.* } See ante*.
Nailors, *may.* }
Pawnbrokers—it seems *may.* 1 *Atk.* 206. 218.
Plumbers, *may.* See ante*.
Receiver-general of taxes, *not.* *Stat.* 5 *Geo.* 2. *c.* 30.
Sales-men, *may.* See ante*. *Good.* 12.
Scriveners, *may.* *Stat.* 21 *Jac.* 1. *c.* 19. § 2.
Ship-owner, *not.*—Freighter, *may.* 1 *Vent.* 29. *Comb.* 182. 1 *Sid.* 411.
Shoemaker, *may.* 2 *Wils.* 171.
Smugglers, *may.* 1 *Atk.* 200.
Stock-jobbers, *not.* See Funds.
Tanners, *may.* See ante*.
Taylors, working, *not.* *Cooke* 45.
Victuallers, *not.* 4 *Burr.* 2067. 2 *Wils.* 382.
Vintners, being wine-merchants, *may.* *Cooke* 37.

The above Alphabetical List, is probably not so perfect or extensive as it might have been made; but the general principles, already laid down, will serve to direct the student in cases of doubt or difficulty.

II. To LEARN what the particular *Acts of Bankruptcy* are, which render a man a bankrupt, the several statutes must be consulted, and the resolutions of the courts thereon;—Among these are to be reckoned:

1. To depart the realm, or from his dwelling-house, with intent to defraud or hinder his creditors. *St.* 13 *Eliz. c.* 7.

2. To begin to keep his house privately, to absent himself from and avoid his creditors. *Stat. Ib.*

3. To procure or suffer himself willingly to be arrested, without just or lawful cause; to suffer himself to be outlawed; or to yield himself to prison. *Stat.* 13 *Eliz. c.* 7. 1 *Jac.* 1. *c.* 15. *sect.* 2.

4. Willingly or fraudulently to procure his goods, money, or chattels, to be attached or sequestered. *Stat.* 1 *Jac.* 1. *c.* 15.

5. To make any fraudulent grant or conveyance of his lands, tenements, goods, or chattels, to the intent, or whereby his creditors shall and may be defeated or delayed for the recovery of their just debts. *Stat. Ib.*

6. Being arrested for debt, to lie in prison two months after his arrest, upon that or any other arrest or detention for debt. *Stat.* 21 *Jac.* 1. *c.* 19.

7. To obtain privilege, other than that of parliament, against arrest. *Stat. Ib.*

8. Being arrested for 100*l.* or more, to escape out of prison. *Stat. Ib.*

9. To prefer to any court, any petition or bill against any of the creditors, thereby endeavouring to enforce them to accept less than their just debts, or to procure time, or longer days of payment, than was given at the time of the original contracts. *Stat. Ib.*

10. For a bankrupt to pay, satisfy, or secure the petitioning creditor his debt, is an act of bankruptcy which shall supersede that commission, and be sufficient on which to ground another: and such petitioning creditor shall lose his debt, to be divided among the other creditors. See *Cooke's B. L. c.* 4. § 1. *St.* 5 *Geo.* 2. *c.* 30. § 24.

11. Neglecting to make satisfaction for any just debt or debts, to the amount of 100*l.* or more, within two months after service of legal process, for such debt, upon any trader, *having privilege of parliament*, is an act of *bankruptcy*. *Stat.* 4 *Geo.* 3. *c.* 33. enforced and explained by 45 *G.* 3. *c.* 124. 52 *G.* 3. *c.* 144.

The legislature having thus, by positive laws, declared what acts shall be considered as criterions of insolvency or fraud, whereon to ground a commission, none other can be admitted by inference or analogy. Therefore it is not an act of bankruptcy for a trader secretly to convey his goods out of his house, and conceal them, to prevent their being taken in execution, nor to give money for notice when a writ should come into the sheriff's office. 1 *Ld. Raym.* 725. *Bull. N. P.* 40. So if a trader procure his goods fraudulently to be taken in execution, or makes a fraudulent sale of them, it is not an act of bankruptcy, though void against creditors. 4 *Burr.* 2478. *Cowp.* 429.

Many of the acts of bankruptcy above described are in themselves equivocal, and capable of being explained by circumstances; for, to bring them within the purview and meaning of the statute, it is absolutely necessary they should be done to defraud and delay creditors from recovering their just debts.

The better to obtain a clear and comprehensive view of the decisions on this part of the subject, each act of bankruptcy, on which any question appears to have been raised, shall be considered separately; premising that the statutes of bankrupts are local, and do not extend to acts done in foreign countries, or other dominions of Great Britain. *Cowp.* 398.

*Departing the realm* will not be an act of bankruptcy, unless done with a view of defrauding or delaying creditors; but if it appear that they are in fact delayed by such absence, it will be the same as if the original departure was fraudulent. *Bull. N. P.* 39. *Com. Dig.* tit. *Bankrupt* (C. 1.) 1 *Atk.* 196. 240. *Cooke's B. L. Vernon* v. *Hankey.*

*Beginning to keep house, or otherwise to absent himself.* Denial to a creditor is *primâ facie* evidence of this act of bankruptcy. But as the statute requires it to be with an intent to delay or defraud creditors, the mere denial is therefore capable of being explained by circumstances, such as sickness, company, business, or even the lateness of the hour at which the creditor calls.—Neither will an order by the debtor to his servant to deny him be sufficient. For where a trader gave orders to his servant to deny him to creditors on the 26th of May, but was not actually denied to a creditor till the 28th, the court held the actual denial, and not the order, constituted the act of bankruptcy. *Bull. N. P.* 39. 1 *Atk.* 201. *Cooke* cites *Hawkes* v. *Sanders, T.* 24 *Geo.* 3.

Keeping in another man's house or chamber, having no house of his own, or on ship-board, is an act of bankruptcy; so a miller keeping in his mill. *Com. Dig.* tit. *Bankrupt.*

Any keeping house for the purpose of delaying a creditor, even for a very short time, will be an act of bankruptcy; notwithstanding the party afterwards goes abroad, and appears in public. 2 *Stra.* 809. 2 *Term Rep.* 59.

A general denial will not be sufficient, but it must be a denial to a creditor who has a debt at that time due; for if he is only a creditor by a note payable at a future day, a denial to him will be no act of bankruptcy. 7 *Vin.* 6. *pl.* 14.

It frequently happens that traders in declining circumstances, call their creditors together to inspect their affairs; and determine whether a commission shall issue against them or not; and if thought advisable, it is usual for the trader to deny himself to a creditor, for the purpose of making an act of bankruptcy. However, it seems doubtful how far such concerted denial will be an act of bankruptcy to affect the interest of third persons. See 1 *Black. Rep.* 441. *Bull. N. P.* 39.

*Departing from his dwelling-house* may become an act of bankruptcy or not, according to the motive by which the party is impelled; if it be done with a view of defrauding his creditors, or even delaying them, and his absence be but for a single day, it will be an act of bankruptcy; and his very absenting himself is sufficient *primâ facie* evidence of an intention to defraud or delay his creditors; but it must be a voluntary absenting, and not by means of an arrest. 1 *Salk.* 110. 1 *Burr.* 484. 2 *Stra.* 809. *Green* 53.

*Suffering himself to be outlawed.* An outlawry in Ireland does not make one a bankrupt; but in the county-palatine of Durham it does. However, an outlawry does not appear to be an act of bankruptcy, unless it be suffered with intent to defraud creditors. *Com. Dig.* tit. *Bankrupt. Stone* 124. *Biling.* 94. *Good.* 23. 1 *Lev.* 13.

*Yielding himself to prison*, is to be intended of a voluntary yielding for debt; and if a person capable of paying will, notwithstanding, from fraudulent motives, voluntarily go to prison, it is an act of bankruptcy. *Bill.* 95. *Good.* 25. *Vin.* tit. *Creditor and Bankrupt*, 62.

*Willingly or fraudulently procuring his goods to be attached or sequestered;* which is a plain and direct endeavour to disappoint his creditors of their security. 2 *Comm.* 478.—The attachment here meant, and which the legislature had in view, is that sort of attachment only by which suits are commenced; as in London and other places where that species of process is used. *Cowp.* 427.

*Making any fraudulent conveyance of his lands or goods.*—A fraudulent grant, to come within the meaning of the statute, must be by *deed;* therefore a fraudulent sale of goods not by deed, is no act of bankruptcy in itself; but being a scheme concerted at the eve of bankruptcy, to cheat innocent persons, in order to secure particular creditors, is such a fraud as shall render the sale void. 4 *Burr.* 2478.

A grant or conveyance fraudulent within stat. 13 *Eliz. c.* 5. or 27 *Eliz. c.* 4. is an act of bankruptcy. *Com. Dig. Cooke.*

A trader before he becomes a bankrupt may prefer one creditor to another; and may pay him his debt; or may make him a mortgage, with possession delivered, or may assign part of his effects; but a preference of one creditor to the rest, by conveying by *deed* all his effects to him, is a fraud upon the whole bankrupt law, and an act of bankruptcy. 1 *Burr.* 467. 7 *East.* 138.

Whether a transaction be fair or fraudulent, is often a question of law; it is the judgment of law upon facts and intents; but transactions valid as between the parties may be fraudulent by reason of covin, collusion, or confederacy to injure third persons. 2 *Burr.* 827. 1 *Burr.* 467.

Nor will the case be different, if the assignment is made to indemnify a surety; for the inconvenience and mischief arising from an undue preference is the same. *Cooke's B. L.* 78. *Dougl.* 282.

An equal distribution among creditors who equally give a general personal credit to the bankrupt, is anxiously provided for; ever since the act 21 *Jac.* 1. *c.* 19. therefore when a bankrupt, by deed, conveys *all* his effects to trustees to pay all but one creditor, it is fraudulent and an act of bankruptcy. 1 *Burr.* 477.

But though a conveyance by deed of all a bankrupt's effects, or so much of his stock in trade, as to disable him from being a trader, or all his household goods, is itself an act of bankruptcy; a conveyance of *part* is very different; that may be public, fair, and honest. As a trader may sell, so may he openly transfer many kinds of property by way of security. What assignment of part will or will not be fraudulent, must depend on the particular circumstances of the case; but a colourable exception of a small part of his estate or effects, will not prevent the deed being declared fraudulent; for the law will never suffer an evasion to prevail to take a case out of the general rule, which is so essential to justice. 1 *Black. Rep.* 441. 2 *Black. Rep.* 362. 996. 1 *Burr.* 477.

An assignment by deed of part of a trader's effects, will be good, if made *bonâ fide*, and possession delivered; and indeed the not delivering possession being only evidence of fraud, may be explained by circumstances. 1 *Burr.* 479. 484. But an assignment even of only *part* of a trader's effects, to a

fair creditor, will if done in contemplation of bankruptcy itself become the very act. 3 *Wils.* 47. *Cowp.* 124.

*Procuring any protection except privilege of parliament.* If any one be protected as the king's servant, it does not make him bankrupt. *Skin.* 21. By stat. 7 *Ann. c.* 12. § 5. declaring the privilege of ambassadors and their train, it is expressly enacted, that no merchant, or other trader whatsoever, within the description of any of the statutes against bankrupts, shall have any benefit of that act.

See as to members of parliament being bankrupts, stats. 4 *Geo.* 3. *c.* 33. 45 *Geo.* 3. *c.* 124. 52 *Geo.* 3. *c.* 144. by which latter act, in case the commission is not superseded, or all debts satisfied within 12 months, the seat of the member becomes actually void; and after the bankruptcy he is incapable of sitting and voting, till such supercession or satisfaction. See title *Parliament.*

*Being arrested for debt, and lying two months in prison.* The statute does not make the mere being arrested an act of bankruptcy. The most substantial trader is liable to be arrested; but the presumption of insolvency arises from his lying in prison two months, without being able to get bail; nor will this presumption be obviated by a mere formal bail, put in for the purpose of changing from one custody to another. Where bail is really put in, the bankruptcy only relates to the time of the surrender; but when it is only formal bail, it will have relation to the first arrest. 1 *Burr.* 437. see *Salk.* 109. *Bull. N. P.* 38.

*Escape out of prison on arrest for* 100*l. or more.* The act clearly intends such an escape as shows he means to run away, and thereby to defeat his creditors; it must be an escape against the will of the sheriff, for a man shall not be made a criminal, where he has not the least criminal intention to disobey any law. 1 *Burr.* 440.

It is not an act of bankruptcy for a banker to refuse payment, if he appears, and keeps his shop open. 7 *Mod.* 139. *S. C. C.* 42.

An act of bankruptcy, if once plainly committed, can never be purged, even though the party continues to carry on a great trade. 2 *Term Rep.* 59. But if the act was doubtful, then circumstances may explain the intent of the first act, and show it not to have been done with a view to defraud creditors. But if, after a plain act of bankruptcy, a man pays off, and compounds with all his creditors, he becomes a new man. 1 *Burr.* 484. 1 *Salk.* 110. See statute 46 *Geo.* 3. *c.* 135.

III. The Proceedings on a commission of bankrupt, depend entirely on the several statutes of bankruptcy; all which are blended together, and digested into a concise methodical order in 2 *Comm.* 480. and here adopted with additions.

1. There must be a petition to the Lord Chancellor by one creditor to the amount of 100*l.* or by two to the amount of 150*l.* or by three or more to the amount of 200*l.*; which debts must be proved by *affidavit.* (*St.* 5 *Geo.* 2. *c.* 30.) Upon which he grants a *commission* to such discreet persons as to him shall seem good, who are then styled commissioners of bankrupt. *St.* 13 *Eliz. c.* 7. of these commissioners there are several existing lists, which take the commissions of bankruptcy in turn. The petitioners, to prevent malicious applications, must be bound in a bond to the Lord Chancellor for 200*l.* to make the party amends in case they do not prove him a bankrupt. And if, on the other hand, they receive any money or effects from the bankrupt, as a recompence for suing out the commission, so as to receive more than their rateable dividends of the bankrupt's estate, they forfeit not only what they shall have so received, but their whole debt. These provisions are made, as well to secure persons in good credit from being damnified by malicious petitions, as to prevent knavish combinations between the creditors and bankrupt, in order to obtain the benefit of a commission. When the commission is awarded and issued, the commissioners are to meet at their own expence, and take an oath for the due execution of their commission, and to be allowed a sum not exceeding 20*s. per diem* each, at every sitting. And no commission of bankrupt shall abate, or be void by the death of the bankrupt subsequent to the commission. *St.* 1 *Jac.* 1. *c.* 15. nor upon any demise of the crown. *St.* 5 *Geo.* 2. *c.* 30. The granting a commission of bankruptcy is not discretionary, but a matter of right. 1 *Vern.* 153.

By stat. 5 *Geo.* 2. *c.* 30. § 25. the petitioning creditor is directed, at his own costs, to prosecute the commission until assignees shall be chosen; which costs are to be ascertained by the commissioners at the meeting for the choice of assignees: and are to be paid by the assignees to the petitioning creditor out of the first money or effects received by them, under the commission.—But these costs may be taxed by a Master in Chancery, on petition to the Lord Chancellor. *Cooke's B. L. c.* 1. § 3.

Notwithstanding the statute 5 *Geo.* 2. has provided a remedy against maliciously suing out commissions of bankrupt, yet it is held not to take away the common law remedy by an action for damages, but that the party may proceed at law to obtain such redress for the injury he has sustained, as a jury may think he is entitled to. 3 *Burr.* 1418. 1 *Atk.* 144.

If more than two of the commissioners should die, by which means there would not be a sufficient number to execute the commission, or if it should be lost, it must be renewed; upon which renewal only half the fees are paid, and the commissioners under the renewed commission proceed from that step which was left incomplete by the former. *Cooke's B. L.*

The commissioners are first to receive proof of the person's being a trader, and having committed some act of bankruptcy: and then to declare him a bankrupt, if proved so; and to give notice thereof in the Gazette, and at the same time to appoint three meetings. At one of these meetings, an election must be made of assignees or persons to whom the bankrupt's estate shall be assigned, and in whom it shall be vested for the benefit of the creditors; and assignees are to be chosen by the major part in value of the creditors who shall have then proved their debts; and one creditor, if to a sufficient amount, may choose himself assignee; but a provisional assignee or assignees may be, if necessary, originally appointed by the commissioners, and afterwards approved or rejected by the creditors: but no creditor shall be admitted to vote in the choice of assignees, whose debt on the balance of accounts does not amount to 10*l.* And at the third meeting at farthest, which must be on the forty-second day after the advertisement in the Gazette, (unless the time be enlarged by the Lord Chancellor; which it may not be for more than fifty days unless on special circumstances of involuntary default by the bankrupt, 1 *Atk.* 222.) the bankrupt, upon notice also personally served upon him, or left at his usual place of abode, must surrender himself personally to the commissioners; which surrender (if voluntary) protects him from all arrests till his final examination is past: and he must thenceforth in all respects conform to the directions of the statutes of bankruptcy; or, in default of either surrender or conformity, he shall be guilty of felony without benefit of clergy, and shall suffer death, and his goods and estate shall be distributed among his creditors. *Stat.* 5 *Geo.* 2. *c.* 30.

In case the bankrupt absconds, or is likely to run away, between the time of the commission issued, and the last day of surrender, he may by warrant from any judge or justice of the peace be apprehended and committed to the county gaol in order to be forth coming to the commissioners; who are also empowered immediately to grant a warrant for seizing his goods and papers. *St.* 5 *Geo.* 2. *c.* 30. and see 1 *Atk.* 240.

By stat. 49 *Geo.* 3. *c.* 121. § 13. bankrupts in custody in ex-

ecution may be brought before the commissioners on the last examination by their warrant.

When the bankrupt appears, the commissioners are to examine him, touching all matters relating to his trade and effects. They may also summon before them, and examine the bankrupt's wife; (*St.* 21 *Jac.* 1. *c.* 19. see 1 *P. Wms.* 610, 611.;) and any other person whatsoever, as to all matters relating to the bankrupt's affairs. And in case any of them should refuse to answer, or shall not answer fully, to any lawful question, or shall refuse to subscribe such their examination, the commissioners may commit them to prison without bail, till they submit themselves and make and sign a full answer: the commissioners specifying in their warrant of commitment the question so refused to be answered. And any gaoler permitting such person to escape, or go out of prison, shall forfeit 500*l.* to the creditors. *St.* 5 *Geo.* 2. *c.* 30.

The bankrupt, upon this examination, is bound upon pain of death to make a full discovery of all his estate and effects, as well in expectancy as possession, and how he has disposed of the same; together with all books and writings relating thereto: and is to deliver up all in his own power to the commissioners; (except the necessary apparel of himself, his wife, and children;) or, in case he conceals or embezzles any effects to the amount of 20*l.* or withholds any books or writings, with intent to defraud his creditors, he shall be guilty of felony without benefit of clergy; and his goods and estate shall be divided among his creditors. *St.* 5 *Geo.* 2. *c.* 30. And unless it shall appear, that his inability to pay his debts arose from some casual loss, he may, upon conviction by indictment for such gross misconduct and negligence, be set upon the pillory for two hours, and have one of his ears nailed to the same and cut off. *St.* 21 *Jac.* 1. *c.* 19.

And so careful is the law to avoid any fraud, dishonesty, or concealment, on the part of the bankrupt, that an agreement by the friends of the bankrupt, to pay a sum, in consideration that the creditors would not examine him as to particular points, is void. *Nerot* v. *Wallace*, 3 *Term Rep.* 17.

After the time allowed to the bankrupt for such discovery is expired, any other person voluntarily discovering any part of his estate, before unknown to the assignees, shall be entitled to *five per cent.* out of the effects so discovered, and such further reward as the assignees and commissioners shall think proper. And any trustee wilfully concealing the estate of any bankrupt, after the expiration of the two and forty days, shall forfeit 100*l.* and double the value of the estate concealed, to the creditors. *St.* 5 *Geo.* 2. *c.* 30.

Hitherto every thing is in favour of the creditors; and the law seems to be pretty rigid and severe against the bankrupt; but, in case he proves honest, it makes him full amends for all this rigor and severity. For if the bankrupt hath made an ingenuous discovery, (of the truth and sufficiency of which there remains no reason to doubt,) and hath conformed in all points to the directions of the law; and, if in consequence thereof, the creditors, or four parts in five, [*three* parts in five, 49 *Geo.* 3. *c.* 121. § 18.] of them in number and value, (but none of them creditors for less than 20*l.*) will sign a certificate to that purport; the commissioners are then to authenticate such certificate under their hands and seals, and to transmit it to the Lord Chancellor, and he, or two of the judges whom he shall appoint, on oath made by the bankrupt that such certificate was obtained without fraud, may allow the same; or disallow it upon cause shown by any of the creditors of the bankrupt. *Stat.* 5 *Geo.* 2. *c.* 30.

If no cause be shown to the contrary, the certificate is allowed of course, and then the bankrupt is entitled to a decent and reasonable allowance out of his effects for his future support and maintenance, and to put him in a way of honest industry. This allowance is also in proportion to his former good behaviour, in the early discovery of the decline of his affairs, and thereby giving his creditors a larger dividend. For, if his effects will not pay one-half of his debts, or ten shillings in the pound, he is left to the discretion of the commissioners and assignees, to have a competent sum allowed him, not exceeding *three per cent.*; but if they pay ten shillings in the pound, he is to be allowed *five per cent.*; if twelve shillings and sixpence, then *seven and a half per cent.*; and if fifteen shillings in the pound, then the bankrupt shall be allowed *ten per cent.*, provided, that such allowance do not in the first case exceed 200*l.* in the second 250*l.* and in the third 300*l.* *St.* 5 *Geo.* 2. *c.* 30.

Besides this allowance, he has also an indemnity granted him of being free and discharged for ever from all debts owing by him at the time he became a bankrupt; even though judgment shall have been obtained against him, and he lies in prison upon execution for such debts. And for that among other purposes, all proceedings in commissions of bankrupt are, on petition, to be entered of record, as a perpetual bar against actions to be commenced on this account; though in general, the production of the certificate, properly allowed, shall be sufficient evidence of all previous proceedings. *St.* 5 *Geo.* 2. *c.* 30.

If the major part of the creditors do not before choosing assignees direct how and to whom the proceeds of the bankrupt's estate shall be paid, the major part of the commissioners shall direct the same to be paid to some person, not being a commissioner, to be divided amongst the creditors. *St.* 49 *Geo.* 3. *c.* 121. § 3.

The commissioners shall not declare a dividend till a true statement in writing be made upon oath by the assignees, of sums received by them. *s.* 4.

If assignees having 100*l.* or more of their bankrupt's estate in their hands become bankrupt, their future effects shall be liable to the payment. *s.* 6.

Money belonging to the bankrupt's estate may be vested in Exchequer bills. *s.* 7.

The allowing the certificate of a bankrupt, will not discharge his sureties; see *post* IV. 4.; but if a bankrupt obtains his certificate before his bail are fixed, it will discharge them; but if not till after they are fixed, they will remain liable notwithstanding the certificate, for it has no relation back; and till allowed it is nothing. And if the creditor proves his debt, with intent to obstruct the certificate, it does not preclude him from pursuing his legal remedies; and even if he had received his debt, or part of it, under the commission, still he might proceed to fix the bail who would be entitled to their remedy, so far as they are oppressed, by *audita querela*, or by motion. 1 *Atk.* 84. 1 *Burr.* 244. 2 *Burr.* 716. 2 *Black.* 812.

However, the bankrupt's certificate, obtained after judgment in an action upon a bail-bond against the bankrupt himself, will not discharge the bail-bond, although it discharged the original debt, for it is a new and distinct cause of action. 1 *Burr.* 436. 2 *Stra.* 1196. 1 *Wils.* 41.

The certificate does not discharge a bankrupt from his own express collateral covenant, which does not run with the land. 4 *Burr.* 2443.—Nor from a covenant to pay rent. 4 *Term Rep.* 94. See *post* IV. 4.

A bankrupt after a commission of bankruptcy sued out, may, in consideration of a debt due before the bankruptcy, and for which the creditor agrees to accept no dividend or benefit, under the commission, make such creditor a satisfaction, in part, or for the whole of his debt, by a new undertaking or agreement, and *assumpsit* will lie upon such new promise or undertaking. 1 *Atk.* 67.

If a bankrupt has his certificate, and an action be brought against him afterwards for a debt precedent to the commission, he may plead his certificate, or otherwise he is without relief. 2 *Vern.* 696, 697.

The common method of pleading is, generally, that he be-

came a bankrupt within the intent and meaning of the statutes made and in force concerning bankrupts, and that the cause of action accrued before he became a bankrupt. This general plea is given by stat. 5 *Geo.* 2. *c.* 30. *sect.* 7.

Though a creditor of a *bankrupt* under 20*l.* is excluded from assent or dissent to the certificate, yet as he is affected by the consequence of allowing the certificate, he hath right to petition, and show any fraud against allowing the certificate. 7 *Vin. Abr.* 134. *pl.* 18.

No allowance or indemnity shall be given to a bankrupt, unless his certificate be signed and allowed; and also if any creditor produces a fictitious debt, or is induced by money or notes to sign his certificate, and the bankrupt does not make discovery of it, but suffers the fair creditors to be imposed upon, he loses all title to these advantages. *St.* 24 *Geo.* 2. *c.* 57. See *Doug.* 216. 673. Neither can he claim them, if he has given with any of his children above 100*l.* for a marriage portion, unless he had at that time sufficient left to pay all his debts, or if he has lost at any one time 5*l.* or in the whole 100*l.* within a twelvemonth before he became a bankrupt, by any manner of gaming or wagering whatsoever; or, within the same time has lost to the value of 100*l.* by stock-jobbing.

Also to prevent the too common practice of frequent and fraudulent or carleless breaking, a mark is set upon such as have been once cleared by a commission of bankrupt, or have compounded with their creditors, or have been delivered by an act of insolvency. Persons who have been once cleared by any of these methods, and afterwards become bankrupts again, unless they pay full 15*s.* in the pound, are only thereby indemnified as to the confinement of their bodies; but any future estate they shall acquire remains liable to their creditors, excepting their necessary apparel, household-goods, and the tools and implements of their trades. *St.* 5 *Geo.* 2. *c.* 30. and an action may accordingly be maintained for such debt. 5 *Term Rep.* 287. But money gained by his trade or profession for the necessary maintenance of himself and family may be recovered by action by an uncertificated bankrupt. *Chippendale* v. *Tomlinson*, *Co. B. L.*

2. By the *stat.* 13 *Eliz. c.* 7. The commissioners shall have full power to dispose of all the bankrupt's lands and tenements, which he had in his own right at the time when he became a bankrupt, or which shall descend or come to him at any time afterwards, before his debts are satisfied or agreed for; [and all lands and tenements which were purchased by him jointly with his wife or children to his own use (or such interest therein as he may lawfully part with,) or purchased with any other person, upon secret trust, for his own use;] and cause them to be appraised to their full value and to sell the same *by deed indented and inrolled*, or divide them proportionably among his creditors. This statute expressly included not only freehold, but customary and copyhold lands; and the lord of the manor is thereby bound to admit the assignee, (See *Cro. Car.* 568. 1 *Atk.* 96.) but did not extend to estates tail, farther than for the bankrupt's life; nor to equities of redemption on a mortgaged estate wherein the bankrupt has no legal interest, but only an equitable reversion. Whereupon the statute 21 *Jac.* 1. *c.* 19. enacts, that the commissioners shall be impowered to sell or convey, by deed indented and inrolled, any lands or tenements of the bankrupt, wherein he shall be seized of an estate tail in possession, remainder or reversion, unless the remainder or reversion thereof shall be in the crown; and that such sale shall be good against all such issue in tail, remainder-men, and reversioners, whom the bankrupt himself might have barred by a common recovery, or other means; and that all equities of redemption upon mortgaged estates, shall be at the disposal of the commissioners; for they shall have power to redeem the same, as the bankrupt himself might have done, and after redemption to sell them. And the commissioners may sell a copyhold entailed by custom. *Stone.* 127. *Billing.* 148. And also, by this and a former act, 1 *Jac.* 1. *c.* 15. all fraudulent conveyances to defeat the intent of these statutes are declared void; but it is provided, that no purchaser *bonâ fide*, for a good or valuable consideration, shall be affected by the bankrupt-laws, unless the commission be sued forth within five years after the act of bankruptcy committed. See *Cooke's B. L. c.* 8.

If there be two joint-tenants, and the one becomes bankrupt and dies, Billinghurst is of opinion the bankrupt's part shall be sold, and that there shall be no survivorship; because the bankrupt's moiety is bound by the statutes, and also the bankrupt had power to sell the same in his life-time, and might depart with it. And by *Stat.* 1 *Jac. c.* 15. (See ante III. 1.) The commissioners after the bankrupt's death, may proceed in execution, in and upon the commission, for and concerning the offender's lands, tenements, *&c.* in such sort as if the offender had been living; which they cannot do, if the survivorship is held to take place.

If the bankrupt be a joint-tenant in fee, for life or years, the commissioners may sell a moiety. So if he be seised in right of his wife, they may sell during the coverture. 1 *Com. Dig.* 530.

In case of a patron becoming bankrupt, the commissioners may sell the advowson of the living; but if the church be void at the time of the sale, the vendee shall not present to the void turn, but the bankrupt himself, because the void turn of a church is not valuable. 1 *Burn's Eccl. Law.* 4 *Ed.* p. 125.

The commissioners may sell offices of inheritance and for terms of years; but an office concerning the execution of justice (and therefore within 5 & 6 *Ed.* 6. *c.* 16.) cannot be sold. 1 *Atk.* 213. But a place that does not concern the execution of justice, but only of the police, may be sold. 1 *Atk.* 210. 215.

If a mortgage is made by a bankrupt, tenant in tail, without suffering a recovery, the assignees shall take advantage of this defect, and hold the land clear of the mortgage. 1 *Wils.* 276.

The commissioners may assign a possibility of right belonging to the bankrupt. 3 *P. Wms.* 132.

When assignees are chosen under a commission, all the estate and effects of the bankrupt, whether they be goods in actual *possession*, or debts, contracts, and legacies, and other choses in action, are vested in them by assignment; (but until the assignment the property is not transferred out of the bankrupt;) and every new acquisition previous to the certificate will vest in the assignees; but as to future real estates, there must be a new assignment of them. 1 *Atk.* 253. *Billing.* 118. 1 *P. Wms.* 385, 6.

The commissioners, by their warrant, may cause any house or tenement *of the bankrupt* to be broke open, in order to enter and seize the same. See 2 *Show.* 247.

When the assignees are chosen or approved by the creditors, the commissioners are to assign every thing over to them: in which assignment the provisional assignee or assignees (if any have been chosen) must join, and the property of every part of the estate is thereby as fully vested in them, as it was in the bankrupt himself, and they have the same remedies to recover it. 12 *Mod.* 324.

By stat. 36 *Geo.* 3. *c.* 90. § 2. if bankrupts refuse to transfer stock over which they have power, the Lord Chancellor may order it to be transferred to the assignees.

The commissioners in England may sell the bankrupt's goods in Ireland; and (notwithstanding a *dictum* of Lord Mansfield to the contrary, See *Dougl.* 151.) it seems now decided, that, by the assignment of the commissioners, *all* the bankrupt's property, *whether in England or abroad*, is con-

veyed to the use of his creditors. See *Hunter* v. *Potts*, 4 *Term. Rep.* 182. and *Cooke's B. L. c.* 8. § 10.

If a man sends bills of exchange, or consigns a cargo, and the person to whom he sends them has paid the value before, though he did not know of the sending them at that time, the sending of them to the carrier will be sufficient to prevent the assignees from taking these goods back, in case of an intervening act of bankruptcy. 4 *Burr.* 2239.

But if the goods were sent in contemplation of bankruptcy, and to give a preference to a former creditor, if the act of bankruptcy is committed before the creditor receives the property, and assents to it, the commissioners may assign it, as part of the bankrupt's effects, and it will vest in the assignees. 4 *Burr.* 2235.

All questions of preference turn upon the action being complete, before an act of bankruptcy committed, for then the property is transferred; otherwise an act of bankruptcy, intervening, vests the property in the hands and disposal of the law. If a man were to make a payment, but the evening before he becomes bankrupt, independent of the act of parliament, and in a cause of dealing and trade, it would be good. Where an act is done, that is right to be done, and the single motive is not to give an unjust preference, the creditor will have a preference. *Cowp.* 123.

If a merchant consigns goods to a trader, and before their arrival, the consignee becomes bankrupt, if the merchant can prevent the goods getting into the bankrupt's hands, the commissioners' assignment will not affect them. 2 *Vern.* 203. 1 *Atk.* 248. *Cowp.* 296.

The future profits arising from a *bankrupt's* personal labour are not subject to the assignment. *Chippendale* v. *Tomlinson*, *T.* 25 *Geo.* 3. *B. R.*

The property vested in the assignees is the whole that the bankrupt had in himself, at the time he committed the first act of bankruptcy, or that has been vested in him since, before his debts are satisfied or agreed for; therefore when the commission is awarded, the commission, and the property of the assignees, shall have a relation, or reference, back to the first and original act of bankruptcy. 4 *Burr.* 32. Insomuch that all transactions of the bankrupt, are from that time absolutely null and void; either with regard to the alienation of his property, or the receipt of his debts, from such as are privy to his bankruptcy; for they are no longer his property, or his debts, but those of the future assignees. Therefore even if a banker pay the draft of a trader keeping cash with him after knowledge of an act of bankruptcy, the assignees may recover the money. 2 *Term. Rep.* 113. 3 *Bro. C. R.* 313. *Vernon* v. *Hankey*, and See 2 *Term. Rep.* 287. And, if an execution be sued out, but not served and executed on the bankrupt's effects till after the act of bankruptcy, it is void as against the assignees. But the king is not bound by this fictitious relation, nor is within the statutes of bankrupts; 1 *Atk.* 262. *W. Jones* 202. 2 *Show.* 480; for if after the act of bankruptcy committed, and before the assignment of his effects, an extent issues for the debt of the crown, the goods are bound thereby. *Vin. Abr.* tit. *Creditor and Bankrupt.* 104. *Cooke's B. L. c.* 14. § 7.

As these acts of bankruptcy however may sometimes be secret to all but a few, and it would be prejudicial to trade to carry this notion to its utmost length, it is provided by *Stat.* 19 *Geo.* 2. *c.* 32. that no money paid by a bankrupt to a *bonâ fide* or real creditor, in a course of trade, even after an act of bankruptcy done, shall be liable to be refunded. Nor (by *stat.* 1. *Jac.* 1. *c.* 15.) shall any debtor of a bankrupt that pays him his debt, without knowing of his bankruptcy, be liable to account for it again. The intention of this relative power being only to reach fraudulent transactions, and not to distress the fair trader.

By 46 *Geo.* 3. c. 135. reciting that great inconveniences and injustice have been occasioned by reason of the fair and honest dealings and transactions of and with traders being defeated by secret acts of bankruptcy, in cases not already provided for, or not sufficiently provided for by law: it is enacted that all conveyances by, all payments by and to, and all contracts with, any bankrupt *bonâ fide* made two months before the date of a commission of bankruptcy shall be good, notwithstanding any secret act of bankruptcy prior to such conveyance, &c. 46 *Geo.* 3. *c.* 135. §. 1.

*Bonâ fide* creditors, whose debts might have been proved under a commission of bankruptcy, if no prior act of bankruptcy had been committed, shall be admitted to prove such debts, if they had no notice of such prior act of bankruptcy. § 2.

Where it shall appear there has been mutual credit given or mutual debts contracted between the bankrupt and any other person, one debt or demand may be set off against the other, notwithstanding any prior act of bankruptcy, provided the credit was given to the bankrupt two calendar months before the date of the commission, and that the person claiming the benefit of such set-off had not notice of any prior act of bankruptcy by such bankrupt, or that he was insolvent. § 3.

By 49 *Geo.* 3. *c.* 121. § 1. so much of this section 3 of 46 *Geo.* 3. *c.* 135. as directed that striking a docket should be deemed notice of a prior act of bankruptcy is repealed.

By 49 *Geo.* 3. *c.* 121. § 2. all executions and attachments against the lands and goods of bankrupts levied or executed more than two months from the date of the commission are declared good notwithstanding a prior act of bankruptcy; provided the plaintiff be ignorant of such act of bankruptcy.

Bankrupts, on obtaining their certificates, shall be discharged of debts proveable under this act, as if no secret act of bankruptcy had been committed. 46 *Geo.* 3. *c.* 135. § 4.

Commissions of bankrupt shall not be avoided by reason of any secret act of bankruptcy having been committed, prior to the contracting the debt of the petitioning creditor. § 5.

Sale of goods by a *bankrupt* after an act of *bankruptcy*, is not merely void; the contract is good between the parties, but it may be avoided by the commissioners or assignees at pleasure; therefore they may either bring *trover* for the goods, as supposing the contract may be void, or may bring debt or *assumpsit* for the value, which affirms the contract. 3 *Salk.* 59 *pl.* 2. 2 *Term. Rep.* 143. 4 *Term. Rep.* 216. 7.

And so if a bankrupt on the eve of bankruptcy, fraudulently deliver goods to a creditor. 4 *Term. Rep.* 211.

The assignees may pursue *any legal* method of recovering the property vested in them, by their own authority; but cannot commence a suit in *equity*, nor *compound* any debts owing to the bankrupt, nor refer any matters to arbitration, without the consent of the creditors, or the major part of them, in value, at a meeting to be held in pursuance of notice in the Gazette. *St.* 5 *Geo.* 2. *c.* 30. § 34. 35. 38. See 1 *Atk.* 91. 107. 210. 253. *Cooke's B. L. c.* 14.

By § 10, 11. of 49 *Geo.* 3. *c.* 121. In actions at law or suits in equity by assignees, the commission and proceedings shall be evidence of the petitioning creditor's debt and of the trading and bankruptcy, unless notice is given that these matters will be disputed.

When they have got in all the effects they can reasonably hope for, and reduced them to ready money, the assignees must, after 4, and within 12 months after the commission issued, give 21 days notice to the creditors of a meeting for a dividend or distribution; at which time they must produce their accounts, and verify them upon oath, if required: [and under *st.* 5 *Geo.* 2. *c.* 30. § 6. by affidavit, if living in the country, and if Quakers by affirmation.] And then the commissioners shall direct a dividend to be made, at so much in the pound, to all creditors who have before proved, or shall then prove their debts. This dividend must be made equally, and in a ratable proportion, to all the creditors, according to

the *quantity* of their debts; no regard being paid to the *quality* of them. Mortgages, indeed, for which the creditor has a real security in his own hands, are entirely safe, for the commission of bankrupt reaches only the equity of redemption. *Finch. Rep.* 466. 2 *Rep.* 25. So are also personal debts, where a creditor has a chattel in his hands, as a pledge or pawn for the payment, or has taken the debtor's lands, or goods in execution. But, otherwise, judgments, and recognizances, (both which are debts of record, and therefore at other times have a priority,) and also bonds and obligations by deed or special instrument, (which are called debts by specialty, and are usually the next in order,) these are all put on a level with debts by mere simple contract, and all paid *pari passu*. *St.* 21 *Jac.* 1. *c.* 19. Nay, so far is this matter carried, that, by the express provision of the *St.* 7 *Geo.* 1. *c.* 31. (See *st.* 5 *Geo.* 2. *c.* 30. § 22. *Cowp.* 243.) debts not due at the time of the dividend made, as bonds or notes of hands payable at a future day certain, shall be proved and paid equally with the rest, allowing a discount or drawback in proportion. *Ld. Raym.* 1549. *Stra.* 949. 1211. 2 *P. Wms.* 396. 3 *Wils.* 17.

And insurances and obligations upon bottomry or *respondentia*, *boná fide* made by the bankrupt, though forfeited after the commission is awarded, shall be looked upon in the same light as debts contracted before any act of bankruptcy. *St.* 19 *Geo.* 2. *c.* 32. § 2. also annuity-bonds, though not forfeited at the time of the bankruptcy. *Cowp.* 540. but see 2 *Black. R.* 110 *b.*—And Polices of Insurances for Life. *Dougl.* (2d edit.) 166.

Within eighteen months after the commission issued, a second and final dividend shall be made, unless all the effects were exhausted by the first. *St.* 5 *Geo.* 2. *c.* 30. It is the duty of assignees to make a dividend as early as possible after the time given by statute. And if they neglect to do so, and keep the money in their own hands, they will be liable to pay interest for it. 1 *Atk.* 90. *Cooke B. L. c.* 7. § 3.

And if any surplus remains after selling his estates, and paying every creditor his full debt, it shall be restored to the bankrupt. *St.* 13. *El. c.* 7. This is a case which sometimes happens to men in trade, who involuntarily, or at least unwarily commit acts of bankruptcy, by absconding and the like, while their effects are more than sufficient to pay their creditors. And if any suspicious or malevolent creditor will take the advantage of such acts, and sue out a commission, the bankrupt has no remedy, but must quietly submit to the effects of his own imprudence, except that, upon satisfaction made to all the creditors, the commission may be *superseded*. 2 *Cha. Ca.* 144. This case may also happen, when a knave is desirous of defrauding his creditors, and is compelled by a commission to do them that justice, which otherwise he wanted to evade. And, therefore, though the usual rule is, that all interest on debts carrying interest shall cease from the time of issuing the commission, yet, in case of a surplus left after payment of every debt, such interest shall again revive, and be chargeable on the bankrupt or his representatives. 1 *Atk.* 244.

A *Supersedeas* is a writ issuing under the great seal, to supersede the commission, and this writ may be issued at the discretion of the Lord Chancellor, when the creditors of the bankrupt agree to supersede the commission; or because the party appears not to have been a trader; that the party had not committed an act of bankruptcy; that the commission was not opened till three months after it issued; or that he has paid all his creditors. 1 *Atk.* 154. 2 *Cha. Ca.* 192. *Sel. Ca. Cha.* 46. 1 *Atk.* 135. 1 *Atk.* 244. *Ex parte Nutt.* 1 *Atk.* 102.

Though the usual course is for the Lord Chancellor to order a feigned issue to try the bankruptcy at law, yet if it appears plainly to have been taken out fraudulently and vexatiously, the court will at once supersede the commission, and order the petitioning creditor's bond to be assigned. 1 *Atk.* 128. 144. 218.

IV. 1. The acts of parliament relating to baukrupts, being made for the relief of creditors, none but a creditor could at any time have taken out a commission; and now he must have a *legal* demand to the amount specified in *st.* 5 *Geo.* 2. *c.* 30. § 23. But a debt in equity will in no circumstances be a foundation for a commission; therefore if a legal demand is not in its own nature assignable, the assignee, notwithstanding his equitable claim, cannot be a petitioning creditor. *Forest.* 248. *Ch. Ca.* 191. *Freem.* 270. 1 *Atk.* 147. 2 *Vez.* 407. 2 *Stra.* 899. 1 *P. Wms.* 783.

It is generally understood, that the commission must issue on the petition of some creditor capable of claiming relief under it; and therefore that if the debt of the petitioning creditor appears to have been contracted subsequent to a secret act of bankruptcy committed by the trader, no commission ought to be granted upon his petition. 2 *Str.* 744. 6. 1042. 1 *Atk.* 73. But see now 46 *Geo.* 3. *c.* 135. § 5. *ante III.* 2.

A debt at law, notwithstanding the statute of limitations has incurred, will support a commission; for the statute does not extinguish the debt, but the remedy, and the least hint will revive it. 2 *Black. Rep.* 703.

It has been determined that a creditor, by notes bought in at 10*s.* in the pound, was a creditor for the full sum, and might take out a commission. 1 *P. Wms.* 783.

A creditor, before the party entered into trade, may on account of such debt sue out a commission, but a creditor for a debt contracted after leaving off trade, cannot. But when a commission is sued out, those creditors who have become such since the quitting trade, may come in and share the dividend with those who were creditors before or during the trading, provided they are not barred by a prior act of bankruptcy. 12 *Mod.* 159. *Ld. Raym.* 287. 1 *Sid.* 411. *Dougl.* 282.

If a creditor has his debtor in execution, he cannot petition for a commission of bankruptcy; for the body of the debtor being in execution is a satisfaction of the debt in point of law. Therefore where a submission had issued on the petition of a creditor who had the bankrupt in execution, it was upon that account superseded. 3 *Wils.* 271. 1 *Stra.* 653.

Nor has the petitioning creditor the ordinary election to sue the bankrupt at law, or come under the commission as other creditors have; (*See post* 2;) for if he was to elect to proceed at law, the commission must be superseded, which would affect those creditors who had proved debts under it. 1 *Atk.* 154.

2. Debts may be proved at any of the public meetings appointed by the commissioners; the usual proof is the oath of the creditor, which if not objected to by the bankrupt himself, or any of those creditors, is generally esteemed sufficient; but if any objection is raised, the demand must be further substantiated by evidence. For though the creditor should make a positive oath of the debt, the commissioners, if they conceive themselves to have just grounds to doubt its fairness, ought to admit it only as a claim; and if it is not made out to their satisfaction, it may be rejected. 1 *Atk.* 71. 221.

Upon the principle of equality among the creditors proving under the commission, the privilege of debtors to come in and prove their debts, and bankrupts to be discharged therefrom, is co-extensive and commensurate; therefore a man shall not prove a debt and proceed in an action at law at the same time. However, the court will not absolutely stop him from bringing an action, but put him to his election; and should he elect to proceed at law; he will still be allowed to prove his debt for the purpose of assenting to, or dissenting from the certificate; which permission is absolutely requisite, to make his remedy at law of any avail, for should the bank-

rupt procure his certificate, he will be thereby discharged from that action, as well as from all debts contracted before the act of bankruptcy. 1 *Atk.* 83. 119. 220. 1 *P. Wms.* 562.

If the creditor, before he proves his debt, proceeds at law against the bankrupt, he cannot be obliged to make his election till a dividend is declared. And where the creditor has already proceeded at law, he is not at liberty to come in, and prove his debt under the commission, without relinquishing his proceedings at law; unless by order from the great seal, for the purpose of assenting to, or dissenting from the certificate. See 1 *Atk.* 219. 2 *Black Rep.* 1317.

But the modern determinations, supported by some of earlier date, have mostly put the creditor to his election before a dividend, provided a reasonable time is afforded the creditor to inform himself of the bankrupt's affairs. *Cooke's B. L. c.* 6. § 2.

Now, by stat. 49. *G.* 3. *c.* 121. § 8. creditors bringing actions against the bankrupts shall not be allowed to prove under the commission.

The being chosen assignee, will not prevent the creditor from suing the bankrupt at law, if he has not proved his debt; for in that case he can only be considered as a creditor at large; and even if he has proved his debt and chosen himself assignee, he may still elect to proceed at law, and be discharged as a creditor under the commission. 1 *Atk.* 153. 221. But a petitioning creditor has not this election; see *ante* 1.

A debt made void by statute, as a debt on an usurious contract, ought not to be permitted to be proved; and though the rule of the court of Chancery is, upon a bill to be relieved against demands of usurious interests, not to make void the whole debt, but to make the party pay what is really due; yet in a commission of bankruptcy, the assignees have a right to insist that the whole is void, as an usurious contract. And unless the assignees and creditors submit to pay what is really due, the Lord Chancellor has not power to order it; and applications of this nature have been frequently refused. 2 *Vez.* 489. 1 *Atk.* 125. see *Dougl.* 716.

If the bankrupt's estate is in arrear for taxes, the collector, when he comes to prove the debt, must produce his authority, that the commissioners may judge of the legality of it. Corporations usually have a clerk or treasurer who is the person to prove debts due to them; he must however produce his appointment under seal to the commissioners. Every security that a creditor has for his debt must be produced at the time of his proving, when the commissioners will mark them as having been exhibited. In the same manner, any person acting for another, must produce his authority to the commissioners and they will mark them as exhibits. *Cooke's Bankrupt Law.* One inhabitant of a parish may prove for himself and the other inhabitants. 1 *Atk.* 111. and see *Cooke's B. L. c.* 4. § 1.

In case of debts uncertain in point of liquidation, as between two merchants in balancing accounts, the matter rests upon a claim to ascertain the sum that was due at the time of the bankruptcy. So where a creditor cannot ascertain his debt with certainty sufficient to enable him to swear to it, or is not able in other respects satisfactorily to substantiate it, or where the agent of a creditor cannot produce his authority, and in many other cases where there appears a probable foundation of a demand, though not sufficiently made out, it is usual for the commissioners to suffer *a claim to be entered*; but that will not entitle the party to a dividend, which he cannot receive without completely proving his debt. If a claim is not substantiated in a reasonable time the commissioners may strike it out; and they generally do so before a dividend is declared, unless sufficient reason is offered to them for prolonging the time; but the creditor is notwithstanding afterwards at liberty to prove his debt, and receive his share upon any future dividends. However in such cases where there has not been gross neglect, the Chancellor will make an order that such creditor shall be paid his proportion of the first dividend out of the money in the assignees' hands upon condition that it does not break in upon any former dividend. 3 *Wils.* 271. *Cooke's B. L.* See *post* 4.

Aliens as well as denizens may come in as creditors; for all statutes concerning bankrupts extend to aliens. *Hob.* 287. See *Stat.* 21 *Jac.* 1. *c.* 19.

3. The distinction of debts payable *in futuro* on a day *certain*, and debts depending upon contingency, has given rise to frequent questions, whether the bankrupt's wife or her trustees should be admitted to prove the sum settled on her by marriage-articles, under a commission against her husband.

Lord Hardwicke, on a petition *ex parte* Winchester, (1 *Atk.* 117. *Dav.* 535.) stated the distinctions of the several cases. The *first* head of cases is where a bond is given by a husband to pay a sum of money in his life-time to trustees, to be laid out in trust for himself and his wife, or children; and in case the husband survives, to the use of himself; if in this case the husband becomes a bankrupt, this being a debt due in his life-lime, and before the bankruptcy, the court will let in the trustees to prove such debt, according to the trusts.

The second head is, where a person gives a covenant to pay to trustees a sum of money for the benefit of the wife or children after his death; and also a judgment by way of collateral security to such covenant, and afterwards becomes bankrupt; this being a debt at law, may be proved under the commission.

The third is, where the father gives a bond to his intended son-in-law, on the marriage of his daughter, to pay a sum of money after his death, and interest in the mean time, on particular days and times, and there is a breach of the condition of the bond, and the father becomes bankrupt; this is a legal debt not depending on a contingency, and therefore may be proved.

The fourth head is, where a man covenants, in consideration of a marriage portion paid him, for his heirs, executors, and administrators to pay to trustees a sum of money, after his decease, *in case his wife survives him.* This case, depending on a contingency, is materially different from the others; because in those there was a remedy at law before the commission issued; and it seems now to be settled, that, on a contingent provision for a wife, she cannot be admitted as a creditor. 3 *Wils.* 271. See 2 *P. Wms.* 497. 2 *Ld. Raym.* 1546. 7 *Vin.* 72. *pl.* 7. *Dav.* 254. 524. 1 *Atk.* 113. 115. 120.—And this, though it be particularly conditioned or provided that such debt shall be proveable.—*Ex parte Hill. Ex parte Matthews. Cooke's B. L.*

But notwithstanding the general rule seems to be thus established, the case will be different, if the assignees are obliged to come into equity to compel the performance of a trust; for then, as they require equity, they shall be obliged to do equity, and secure the settlement to the wife. 1 *Atk.* 114. 2 *Vern.* 662. See *post* 4.

4. *Contingent debts* are said not to be included in *stat.* 7 *Geo.* 1. *c.* 31. because it being uncertain whether they will ever become due or not, it is impossible to make such abatement of *5l. per cent.* as that act directs, and therefore they cannot be within it. And this doctrine has been constantly followed and admitted, as appears by the cases allowed in the Division (3), immediately preceding; the principle, therefore, that contingent creditors cannot be admitted to prove their debts, where the act of bankruptcy is prior to the happening of the contingency, is clear and indisputable. 1 *Atk.* 118. But many questions have arisen as to what debts shall be said to be contingent within the meaning of the rule.

One having only a cause of action, cannot come in and prove it as a debt; because the damages that may be given are considered merely as contingent; even in case of a bond of indemnity, where the condition is broken. 3 *Wils.* 270.

2 *Stra.* 1160. And this, though the surety is called upon, and liable to pay the debt, if it is not actually paid. 1 *Term Rep.* 599.

But when judgment is obtained in any action, it then becomes such a debt as may be proved, and the judgment, when signed, relates to the verdict. 4 *Term Rep.* 94. 2 *Black.* 1317.

If a lessee ploughs up meadow ground, for which he is bound to pay the lessor a certain sum of money as a penalty, that penalty cannot be proved as a debt under the commission: nor if a man be bound in an obligation, in a certain sum, to perform covenants, and the obligor, before he becomes a bankrupt, breaks those covenants, the obligee cannot prove this as a debt. If a bond by a principal and surety has not been forfeited, before the surety became bankrupt, the debt cannot be proved under his commission, but he may be sued upon it notwithstanding his certificate. *Doug.* 155. 3 *Wils.* 270. The bankruptcy of the lessee is no bar to an action on *covenant* (made before his bankruptcy) brought against him for rent due after the bankruptcy. 4 *Term. Rep.* 94: But see *st.* 49 *Geo.* 3. *c.* 121. § 19. *post.*

Where a man undertakes to pay a sum of money for another, his undertaking alone will not create a debt capable of being proved under a commission; and if an act of bankruptcy intervenes between the undertaking and the actual payment, it can never be proved, and the creditor can only resort to the bankrupt personally. But if the party engaging to pay the debt of another, is taken in execution for that debt, his imprisonment is considered as a payment and satisfaction of the debt, sufficient to give him a right of proving under the commission. *Cowp.* 525. 3 *Wils.* 13.

If the party engaging to secure the debt of another himself becomes bankrupt before that debt is payable by the principal, the creditor cannot prove under his commission. *Cowp.* 460.

Where a man becomes bail for another, it is considered as a contingent debt. And if the bail commit an act of bankruptcy before the judgment, it cannot be proved under the commission. 2 *Stra.* 1043. 3 *Wils.* 262.

Several cases of contingent debts are provided for by *stat.* 49 *Geo.* 3. *c.* 121. By § 8. of that act, sureties are permitted to prove under the bankruptcy, and to stand in the place of the creditor. By § 9. any debts not payable at the time of the bankruptcy, but at a subsequent period, may be proved, deducting rebate or discount of 5*l. per cent.* in England, and 6*l. per cent.* in Ireland. By § 16. agents having effected policies of insurance with the bankrupt may prove in the absence of the party intrusted. And by § 19. bankrupt lessees &c. delivering up their leases or agreements shall not remain liable to the rent; and if assignees decline accepting the lease, the lessor may apply to Chancery, who may make order therein. As to *Annuities*, see *post* 5.

5. The general rule as to common *annuities* is, that where one is entitled to an annuity from another, which is not a rent charge on land, or on a specific part of the grantor's estate, but personal, to be paid by him, who afterwards becomes bankrupt, it is only a general demand on him and his estate; and nothing is a debt on his estate but the arrears of the annuity at the time of the bankruptcy, unless the penalty of the annuity-bond has become forfeited; for otherwise the payments accruing afterwards became a debt after the bankruptcy, and cannot be proved. But where there has been a forfeiture prior to the bankruptcy, in order to prevent the injustice of admitting the creditor only to prove the arrears, and the great inconvenience that would ensue if the annuity should be received from time to time, as an accruing debt on the estate, by which means the division of the estate would be perpetual, and there could be no final dividend during the annuitant's life, the court of Chancery puts it in another shape of setting a value on the annuity, because it was only a general personal demand. And in setting this value, consideration must be had of the time the annuitant has enjoyed it. 2 *Vez.* 490. 1 *Atk.* 251. 2 *Black.* 1107.

Now by *stat.* 49 *Geo.* 3. *c.* 121. § 17. Annuity Creditors may prove their debts under a commission of bankrupt, according to the value of the annuity to be ascertained by the commissioners.

In case of an *apprentice*, where the master becomes bankrupt, commissioners recommend it to the creditors to allow him a gross sum out of the estate, for the purpose of binding him to another master; as it would be hard to make him come in as a creditor under the commission; but this, though it is equitable and just, must be considered as an indulgence, and not a right; for the court can only order him to be admitted as a creditor. 1 *Atk.* 149. 261.

A *bond*, though it be not *assignable* at law, may be proved under the commission by the assignee; but the assignor must join in the deposition that he hath not received the debt, or any part thereof, or any security or satisfaction for the same. *Cooke's B. L.*

In *bills of exchange* and promissory notes, there is a double contract; the first between the principal debtor and creditor; and also an implied contract, that the principal debtor will indemnify the surety, so that if the creditor, the indorsee, comes upon the surety the indorsor, the indorsor or his assignees may come in against the original or principal debtor. This is the case between principal and surety, and is likewise the case where an indorsor is barely a surety, and no consideration is paid by the original drawer. 1 *Atk.* 123.

The holder of a bill of exchange is entitled to prove his debt under the commission against the drawer, acceptor, and indorsor, and to receive a dividend from each, upon his whole debt, provided he does not, in the whole, receive more than 20*s.* in the pound. 1 *Atk.* 107. But in this case, if the creditor has actually received part of his debt under a commission, he can only prove the remainder under another. See 2 *P. Wms.* 89. 407. 1 *Atk.* 109. 129. 2 *Vez.* 114, 115.

Creditors are not allowed to prove *interest* on notes or bills unless it is expressed in the body of them. But the creditor may prove the full sum for which the notes were given, notwithstanding he received 5*l. per cent.* discount. *Cooke's B. L.* 1 *Atk.* 151.

A *child* living with the father, and earning money for itself, may, if the father receives that money, be admitted a creditor under the commission against him. 2 *Vez.* 675.

A *landlord* having a legal right to distrain goods while they remain on the premises, the issuing a commission of bankrupt against the tenant, and the messenger's possession of the tenant's goods, will not prevent him from distraining for rent; for it is not such a *custodia legis* as an execution; and even there the law allows the landlord a year's rent. And the assignment of the commissioners of the bankrupt's estate and effects is only changing the property of the goods, and while upon the premises they remained liable to be distrained. 1 *Atk.* 101—104.

And as a creditor, after proving his debt, may elect to abide by such proof, or relinquish it, and proceed at law, so a landlord, who is considered in a higher degree than a common creditor, may make his election to waive his proof in his distress for rent. *Cooke's B. L.*—But particular circumstances may deprive the landlord of this right; as if he neglects to distrain, and suffers the goods to be sold by the assignees. 1 *Atk.* 104. See 1 *Bro. C. R.* 427. And a landlord may distrain before the end of the term by custom, as in Norfolk. 2 *Term Rep.* 600. A proviso in a lease, that it shall be void in case of the bankruptcy of the lessee is valid. 2 *Term Rep.* 133.

If an *executor* becomes bankrupt, as he acts *in auter droit*, his bankruptcy does not take away the right of executorship; and the *legatees* or creditors of the testator cannot prove

under the commission, unless the bankrupt has committed a *devastavit*.—But though a bankrupt executor may strictly be the proper hand to receive the assets, yet if his assignees have received any of the property, the Chancellor may appoint a receiver, with whom the assignees shall account. 1 *Atk.* 101. or direct the bankrupt himself to be admitted a creditor for what he may be entitled to as executor, and order the dividend to be paid into the Bank. See *Cooke's B. L. c.* 6. § 3. The effects possessed by a bankrupt as executor, are not liable to the assignment of the commissioners. 3 *Burr.* 1369.

Commissioners after a man becomes a bankrupt compute *interest* upon debts no lower than the date of the commission. —And a specialty creditor cannot have interest beyond the penalty contained in his security; but a creditor by note, carrying interest, may receive the full amount. 1 *Atk.* 79, 80.

If a bankrupt is a *factor*, and goods are consigned to him or his order, which comes to his possession, though he has the power of immediately selling them, and taking the money, in which case the consignor can only come as a general creditor upon his estate, yet, notwithstanding the legal property the factor had in, and power over them, if they remain in *specie* in his hands, they shall be delivered to the principal, who has a lien upon them as his own property; and the bankrupt only as agent and trustee for him.—And even where the factor had sold the goods, and taken notes for them, it has been determined that the original owner had a specific lien upon, and was entitled to the notes. 2 *Vez.* 586. 1 *Atk.* 232.

6. If the assignees misbehave in the trust reposed in them, they may be removed by petition to the Chancellor. So, if an assignee himself becomes bankrupt, that will be a sufficient ground for his removal. 3 *Atk.* 97. 7 *Vin. Abr.* 77.—Or if the commissioners act improperly at the choice of assignees. When an assignee is removed, he must join with the old assignee and the commissioners in making an assignment to the new assignee. The common practice, where only one assignee is removed, is, to make him join with his companion in assigning to the new assignee, and to the one retained, whereby a man is made to convey to himself, which appears absurd. The most feasible plan seems for the old assignees to convey to a third person, in trust, that he should immediately re-convey to the old and new appointed assignee. See *Cooke's B. L.*

Assignees are in the nature of trustees; and where they employ an agent to receive or pay money, and he abuses this confidence, an assignee cannot be distinguished from any other trustee, who, if his agent deceive him, must answer over to the *cestui que trusts*. For the chief consideration of the creditors in the choice of assignees is certainly the ability of the persons, that they may be responsible for the sums they receive from the bankrupt's estate. 1 *Atk.* 88. 90.

But the negligence of one assignee shall not hurt another joint assignee, where he is not at all privy to any private and personal agreement entered into by his brother assignee. *Id. ib.*

If an assignee becomes a bankrupt, and has applied any of the money received by him in that capacity to his own use, the commissioners are to be considered as specialty creditors; because the assignees executed a counterpart of the assignment to them, and the agreement being under hand and seal, makes it in the nature of a specialty debt, and therefore they may come upon his real estate. 1 *Atk.* 89.

By § 12. of 49 *Geo.* 3. *c.* 121. actions shall not be brought against assignees for dividends, but the Chancellor may on petition order payment thereof with interest and costs.

7. If there is a joint commission against two partners, they must be each found bankrupts; and though one of them should die, the commission may still go on; but if one of the joint-traders be dead, at the time of the taking out the commission, it abates, and is absolutely void. *Cooke's B. L.*

It was formerly the practice, where there were several partners, to take out separate commissions against each, as well as a joint-commission; but this has been since discountenanced, it being the common course of the court, upon petition, to make an order for the separate creditors to come in and prove their debts under the joint-commission; and that the assignees should keep distinct accounts of the several estates; and this may be done, because the assignment, in the case of a joint-commission is of the whole estate. But on the other hand, where separate commissions are taken out against joint-traders, it seems to have been the opinion that joint-creditors could not prove their debts under the separate commission, except for the purpose of assenting to, or dissenting from, the certificate; but that they must proceed to take out a joint commission. *Cooke's B. L.* 1 *Atk.* 138. 98. But it seems now to be considered that a joint commission cannot legally be supported while there is a separate one subsisting; because a trader having been declared a bankrupt, the whole of his property is assigned under the first commission, and, till he obtains his certificate, he is incapable of trading or contracting for his own benefit. However it is certain that, in practice, joint-commissions are taken out after the parties have been declared bankrupts under separate commissions, by which means great expence is saved, and the joint effects disposed of to better advantage; and therefore in a fair case, and where it can be made appear that the bankrupt's estate will be benefited by prosecuting a joint-commission, the Lord Chancellor, to make it valid, will supersede the prior separate one. *Coup.* 824. 1 *Atk.* 252. *Cooke's B. L. c.* 1. § 2.

Joint-creditors are entitled to a distribution of the joint or partnership estate, without the separate creditors being permitted to participate with them; but, notwithstanding separate creditors are not entitled to share the dividend of the joint-property, until the joint-creditors have received 20*s.* in the pound, yet they are, upon petition, let in to prove their respective separate debts under the joint-commission, paying contribution to the charge of it; and as the joint or partnership estate is, in the first place, to be applied to pay the joint or partnership debts, so, in like manner, the separate estate shall be, in the first place, applied to pay all the separate debts. This is settled as a rule of convenience; and it is resolved, that if there be a surplus of the joint-estate, besides what will pay the joint-creditors, the same shall be allotted, in due proportions, to the separate estate of each partner, and applied to pay the separate creditors. And, on the other hand, if there be a surplus of the separate estate, beyond what will satisfy the separate creditors, it shall go to supply any deficiency that may remain as to the joint-creditors. 1 *Atk.* 68. 2 *Vern.* 706. *Dav.* 373. 2 *P. Wms.* 501.

Where persons in trade [*e. g.* A. B. and C.] have been connected together in various partnerships, and a joint-commission taken out against them all, an order has been made for keeping distinct accounts of the different partners, as well as of the separate estates of each partner. But when there have been various partnerships [*e. g.* A. & B. and A. & C.] and a joint-commission is taken out against one *firm*, in which some of the parties were not engaged, there can be only the common order for keeping the distinct accounts of the joint and separate estate. *Cooke's B. L. c.* 6. § 15.

On a joint-debt, if separate commissions are taken out against the joint-debtors, the creditor may prove his whole debt under each commission, and receive a dividend, so as he does not obtain more than 20*s.* in the whole. *Cooke's B. L.*

Where there is a joint and several creditor, he must, according to the rule of the court now firmly established, make his election whether he will come in upon the joint or the separate estate; that is, which he will come in upon in *preference*; for which ever he may elect, he will be entitled to come in upon the surplus of the other, if there should be any.

And in order to make his election, he must have a reasonable time to enquire into the state of the different funds, but he is not entitled to defer such election until a dividend be declared. *Cooke's B. L. c.* 6. § 15.

An act of bankruptcy by one partner, is to many purposes a dissolution of the partnership, by virtue of the relation in the statutes, which avoids all the acts of a bankrupt from the day of the bankruptcy; and from the necessity of the thing, all his property being vested in the assignees, who cannot carry on a trade. But after a dissolution of partnership by agreement, by an execution, or by a bankruptcy, the partner out of possession of the partnership effects, has the same lien on any new goods brought in which he had upon the old. One partner has not, after a dissolution, a right to change the possesssion, or to make an actual division of the specific effects; for one partner may be a creditor of the partnership to ten times the value of all the effects. The other partner, in that case, can only have a right to an account of the partnership, and to the balance due to him, if any, on that account; and no person deriving under the partner can be in a better condition than himself; his executor stands in the very same light. So the assignees under a commission of bankruptcy against one partner must be in the same state. They can only be tenants in common of an undivided moiety, subject to all the rights of the other partner. 4 *Burr.* 2176. *Comp.* 448. 471. 12 *Mod.* 446.

If a partner is a creditor on the partnership account, he can have no satisfaction but out of the surplus, which shall remain after the joint-creditors are paid; for the joint-creditors rely upon the ostensible state of the fund, and give credit to it accordingly. But Lord Hardwicke said, that where there are joint and separate creditors, if one partner lends a sum of money to the partnership, the creditors of his separate estate have a right to this in the first place. 1 *Atk.* 287. *Vez. jun.* 167.

But this has since been determined contrary; as where there was a joint commission against two partners, and a separate one against one of them. The petitioners, assignees under the separate commission, petitioned to be admitted creditors under the joint commission, for a sum of money brought by their bankrupt into the partnership, beyond his share, and as being, therefore, a creditor on the partnership for that sum; but refused, on the principle that he cannot be a creditor on the partnership in competition with the joint creditors. *Cooke's B. L. c.* 13.

So, where one partner has taken more than his share out of the joint-fund, the joint-creditors, as the rule seems to be now settled, cannot be admitted to prove against the separate estate of the partner who drew out the money, until his separate creditors are satisfied, unless it can be shewn that the partner acted fraudulently, with a view to benefit his separate creditors, at the expence of the joint-creditors. *Cooke's B. L. c.* 13. See tit. *Partners.*

One partner may be a creditor of another, and may, if he continues solvent, prove his debt under a separate commission. 1 *Atk.* 225. 2 *C. R.* 226. *Cooke's B. L. c.* 13.

If there be two partners, and one of them becomes bankrupt, and, on a separate commission being sued out against him, his certificate is allowed; this does not only discharge the bankrupt of what he owed separately, but also of what he owed jointly, and on the partnership account; because, by the act of parliament, the bankrupt, upon making a full discovery, and obtaining his certificate, is to be discharged of *all* debts. 3 *P. Wms.* 24.

Where two partners are bankrupts, and a joint commission is taken out against them, if they obtain an allowance of their certificate, this will ban as well their separate as their joint-creditors. 3 *P. Wms.* 24.

Before the statute 10 *Ann. cap.* 15. if there were two partners, and only one party became bankrupt, and a separate commission was taken out against him, there was no doubt but the discharge of that bankrupt discharged him from all debts which he owed in his joint as well as private capacity; but the great question was, whether, by such discharge of the bankrupt, the partner of the bankrupt should likewise be discharged from such debts as he was discharged of; and therefore that statute has enacted, that the partner shall *not* be discharged.

## V. Practical Notes and Forms.

The first step to be taken towards procuring a Commission of Bankruptcy, is for the creditor to make an affidavit of his debt before a Master in Chancery; or if he resides altogether in the country, before a Master extraordinary there, to be filed in the Secretary of Bankrupts' Office in London, and exhibited to the commissioners at their first meeting.—The following is the form of an affidavit:

*A. B. of &c. maketh oath that John Wilson, of Chelmsford, in the county of Essex, shop-keeper, is justly and truly indebted unto him, this deponent, and to Thomas Abel his partner, in the sum of* 100*l. and upwards; for goods sold and delivered by this deponent, and his said partner, to and for the use of the said John Wilson; and this deponent further saith, that the said John Wilson is become a bankrupt, within the true intent and meaning of some or one of the statutes made, and now in force concerning bankrupts, as this deponent hath been informed and believes.*

*Sworn at the public office, the* 1*st day of September,* 1784, *before me,* Peter Holford.

When the affidavit is sworn, it is carried to the Secretary of Bankrupts' Office, where the party suing for the commission enters into the bond. See III. 1.

The clerk of the bankrupts fills up a blank petition in the name of the person that makes the affidavit; and annexes the affidavit and bond to the petition, when he prefers the same to the Lord Chancellor.

This petition is answered in a few days, and the petitioning creditor has a commission without any further trouble.

### A Commission of Bankrupt.

*George the Third, by the grace of God, of the United Kingdom of Great Britain and Ireland, king, defender of the Faith, &c. to our trusty and well beloved William Bumpstead, Henry Hunter, Henry Cowper, Henry Russel, Esquires, and Richard Hargrave, Gentleman, greeting. Whereas, we are informed that John Wilson, of, &c. using and exercising the trade of a merchant by way of bargaining, exchange, bartering, and chevizance; seeking his trade and living by buying and selling; about —— since, did become bankrupt within the several statutes made against bankrupts, to the intent to defraud and hinder Thomas Abel, of, &c. and other his creditors of their just debts and duties to them due and owing: We, minding the due execution as well of the statute touching orders for bankrupts, made in the parliament begun and holden at Westminster, the 2d day of April, in the thirteenth year of the reign of Elizabeth, late queen of England, made and provided; as of the stat. &c.* [*mentioning stats.* 1. Jac. 1. 21 Jac. 1. and 5 Geo. 2.] Upon trust *of the wisdom, fidelity, diligence, and provident circumspection, which we have conceived in you, do by these presents, name, assign, appoint, constitute and ordain you our special commissioners;* Hereby *giving full power and authority unto you, four or three of you, to proceed according to said statutes, and all other statutes in force concerning bankrups; not only concerning the said bankrupt, his body, lands, tenements, freehold and customary goods, debts, and all other things whatsoever;*

*but also concerning all other persons, who by concealment, claim, or otherwise, do, or shall offend, touching the premises, or any part thereof, contrary to the true intent and meaning of the said statutes:* And to do and to execute *all and every thing and things whatsoever, as well for and towards satisfaction and payment of the said creditors; as towards and for all other intents and purposes, according to the ordinance and provision of the same statutes.* Willing *and commanding you, four or three of you, to proceed to the execution and accomplishment of this our commission, according to the true intent and meaning of the same statutes, with all diligence and effect. Witness ourself at Westminster, the —— day of —— in the —— year of our reign.*

J. YORKE.

Having got the commission, the petitioning creditor must employ one of the messengers to summon a meeting of the major part of the commissioners to open the same; when the petitioning creditor must come prepared to prove his debt, and the party a bankrupt, within the statutes.

OATH to be administered by the Commissioners to Witnesses upon their Examination.

*You are here produced, as witnesses, by virtue of a commission out of the high court of Chancery, to us, and others directed, to be by us examined, concerning the bankruptcy of John Wilson, of, &c. Now to all such questions and interrogatories as shall be asked you, by virtue of this commission of bankrupt concerning the said John Wilson, his trade or profession, his absconding, and other acts which he hath done or suffered, by which he may be discovered to be a bankrupt, and also concerning his lands and tenements, goods and chattels, debts and duties, frauds and concealments, and other matters and things, in obedience to the said commission, and pursuant to the several statutes made concerning bankrupts, you, and every of you shall, true and direct answer make, and swear the truth, the whole truth, and nothing but the truth. So help you God.*

All the depositions must be signed by the witnesses. If the party is a Quaker, then instead of swear, say, "*You shall solemnly, sincerely, and truly, declare, and affirm.*"

Immediately upon the commissioners declaring the party a bankrupt, they issue their warrant for seizure of his effects, and the messenger by virtue thereof seizes the effects, and continues to keep possession till the commissioners have executed the assignment.

The application to enlarge the time for the bankrupt's surrender, must be by petition to the great seal, six days at least before the last sitting appointed in the Gazette; this petition may be either in the name of the bankrupt, or of his assignees.

It is usual for the commissioners to recommend, and the creditors to agree, to return the bankrupts their rings, money, &c. particularly the jewels, &c. of their wives.

If the bankrupt happens to be a foreigner, and does not understand English, his English examination must be interpreted, and read to him in the language he understands, by a person versed in both languages, who must be first sworn to interpret truly; of which oath and interpretation there must be a memorandum made and annexed to the bankrupt's examination.

If the bankrupt does not surrender himself to the commissioners by twelve o'clock at night of the last day given, the messenger warns him so to do, by a proclamation made by him in the middle of Guildhall; the commissioners continuing sitting till that time.

FORM OF A BANKRUPT'S CERTIFICATE.

To the Right Honourable the Lord High Chancellor of Great Britain.

*We whose names and seals are hereunto subscribed and set, being the major part of the commissioners, named and authorized in and by a commission of bankruptcy, awarded and issued against John Thomas, of, &c. (as described in the commission) bearing date at Westminster, the 8th day of, &c. directed to William Bumpstead, &c. do humbly certify to your Lordship that the major part of the commissioners by the said commission authorised, having begun to put the said commission into execution, did find that the said John Thomas became a bankrupt, since the 10th day of May, 1784, and before the date and suing forth of the said commission, within the true intent and meaning of the statutes made, and now in force concerning bankrupts, or some of them; and did thereupon declare and adjudge him a bankrupt accordingly. And we further humbly certify to your Lordship, that the said John Thomas being so declared a bankrupt, the major part of the commissioners by the said commission authorised, pursuant to the directions of the act of parliament made in the 5th year of the reign of his late majesty king George II. intitled, "An act to prevent the committing of frauds by bankrupts," did cause due notice to be given and published in the London Gazette of such commission being issued, and of the times and places of three several meetings of the said commissioners, within forty-two days next after such notice (the last of which meetings was appointed to be* on the forty-second day); *at which time the said John Thomas was required to surrender himself to the said commissioners named in the said commission or the major part of them, and to make a full disclosure and discovery of his estate and effects; and the creditors of the said John Thomas, were desired to come prepared to prove their debts, and to assent to or dissent from the making this certificate. And we further humbly certify to your lordship, that such three several meetings of the major part of the commissioners by the said commission authorised, were had pursuant to such notice so given and published; and that at one of those meetings the said John Thomas did surrender himself to the major part of the commissioners, by the said commission authorised, and did sign and subscribe such surrender, and did submit to be examined from time to time upon oath, by and before the major part of the commissioners, by the said commission authorised: and in all things to conform to the several statutes made and now in force concerning bankrupts; and particularly to the said act made in the fifth year of his late majesty's reign. And we further humbly certify to your lordship, that at the last of the said three meetings, the said John Thomas finished his examination, before the major part of the said commissioners, by the said commission authorised, according to the directions of the said last mentioned act, and upon such his examination made a full disclosure and discovery of his estate and effects; and in all things conformed himself to the several statutes made and now in force concerning bankrupts, and particularly according to the directions of the said statute made in the fifth year of his late majesty's reign; and there doth not appear to us any reason to doubt of the truth of such discovery, or that the same is not a full discovery of all the estates and effects of the said John Thomas. And we further humbly certify to your lordship, that the creditors whose names* or marks *are subscribed to this certificate, are full four parts in five in number and value of the creditors of the above named John Thomas, who are creditors for not less than 20l. respectively, and who have duly proved their debts under the said commission; and that it doth appear to us by due proof by affidavit in writing, that such several subscribing creditors, or some person by them respectively duly authorised thereunto, did, before our signing hereof, sign this certificate, and testify their consent to our signing the same, and to the said John Thomas having such allowance and benefit, as by the said last mentioned act are allowed to bankrupts, and to the said John Thomas being discharged from his debts, in pursuance of the same act. In witness whereof we have hereunto set our hands and seals, this —— day of —— in the —— year of the reign of, &c. and in the year of our Lord* 1784.

*We the creditors of the above named John Thomas, whose names or marks are hereunder subscribed, do hereby testify and declare our consent, that the major part of the commissioners, by the above mentioned commission authorised, may sign and seal the certificate above written; and that the said John Thomas may have such allowance and benefit as are given to bankrupts by the act of parliament made in the 5th year of the reign of his late majesty king George II., intituled, "An act to prevent the committing of frauds by bankrupts;" and be discharged from his debts in pursuance of the same act.*

*William Bumpstead,*
*Henry Hunter,*
*Henry Russel.*

(*The creditors names*) A. B. C. D.

The messengers have printed forms of certificates, therefore the best way is to get a blank from them.

If any person sign the bankrupt's certificate by virtue of a letter of attorney, such letter of attorney must be left at the bankrupts' office.

The certificate, together with the affidavit of seeing the creditors sign it, and also letters of attorney, (if any such there be) must be lodged with the secretary of bankrupts; who will thereupon give the messenger an authority to the printer of the Gazette, to insert an advertisement therein, signifying that the acting commissioners have certified to the great seal, that the bankrupt hath conformed, and that the certificate will be allowed and confirmed, unless cause shewn to the contrary, within twenty-one days from the date of the said advertisement.

If no cause is shewn within the twenty-one days, against the allowance of the certificate, the Lord Chancellor will allow the same, by the following subscription on the said certificate:

"—— *day of* —— 1784.

"*Whereas the usual notice hath been given in the London Gazette, of* —— *the* —— *day of* —— *last, and none of the creditors of the above named John Thomas have shewn any cause to the contrary; I do allow and confirm this certificate.*

THURLOW, C."

CERTIFICATE for a Judge or Justice of Peace to grant his Warrant for apprehending and committing a Bankrupt.

*In the Matter of John Thomas, a Bankrupt.*

*We whose names are hereunto subscribed, and seals set, do hereby certify, that a commission of bankrupt, under the great seal of Great Britain, grounded upon the several statutes made and now in force concerning bankrupts, bearing date at Westminster, the —— day of June instant, hath been awarded and issued against John Thomas, of, &c. and directed to William Bumpstead, &c. thereby giving full power and authority to four or three of them to execute the same. And we do further certify, that we, being the major part of the commissioners, by the said commission authorised, have proceeded in the execution of the said commission, and have found upon the due examination of witnesses, and other good proof, upon oath, before us had and taken, that the said John Thomas, before the date and suing forth of the said commission, became bankrupt to all intents and purposes within the compass, true intent, and meaning of the several statutes made and now in force concerning bankrupts, or within some or one of them, before the date and suing forth of the said commission. Given under our hands and seals at Searl's Coffee-house, Lincoln's Inn, in the county of Middlesex, this —— day of June, in the year of our Lord, 17—.*

*Witness John Knight.*

WILLIAM BUMPSTEAD (*L. S.*)
HENRY HUNTER (*L. S.*)
HENRY RUSSEL (*L. S.*)

The execution of this certificate must be proved by the subscribing witness before the judge or justice, previous to his granting his warrant.

It is usual for the assignees to give notice of the time and place they intend to pay the dividends; if by the assignees, the Solicitor signs an authority for that purpose, to the following effect; viz.

"*Gentlemen,*

"*Please to pay Mary Combes the sum of —— being her dividend of —— shillings in the pound on her debt of —— proved under the commission of bankrupt against Francis Gibbons, of, &c.*

"*Yours, &c.* JOHN KNIGHT. *14th July*, 1780.

"*To Messrs. Partridge and Dennis, said bankrupt's assignees.*"

The assignees, upon receiving this authority, pay the creditor, and take a receipt in a book to the following purport, viz.

"*Received this —— day of July*, 1780, *of Messrs. Partridge and Dennis, assignees of the estate and effects of Francis Gibbons, of, &c. bankrupt, the sum of —— being a dividend of —— shillings in the pound, on my debt of —— proved under the said commission.* MARY COMBES."

WRIT OF SUPERSEDEAS.

*George the Third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth: To our trusty and well-beloved William Bumpstead, Henry Hunter, Henry Russel, Henry Cowper, Esquires, and Richard Hargrave, Gentleman, greeting: Whereas we being informed that John Thomas, of, &c. using and exercising the trade of merchandize, by way of bargaining, exchange, bartering, chevizance, seeking his trade of living by buying and selling, did become bankrupt within the several statutes made against bankrupts, to the intent to defraud and hinder Charles Jones, of, &c. and others, his creditors, of their just debts and duties, to them due and owing; and we, minding the due execution of the several statutes made against bankrupts, did, by our commission, under the great seal of Great Britain, bearing date at Westminster, the —— day of —— in the —— year of our reign, name, assign, appoint, constitute, and ordain you our special commissioners, thereby giving, &c.* (here recite the original commission to, "*diligence and effect,*" then add) *Now forasmuch as the said John Thomas, the bankrupt, by his humble petition, exhibited to our Lord High Chancellor of Great Britain, for the reasons therein contained, prayed that the said commission might be superseded, whereunto we graciously inclining, do, by these presents, will and command you, and every of you, to stay and surcease all further proceedings upon the said commission, and that you supersede the same accordingly, as our special trust is in you reposed. Witness ourselves at Westminster, the —— day of —— in the —— year of our reign.* J. YORKE.

When this writ is obtained the commissioners must be served therewith, by delivering to each of them a copy, and, at the same time, shewing them respectively the original writ under seal, and then the proceedings are at an end; but it is usual to give notice thereof in the Gazette.

BANKS. See *Bank*; *Sea-Banks*.

BANLEUGA. Vide *Bannum*.

BANNERET. Knight Banneret is a knight made in the field, with the ceremony of cutting off the point of the standard and making it as it were a banner; and such are allowed to display their arms on a banner in the king's army as barons do; and were next to barons in dignity. See *stat.* 5. *Ric.* 2. *stat.* 2. *c.* 4.; by which it seems such bannerets were anciently called by summons to parliament. *Terms de la Ley.* See *Parliament. Precedence.*

BANNIMUS. The form of an expulsion of any member from the University of Oxford, by affixing the sentence in some public places, as a denunciation or promulgation of it. And the word *banning* is taken for an exclamation against, or cursing of another.

BANNITUS, or *Banniatus.*] An outlaw, or banished man. *Pat. Ed.* 2.

BANNOCK. A thick cake of oatmeal, being a perquisite of the servant of the mill in *Thirlage*. See that title.

BANNUM vel BANLEUGA. The utmost bounds of a manor or town; so used 47 *Hen.* 3. *Rot.* 44, *&c. Banleuga de Arundel* is taken for all that is comprehended within the limits or lands adjoining, and so belonging to the castle or town. *Seld. Hist. of Tythes*, p. 75.

BANS. The previous proclamation in church necessary to the validity of a marriage not authorised by licence. See title *Marriage*; and as to Bans in Scotland. 10 *Ann. c.* 7.

BAR. See *Barr.*

BARATRY. See *Barrator. Barratry.*

BARBERS, Were incorporated with the *surgeons* of London; but not to practise surgery, except drawing of teeth, &c. 32 *Hen.* 8. *c.* 42. but separated by 18 *Geo.* 2. *c.* 15. See *Surgeon.*

BARBICAN, *barbicanum.*] A watch-tower or bulwark.

BARBICANAGE, *barbicanagium.*] Money given for the maintenance of a *barbican*, or watch-tower; or a tribute towards the repairing or building a bulwark. *Carta* 17 *Ed.* 3. *Monasticon. tom.* 1. *p.* 976.

BARCA. A barque: Gloss. Sax. *Ælfrici;* a flot-ship.

BARCARIUM, *barcaria.*] A sheep-cote, and sometimes used for a sheep-walk. *MS. de Placit. Ed.* 3. See *Bercaria.*

BARGAIN. See *Agreement.*

BARGAIN AND SALE, Is an instrument whereby the property of lands and tenements is for valuable consideration granted and transferred from one person to another: it is called a real contract upon a valuable consideration for passing of lands, tenements, and hereditaments, by deed indented and inrolled. 2 *Inst.* 672.

Since the introduction of uses and trusts, and the stat. 27 *H.* 8. *c.* 10. for transferring the possession to the use, the necessity of livery of seisin for passing a freehold in corporeal hereditaments, has been almost wholly superseded; and in consequence of it, the conveyance by feoffment is now very little in use. Before the statute of uses, *equitable* estates of freehold might be created through the medium of trusts, without livery; and by the operation of the statute, *legal* estates of freehold may now be created in the same way. They who framed the statute of uses evidently foresaw that it would render livery unnecessary to the passing of a freehold; and that a freehold of such things as do not lie in grant would become transferrable by *parol* only, without any solemnity whatever. To prevent the inconveniencies which might arise from a mode of conveyance so uncertain in the proof, and so liable to misconstruction and abuse, it was enacted in the same session of parliament, that an estate of freehold should not pass by bargain and sale only, unless it was by indenture enrolled in one of the courts at Westminster, or in the county where the lands lie; such inrollment to be made within six months after the date of the indenture. Stat. 27 *H.* 8. *c.* 16. See 2 *Inst.* 675. *Dy.* 229. *Poph.* 48. *Dalt.* 68. The objects of this provision evidently were, first, to enforce the contracting parties to ascertain the terms of the conveyance, by reducing it into writing; secondly, to make the proof of it easy, by requiring their seals to it, and consequently the presence of a witness; and lastly, to prevent the frauds of secret conveyances, by substituting the more effectual notoriety of enrollment, for the more ancient one of livery. But the latter part of this provision, which if it had not been evaded, would have introduced almost an universal register of conveyances of the freehold, in case of corporeal hereditaments, was soon defeated by the invention of the conveyance by lease and release, which sprung from the omission to extend the statute to bargains and sales for terms of years: (See 8 *Co.* 93. 2 *Ro. Ab.* 204. 2 *Inst.* 671.) and the other parts of the statute were necessarily ineffectual in our courts of equity, because these were still left at liberty to compel the execution of trusts of the freehold, though created without deed or writing. The inconveniencies from this insufficiency of the statute of enrollments are now in some measure prevented by stat. 29 *Ch.* 2. *c.* 3. which provides against conveying any lands or hereditaments for more than three years, or declaring trusts of them, otherwise than by writing. 1 *Inst.* 48. *a.* n. 3.

This may serve at present to illustrate the doctrine of *Bargain and Sale*; but to obtain a clear and distinct idea of this part of the law, see further titles *Conveyance, Deed, Feoffment, Lease and Release, Use, &c.* and 1 *Inst. by Hargrave* and *Butler.*

At present it may be fit to consider,

I. *What things may be bargained and sold.*
II. 1. *By whom, to whom, and*
2. *By what Words a Bargain and Sale may be made.*
III. 1. *Of the Consideration, and*
2. *Enrollment of a Bargain and Sale.*
IV. *Of the Manner of pleading Bargains and Sales.*

I. All things, for the most part, that are grantable by *deed* in any other way, are grantable by *bargain and sale;* and lands, rents, advowsons, tithes, &c. may be granted by it in fee simple, fee-tail, for life, &c. 1 *Rep.* 176. 11 *Rep.* 25.

Any freehold or inheritance in possession, reversion, or remainder upon an estate for years, or life, or in tail, may be bargained and sold, but the deed shall be enrolled. 2 *Co.* 54. *Dyer* 309. 2 *Inst.* 671.

But if tenant for life *bargains and sells* his land by deed enrolled, it will be a forfeiture of his estate. 4 *Leon.* 251.

But a man seized of a freehold may bargain and sell for years, and this shall be executed by the statute of uses. 27 *H.* 8. *c.* 10.

A man possessed of a term cannot bargain and sell it, so as to be executed by the statute. 2 *Co.* 35, 36. *Poph.* 76.

A *bargain and sale* of the profits of land, is a *bargain and sale* of the land itself; for the profits and the land are the same thing in substance. *Dyer* 71.

A rent in *esse* may be bargained and sold, because this is a freehold within the statute; and, before the statute, a rent newly created might be bargained and sold, because when money, as an equivalent, was given, and ceremonies or words of law were wanting, the Chancery supplied them; but it seems that, since the statute, *a rent newly created* cannot be *bargained and sold;* because there ought to be a freehold in some other person, to be executed in *cestui que use;* but here can be no seisin of his rent in the bargainor, because no man can be seized of a rent in his own land, and consequently there can be no estate to be executed in the bargainee. *Kelw.* 85. 1 *Co.* 126. 1 *And.* 327. 1 *Jones* 179. *Sed qu. de hoc.*

If A., by indenture enrolled, bargains and sells lands to B. and his heirs, with a way over other lands of A. this is void as to the way; for nothing but an use passes by the deed, and

there can be no use of a thing not in *esse*, as a way, common, &c. before they are created. *Cro. Jac.* 189.

II. 1. The king, and all other persons that cannot be seized to a use, cannot bargain and sell; for at common law, when a man had sold his land for money without giving livery, the use only passed in equity, and this is now executed, and becomes a bargain and sale by the statute; but, antecedent to any such execution, there must be a use well raised, which cannot be without a person capable of being seised to a use, which the king is not, there being no means to compel him to perform the use or trust; for the Chancery has only a delegated power from the king over the consciences of his subjects; and the king is the universal judge of property, and ought to be perfectly indifferent, and not to take upon him the particular defence of any man's estate as a trustee. *Bro. Feoffment to Uses*, 33. *Hard.* 468. *Poph.* 72.

If tenant in tail bargains and sells his land in fee, this passes an estate determinable upon the life of the tenant in tail; for, at common law, the use could not be granted of any greater estate than the party had in him; now tenant in tail had an inheritance in him, but he could dispose of it only during his own life; and therefore, when he sells the use in fee, *cestui que use* has a kind of *an inheritance*, yet determined within the compass of a life; and the statute executes it in the same manner as he has the use, and consequently he will have some properties of a tenant in fee, and some of a tenant for life only; but if tenant for life bargains and sells in fee, this passes only *an estate for life*, for he could not pass the use of an estate for life to the bargainee, and the statute executes the possession as the party has the use. 10 *Co.* 96. 98. 1 *Saund.* 260, 261. 1 *Co.* 14, 15. *Co. Lit.* 151.

A man may bargain and sell to a corporation, for they may take a use, though the money be given by the governors in their natural capacity. 10 *Co.* 24. 34. 2 *Rol. Abr.* 788.

A man may bargain and sell to his son; but then the consideration of money ought to be expressed, and it ought to have all the other circumstances of bargain and sale; but this shall operate as a covenant to stand seized, if there be none but the consideration of natural love and affection expressed. 7 *Co.* 40. 2 *Co.* 24. *Cro. Eliz.* 394. 1 *Vent.* 137. 1 *Lev.* 56. But if a son and heir bargains and sells the inheritance of his father, this is void, because he hath no right to transfer; the same law of a release. *Keilw.* 84. *Co. Lit.* 265.

If an infant bargains and sells his land by deed indented and enrolled, yet he may plead non-age: for, notwithstanding the statute, the bargainee claims by the deed as at common law, which was, and therefore is, still defeasible by non-age. 2 *Inst.* 673.

If a husband seized of lands, in right of his wife, or tenant in tail, bargains and sells the trees growing on the lands, and dies before severance, the bargainee cannot afterwards cut them down and take them away. *Mo.* 41. See tit. *Baron and Feme* IV.

If there be two joint-tenants, and one of them makes a bargain and sale *of his own* estate in fee, and then the other dies, the other moiety shall survive to the bargainor: for, since the freehold is in the bargainor, the inheritance continues; but if such joint-tenant had bargained and sold *totum statum suum* in fee, though he died before enrollment; yet, if the deed were afterwards enrolled, the moiety would not survive, but would pass to the bargainee. *Cro. Jac.* 53. *Co. Lit.* 186. 1 *Bulst.* 3.

2. The very words *bargain and sell* are not of absolute necessity in this deed, for other words equivalent will suffice; as if a man, seized of lands in fee, sell the same to another, by the words *alien* or *grant*, the deed being made in consideration of money, and indented and enrolled, will be an effectual *bargain and sale*. In short, whatever words upon valuable consideration would have raised an use of any lands, &c. at common law, the same would amount to a bargain and sale within this act; as if a man by deed, &c. for a valuable consideration, covenants to stand seized to the use of another, &c. 2 *Inst.* 672. *Cro. Jac.* 210. *Mo.* 34. *Cro. Eliz.* 166.

III. 1. There must be a good consideration given, or, at least, said to be given, for lands in these deeds; and for a competent sum of money, is a good consideration; but not the general words for divers considerations, &c. *Mod. Ca.* 777. Where money is mentioned to be paid in a *bargain and sale*, and in truth no money is paid, some of our books tell us this may be a good *bargain and sale*; because no averment will lie against that which it expressly affirmed by the deed, except it comes to be questioned whether fraudulent or no, upon the statute against fraudulent deeds, *Dyer*, 90. If no consideration of money is expressed in a deed of *bargain and sale*, it may be supplied by an averment that it was made for money: and after a verdict on a trial, it shall be intended that evidence was given at the trial of money paid. 1 *Ventr.* 108. If lands are *bargained and sold* for money only, the deed is to be enrolled according to the statute; but if it be in consideration of money, and natural affection, &c. the estate will pass without it. 2 *Inst.* 672. 2 *Lev.* 56.

If a man, in consideration of so much money to be paid at a day to come, bargains and sells, the use passes presently, and after the day the party has an action for the money, for it is a sale, be the money paid presently or hereafter. *Dyer* 337 *a.*

2. If the deed of bargain and sale be not enrolled within the six months, (which are to be reckoned after twenty-eight days to the month, the day of the date taken exclusively,) it is of no force; so that if a man bargains and sells his land to me, and the trees upon it, although the trees might be sold by deed without enrollment, yet, in this case, if the deed be not enrolled, it will be good neither for the trees nor the land. *Dyer* 90. 7 *Rep.* 40. 2 *Bulst.* 8. A bargain and sale of a manor, to which an advowson is appendant by indenture not enrolled, will not pass the advowson or the manor, for it was to go as appendant. *Bro. Cas.* 240.

But in some cases, where a deed will not enure by way of bargain and sale, by reason of some defect therein, it may be good to another purpose. *Dyer* 90.

If two bargains and sales are made of the same land, to two several persons, and the last deed is first enrolled; if, afterwards, the first deed is also enrolled within six months, the first buyer shall have the land; for, when the deed is enrolled, the bargainee is seised of the land from the delivery of the deed, and the enrollment shall relate to it. *Hob.* 165. *Wood's Inst.* 259. Neither the death of the bargainor or bargainee, before the enrollment of the deed of bargain and sale, will hinder the passing of the estate to the bargainee: but the estate of freehold is in the bargainor until the deed is enrolled; so that the bargainee cannot bring any action of trespass before entry had, though it is said he may surrender, assign, &c. *Cro. Jac.* 52. *Co. Lit.* 147.

A bargainee shall have rent which incurs after the bargain and sale, and before the enrollment. *Sid.* 310. Upon the enrollment of the deed, the estate settles *ab initio*, by the stat. 27 *H.* 8. *c.* 16. which says, that it shall not vest, except the deed be enrolled; and when it is enrolled, the estate vests presently by the statute of uses. 1 *Danv. Abr.* 696.

If several seal a deed of bargain and sale, and but one acknowledge it, and thereupon the deed is enrolled; this is a good enrollment within the statute. *Style* 462. None can make a bargain and sale of lands that hath not the actual possession thereof at the time of the sale; if he hath not the possession, the deed must be sealed upon the land to make it good. 2 *Inst.* 672. 1 *Lill.* 290.

Houses and lands in London, and any city, &c. are ex-

empted out of the statute of enrollments. 2 *Inst.* 676. 1 *Nels. Abr.* 342.—See further, tit. *Enrollment.*

IV. In pleading a bargain and sale the deed itself must be shewn under seal. 1 *Inst.* 225. For though the enrollment being on record is of undoubted veracity, being the transaction of the court, yet the private deed has not the sanction of a record, though publicly acknowledged and enrolled; for it might have been falsely and fraudulently dated, or ill executed. *Co. Lit.* 225 *b.* 251 *b.* 2 *Inst.* 673. 4 *Co.* 71. 5 *Co.* 53. 2 *Rol. Rep.* 119.

It must likewise be set forth that the enrollment was within six months, or *secundum forman statuti, &c.* Vide *Allen* 19. *Carter* 221. *Style* 34. *S. C.*

In pleading a bargain and sale the party ought regularly to aver payment of the money. 1 *Leon.* 170. See *Moor* 504.

In replevin the case upon the pleadings was, that the defendant made a title under bargain and sale, enrolled within six months, and the statute of uses, and did not shew that it was *in consideration of money;* but adjudged that, *after a verdict*, as this case was, it shall be intended, that evidence was given at the trial of money paid. 1 *Vent.* 108.

The party that claims by any bargain and sale must shew in what court the deed is enrolled, because he must shew all things in certain that make out his title; otherwise his adversary would be put to an infinite search before he could traverse with security. *Yelv.* 213. *Cro. Jac.* 291. *S. C. Yelv.* 313.

BARKARY, *barkaria, corticulus.*] A tan-house or place to keep bark in for the use of tanners. *New Book Entr.* tit. *Assise, Corp. Polit.* 2.

BARMOTE. A court not of record within the Hundred of the Peak in Derbyshire, for the regulation of groves, possessions and trade of the miners and lead. *Terms de la Ley.*

BARON, *baro.*] Is a French word, and hath divers significations here in England. First, it is taken for a degree of nobility next to a viscount. *Bracton, lib.* 1. *cap.* 8. says, they are called *barones, quasi robur belli.* In which signification it agrees with other nations, where *baroniæ* are as much as *provinciæ:* so that barons are such as have the government of provinces, as their fee holden of the king; some having greater, and others less authority within their territories. It is probable that, formerly, in this kingdom, all those were called barons that had such seigniories as we now call *courts-baron;* as they were called *seigneurs* in France, who had any manor or lordship: and soon after the conquest, all such came to parliament, and sat as peers in the lords' house. But when, by experience, it appeared that the parliament was too much thronged by these barons, who were very numerous, it was, in the reign of King John, ordained, that none but the *barones majores* should come to parliament, who, for their extraordinary wisdom, interest, or quality, should be summoned by writ. After this, men observing the estate of nobility to be but casual, and depending merely upon the king's will, they obtained of the king letters patent of this dignity to them and their heirs male, who were called *barons by letters patent*, or by creation, whose posterity are now, by inheritance, those barons that are called lords of the parliament; of which kind the king may create at his pleasure. Nevertheless, there are still barons by writ, as well as barons by letters patent: and those barons who were first by writ, may now also justly be called *barons by prescription*, for that they and their ancestors have continued barons beyond the memory of man. 2 *Inst.* 48. See tit. *Peers of the Realm.* The original of barons by writ Camden refers to King Henry III.; and barons by letters patent or creation commenced 11 *R.* 2. *Camb. Brit. page* 109. To these is added a third kind of barons, called *barons by tenure*, which are some of our ancient barons; and likewise the bishops, who, by virtue of baronies annexed to their bishopricks, always had place in the lords' house of parliament, as barons by succession. *Selden Tit. of Honour, lib.* 4. *cap.* 13. See title *Parliament.*

There are also *barons* by *office;* as the *barons of the Exchequer, barons of the Cinque Ports, &c.* In ancient records, the word *baron* includes all the nobility of England, because regularly, all noblemen were barons, though they had a higher dignity; and therefore the charter of King Edward I., which is an exposition of what relates to barons in *Magna Charta*, concludes *testibus archiepiscopis, episcopis, baronibus, &c.* And the great council of the nobility, when they consisted, besides earls and barons, of dukes, marquisses, &c. were all comprehended under the name *de la councell de baronage. Glanv. cap.* 4. These barons have given them two ensigns to remind them of their duties; first, a long robe of scarlet, in respect whereof they are accounted *de magno concilio regis;* and, secondly, they are girt with a sword, that they should ever be ready to defend their king and country. 2 *Inst.* 5. A baron is *vir notabilis et principalis:* and the chief burgesses in London were, in former times, barons, before there was a lord mayor, as appears by the city seal and their ancient charters.—*Henricus* 3. *Rex. Sciatis nos concessisse et hac præsenti charta nostra confirmasse* baronibus *nostris de civitate nostra London quod eligant sibi mayor de seipsis singulis annis, &c. Spelm. Gloss.* The earls palatine and marches of England had anciently their barons under them; but no barons, but those who held immediately of the king, were peers of the realm. It is certain the king's tenants were called barons; as we may find in Mat. Paris, and other writers: and in days of old, all men were styled barons, whence the present law-term of *baron and feme* for Husband and Wife. See *Baron and Feme.*

To constitute a Baron in Scotland, in the strict law sense of the word, his lands must have been ceded by the king *in liberam baroniam.* A baron in this sense enjoyed a jurisdiction both civil and criminal, which jurisdiction was by 20 *Geo.* 3. *c.* 43. reduced to the right of recovering from his vassals and tenants the feu duties and rents of the land, and compelling them to perform the services to which they may be bound, and to the right of deciding in civil questions not exceeding 40*s.* Their criminal jurisdiction is limited to assaults and minor offences, and so restricted that it has ceased to be exercised. The act also provides that no future charter of erection of a barony shall convey any higher jurisdiction than for recovering rents, rights, and civil services. But by 35 *Geo.* 3. *c.* 122, the crown may erect free and independent burghs of barony in those parts of the sea coast where the fishery is carried on; the magistrates in such burghs having the power of justice concurrently with the justices of the county.

BARONY, *baronia.*] Is that honour and territory which give title to a baron, see *Baron;* comprehending not only the fees and lands of temporal barons, but of bishops, also who have two estates; one as they are spiritual persons, by reason of their spiritual revenues and promotions; the other grew from the bounty of our English kings, whereby they have baronies and lands added to their spiritual livings and preferments. The baronies belonging to bishops are by some called *regalia*, because *ex sola liberalitate regum eis olim concessa et a regibus in feudum tenentur.* Blount. Barony, Bracton says, (*lib.* 2. *cap.* 34.) is a right indivisible; and therefore, if an inheritance be to be divided among coparceners, though some capital messuages may be divided, yet *si capitale messuagium sit caput comitatûs vel caput* baroniæ, they may not be parcelled. In ancient times thirteen knight fees and a quarter made a tenure *per baroniam*, which amounted to 400 marks *per annum.*

BARONET, *baronettus.*] Is a dignity of inheritance created by letters patent, and usually descendible to the issue male; a degree of honour which hath precedency before all knights, as knights of the bath, knights bachelors, &c. except *Bannerets*, made *sub vexillis regiis in exercitu regali in aperto bello, et*

*ipso rege personaliter præsente.* This order of baronets was instituted by King James I. in the year 1611, and was then a purchased honour, for the purpose of raising money to pay troops sent out to quell some insurgents in the province of Ulster in Ireland.—The arms of which province being a red or bloody hand, every baronet has added, on his creation, to his coat of arms. Their number at first was but two hundred; but now they are without limitation: they are created by patent with an *habendum sibi et hæredibus masculis, &c.*

BARON AND FEME. The law term for *Husband and Wife.*

Our law considers marriage in no other light than as a civil contract. The *holiness* of the matrimonial state is left entirely to the ecclesiastical law; the temporal courts not having jurisdiction to consider unlawful marriage as a sin, but merely as a civil inconvenience. The punishment therefore, or annulling of incestuous and unscriptural marriages, is the province of the Spiritual Court.—Taking marriage in a civil light, the law treats it as it does all other contracts; on this part of the subject therefore, as well as on what relates to marriage promises, marriage settlements, &c. see this Dict. title *Marriage.*

By marriage, the husband and wife are one person in law. 1 *Inst.* 112.—that is, the very being, or legal existence, of the woman is suspended during the marriage; or, at least, is incorporated and consolidated into that of her husband: under whose wing, protection, and *cover*, she performs every thing; and is therefore called in our law-French a *feme-covert*, [*fœmina viro cooperta*]; is said to be *covert-baron*, or under the protection and influence of her husband, her *baron* or lord; and her condition during her marriage is called her coverture. Therefore, if an estate be granted or conveyed to an husband and wife, and their heirs, they do not take by moieties, as other joint-tenants, but the entire estate is in both. 2 *Lev.* 39. And if an estate be granted to an husband and wife, and another person, the husband and wife have but one moiety, and the other person the other moiety. *Lit.* § 291.—A woman may be attorney for her husband; for that implies no separation from, but is rather a representation of her lord. *F. N. B* 27. Upon this principle of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities that either of them acquire by the marriage.

We may consider the effect of these rights, duties, and disabilities, according to the following arrangement:

I. 1. *Of Grants and Contracts between Husband and Wife.*
   2. *Of their being Evidence for or against each other.*
II. *What Acts and Agreements of the Wife before Marriage bind the Husband.*
III. 1. *Of the Husband's Power over the Person of his Wife, and of her Remedy for any Injury done to her by him.*
   2. *Of Actions by him for criminal Conversation with her.*
IV. *Of his Interest in her Estate and Property; and hers in his, as to her Paraphernalia.*
V. *Where the Husband shall be liable to the Wife's Debts contracted before Marriage; and therein of a Wife that is Executrix or Administratrix.*
VI. *Of her Contracts during Marriage, and how far the Husband is bound by such Contracts; and where a Wife shall be considered as a Feme Sole.*
VII. *Where she alone shall be punished for a criminal Offence, and where the Husband shall be answerable for what she does in a civil action.*
VIII. *What Acts done by the Husband, or Wife alone, or jointly with the Wife, will bind the Wife; and therein of her Agreement or Disagreement to such Acts after the Death of the Husband.*
IX. *Where the Husband and Wife must join in bringing Actions.*
X. *Where they must be jointly sued.*
XI. *Of the Effects of Divorce; and of separate Maintenance, Alimony, and Pin Money.—And see title* Divorce.

I. 1. At common law a man could neither in possession, reversion or remainder, limit an estate to his wife; but by stat. 27 *H.* 8. *c.* 10. a man may covenant with other persons to stand seized to the use of his wife; or may make any other conveyance to her use, but he may not covenant with his wife to stand seized to her use. A man may devise lands by will to his wife, because the devise doth not take effect till after his death. *Co. Litt.* 112.

As to devises by femes covert. See tit. *Devise, Will.*

According to some books, by custom of a particular place, as of York, the wife may take by *immediate* conveyance from the husband. *Fitz. Prescription* 61. *Bro. Custom.* 56. And it seems that a *donatio causâ mortis* by husband to wife may be good; because that is in the nature of a legacy. 1 *P. Wms.* 441.

Where the husband or wife act *en autre droit*, the one may make an estate to the other; as if the wife has an authority by will to sell, she may sell to her husband. 1 *Inst.* 112 *a.* 187 *b.* and the notes there.

If the feme obligee take the obligor to husband, this is a release in law. The like law is if there be two femes obligees, and the one take the debtor to husband. 1 *Inst.* 264 *b.* *Cro. Car.* 551.

In the case of *Smith* v. *Stafford*, (*Hob.* 216.) the husband promised the wife before marriage, that he would leave her worth 100*l.* The marriage took effect, and the question was, whether the marriage was a release of the promise. All the judges but Hobart were of opinion, that as the action could not arise during the marriage, the marriage could not be a release of it. The doctrine of this case seems to be admitted in the case of *Gage* v. *Acton*; (1 *Salk.* 325. 12 *Mod.* 290:) the case there arose upon a bond executed by a husband to the wife before marriage, with a condition, making it void if she survived him, and left her 1000*l.* Two of the judges were of opinion that the debt was only suspended, as it was on a contingency which could not by any possibility happen during the marriage. But Lord C. J. Holt differed from them; he admitted that a covenant or promise by the husband to the wife, to leave her so much in case she survives him is good, because it is only a future debt on a contingency, which cannot happen during the marriage, and that is precedent to the debt; but that a bond debt was a present debt, and the condition was not precedent but subsequent, that made it a present duty; and the marriage was consequently a release of it. The case afterwards went into Chancery; the bond was there taken to be the agreement of the parties, and relief accordingly decreed. 2 *Vern.* 481.—A like decree was made in the case of *Carnel* v. *Buckle*, 2 *P. Wms.* 243. and see 2 *Freem.* 205.—See tit. *Bankrupt* IV. 3.

A. before marriage with M. agrees with M. by deed in writing, that she, or such as she should appoint, should during the coverture, receive and dispose of the rents of her jointure, by a former husband, as she pleased. It was decreed that, This *agreement being with the feme herself* before marriage, was by the marriage *extinguished*. *Chan. Ca.* 21. But where a man before marriage *articled with the feme to make a settlement of certain lands, before the marriage should be solemnized*; they *intermarried before the settlement*, and then the baron died: On a bill by the widow for an execution of the articles, it was decreed *against the heir* at law of the baron, that the articles should be executed. 2 *Vent.* 343.

2. In trials of any sort, Husband and Wife are not allowed to be evidence, for or against each other; partly because it is

impossible their testimony should be indifferent; but principally because of the union of person; and therefore if they were admitted to be witnesses *for* each other, they would contradict one maxim of law, "*nemo in propriâ causâ testis esse debet*;" and if *against* each other, they would contradict another maxim, "*nemo tenetur seipsum accusare.*" But where the offence is directly against the person of the wife, this rule has been usually dispensed with; (*State Trials. vol.* 1. *Lord Audley's case, Stra.* 633:) and therefore by *Stat.* 3 *H.* 7. *c.* 2. in case a woman be forcibly taken away and married, she may be a witness against such her husband, in order to convict him of felony. For in this case she can with no propriety be reckoned his wife; because a main ingredient, her consent, was wanting to the contract: and also, there is another maxim of law, that no man shall take advantage of his own wrong; which the ravisher here would do, if by forcibly marrying a woman he could prevent her from being a witness, who is perhaps the only witness to that very fact. 1 *Comm.* 443. 4. See title *Marriage.*

The husband cannot be a witness against the wife, nor the wife against the husband, to prove the first marriage on an indictment, on *stat.* 1 *Jac.*1. *c.* 11. for a second marriage. But the *second* wife or husband may be a witness; the second marriage being void. *Bull. N. P.* 287. 1 *Hall. P. C.* 693.

In *Raym.* 1. there is an opinion, that a husband and wife may be witnesses against one another in *treason*: but the contrary is adjudged. 1 *Brownl.* 47. See 2 *Keb.* 408. and 1 *H. P. C.* 301.—The rule in Lord Audley's case, is denied to be law, *Raym.* 1.; and perhaps was admitted on the particular circumstances of the facts which were detestable in the extreme, the husband having assisted in the rape of his wife, —In an information against two, one for perjury, and the other for subornation, in swearing on the trial of an ejectment, that a child was supposititious, the husband of one of the defendants was admitted to give evidence of the birth, but refused as to the subornation. *Sid.* 377. 2 *Keb.* 403. *Mar.* 120.—And the evidence of a wife has been disallowed even against others, where her husband might be indirectly in danger. *Dalt.* 540. *Leach's Hawk. P. C.* ii. 607. 8.—A husband and wife may demand surety of the peace against each other, and their evidence must then of necessity be admitted against each other. 1 *Hawk. P. C.* 253. see *Stra.* 1231; and the other authorities cited by Hawkins.

The wife of a bankrupt may be examined by the commissioners.—See tit. *Bankrupt*, III. 1.

It seems that a wife may be evidence to prove a fraud on the husband, particularly if she were party thereto, as in case of a marriage-brocage agreement. *Sid.* 431. See *post.* II. And in cases of seduction, *L. E.* 55.—And in civil actions, where the husband is not concerned in the action, but the evidence is *collateral* to discharge the defendant, by charging the husband. 1 *Stra.* 504; and see 1 *Stra.* 527.

II. As by marriage the husband and wife become one person in law, therefore such an union works an extinguishment or revocation of several acts done by her before the marriage; and this not only for the benefit of the husband, but likewise of the wife, who, if she were allowed at her pleasure to rescind and break through, or confirm several acts, might be so far influenced by her husband, as to do things greatly to her disadvantage. 4 *Co.* 60. 5 *Co.* 10. *Keilw.* 162. *Co. Lit.* 55. *Hetl.* 72. *Cro. Car.* 304.

But in things which would be manifestly to the prejudice of both husband and wife, the law does not make her acts void; and therefore if a feme sole makes a lease at will, or is lessee at will, and afterwards marries, the marriage is no determination of her will, so as to make the lease void; but she herself cannot without the consent of her husband determine the lease in either case. 5 *Co.* 10.

So where a warrant of attorney was given to confess a judgment to a feme sole, the court gave leave, notwithstanding the marriage, to enter up judgment; for that the authority shall not be deemed to be revoked or countermanded, because it is for the husband's advantage; like a grant of a reversion to a feme sole who marries before attornment, yet the tenant may attorn afterwards; otherwise if a feme sole gives a warrant of attorney, and marries, for this is to charge the husband. 1 *Salk.* 117. 399.

But if a feme sole makes her will, and devises her land to *J. S.* and afterwards marries him, and then dies, yet *J. S.* takes nothing by the will, because the marriage was a revocation of it. 4 *Co.* 60.—See tits. *Devise, Will.*

Equity will set aside the intended wife's contracts, though legally executed, when they appear to have been entered into with an intent to deceive the husband, and are in derogation of the rights of marriage; as were a widow made a deed of settlement of her estate, and married a second husband, who was not privy to such settlement; and it appearing to the court, that it was in confidence of her having such estate that the husband married her, the court set aside the deed as fraudulent; so where the intended wife, the day before her marriage, entered privately into a recognizance to her brother, it was decreed to be delivered up. See 2 *Chan. Rep.* 41. 79. 81. 2 *Vern.* 17. 2 *Vez.* 264. See *ante* I. 2.

But where a widow, before her marriage with a second husband, assigned over the greatest part of her estate to trustees for children by her former husband; though it was insisted that this was without the privity of the husband, and done with a design to cheat him, yet the court thought, that a widow might thus provide for her children before she put herself under the power of a husband; and it being proved that 8000*l.* was thus settled, and that the husband had suppressed the deed, he was decreed to pay the whole money, without directing any account. 1 *Vern.* 408.

III. 1. By marriage the husband hath power over his wife's person; and by the old law he might give her moderate correction, 1 *Hawk. P. C.* 258; but this power was confined within reasonable bounds. *Moor.* 874. *F. N. B.* 80.—In the time of Charles II. this power of correction began to be doubted. 1 *Sid.* 113. 3 *Keb.* 433. The courts of law, however, still permit a husband to restrain a wife of her liberty, in case of any gross misbehaviour. *Stra.* 478. 875. But if he threaten to kill her, &c. she may make him find surety of the peace, by suing a writ of *supplicavit* out of Chancery, or by preferring *articles* of the *peace* against him in the court of King's Bench, or she may apply to the Spiritual Court for a *divorce, propter sævitiam. Crom.* 28. § 36. *F. N. B.* 80. *Hetl.* 149. *cont.* 1 *Sid.* 113. 116. *Dalt. c.* 68. *Lamb.* 7. *Crom.* 133.

So may the husband have security of the peace against his wife. *Stra.* 1207.

But a wife cannot, either by herself or her *prochein amy*, bring a *homine replegiando* against her husband: for he has by law a right to the custody of her, and may, if he think fit, confine her, but he must not imprison her; if he does, it will be a good cause for her to apply to the Spiritual Court for a divorce *propter sævitiam*; and the nature and proceedings in the writ *de homine replegiando* shew that it cannot be maintained by the wife against her husband. *Prec. in Ch.* 492.

The courts of law will grant a *habeas corpus* to relieve a wife from unjust imprisonment.

2. The ground of the action for adultery, is the injury done to the husband, by alienating the affections of his wife, destroying the comforts arising from her company, and that of her children, and imposing on him a spurious issue.

For this among other reasons it has been ruled that no action for *crim. con.* can be brought for act of adultery, after sepa-

ration between husband and wife. 5 *T. R.* 357. this doctrine was shaken in a later case; See *Chambers* v. *Caulfield*, 6 *East*. 244.

In this action the plaintiff must bring proof of the actual solemnization of a marriage; nothing shall supply its place: cohabitation or reputation are not sufficient, nor any collateral proof whatever. 4 *Burr*. 2057. *Bull. N. P.* 27. *Doug*. 162. *Esp. N. P.* 343.—But it is not necessary to prove a marriage according to the ceremony of the church of England; if the parties are Jews, Quakers, &c. proof of a marriage according to their rites is sufficient. *Bull. N. P.* 28.—The confession of the wife will be no proof against the defendant; but a discourse between her and the defendant may be proved, and the defendant's letters to her; but the wife's letters to the defendant will be no evidence for him. *Id.*

The injury in case of adultery being great, the damages are generally considerable, but depend on circumstances; such on the one hand as go in aggravation of damages, and to shew the circumstances and property of defendant; or on the other hand, such as go in extenuation of the offence, and mitigation of damages. *Bull. N. P.* 27. *Esp.* 343. 4.—The defendant may prove particular acts of criminality in the wife, previous to her guilt with him, but not her general character, in extenuation. *Id. ib.*

If a woman is suffered by her husband to live as a common prostitute, and a man is thereby drawn into *crim. con.* no action at the suit of the husband will lie; but if the husband does not know this, it goes only in mitigation of damages. *Id. ib.*

It is now determined that if the husband consent to his wife's adultery, this will go in bar of his action. 4 *Term Rep.* 657. in the case of *Duberly* v. *Gunning*.—See 12 *Mod*. 232.

It seems to be in the discretion of the court to grant a new trial in this action, on account of excessive damages; but which they will be very cautious in doing. 4 *Term Rep.* 651.

If adultery be committed with another man's wife *without any force, but by her own consent*, though the husband may have assault and battery, and lay it *vi et armis*, yet they shall in that case punish him below for that very offence; for an indictment will not lie for such an assault and battery; neither shall the husband and wife join in an action at common law; and therefore they proceed below, either civilly, that is, to divorce them, or criminally, because they were not criminally prosecuted above. 7 *Mod*. 81.

IV. *As to the lands of the wife.* The freehold or right of possession of all her lands of inheritance, vests in the husband immediately upon the marriage, the right of property still being preserved to her. 1 *Inst*. 351 *a*. 273 *b*. 326 *b*. in note. This estate he may convey to another.—An incorrect statement in the book called Cases in Equity. *temp. Ld. Talbot. p.* 167. of what was delivered by his Lordship in the case of *Robinson* v. *Cummins*, seems to have given rise to a notion that the husband could not make a tenant to the præcipe of his wife's estate, for the purpose of suffering a common recovery of it, without the wife's previously joining in a fine; but it now seems to be a settled point that he can. See *Cruise on Recoveries*; and post. tit. *Fine and Recovery*.—By *stat*. 32. *H*. 8. *c*. 28. leases of the wife's inheritance must be made by indenture, to which the husband and wife are both parties, to be sealed by the wife, and the rent to be reserved to the husband and wife, and to the heirs of the wife; and the husband shall not alien the rent longer than during the coverture, except by fine levied by husband and wife.—By the same act it is provided, that no fine or other act done by the husband only of the inheritance or freehold of his wife, shall be any discontinuance thereof, or prejudicial to the wife or her heirs, but they may enter according to their rights; fines whereunto the wife is party and privy [and the above-mentioned leases] only excepted. As to alienations of a husband's estate by a woman tenant in dower, *&c.* see *Stat*. 11. *H*. 7. *c*. 20. which makes them void. See *post Div.* VIII. and also tit. *Forfeiture.*

*As to chattels real, and things in action of the wife; where the husband survives the wife.*

At the common law no person had a right to administer. The ordinary might grant administration to whom he pleased, till the statutes, which gave it to the next of kin; and if there were persons of equal kindred, which ever took administration first, was entitled to the surplus. The statute of distribution was made to prevent this. Where the wife was entitled only to the trust of a chattel real, or to any chose in action, or contingent interest in any kind of personalty, it seems to have been doubted, whether, if the husband survived her, he was entitled to the benefit of it or not. See 1 *Inst*. 351. 4 *Inst*. 871. *Rol. Ab*. 346. *All*. 15. *Cro. Eliz*. 466. 3 *C. R*. 37. *Gilb. Ca. Eq*. 234.—See tit. *Executor* I. 1. V. 8.

Upon the construction of the statute of Distributions, (see tit. *Executor* V. 8.) it has been held that the husband may administer to his deceased wife; and that he is entitled, for his own benefit, to all her chattels real, things in action, trusts, and every other species of personal property, whether actually vested in her, and reduced into possession, or contingent, or recoverable only by action or suit.—It was, however, made a question after the *stat*. 29 *Car*. 2. *c*. 3. § 25. whether, if the husband having survived his wife, afterwards die, during the suspense of the contingency upon which any part of his wife's property depended, or without having reduced into possession such of her property as lay in action or suit, his representative, or his wife's next of kin, were entitled thereto. But, by a series of cases, it is now settled, that the representative of the husband is entitled as much to this species of his wife's property, as to any other; that the right of administration follows the right of the estate, and ought, in case of the husband's death after the wife, to be granted to the next of kin of the husband. See Mr. Hargrave's *Law Tracts*, 475. And that if administration *de bonis non* of the wife is obtained by any third person, he is a trustee for the representative of the husband. See 1 *P. Wms*. 378. 382.

*If the wife survive the husband.*—As to this point, there is a material difference with respect to chattels real, and goods, cattle, money, and other chattels personal.—All chattels personal become the property of the husband immediately on the marriage; he may dispose of them without the consent or concurrence of his wife; and at his death, whether he dies in her life time, or survives her, they belong to his personal representative. See 10 *Co*. 42. 2 *Inst*. 510.

With respect to her *chattels real*, as leases for years, there is a distinction between those which are in the nature of a present vested interest in the wife, and those in which she has only a possible or contingent interest. To explain this fully, it seems proper to mention, that it was formerly held that a disposition of a term of years to a man for his life, was such a total disposition of the term, that no disposition could be made of the possible residue of the term; or at least, that if it was made, the first devisee might dispose of the whole term, notwithstanding the devise of the residue. This is reported (*Dy*. 74.) to have been determined by all the judges in a case in 6 *Ed*. 6. The Court of Chancery first broke through this rule and supported such future dispositions when made by way of trust; their example was followed by the courts of law in Mat. Manning's case, 8 *Rep*. 94 *b*. and Lampet's case, 10 *Rep*. 46 *b*. This disposition of the residue of a term, after a previous disposition of it to one for life, operates by way of executory devise, and the interest of the devisee of the residue is called a possibility. This possible interest in a term of years

differs from a contingent interest created by way of remainder. If a person limits a real estate to A. for life, and after the decease of A., and if B. dies in A.'s life time, to C. for a term of years; this operates not as an executory devise, but as a remainder, and therefore is not to be considered as a possibility, but as a contingent interest.

Now if a person marries a woman possessed of, or entitled to, the trust of a present, actual, and vested, interest in a term of years, or any other chattel real, it so far becomes his property, that he may dispose of it during her life; and if he survives her, it vests in him absolutely; but if he makes no disposition of it, and she survives him, it belongs to her, and not to his representatives: nor is he in this case entitled to dispose of it from her by will. *Prec. Ch.* 418. 2 *Vern.* 270.

If a person marries a woman entitled to a possible or contingent interest in a term of years, if it is a legal interest, that is such an interest, as, upon the determination of the previous estate, or the happening of the contingency, will immediately vest in possession in the wife, there the husband may assign it; unless perhaps, in those cases, where the possibility or contingency is of such a nature that it cannot happen during the husband's life-time. 1 *Inst.* 46 *b.* 10 *Rep.* 51 *a.* *Hutt.* 17. 1 *Salk.* 326. But it is an exception to this rule, at least in equity, that if a future or executory interest in a term, or other chattel, is provided for the wife, by or with the consent of the husband, there he cannot dispose of it from the wife, as it would be absurd to allow him to defeat his own agreement. But this supposes the provision to be made before marriage; for, if made subsequent, it is a mere voluntary act, and void against an assignee for a valuable consideration. 1 *Cha. Ca.* 225. 1 *Vern.* 7. 18. 1 *Eq. Ab.* 58.

If a wife have a chattel real *en auter droit*, as executor or administrator, the husband cannot dispose of it. 1 *Inst.* 351 *a.* But if the wife had it as executrix to a former husband, the husband may dispose of it. 3 *Wils.* 277.—And if a woman be joint-tenant of a chattel real, and marries and dies, the husband shall not have it, but it survives to the other joint-tenant. 1 *Inst.* 185 *b.*—And the husband hath not power over a chattel real, which the wife hath as guardian. *Plowd.* 294.

*Things in action* do not vest in the husband till he reduces them into possession. It has been held that the husband may sue alone for a debt due to the wife upon bond; but that if he join her in the action, and recover judgment and die, the judgment will survive to her. 1 *Vern.* 396. See *All.* 36. 2 *Lev.* 107. 2 *Vez.* 677. The principle of this distinction appears to be, that his bringing the action in his own name alone is a disagreement to his wife's interest, and implies it to be his intention that it should not survive to her; but if he brings the action in the joint names of himself and his wife, the judgment is that they *both* should recover; so that the surviving wife, and not the representative of the husband, is to bring the *scire facias* on the judgment. In 3 *Atk.* 21. Lord Hardwicke is reported to say, that at law, if the husband has recovered a judgment for a debt of the wife, and dies before execution, the surviving wife, not the husband's executors, is entitled.

These appear to be the general principles of the courts of Law, respecting the interest which the husband takes in, and the power given him over, the things in action of his wife; but the courts of Equity have admitted many very nice distinctions respecting them.

1. A settlement made before marriage, if made in consideration of the wife's fortune, entitles the representative of the husband, dying in his wife's life-time, to the whole of her things in action; but it has been said that, if it is not made in consideration of her fortune, the surviving wife will be entitled to the things in action, the property of which has not been reduced [into his power] by the husband in his life-time; so, if the settlement is in consideration of a particular part of her fortune, such of the things in action, as are not comprised in that part, it has been said, survive to the wife. See *Pre. Ch.* 63. 2 *Vern.* 502. *Talb.* 168. In the case of *Blois* v. *Countess of Hereford*, (2 *Vern.* 501.) a settlement was made for the benefit of the wife, but no mention was made of her personal estate; it was decreed to belong to the representative of the husband; and it was then said, that in all cases where there was a settlement equivalent to the wife's portion, it should be intended that he is to have the portion, though there is no agreement for that purpose. See *Eq. Ab.* 69.

2. If the husband cannot recover the things in action of his wife but by the assistance of a Court of Equity, the court, upon the principle that he who seeks equity must do equity, will not give him their assistance to recover the property, unless he either has made a previous provision for her, or agrees to do it out of the property prayed for: or unless the wife appears in court, and consents to the property being made over to him. 2 *P. Wms.* 641. 3 *P. Wms.* 12. *Toth* 179. 2 *Vez.* 669. Neither will the court, where no settlement is made for the wife, direct the fortune to be paid to the husband, in all cases where she does appear personally and consent to it. 2 *Vez.* 579. It appears to be agreed, that the interest is always payable to the husband, if he maintains his wife. 2 *Vez.* 561, 562.; yet where the husband receives a great part of the wife's fortune, and will not settle the rest, the court will not only stop the payment of the residue of her fortune, but will even prevent his receiving the interest of the residue, that it may accumulate for her benefit. 3 *Atk.* 21.

3. Voluntiers and assignees under a commission of bankruptcy are, in cases of this nature, subject to the same equity as the husband; and are therefore required by the court, if they apply for its assistance in recovering the wife's fortune, to make a proper provision for her out of it. 2 *Atk.* 420. 1 *P. Wms.* 382. But if the husband actually assigns either a trust term of his wife, or a thing in action, for a valuable consideration, the court does not compel the assignee to make a provision for the wife. 1 *Vern.* 7. See 1 *Vern.* 18.—and Cox's *P. Wms.* i. 459. *in note*, where Lord Thurlow is reported to have said, in a case before him, "that he did not find it any where decided that, if the husband makes an actual assignment, by contract, for a valuable consideration, the assignee should be bound to make any provision for the wife: but that a court of equity has much greater consideration for an assignment actually made by contract, than for an assignment made by mere operation of law; for in this latter case, the creditor should be exactly in the case of the husband, and subject precisely to the same equity in favour of the wife."

4. But notwithstanding the uniform and earnest solicitude of the courts of equity, to make some provision for the wife out of her fortune, in those cases where the husband, or those claiming under him by act of law, cannot come at it without the assistance of those courts, still it does not appear that they have ever interfered to prevent its being paid the husband, or to inhibit him from recovering it at law. 2 *Atk.* 420.—In *Pre. Ch.* 414. it is observed, that if the trustees pay the wife's fortune, it is without remedy.

5. Money due on mortgage is considered as a thing in action. It seems to have been formerly understood, that as the husband could not dispose of lands mortgaged in fee without the wife, the estate remaining in the wife carried the money along with it to her and her representatives; but that as to the trust and the absolute power of a term of years, there was nothing to keep a mortgage-debt, secured by a term, from going to the husband's representatives: but this distinction no longer prevails; and it is now held, that though in the case of a mortgage in fee, the legal fee of the lands in mortgage continues in the wife, she is but a trustee, and the trust of the mortgage follows the property of the debt. See 1 *P. Wms.* 458. 2 *Atk.* 207.

6. If baron and feme have a decree for money in right of the feme, and then the baron dies, the benefit of the decree belongs to the feme, and not to the executor of the husband. This was certified by Hyde Ch. J. and his certificate confirmed by Lord Chancellor. 1 *Chn. Ca.* 27. If the wife has a judgment, and it is extended upon an *elegit*, the husband may assign it without a consideration. So if a judgment be given in trust for a feme sole, who marries, and, by consent of her trustees, is in possession of the land extended, the husband may assign over the extended interest; and, by the same reason, if the feme has a decree to hold and enjoy lands until a debt due to her is paid, and she is in possession of the land under this decree, and marries, the husband may assign it without any consideration, for it is in nature of an extent. 3 *P. Wms.* 200.

The above summary on this part of the law relative to baron and feme, is principally taken from the ingenious and laborious notes on 1 *Inst.*—To which may be added the following miscellaneous observations.

7. If a lease be conveyed by a *feme sole*, in trust for the use of herself, if she afterwards marries, it cannot be disposed of by the husband; if she dies, he shall not have it, but the executors of the wife. March 44. See 2 *Vern.* 270.

If a *feme*, having a rent for life, takes husband, the *baron* shall have action of debt for the rent incurred during the coverture, after the death of the *feme*: 1 *Danv.* 719. And arrears due in the life-time of the husband, after his death shall survive to the wife, if she outlives him, and her administrators after her death. 2 *Lut.* 1151. A *feme*, lessee for life, rendering rent, takes husband and dies, the *baron* shall be charged in action of debt for the rent which was grown due during the coverture, because he took the profits out of which the rent ought to issue. *Keilw.* 125. *Raym.* 6.

If a feme covert sues a woman in the spiritual court for adultery with her husband, and obtains a sentence against her and costs, the husband may release these costs, for the marriage continues; and whatever accrues to the wife during coverture belongs to the husband; *per Holt*, Ch. J. on motion for prohibition: 1 *Salk.* 115.

But if the husband and wife be divorced *a mensâ & thoro*, and the wife has her alimony, and sues for defamation or other injury, and there has costs, and the husband releases them, this shall not bar the wife, for these costs come in lieu of what she hath spent out of her alimony, which is a separate maintenance, and not in the power of her husband. 1 *Rol. Rep.* 426. 3 *Bulst.* 264. 1 *Rol. Abr.* 343. 2 *Rol. Abr.* 293. 1 *Salk.* 115.

A legacy was given to a feme covert, who lived separate from her husband, and the executor paid it to the feme, and took her receipt for it; yet on a bill brought by the husband against the executor, he was decreed to pay it over again, with interest. 1 *Vern.* 261.

If husband is attainted of felony, and pardoned on condition of transportation for life, and afterwards the wife becomes entitled to an orphanage share of personal estate, it shall not belong to the husband, but to the wife. 3 *P. Wms.* 37.

Trinkets and jewels given to a wife before marriage, become the husband's again by marriage, and are liable to his debts, if his personal estate is not sufficient. 2 *Atk.* 104.

8. And as the husband may generally acquire a property in all the personal substance of the wife, so, in one particular instance, the wife may acquire a property in some of her husband's goods, which shall remain to her after his death, and not go to his executors. These are called her *paraphernalia*; which is a term borrowed from the Civil Law, and is derived from the Greek παρα φερνη, signifying something over and above her dower. Our law uses it to signifying the apparel and ornaments of the wife suitable to her rank and degree; and therefore even the jewels of a Peeress, usually worn by her, have been held to be *paraphernalia*. *Moor* 213.—These she becomes entitled to at the death of her husband, over and above her jointure or dower, and preferably to all other representatives. *Cro. Car.* 343. 7. 1 *Ro. Ab.* 911. 2 *Leon.* 106. —Neither can the husband devise by his will such ornaments or jewels of his wife; though, during his life, perhaps he hath the power to sell or give them away. *Noy's Max. c.* 49. 2 *Comm.* 436.—But if she continue in the use of them till his death, she shall afterwards retain them against his executors and administrators, and all other persons except creditors, where there is a deficiency of assets. 1 *P. Wms.* 730.—And her necessary apparel is protected even against the claim of creditors. *Noy's Max. c.* 49.

That the widow's paraphernalia are subject to the debts, but preferred to the legacies of the husband; and that the general rules of marshalling assets are applicable in giving effect to such priority, see not only 1 *P. Wms.* 730, quoted above, but also 2 *P. Wms.* 544. 2 *Atk.* 104. 642. 3 *Atk.* 369. 393. 2 *Vez.* 7. See also *Cha. Ca.* 240. 1 *C. R.* 27.

In one place Rolle says, the wife shall have a necessary *bed* and apparel. 1 *Rol.* 911. *l.* 20.—See further, on the subject of paraphernalia, *Com. Dig.* tit. *Baron and Feme* (F. 3.)

V. If a *Feme sole* indebted takes husband, her debt becomes that of the husband and wife, and both are to be sued for it; but the husband is not liable after the death of the wife, unless there be a judgment against both during the coverture. 1 *Rol. Abr.* 351. F. N. B. 120. Where there is judgment against a *feme sole*, who marries and dies, the *baron* shall not be charged therewith; though, if the judgment be had upon *scire facias* against *baron and feme*, and then the *feme* dies, he shall be charged. 3 *Mod.* 186. In action brought against a *feme sole*, if, pending the action, she marries, this shall not abate the action; but the plaintiff may proceed to judgment and execution against her, according as the action was commenced. 1 *Lill.* 217. *Trin.* 12. *W.* 3. And if *habeas corpus* be brought to remove the cause, the plaintiff is to move for a *procedendo* on the return of the *habeas corpus*: also the court of B. R. may refuse it, where brought to abate a just action. 1 *Salk.* 8.

In general the husband is liable to the wife's debts contracted before marriage, whether he had any portion with her or not; and this the law presumes reasonable, because by the marriage, the husband acquires an absolute interest in the personal estate of the wife, and has the receipt of the rents and profits of her real estate during coverture; also whatever accrues to her by her labour, or otherwise, during the coverture, belongs to the husband; so that in favour of creditors, and that no person's act should prejudice another, the law makes the husband liable to those debts with which he took her attached. *F. N. B.* 265. 20 *Hen.* 6. 22 *h.* *Moor* 468. 1 *Rol. Abr.* 352. 3 *Mod.* 186.

If baron and feme are sued on the wife's bond, entered into by the feme before marriage, and judgment is had thereupon, and the wife dies before execution, yet the husband is liable; for the judgment has altered the debt. 1 *Sid.* 337.

If judgment be against husband and wife, he dies, and she survives, execution may be against her. 1 *Rol. Abr.* 890 *l.* 10. 50. See *post* X.

Where a man marries a *widow executrix*, &c. her evidence shall not be allowed to charge her second husband with more than she can prove to have actually come to her hands. Agreed *per cur.* *Abr. Eq. Ca.* 227. *Hil.* 1719.

*D. confessed a judgment to F.* who made his wife, the plaintiff, *executrix*, and died; she *administered, and married a second husband, and* then, *she alone*, without her husband, *acknowledged satisfaction, though no real satisfaction was made.* The court held that this was not good. *Sid.* 31.

A wife, *administratrix*, under seventeen, shall join with her husband in an action; *per Twisden* J. *Mod.* 297.

If a feme *executrix takes baron*, and *he releases all actions*, this shall be a bar during the coverture without question; by the justices. *Br. Releases, pl.* 29.

If a *feme executrix take baron*, and the *baron puts himself in arbitrament for death of the testator*, and *award is made*, and the *baron dies*, the *feme shall be barred; per tot' cur'*. Brooke says, that from hence it seems to him, that the release of the baron without the feme is a good bar against the feme; *quod conceditur*, anno 39 *H.* 15.; and therefore he excepted those debts in his release, otherwise they had been extinct. *Br. Releases, pl.* 79.

If a man marries an administratrix to a former husband, who, in her widowhood, wasted the assets of her intestate, the husband is liable to the debts of the intestate during the life of the wife; and this shall be deemed a *devastavit* in him. *Cro. Car.* 603.

VI. Every gift, grant, or disposition of goods, lands, or other thing whatsoever; and all obligations and feoffments made by a *feme covert*, without her husband's consent, are void. 1 *H.* 5. 125. *Fitz. Covert.* 18.

The husband is obliged to maintain his wife in necessaries; yet they must be according to his degree and estate, to charge him; and necessaries may be suitable to a husband's degree of quality, but not to his estate; also they may be necessaries, but not *ex necessitate*, to charge the husband. 1 *Mod.* 129. 1 *Nels. Abr.* 354. If a woman buys things for her necessary apparel, though without the consent of her husband, yet the husband shall be bound to pay it. *Brownl.* 47. And if the wife buys any thing for herself, children, or family, and the *baron* does any act precedent or subsequent, whereby he shows his consent, he may be charged thereupon. 1 *Sid.* 120. The expenses of a feme covert's funeral, paid by her father while her husband had left her, and was gone abroad, deemed necessaries. *H. Black. Rep.* 90. Though a wife is very lewd, if she cohabits with her husband, he is chargeable for all necessaries for her, because he took her for better, for worse: and so he is if he runs away from her, or turns her away; but *if she goes away from her husband*, then as soon as such separation is notorious, whoever gives her credit doth it at his peril, and the husband is not liable, unless he takes her again. 1 *Salk.* 119. see 1 *Stra.* 647. 706. and as to actions against femes covert having eloped, see 2 *Black. Rep.* 1079.

If a man cohabits with a woman, allows her to assume his name, and passes her for his wife, though in fact he is not married to her, yet he is liable to her contracts for necessaries; and therefore *ne unques accouple* is a bad plea in an action on the case for the debt of a wife; it is good only in dower or an appeal. *Bull. N. P.* 136. *Esp. N. P.* 124.

Although a husband be bound to pay his wife's debts for her reasonable provision, yet if she parts from him, especially by reason of any misbehaviour, and he allows her a maintenance, he shall never after be charged with her debts, till a new cohabitation; but if the husband receive her, or come after her, and lie with her but for a night, that may make him liable to the debts. *Pasch.* 3 *Ann. Mod. Cas.* 147. 171. If there be an agreement in writing between husband and wife to live separate, and that she shall have a separate maintenance, it shall bind them both till they both agree to cohabit again; and if the wife is willing to return to her husband, she may; but it has been adjudged, that the husband hath no coercive power over the wife to force her, though he may visit her, and use all lawful means in order to a reconciliation. *Mich. Geo.* 1. *Mod. Ca.* in *L. & E.* 22.

Where there is a separation by consent, and the wife hath a separate allowance, those who trust her, do it upon her own credit. 1 *Salk.* 116. If a husband makes his wife an allowance for clothes, &c. which is constantly paid her, it is said he shall not be charged. 1 *Sid.* 109. And if he forbids particular persons to trust her, he will not be chargeable: but a prohibition in general, by putting her in the news-papers, is no legal notice not to trust her. 1 *Vent.* 42.

In *assumpsit* the defendant proved that she was married, and her husband alive in France, the plaintiff had judgment, upon which, as a verdict against evidence, she moved for a new trial, but it was denied; for it shall be intended that she was divorced; besides the husband is an alien enemy, and in that case, why is not his wife chargeable as a feme sole? 1 *Salk.* 116. *Deerly* v. *Duchess of Mazarine.*

It was at one time held, that "where the husband and wife part by consent, and she has a separate maintenance from the husband, she shall in all cases be subject to her own debts." In the case of *Ringstead* v. *Lady Lanesborough, M.* 23 *Geo.* 3. and *H.* 23 *Geo.* 3. in actions against the defendant for goods sold she pleaded coverture; and the plaintiff's replication "that she lived separate and apart from her husband, from whom she had a separate maintenance; and so was liable to her own debts," was on demurrer holden to be good; and plaintiff had judgment.—In the above case the plea also stated that the husband lived in Ireland, which being out of the process of the court, some stress was laid on it in the decision; but in the case of *Barwell* v. *Brooks, H.* 24 *Geo.* 3. it was decided generally, that the husband was not liable in any case where the wife lived apart, and had a separate maintenance; and this was recognized in *Corbett* v. *Poelnitz*, and other cases. See 1 *Term Rep.* 5. 5 *Term Rep.* 679. 1 *Bos. & Pull.* 357.

But subsequently, after two arguments before all the judges of the King's Bench, the court declared it to be their opinion, that a feme covert living apart from her husband, having a separate maintenance secured to her by deed, cannot contract and be sued as a feme sole; in fact, that *by no agreement between a man and his wife*, can she be legally made responsible for the contracts she may enter into, or be liable to the actions of those who may have trusted her engagements, as if she were sole and unmarried. *Marshall* v. *Rutton*, 8 *Term Rep.* 545. And where husband and wife were separated by deed, and the husband covenanted with a third person to pay to his wife, or to whom she should appoint, a certain weekly allowance, and the wife lived with such third person (her sister) who found her in necessaries, the court of Common Pleas held, that the husband having failed to pay the stipulated allowance, an action of *indeb. assumpsit* might be maintained against him for such necessaries. *Nurse* v. *Craig*, 2 *New Rep.* 148.

A husband who has abjured the realm, or who is banished, is thereby *civiliter mortuus;* and being disabled to sue or be sued in right of his wife, she must be considered as a *feme sole;* for it would be unreasonable that she should be remediless on her part, and equally hard on those who had any demands on her, that, not being able to have any redress from the husband, they should not have any against her. *Bro. Baron and Feme* 66. *Co. Lit.* 133. 1 *Rol. Rep.* 400. *Moor* 851. 3 *Bulst.* 188. 1 *Bulst.* 140. 2 *Vern.* 104.

So where a married man was transported for felony, the court of King's Bench held that the wife might be sued alone, for debt contracted by her after the transportation. 1 *Term Rep.* 9. And this determination does not seem questioned in any subsequent case.

A husband is not bound to receive, nor is he liable to pay for necessaries found to his wife after she has committed adultery, though he has before committed adultery himself, and turned her out of doors without any imputation on her conduct. 6 *T. R.* 608.

But where the wife having committed adultery, the husband left her in his house with two children bearing his name, but without making any provision for her in consequence of the separation; although she continued in a state of adultery, the court of Common Pleas held that the husband was liable

for necessaries furnished to her, unless it appear that the plaintiff knew, or ought to have known, the circumstances under which she was living. 1 *Bos. & Pul.* 226.

The *baron* in an account shall not be charged by the receipt of his wife, except it came to his use. 1 *Danv.* 707. Yet if she usually receives and pays money, it will bind him in equity. *Abr. Cas. Eq.* 61. And why not in law, in an action for money had and received? For goods sold to a wife, to the use of the husband, the husband shall be charged, and be obliged to pay for the same. *Sid.* 425.

If the wife *pawn her clothes* for money, and afterwards *borrows money to redeem them*, the husband is not chargeable unless he were consenting, or that the first sum came to his use. 2 *Show.* 283.

If a wife takes up clothes, as silk, &c. and *pawns them before made into clothes*, the husband shall not pay for them, because they never came to his use; otherwise if made up and worn, and then pawned; *per Holt*, Ch. J. at Guildhall. 1 *Salk.* 118.

A wife may use the goods of her husband, but she may not dispose of them: and if she takes them away, it is not felony, for she cannot by our law steal the goods of her husband; but if she delivers them to an adulterer, and he receives them, it will be felony in him. 3 *Inst.* 308. 310.

If the *baron is beyond sea* in any voyage, *and during his absence the wife buys necessaries*, this is a good evidence for a jury to find that the baron *assumpsit*. *Sid.* 127.

By the *custom of London*, if a *feme covert* trades by herself, in a trade with which her husband *does not intermeddle*, she may sue and be sued as a *feme sole*. 10 *Mod.* 6.

But in such case she cannot give a bond and warrant of attorney to confess a judgment: and when sued as a *feme sole*, she must be sued in the courts of the city of London; for if sued in the courts above, the husband must be joined. So the wife alone cannot bring an action in the courts above, but only in the city courts; and this even though her husband be dead; if the cause of action accrued in his life time. 4 *Term Rep.* 361. 2. See title *London*.

If a feme covert, without any authority from her husband, contract with a servant by *deed*, the servant, having performed the service stipulated, may maintain assumpsit against the husband. 6 *T. R.* 176.

VII. In some cases the command or authority of the husband, either express or implied, will privilege the wife from punishment, even for capital offences. And therefore if a woman commit bare *theft* or *burglary* by the coercion of her husband, (or even in his company which the law construes a coercion,) she is not guilty of any crime, being considered as acting by compulsion, and not of her own will.

But for crimes *mala in se*, not being merely offences against the laws of society, she is answerable; as for *murder* and the like; not only because these are of a deeper die, but also since in a state of nature, no one is in subjection to another, it would be unreasonable to screen an offender from the punishment due to natural crimes, by the refinements and subordinations of civil society. In *treason* also, (the highest crime which a member of society can, as such, be guilty of) no plea of coverture shall excuse the wife: no presumption of the husband's coercion shall extenuate her guilt. 1 *Hale's P. C.* 47. And this as well because of the odiousness and dangerous consequence of the crime itself, as because the husband having broken through the most sacred tie of social community, by rebellion against the state, has no right to that obedience from a wife which he himself as a subject has forgotten to pay. 4 *Comm.* 28, 29. (But she shall not be considered criminal for receiving her husband, though guilty of treason, nor for the receiving another offender jointly with her husband. *Leach's Hawk. P. C.* i. *c.* 1. § 11. in *note.*)—See tit. *Accessary*.

If also a feme commit a theft *of her own voluntary act*, or by the bare command of her husband, or be guilty of treason, murder or *robbery*, though in company with, or by coercion of her husband, she is punishable. 1 *Hawk. P. C. c.* 1. § 11. —The distinction between her guilt in *burglary* or *theft* and *robbery*, seems to be, that in the former, if committed through the means of her husband, "she cannot know what property her husband may claim in the goods taken; 10 *Mod.* 63.;" but in robbery the wife has an opportunity of judging in what *sort of right* the goods are taken. *Leach's Hawk. P. C.* i. *c.* 1. § 9. in *note*.

If the wife receive stolen goods of her own separate act, without the privity of her husband, or if he knowing thereof, leave the house and forsake her company, she alone shall be guilty as accessary. 22 *Ass.* 40. *Dalt.* 157. 1 *Hale P. C.* 516.

In inferior misdemeanors also, another exception may be remarked; that a wife may be indicted and set in the pillory *with* her husband, for keeping a brothel; for this is an offence touching the domestic economy or government of the house, in which the wife has a principal share; and is also such an offence as the law presumes to be generally conducted by the intrigues of the female sex. 1 *Hawk. P. C. c.* 1. § 12. 10 *Mod.* 63.

A feme covert generally shall answer, as much as if she were sole, for any offence not capital against the common law or statute; and if it be of such nature, that it may be committed by her alone, without the concurrence of her husband, she may be punished for it without the husband by way of indictment, which being a proceeding grounded merely on the breach of the law, the husband shall not be included in it for any offence to which he is no way privy. 9 *Co.* 71. 1 *Hawk. P. C. c.* 1. § 9. See *Moor* 813. *Hob.* 93. *Noy.* 103. *Savil* 25. *Cro. Jac.* 482. 11 *Co.* 61.

A feme may be *indicted* alone for a riot. *Dalt.* 447. For selling gin against the stat. 9 *Geo.* 2. *c.* 23. *Str.* 1120.—For recusancy. *Id. ib. Hob.* 96. 1 *Sid.* 410. 11 *Co.* 64. *Sav.* 25. —For being a common scold. 6 *Mod.* 213. 239.—For assault and battery. *Salk.* 384.—For forestalling. *Sid.* 410.—For usury. *Skin.* 348.—For barratry. 1 *Hawk. P. C. c.* 81. § 6. See *c.* 1. § 13.—For a forcible entry. 1 *Hawk. P. C. c.* 64. § 35.—For keeping a gaming house. 10 *Mod.* 335.—Keeping a bawdy-house, if the husband does not live with her. 1 *Bac. Abr.* See *ante*.—For trespass or slander. *Keilw.* 61. *Ro. Ab.* 251. *Leon.* 122. *Cro. Car.* 376.—See 1 *Hawk. P. C. c.* 1. § 13. in *note*.

A man must answer for the trespasses of his wife: if a *feme covert* slander any person, &c. the husband and wife must be sued for it, and execution is to be awarded against him. 11 *Rep.* 62.—See *post* X.

Husband and wife may be found guilty of *nusance*, *battery*, &c. 10 *Mod.* 63.

If the wife incur the forfeiture of a penal statute, the husband may be made a party to an action or information for the same; as he may be generally to any suit for a cause of action given by his wife, and shall be liable to answer what shall be recovered thereon. 1 *Hawk. P. C. c.* 1.

For the punishment of femes covert, see tits. *Felony*, *Treason*, *&c.*

VIII. A wife is *sub potestate viri*, and therefore her acts shall not bind her, unless she levy a fine, &c. when she is examined in private, whether she doth it freely, or by compulsion of the husband; if *baron and feme* levy a fine, this will bar the feme; and where the *feme* is examined by writ, she shall be bound, else not. 1 *Danv. Abr.* 708. See ante IV.

If a common recovery be suffered by husband and wife of the wife's lands, this is a bar to the wife: for she ought to be examined upon the recovery. *Pl. Com.* 514 *a.* 10 *Co.* 43 *a.* 1 *Rol.* 347 *l.* 19.

So if husband and wife are vouchees in a common recovery the recovery shall be a bar, though the wife be not examined; for though it be proper that she be examined, yet that is not necessary, and is frequently omitted. 1 *Sid.* 11. *Sti.* 319, 320.

A recovery, as well as a fine by a feme covert, is good to bar her, because the *præcipe* in the recovery answers the writ of covenant in the fine, to bring her into court, where the examination of the judges destroys the presumption of the law, that this is done by the coercion of the husband, for then it is to be presumed they would have refused her. 10 *Co.* 43. 1 *Rol. Abr.* 395.

By the custom in some cities and boroughs, a bargain and sale by the husband and wife, where the wife is examined by the mayor or other officer, binds the wife after the husband's death. 2 *Inst.* 673.—And it seems that by stat. 34 *Hen.* 8. *c.* 22. all such customary conveyances shall be of force notwithstanding the stat. 32 *Hen.* 8. *c.* 28. See ante *Div.* IV.

So by custom in Denbigh in Wales, a surrender by husband and wife, where the wife is examined in court there, binds the wife and her heirs as a fine does; and this custom is not taken away by stat. 27 *H.* 8. *c.* 26. for it is reasonable and agreeable to some customs in England. *Dy.* 363 *b.*

So a surrender of a copyhold by husband and wife, the wife being examined by the steward, binds the wife. *Com. Dig.* tit. *Baron and Feme* (G. 4.) there cites *Litt.* 274. but which is to a different purpose.

A wife is disabled to make contracts, &c. 3 *Inst.* 110. And if a married woman enters into bond as *feme sole*, if she is sued as *feme sole*, she may plead *non est factum*, and the coverture will avoid her bond. 1 *Lill. Abr.* 217. A feme covert may plead *non assumpsit*, and give coverture in evidence, which makes it no promise, &c. *Raym.* 395.

In case money be due to the husband by bill or bond, or for rent on a lease, and it is paid to the wife; this shall not prejudice him, if after payment he publicly disagrees to it. 19 *Jac.* 1. *B. R.* 2 *Shep. Abr.* 426. *Contra*, if she is used to receive money for him, or if it can be proved the money paid came to his use.

If a feme covert levies a fine of her own inheritance without her husband, this shall bind her and her heirs, because they are estopped to claim any thing in the land, and cannot be admitted to say she was covert against the record; but the husband may enter and defeat it, either during the coverture, to restore him to the freehold he held *jure uxoris*, or after her death to restore himself to his tenancy by the courtesy, because no act of a feme covert can transfer that interest which the intermarriage has vested in the husband; and if the husband avoids it during the coverture, the wife or her heirs shall never after be bound by it. *Bro.* tit. *Fines*, 33. 10 *Co.* 43. *Hob.* 225. 7 *Co.* 8. *Co. Lit.* 46.

*Lease* made *by baron and feme*, shall be said to be the lease of them both till the feme disagrees, which she cannot do in the life of the baron. *Br. Agreement, pl.* 6.

The examination of a feme covert is not always necessary in levying of fines, because that being provided that she may not at the instance of her husband make any unwary disposition of her property, it follows, that when the husband and wife do not take an estate by the fine, and part with nothing, the feme need not be examined; but where she is to convey or pass any estate or interest, either by herself or jointly with her husband, there she ought to be examined; therefore if A. levies a fine *come ceo* to baron and feme, and they render to the conuzor, the feme shall be examined; so it is where she takes an estate by the fine rendering rent. 2 *Inst.* 515. 2 *Rol. Abr.* 17.

If baron and feme by fine *sur concessit* grant land to J. S. for ninety-nine years, and warrant the said land to J. S. during the said term, and the baron dies, and J. S. is evicted by one that hath a prior title, he may thereupon bring covenant against the feme, notwithstanding she was covert at the time when the fine was levied. 2 *Saund.* 177. 1 *Sid.* 466. S. C. 1 *Mod.* 290. 2 *Keb.* 684. 703.—See title *Fines.*

If a husband disseise another to the use of his wife, this does not make her a disseisoress, she having no will of her own, nor will any agreement of hers to the disseisin during the coverture, make her guilty of the *disseisin*, for the same reason: but her agreement after her husband's death will make a disseisoress, because then she is capable of giving her consent, and that makes her tenant of the freehold, and so subject to the remedy of the disseisee. 1 *Rol. Abr.* 660. *Bro. Disseisin* 67.

But if a feme covert actually enters and commits a disseisin, either sole or together with her husband, then she is a disseisoress, because thereby gains a wrongful possession; but such actual entry cannot be to the use of her husband or a stranger, so as to make them disseisors, because though by such entry she gains an estate, yet she has no power of transferring it to another. *Co. Lit.* 357. 1 *Rol. Abr.* 660. *Bro. Disseisin* 15. 67. See 8 *Hen.* 6. 14. *cont.*

If the husband, seised of lands in right of his wife, makes a lease thereof for years by indenture or deed poll, reserving rent; all the books agree this to be a good lease for the whole term, unless the wife, by some act after the husband's death, shows her dissent thereto; for if she accepts rent which becomes due after his death, the lease is thereby become absolute and unavoidable; the reason whereof is, that the wife, after her intermarriage, being by law disabled to contract for, or make any disposition of, her own possessions, as having subjected herself and her whole will to the will and power of her husband; the law therefore transfers the power of dealing and contracting for her possessions, to the husband, because no other can then intermeddle therewith, and without such power in the husband, they would be obliged to keep them in their own manurance or occupation, which might be greatly to the prejudice of both; but to prevent the husband's abusing such power, and lest he should make leases to the prejudice of his wife's inheritance, the law has left her at liberty after his death, either to affirm and make good such lease, or defeat and avoid it, as she finds it subservient to her own interest; and this she may do, though she joined in such lease, unless made pursuant to statute 32 *Hen.* 8. *c.* 28. See ante IV. *Bro. Acceptance* 10. *Bro. Leases* 24. *Cro. Jac.* 332. 2 *And.* 42. *Co. Lit.* 45. *Plow.* 137. *Cro. Jac.* 563. *Yelv.* 1. *Cro. Eliz.* 769.

Husband and wife make a lease for years, by indenture, of the wife's lands, reserving rent; the lessee enters, the husband before any day of payment dies; the wife takes a second husband, and he at the day accepts the rents, and dies; and it was held, that the wife could not now avoid the lease, for by her second marriage she transferred her power of avoiding it to her husband, and his acceptance of the rent binds her, as her own act before such marriage would have done; for he by the marriage succeeded into the power and place of the wife, and what she might have done either as to affirming or avoiding such lease before marriage, the same may the husband do after the marriage. *Dyer* 159. 1 *Rol. Abr.* 475. 1 *Rol. Rep.* 132.

A re-delivery by the wife after the death of her husband, of a deed delivered by her during the coverture is a sufficient confirmation of such deed so as to bind her, without its being re-executed or re-attested—and circumstances alone may be equivalent to such re-delivery, though the deed be a joint deed by baron and feme affecting the wife's land; and no fine levied. *Comp.* 201.

The husband being seised of copyhold lands in right of his wife in fee, makes thereof a lease for years not warranted by the custom, which is a forfeiture of her estate, yet this shall not bind the wife or her heirs after the husband's death, but

that they may enter and avoid the lease, and thereby purge the forfeiture; and the diversity seems between this act, which is at an end when the lease is expired or defeated by the entry of the lord, or the wife after the husband's death, and such acts as are a continuing detriment to the inheritance, as wilful waste by the husband, which tends to the destruction of the manor; so of non-payment of rent, denial of suit or service; for such forfeitures as these bind the inheritance of the wife after the husband's death; but in the other case the husband cannot forfeit by this lease more than he can grant, which is but for his own life. 2 *Rol. Rep.* 344. 361. 372. *Cro. Car.* 7. *Cro. Eliz.* 149. 4 *Co.* 27.

A feme covert is capable of purchasing, for such an act does not make the property of the husband liable to any disadvantage, and the husband is supposed to assent to this, as being to his advantage, but the husband may disagree; and that shall avoid the purchase; but if he neither agrees nor disagrees, the purchase is good, for his conduct shall be esteemed a tacit consent, since it is to turn to his advantage; but in this case, though the husband should agree to the purchase, yet after his death she may waive it, for having no will of her own at the time of the purchase, she is not indispensably bound by the contract; therefore if she does not, when under her own management and will, by some act express her agreement to such purchase, her heirs shall have the privilege of departing from it. *Co. Lit.* 3 *a.*

Jointress paying off a mortgage was decreed *to hold over* till she or her executor be satisfied, and interest to be allowed her. *Chan. Cases* 271.

The husband gave a voluntary bond after marriage to make a jointure of a certain value on his wife; the husband accordingly makes a *jointure;* the wife gives up the bond; the jointure is *evicted;* the jointure shall be made good out of the husband's personal estate, there being no creditors in the case; and the delivery up of the bond by a feme covert could no ways bind her interest. *Vern.* 427, *pl.* 402.

A feme covert agrees to sell *her inheritance*, so as she might have 200*l.* of the money secured to her; the land is sold, and the money put out in a trustee's name accordingly; this money shall not be liable to the *husband's debts*, nor shall any *promise by the wife*, to that purpose, subsequent to the first original agreement, be binding in that behalf. 2 *Vern.* 64, 65. *pl.* 58. *Trin.* 1688.

It is a general rule that a *feme covert*, acting with respect to her separate property, is competent to act in all respects as if she were a feme sole. 2 *Vez.* 190. 1 *Bro. C. R.* 20.; and see 1 *Vez.* 163.—Where the wife, being authorised by settlement to dispose of her separate estate, contracted to sell it, the court of Chancery will bind her to a specific performance. 1 *Vez.* 517. 1 *Bro. C. R.* 20.—So the bond of a *feme covert*, jointly with her husband, shall bind her separate estate. 1 *Bro. C. R.* 16. 2 *Vez.* 190.

IX. In those cases where the debt or cause of action will survive to the wife, the husband and wife are regularly to join in action; as in recovering debts due to the wife before marriage; in actions relating to her freehold or inheritance, or injuries done to the person of the wife. 1 *Rol. Abr.* 347. 2 *Mod.* 269.

But if a feme sole hath a rent-charge, and rent is in arrear, and she marries, and the baron distrains for this rent, and thereupon a rescous is made, this is a tort to the baron himself, and he may have an action alone. *Cro. Eliz.* 439. *Owen* 82. *S. P.* *Moor* 584. *S. C.*

So if a feme sole hath right to have common for life, and she takes husband, and she is hindered in taking the common, he may have an action alone without his wife, it being *only to recover damages.* 2 *Bulst.* 14.

But if baron and feme are disseised of the lands of the feme, they must join in action for the recovery of this land. 1 *Bulst.* 21.

The baron may have an action alone upon the stat. 5 *R.* 2. *st.* 1. *c.* 8. for entering into the land of the feme; trespass and taking charters of the inheritance of the feme; *quare impedit*, *&c.* But for personal torts they must join, though the baron is to have the damages. 1 *Danv.* 709. 1 *Rol. Rep.* 360. The husband is to join in actions for battery to the wife; and a wife may not bring any action for wrong to her without her husband. *Co. Lit.* 132. 326. An action for a battery on the wife, brought by husband and wife, must be laid *to the damage of both.* 2 *Ld. Raym.* 1209. For an injury done to the wife alone, action cannot be maintained by the husband alone, without her; but for assault, and debauching or lying with the wife, or for a loss and injury done to the husband, in depriving him of the conversation and service of his wife, he alone may bring an action; and these last actions are laid for assault, and detaining, &c. the wife, *per quod consortium amisit, &c.* *Cro. Jac.* 538. See *Yelv.* 89.

For taking any thing from the wife, the husband only is to bring the action, who has the property; for the wife hath not the property. *In all cases where the feme shall not have the thing recovered, but the husband only, he alone is to bring the action*, 1 *Rol. Rep.* 360. except as above, &c. For a personal duty to the wife, the baron only may bring the action: and the husband is entitled to the fruits of his wife's labour, for which he may bring *quantum meruit.* 1 *Lill. Abr.* 227. 1 *Salk.* 114. In case, before marriage, a *feme* enters into articles concerning her estate, she is as a separate person; and the husband may be plaintiff in equity against the wife. *Prec. in Chan.* 24.

Where the *feme is administratrix*, the suit must be in both their names; for, by the intermarriage, the husband hath authority to intermeddle with the goods as well as the wife; but, in the declaration, the granting administration to the feme must be set forth. Vid. the *Books of Entries*, and *Godb.* 40. *pl.* 44.

In action *for goods which the feme hath as executrix*, they must join, to the end that the damages thereby recovered may accrue to her as executrix, in lieu of the goods. *Went. Off. Ex.* 207.

In an action upon a *trover* before marriage, and a *conversion* after, the baron and feme ought to join; for this action, as a trespass, disaffirms the property; but the baron alone ought to bring a *replevin*, *detinue*, *&c.* for the allegations admit and affirm a property in the feme at the time of the marriage, which, by consequence, must have vested in the baron. 1 *Sid.* 172. 1 *Keb.* 641. *S. C.* 1 *Vent.* 261. 2 *Lev.* 107. *S. P.*; and that he may join the wife at his election.

If A. declares that the defendant, being indebted to him and his wife, as executrix to one J. S., in consideration that A. would forbear to sue him for three months, assumed, &c. and avers that he forbore, and that his wife is still alive, the action is well maintainable by the husband alone, for this is on a new contract, to which the wife is a stranger. *Carth.* 462. 1 *Salk.* 117. *Yelv.* 84. *Cro. Jac.* 110. *S. P.*

Where a right of action doth accure to a woman before marriage, as where a bond is made to her and forfeited, there, if she marry, she must be joined with the husband in an action of debt against the obligor. *Owen* 82.

In all actions *real* for the land of the wife, the husband and wife ought to join. *R.* 1 *Bulst.* 21. So, in actions personal for a *chose in action*, due to the wife before coverture. 1 *Rol.* 347 *l.* 53. *Cro. El.* 537. Vide *Com. Dig.*

In the civil law the husband and the wife are considered as two distinct persons; and may have separate estates, contracts, debts, and injuries: and therefore, in our ecclesiastical courts, a woman may sue and be sued without her husband. 2 *Rol. Ab.* 298. See tit. *Action.*

X. The husband is by law answerable for all actions for which his wife stood attached at the time of the coverture, and also for all torts and trespasses during coverture, in which cases the action must be joint against them both; for if she alone were sued, it might be a means of making the husband's property liable, without giving him an opportunity of defending himself. *Co. Lit.* 133. *Doctr. Placit.* 3. 2 *Hen.* 6. 4.

If goods come to a feme covert by *trover*, the action may be brought against husband and wife, but the conversion may be laid only in the husband, because the wife cannot convert goods to her own use; and the action is brought against both, because both were concerned in the trespass of taking them. See *Co. Lit.* 351. 1 *Rol. Abr.* 6. *pl.* 7. *Yelv.* 166. *Noy* 79. 1 *Leon.* 312. *Cro. Car.* 254. 494. 1 *Rol. Abr.* 348. But in *debt* upon a *devastavit* against *baron* and *feme* executrix, it shall not be laid *quod devastaverunt*, for a feme covert cannot waste. 2 *Lev.* 145.

An action on the case was brought against baron and feme for retaining and keeping the servant of the plaintiff, and judgment accordingly. 2 *Lev.* 63.

If a lease for life or years be made to baron and feme, reserving rent, an action of debt for rent arrear may be brought against both; for this is for the advantage of the wife. 1 *Rol. Abr.* 348.

If an action be brought against an husband and wife, for the debt of the wife when sole, and the plaintiff recovers judgment, the *ca. sa.* shall issue to take both the husband and wife in execution. *Moor* 704.—But if the action was originally brought against herself when sole, and pending the suit she marries, the *ca. sa.* shall be awarded against her only, and not against the husband. *Cro. Jac.* 323.—Yet, if judgment be recovered against an husband and wife for the contract, nay, even for the personal misbehaviour (*Cro. Car.* 513.) of the wife during her coverture, the *ca. sa.* shall issue against the husband only: which is (says Mr. J. Blackstone) one of the many great privileges of English wives. 3 *Comm.* 414. See 3 *Wils.* 124.—See tits. *Arrest*, *Bail*, *Execution*, *Action*, &c.—But in an action against husband and wife, for an assault by the wife, it was held that both may be taken in execution. 1 *Wils.* 149. See *Espinasse's N. P.* 327.

Where a woman before marriage becomes bound for the payment of a sum of money, and on her marriage separate property is settled on her, if the obligee can have no remedy against the husband, the wife's separate property is bound. But the obligee must first endeavour to recover against the husband by suing him. 1 *Bro. C. R.* 17. in *note*.

XI. If *baron and feme* are divorced *causâ adulterii*, which is a divorce *à mensâ & thoro*, they continue *baron and feme*; it is otherwise in a divorce *à vinculo matrimonii*, which dissolves the marriage.

The feme, after divorce, shall re-have *the goods which she had before marriage*. *Br. Coverture*, *pl.* 82. D. 13. *pl.* 68. *per Fitzherbert*. *Keilw.* 122 *b. pl.* 75.

But if the husband had given or sold them without collusion before the divorce, there is no remedy; but if by collusion, she may aver the collusion, and have *detinue* for the whole, whereof the property may be known; and as for the rest, which consists of money, &c. she shall sue in the spiritual court. *Br. Deraignment* and *Divorce*, *pl.* 1. cites 26 *H.* 8. 7.

If *a man is bound to a feme sole*, and after *marries her*, and after they are divorced, *the obligation is revived*. *Br. Coverture*, *pl.* 82. Because the divorce being *à vinculo matrimonii*, by reason of some prior impediment, as pre-contract, &c. makes them never husband and wife *ab initio*; but if the husband had made a feoffment in fee of the lands of his wife, and then the divorce had been, that would have been a discontinuance as well as if the husband had died, because there the interest of a third person had been concerned, but between the parties themselves it will have relation to destroy the husband's title to the goods, and it proves no more than the common rule, viz. that relations will make a nullity between the parties themselves, but not amongst strangers. *Ld. Raym.* 521. *Hil.* 11 *W.* 3.

If a man *gives lands in tail to baron and feme*, and they have issue, and after, *divorce is sued*, now they have only frank tenement, and the issue shall not inherit. *Br. Tail et Dones, &c. pl.* 9.

If the baron and feme, *purchase jointly and are disseised, and the baron releases*, and after they are divorced, the feme shall have the *moiety*, though before the divorce there were no moieties; for the divorce converts it into moieties. *Br. Deraignment, pl.* 18. cites 32 *Hen.* 8.

If baron *alien* the *wife's land*, and then there is a divorce *causa præcontractûs*, or any other divorce which dissolves the marriage *a vinculo matrimonii*, the wife during the life of the baron may *enter* by statute 32 *Hen.* 8. *c.* 28. *Dyer* 13. *pl.* 61. But vide *Ld. Raym.* 521.

But if after such alienation and divorce the baron dies, she is put to her *cui in vita ante divortium*; and yet the words of the statute are, that such alienation shall be void, but this shall be intended to toll the *cui in vita*. *Mo.* 58. *pl.* 164. *Pasch.* 8 *Eliz. Broughton* v. *Conway*.

Divorce *causâ adulterii* of the husband; afterwards the wife sues in the spiritual court for a *legacy*; the executor pleads the *release of the baron*; the release binds the wife, for the *vinculum matrimonii* continues. *Cro. Eliz.* 908. Vide 1 *Salk.* 115.

Holt held, that if *feme covert*, after divorce *à mensâ & thoro*, sues for a legacy, which, if recovered, comes to her husband, there the husband may release it, because there is no alimony: and if he may release the duty, he may release the costs. 1 *Salk.* 115. *pl.* 4. *S. C. & S. P.* and see 1 *Vern.* 261.

A divorce was *à mensâ & thoro*, and then the husband dies intestate. The wife, by bill, prayed assistance as to *dower and administration*, (it being granted to another,) and *distribution*. The Master of the Rolls bid her go to law, to try if she was entitled to her dower, there being no impediment, and as to that dismissed the bill; and as to the administration, the granting that is in the ecclesiastical court; but the distribution more properly belongs to this court; but since in that court she is such a wife as *is not entitled to administration*, he dismissed the bill as to distribution too, and said, if they could repeal that sentence, she then would be entitled to distribution. *Ch. Prec.* 111.

In case of a divorce *à mensâ et thoro* the law allows *alimony* to the wife; which if that allowance which is made to a woman for her support out of the husband's estate, being settled at the discretion of the ecclesiastical judge, on consideration of all the circumstances of the case.—And the ecclesiastical court is the proper court in which to sue for alimony. *Het.* 69.—This is sometimes called her *estovers*, for which, if the husband refuses payment there is (besides the ordinary process of excommunication in the ecclesiastical court) a writ at common law *de estoveriis habendis*, in order to recover it. 1 *Lev.* 6. It is generally proportioned to the rank and quality of the parties; but in case of an elopement and living with an adulterer, the law allows her no alimony. *Cowel.* 1 *Inst.* 235 *a.* 12 *Rep.* 30.

A bill may be brought in Chancery for a specifick performance of an *agreement* by the husband with a third person, for a separate maintenance of the wife; notwithstanding that alimony belongs to the spiritual court. *Treat. Eq.* 39.

The court of chancery has decreed the wife a separate maintenance out of a trust fund on account of the cruelty and ill-behaviour of the husband, though there was no evidence of a divorce or *agreement* that the fund in dispute should be so applied. 2 *Vern.* 752.—And in another case the husband having quitted the kingdom, Lord Hardwicke decreed the wife the

interest of a trust fund till he should return and maintain her as he ought. 2 *Atk.* 96.—Yet in a subsequent case Lord Hardwicke observes, that he could find no decree to compel a husband to pay a separate maintenance to his wife, except upon an *agreement* between them, and even then unwillingly. 3 *Atk.* 547.—And this latter opinion seems most reconcileable with principle; for the case of a divorce *propter sævitiam* (See 2 *Vern.* 493.) may be considered as an implied agreement; and if there be an express or implied agreement, there seems no doubt but that courts of equity may, concurrently with the spiritual court, in proceeding upon it, decree a separate maintenance. *Wood's Inst.* 62. 2 *Vern.* 386. *Guth* v. *Guth*, MSS. —The spiritual court however would be the more proper jurisdiction if it acted *in rem*. *Lit. Rep.* 78. 2 *Atk.* 511. But if after an agreement between husband and wife to live separate, they appear to have cohabited, equity will consider the agreement as waived thereby. *Fletcher* v. *Fletcher, Mich.* 1788.—See *Fonblanque's Treat. Eq.* 96, 7.

Where, on a separation, lands are conveyed by the baron in trust for the feme, chancery will not bar the feme from *suing the baron* in the trustee's name, and a surrender or release by the baron shall not be made use of against the feme. 2 *Chan. Ca.* 102.

A woman living separate from her husband, and having a separate maintenance, *contracts debts*. The *creditors*, by a bill in this court, may follow the separate maintenance whilst it continues; but when that is determined, and the husband dead, they cannot by a bill charge the jointure with the debts: by Lord Keeper North; and the rather, because the executor of the husband, who may have paid the debt, is no party. *Vern.* 326.

Where the husband, during his cohabitation with the wife, makes her an allowance of so much a year for her expenses, if she out of her own good housewifery saves any thing out of it, this will be the husband's estate, and he shall reap the benefit of his wife's frugality; because when he agrees to allow her a certain sum yearly, the end of the agreement is, that she may be provided with clothes and other necessaries, and whatsoever is saved out of this, redounds to the husband; *per* Lord Keeper Finch. *Freem. Rep.* 304.

A term was created on the marriage of A. with B. for raising 200*l.* a year for pin-money, and in the settlement A. covenanted for payment of it. There was an *arrear of one year at A.'s death*, which was decreed, because of the covenant to be charged on a trust-estate, settled for payment of debts, it being in arrear for one year only; *secus* had it been in arrear for several years. *Chan. Prec.* 26.

The plaintiff's relation (to whom he was heir) allowed the wife pin-money; which *being in arrear*, he *gave her a note* to this purpose; *I am indebted to my wife* 100*l. which became due to her such a day;* after *by his will he makes provision out of his lands for payment of all his debts, and all monies which he owed to any person in trust for his wife;* and the question was, whether the 100*l.* was to be paid within this trust; and my Lord Keeper decreed not; for in point of law it was no debt, because a man cannot be indebted to his wife; and it was not money due to any in trust for her. *Hil.* 1701. between Cornwall and the Earl of Montague. But *quære;* for the testator looked on this as a debt, and seems to intend to provide for it by his will. *Abr. Eq. Ca.* 66.

Where the wife hath a separate allowance *made before marriage*, and *buys jewels with the money* arising thereout, they will not be assets liable to the husband's debts. *Chan. Prec.* 295.

Where there is a provision for the wife's separate use *for clothes*, if the *husband finds her clothes*, this *will bar the wife's claim:* nor is it material whether the allowance be provided out of the estate which was originally the husband's, or out of what was her own estate; for in both cases her *not having demanded it* for several years together shall be *construed a consent from her that he should receive it; per Lord C. Macclesfield.* 2 *P. Wms.* 82, 83.

So where 50*l. a year was reserved for clothes and private expences*, secured by a term for years, and ten years after the husband died, and soon after the wife died; the executors in equity demanded 500*l.* for ten years' arrear of this pin-money; but it appearing that the *husband maintained her*, and *no proof that she ever demanded it*, the claim was disallowed. 2 *P. Wms.* 341.

BARONET. A dignity or degree of honour next after barons, having precedency of all knights excepting *knights bannerets*, created by the king under the royal standard. See *Precedence.*

BARONY. See *Baron.*

BAR, or BARR, Lat. *barra.* Fr. *barre.*] In a legal sense, is a *Plea* or peremptory exception of a defendant, sufficient to destroy the plaintiff's action. And it is divided into *bar* to common intendment, and *bar* special; *bar temporary*, and *perpetual;* bar to a *common intendment* is an *ordinary* or *general* bar, which usually is a bar to the declaration of the plaintiff; bar *special* is that which is more than ordinary, and falls out upon some special circumstance of the fact, as to the case in hand. *Terms de Ley.*

Bar *temporary* is such a bar that is good for the present, but may afterwards fail: and bar *perpetual* is that which overthrows the action of the plaintiff for ever. *Plowd.* 26. But a plea in bar, not giving a full answer to all the matter contained in the plaintiff's declaration is not good. 1 *Lill. Abr.* 211. If one be barred by a plea to the *writ* or to the *action of the writ*, he may have the same writ again, or his right action: but if the plea in bar be to the *action* itself, and the plaintiff is barred by judgment, &c. it is a bar for ever in *personal* actions. 6 *Rep.* 7. And a recovery in debt is a good bar to action on the case for the same thing; also a recovery on *assumpsit* in case, is a good bar in debt, &c. *Cro. Jac.* 110. 4 *Rep.* 94.

In all actions *personal*, as debt, account, &c. a bar is perpetual, and in such case the party hath no remedy, but by writ of error or attaint; but if a man is barred in a real action or judgment, yet he may have an action of as high a nature, because it concerns his inheritance; as for instance, if he is barred in a *formedon in descender*, yet he may have a *formedon in the remainder*, &c. 6 *Rep.* 7. It has been resolved, that a bar in any action real or personal by judgment upon demurrer, verdict, or confession, is a bar to that action, or any action of the like nature for ever; but, according to Pemberton, Chief Justice, this is to be understood, when it doth appear that the evidence in one action would maintain the other: for otherwise the court shall intend that the party hath mistaken his action. *Skin.* 57. 58.

Bar to a *common intent* is good: and if an executor be sued for his testator's debt, and he pleadeth that he had no goods left in his hands at the day the writ was taken out against him, this is a good bar to a common intendment, till it is shewn that there are goods: but if the plaintiff can shew by way of replication, that more goods have fallen into his hands since that time, then, except the defendant allege a better bar, he shall be condemned in the action. *Plowd.* 26. *Kitch.* 215. *Bro.* tit. *Barre.*

There is a bar material, and a bar at large: bar material may be also called special bar; as when one, in stay of the plaintiff's action, pleadeth some particular matter, viz. a descent from him that was owner of the land, &c. a feoffment made by the ancestor of the plaintiff, or the like: a bar at large is, when the defendant, by way of exception, doth not traverse the plaintiff's title, by pleading, nor confess, nor avoid it, but only makes to himself a title in his bar. *Kitch.* 68. 5 *H.* 7. 29.

See titles *Abatement*, *Action*, *Judgment;* and especially *Pleading.*

This word Bar is likewise used for the place where serjeants and counsellors at law stand to plead the causes in court; and where prisoners are brought to answer their indictments, &c.

whence our lawyers, that are called to the bar, are termed barristers. 24 *H.* 8. *c.* 24.

BARRASTER, BARRISTER, *barrasterius.*] A counsellor learned in the law, admitted to plead at the bar, and there to take upon him the protection and defence of clients. They are termed *jurisconsulti;* and in other countries called *licentiati in jure;* and anciently *barristers* at law were called *apprentices* of the law, (from the French *apprendre* to learn,) in Lat. *apprenticii juris nobiliores. Fortesc.* The time before they ought to be called to the bar, by the ancient orders, was eight years, now reduced to five; and the exercises done by them, (if they were not called *ex gratiâ,*) were twelve grand moots performed in the inns of Chancery, in the time of the grand readings, and twenty-four petty moots in the term times, before the readers of the respective inns: and a *barrister* newly called was to attend the six (or four) next long vacations the exercise of the house, viz. in Lent and Summer, and was thereupon for those three (or two) years stiled a vacation *barrister.* Also they are called *utter barristers, i. e.* pleaders *ouster* the bar, to distinguish them from benchers, or those that have been readers, who are sometimes admitted to plead within the bar, as the king, queen, or prince's counsel are.

From the degrees of barristers and serjeants at law, (see title *Serjeant*) some are usually selected to be his Majesty's counsel; the two principal of whom are called his Attorney and Solicitor General.—The first king's counsel under the degree of serjeant, was Sir Francis Bacon, who was made so *honoris causâ,* without either patent or fee; so that the first of the modern order, who are now the sworn servants of the crown, with a standing salary, seems to have been Sir Francis North, afterwards lord keeper to Charles II. These king's counsel must not be employed in any cause against the crown without special licence, but which is never refused, and costs about 9*l.* A custom now prevails of granting letters patent of precedence to such barristers as the crown thinks proper to honour with that mark of distinction, whereby they are entitled to such rank and pre-audience as are assigned in their respective patents, sometimes next after the king's attorney-general, but usually next after his Majesty's counsel then being.—These, as well as the queen's attorney and solicitor-general, rank promiscuously with the king's counsel, and together with them sit within the bar of the respective courts: but receive no salaries and are not sworn, and therefore are at liberty to be retained in causes against the crown. And all other serjeants and barristers indiscriminately, (except in the court of Common Pleas, where serjeants only are admitted in term time) may take upon them the protection and defence of any suitors whether plaintiff or defendant. 3 *Comm.* 27, 28.

A counsel can maintain no action for his fees; (*Davis Pref.* 22. 1 *C. R.* 38.;) which are given not as a salary or hire, but as a mere gratuity, which a barrister cannot demand without doing wrong to his reputation. *Davis* 23.

In order to encourage due freedom of speech in the lawful defence of their clients, and at the same time to give a check to unseemly licentiousness, it hath been holden, that a counsel is not answerable for any matter by him spoken, relative to the cause in hand, and suggested in his client's instructions; although it should reflect upon the reputation of another, and even prove absolutely groundless: but if he mentions an untruth of his own invention, or even upon instructions, if it be impertinent to the cause in hand, he is then liable to an action from the party injured. *Cro. Jac.* 90. And counsel guilty of deceit or collusion are punishable by stat. *Westm.* 1. 3 *E.* 1. *c.* 28. with imprisonment for a year and a day, and perpetual silence in the courts; and the latter punishment is still sometimes inflicted for gross misdemeanours in practice. *Raym.* 376. 3 *Comm.* 29.

*Barristers,* who constantly attend the King's Bench, &c. are to have the privilege of being sued in transitory actions in the county of Middlesex. But the court will not change the venue because some of the defendants are barristers. *Str.* 610. See tit. *Privilege.*—Pleas, before they are filed, must be signed by a barrister or serjeant. See titles *Abatement, Pleading.* See further titles *Counsellor, Non-conformists, Oaths.*

BARRATOR, or BARRETOR, Lat. *barractator,* Fr. *barrateur.*] A common mover of suits and quarrels, either in courts, or elsewhere in the country, that is himself never quiet, but at variance with one or other. Lambard derives the word *barretor* from the Lat. *balatro,* a vile knave: but the proper derivation is from the Fr. *barrateur, i. e.* a deceiver, and this agrees with the description of a common *barretor* in Lord Coke's Reports, viz. that he is a common mover and maintainer of suits in disturbance of the peace, and in taking and detaining the possession of houses and lands, or goods by false inventions, *&c.* 8 *Rep.* 37.

However it seems clear that *no general indictment,* charging the defendant with being a common oppressor, and disturber of the peace, and stirrer up of strife among neighbours is good, without adding the words *common barretor,* which is a term of art appropriated by law to this purpose. 1 *Mod.* 288. 1 *Sid.* 282. *Cro. Jac.* 526. 1 *Hawk. P. C. c.* 81. § 9.

A common *barretor* is said to be the most dangerous oppressor in the law; for he oppresseth the innocent by colour of law, which was made to protect them from oppression. 8 *Rep.* 37. No one can be a *barretor* in respect of one act only; for every indictment for such crime must charge the defendant with being *communis barractator,* and conclude *contra pacem, &c.* And it hath been holden, that a man shall not be adjudged a *barretor* for bringing any number of suits in his own right, though they are vexatious, especially if there be any colour for them; for if they prove false he shall pay the defendant costs. 1 *Rol. Abr.* 355. 3 *Mod.* 98.

A *barrister* at law entertaining a person in his house, and bringing several actions in his name, where nothing was due, was found guilty of *barratry.* 3 *Mod.* 97. An attorney is in no danger of being convicted of *barratry,* in respect of his maintaining another in a groundless action, to the commencing whereof he was no way privy. *Ibid.* A common solicitor, who solicits suits, is a common *barretor,* and may be indicted thereof, because it is no profession in law. 1 *Danv. Abr.* 725.

The punishment for this offence in a common person is by fine and imprisonment; but if the offender (as is too frequently the case) belongs to the profession of the law, a barretor who is thus able as well as willing to do mischief, ought also to be disabled from practising for the future. See the stat. 12 *Geo.* 1. *c.* 29. under title *Attornies at Law.* 4 *Comm.* 134. and see *stat.* 34 *E.* 3. *c.* 1. 1 *Hawk. P. C. c.* 81.

It seems to be the settled practice not to suffer the prosecutor to go on in the trial of an indictment of this kind, without giving the defendant a note of the particular matters which he intends to prove against him; for otherwise it would be impossible to prepare a defence against so general and uncertain a charge, which may be proved by such a multiplicity of different instances. 5 *Mod.* 18. 1 *Ld. Raym.* 490. 12 *Mod.* 516. 2 *Atk.* 340. 1 *Hawk. P. C. c.* 81. § 13.

To this head may also be referred another offence of equal malignity and audaciousness, that of suing another in the name of a fictitious plaintiff; either one not in being at all, or one who is ignorant of the suit. This offence, if committed in any of the king's superior courts, is left, as a high contempt, to be punished at their discretion. But in courts of a lower degree, where the crime is equally pernicious, but the authority of the judges not equally extensive, it is directed by stat. 8 *Eliz. c.* 2. to be punished by six months imprisonment, and treble damages to the party injured. 4 *Comm.* 134.

BARRATRY, see *Barrator, Insurance,* II. 4. This term was applied to the obtaining benefices at Rome.

In Scotland the crime of a judge who is induced to pronounce a judgement by bribery is termed *barratry*. See Act. 1540. *c.* 104.

BARREL, *barillum.*] A measure of wine, ale, oil, &c. Of wine it contains the eighth part of a tun, the fourth part of a pipe, and the moiety of a hogshead; that is, thirty-one gallons, and a half. *Stat.* 1. *R.* 3. *c.* 13.—Of beer it contains thirty-six gallons; and of ale, thirty-two gallons. *Stats.* 23 *H.* 8. *c.* 4. 12 *Car.* 2. *c.* 23.—The assise of herring-barrels is thirty-two gallons wine measure, containing in every barrel usually a thousand full herrings. *Stat.* 13. *El. c.* 11.—The eel barrel contains thirty gallons. 2 *H.* 6. *c.* 11.

BARRETOR, BARRETRY—See *Barrator.*

BARR-FEE, a fee of 20*d*, payable by every prisoner acquitted of felony, to the sheriff or jaoler. 21 *H.* 7. 16 *b. Terms de la ley.*—See *Fees.*

BARRIERS, Fr. *barrieres*; *jeu de barres*, i. e. *palæstra.*] A martial exercise of men armed and fighting together with short swords, within certain bars or rails which separated them from the spectators; it is now disused here in England. *Cowel.* There are likewise *barrier towns*, or places of defence on the frontiers of kingdoms.

BARRISTER. See BARRASTER.

BARROW, from the Sax. *boerg*, a heap of earth.] A large hillock or mount, raised or cast up in many parts of England, which seems to have been a mark of the Roman *tumuli*, or sepulchres of the dead. The Sax. *beora* was commonly taken for a grove of trees on the top of a hill. *Kennet's Gloss.*

To BARTER, from the Fr. *barater*, or Span. *baratar*, *circumvenire.*] To exchange one commodity for another, or truck wares for wares. *Stat.* 1. *R.* 3. *c.* 9. Because probably they that exchange in this manner do endeavour, for the most part, one to over-reach and circumvent the other.—So *bartery* the substantive in *stat.* 13 *Eliz. c.* 7. of *Bankrupts.*

BARTON, or BURTON, a word used in Devonshire for the demesne lands of a manor; sometimes the manor house itself, and in some places for out-houses and fold-yards. In the *stat.* 2 & 3 *Ed.* 6. *c.* 12. *barton* lands and demesne lands are used as *synonima.* *Blount* says it always signifies a farm distinct from a mansion—and *bertonarii* were farmers, husbandmen that held bartons at the will of the lord.—In the west, they called a great farm a *berton* or *barton*; and a small farm, a *living.* *Blountin* v. *Barton* and *Berton.*

BAS CHEVALIERS, low or inferior knights by tenure of a base military fee; as distinguished from bannerets, the chief or superior knights; hence we call our simple knights; *viz.* knights batchelors, *bas chevaliers.* *Kennet's Gloss.* to *Paroch. Antiq.*

BASE COURT, Fr. *cour basse.*] Is any inferior court, that is not of record, as the court baron, &c. *Kitch. fol.* 95, 96.

BASE ESTATE, Fr. *bas estat.*] Or Base Tenure. That *estate* which *base* tenants have in their lands. And *base* tenants, according to Lambard, are those who perform villainous services to their lords; but there is a difference between a *base estate* and villenage, for to hold in pure villenage is to do all that the lord will command him; and if a copyholder have but a *base estate*, he not holding by the performance of every commandment of his lord, cannot be said to hold in villenage. See *Kitch.* 41.—This Dict. title *Tenures.*

BASE FEE, Is a tenure in *fee* at the will of the lord, distinguished from socage free tenure: but Lord Coke says, that a *base fee*, or qualified fee, is what may be defeated by limitation, or on entry, &c. *Co. Lit.* 1. 18. *Bassa tenura*, or *base* tenure, was a holding by villenage, or other customary service, opposed to *alta tenura*, the higher tenure in *capite* or by military service, &c.—See tit. *Tenure; Tail.*

BASE INFEFTMENT, is when the vassal disposes lands to be holden of himself. *Scotch Dict.*

BASELS, *basselli.*] A kind of coin abolished by King Hen. 2. *anno* 1158. *Hollingshed's Chron. p.* 67.

BASELARD, or BASILLARD, in the *stat.* 12 *Rich.* 2. *c.* 6. signifies a weapon, which Mr. Speight, in his exposition upon Chaucer, calls *pugionem vel sicam*, a poniard. *Knighton, lib.* 5. *p.* 2731.

BASE RIGHTS are those by which the grantor creates a subinfeudation in favour of a vassal to be holden of himself. *Scotch Dict.*

BASILEUS, A word mentioned in several of our historians, signifying King, and seems peculiar to the kings of England, Monasticon, *tom.* 1. *p.* 65. *Ego Edgar totius Angliæ* basileus *confirmavi.*—In many places of the Monasticon this word occurs: and also in Ingulphus, Malmesbury, Mat. Paris, Hoveden, &c.

BASKET-TENURE of lands. See *Canestellus.*

BASNETUM. A *basnet*, or helmet.

BASSINET, A skin with which the soldiers covered themselves. *Blount.*

BASTARD, *bastardus*; fancifully derived from the Greek Βασσαρις, *meretrix*; more truly from the Brit. *Bastaerd*, *nothus*, *spurius*; or according to Spelman from the German, *bastart*—*bas* low, and *start* risen, Sax. *steort*; as up-start, *homo novus*, suddenly risen up.] One whose father and mother were not lawfully married to each other, previous to his birth; or as it has been seemingly more incorrectly phrased, "one born out of lawful wedlock."

I. 1. *Who are Bastards, and of their Incapacities.*
2. *Of the Trial of Bastardy.*

II. 1. *Of the Case of Infant-Bastards, their Maintenance and Protection.*
2. *Of the Murder of Infant-Bastards.*

I. 1. A bastard by our English laws, is one that is not only begotten, but born out of lawful matrimony. The civil and canon laws do not allow a child to remain a bastard, if the parents afterwards intermarry; [and this is still the law in Scotland;] and herein they differ most materially from the English law; which though not so strict as to require that the child shall be *begotten*, yet makes it an indispensible condition to make it legitimate, that it shall be *born* after lawful wedlock. 1 *Comm.* 454. 2 *Inst.* 96, 7.

Blackstone observes, that the reason of our English law is surely much superiour to that of the Roman, if we consider the principal end and design of the marriage contract taken in a civil light. He then recapitulates several motives, which he concludes we may suppose actuated the Peers at the parliament of Merton, when they refused to enact that children born before marriage should be esteemed legitimate. 1 *Comm.* 456.—and see 1 *Inst.* 244 *b.* and 245 *a.* in the notes.

If a man marries a woman grossly big with child by another, and within three days after, she is delivered, the issue is no bastard. 1 *Danv. Abr.* 729. If a child is born within a day after marriage between parties of full age, if there be no apparent impossibility that the husband should be the father of it, the child is no bastard, but supposed to be the child of the husband. 1 *Rol. Abr.* 358.

All the children born before matrimony are bastards; so are all children born so long after the death of the husband, that by the usual course of gestation they could not be begotten by him. But this being a matter of some uncertainty, the law is not exact as to a few days. *Cro. Jac.* 451.—See 1 *Inst.* 123 *b.* in note 1 and 2; where the time of gestation as connected with this question is enquired into at great length, and with exquisite nicety and accuracy. On the whole it appears that what is commonly considered as the *usual* period is forty weeks, or 280 days.—But though the child is born some time after, it only affords *presumption*, not proof of illegitimacy. The information of the late celebrated

anatomist, Dr. Hunter, is also given, from which we learn, 1. That the usual period is nine calendar months; (from 270 to 280 days;) but there is *very commonly* a difference of one, two, or three weeks.—2. A child may be born alive at any time, from three months, but we see none born with powers of coming to manhood, or of being reared before seven calendar months, or near that time; at six months it cannot be. —3. The doctor said he had *known* a woman bear a living child, in a perfectly natural way, fourteen days later than nine calendar months; and he *believed* two women to have been delivered of a child alive, in a natural way, above ten calendar months from the hour of conception.

This case of birth of children after the death of the husband gives occasion to the writ *de ventre inspiciendo*. See title *Ventre inspiciendo*.

But if a man dies, and his widow soon after marries again, and a child is born within such a time, as that by the course of nature it might have been the child of either husband, in this case he is said to be more than ordinarily legitimate, for he may when he arrives to years of discretion, choose which of the fathers he pleases. 1 *Inst.* 8. For this reason by the ancient Saxon laws, in imitation of the civil law, a widow was forbidden to marry for twelve months. *Ll. Ethel. A. D.* 1008. *Ll. Canut. c.* 71. 1 *Comm.* 456. 7.—See 1 *Inst.* 8 *a.* in *note* 7. where it is said, "Brook questions this doctrine, from which it seems as if he thought it reasonable that the circumstances of the case, instead of the choice of the issue, should determine who is the father." See *Bro. Ab. Bastardy. p.* 18. *Palm.* 10.—See further, 1 *Inst.* 123 *b.* in note 1, where additional authorities are cited, to shew that in this case a jury ought to decide on the question, according to proof of the woman's condition.

Children born during wedlock, may also in some circumstances be bastards. As if the husband be out of the kingdom of England, (or as the law somewhat loosely phrases it, *extra quatuor maria*,) for above nine months, so that no access to his wife can be presumed, her issue during that period shall be bastards. 1 *Inst.* 244. But generally, during the coverture, access of the husband shall be presumed, unless the contrary can be shewn. *Salk.* 123. 3 *P. Wms.* 276. *Stra.* 925; which is such a negative as can only be proved by shewing him to be elsewhere; for the general rule is *præsumitur pro legitimatione.* 5 *Rep.* 98.—See also 1 *Inst.* 126 *a.* in note 2; and as to these phrases *infrà* (or more classicaly *intrà*) *et extra quatuor maria*, see some incomplete notes in 1 *Inst.* 108 *a.* note 6; and 261 *a.* note 1.—Although a feme convert may on a question of bastardy give evidence of the fact of criminal conversation, yet she shall not be admitted to prove the non-access of her husband. *Annal.* 79.

There are determinations by which it appears that the child of a married woman may be proved a bastard by other circumstantial evidence than that of the husband's *non-access.* 4 *Term. Rep.* 251. 356.

In a divorce *à mensâ et thoro*, if the wife has children, they are bastards; for the law will presume the husband and wife conformable to the sentence of separation, unless access be proved; but in a voluntary separation by agreement, the law will suppose access unless the negative be shewn; and the children, *primâ facie* shall not be esteemed bastards. *Salk.* 123.—In case of divorce in the spiritual court, *à vinculo matrimonii*, all the issue born during the coverture are bastards; because such divorce is always upon some cause, that rendered the marriage unlawful and null from the beginning. 1 *Inst.* 235.

If a man or woman marry a second wife or husband the first being living, and have issue by such second wife or husband, the issue is a *bastard*. See *Bott.* (*Ed.* 1793 by *Const.*) 397. *pl.* 521. Before the statute 2 & 3 *Ed.* 6. *c.* 21. one was adjudged a *bastard*, *Quia filius sacerdotis.*

A man hath issue a son by a woman before marriage, and afterwards marries the same woman, and hath issue a second son born after the marriage; the first of these is termed in law a *bastard eigné*, and the second a *mulier*, or *mulier puisné*; by the common law, as hath been said, such *bastard eigné* is as incapable of inheriting, as if the father and mother had never married; but yet there is one case in which his issue was let into the succession and that was by the consent of the lord and person legitimate; as if upon the death of the father the *bastard eigné* enters, and the *mulier* during his whole life never disturbs him, he cannot upon the death of the *bastard eigné* enter upon his issue. *Lit. sect.* 399. *Co. Lit.* 245.

To exclude the *mulier* from the inheritance, there must not only be an uninterrupted possession of the *bastard eigné* during his life, but a descent to his issue. *Co. Lit.* 244. 1 *Rol. Abr.* 624. See 2 *Comm. c.* 2. § 5.

No man can bastardize another after his death, that was a *mulier* by the laws of holy church, and who carried the reputation of legitimate during his life; for a man must be bastardized by the rules of the civil or common law: by the rules of the civil law, this person is by supposition legitimate; and if the common law be made the judge, he cannot be bastardized; for it is a rule of common law, that a personal defect dies with the person, and cannot after his death be objected to his successor that represents him; and this rule of law was taken from the humanity of the ancients, which would not allow the calumny of the dead: as also from an important reason of convenience, for pedigrees are often derived through several persons, concerning whom there remains little knowledge or remembrance of any thing, but only of their being; and therefore it were an easy matter to throw on them the aspersion of bastardy by any forged evidence, which cannot be confronted by opposite proof; and so it is fit to limit a time in which all proofs of bastardy are to be disallowed. 7 *Co.* 44. *Jenk. Rep.* 268. 1 *Brownl.* 42. *Co. Lit.* 33 *a.* *Lit. sect.* 399. *Co. Lit.* 245.

In the case of *Pride* v. *The Earls of Bath and Montague*, it was held that the rule that a person shall not be bastardized after his death, is only good in the case of *bastard eigné* and *mulier puisné*. 1 *Salk.* 120. 3 *Lev.* 410.

If there be an apparent impossibility of procreation on the part of the husband, natural, or accidental, as in case of the husband being only eight years old, or disabled by disease, there the issue of the wife shall be a bastard. 1 *Inst.* 244.

The rights of a bastard are very few, being only such as he can acquire; for he can *inherit* nothing, being looked upon as the son of nobody, and sometimes called *filius nullius*, sometimes *filius populi. Fortesc. de Ll. c.* 40. Yet he may gain a surname by reputation, though he has none by inheritance. 1 *Inst.* 3. 123. 6 *Co.* 65.

Where a remainder is limited to the eldest son of Jane S. whether legitimate or illegitimate, and she hath issue, a bastard shall take this remainder, because he acquires the denomination of her issue by being born of her body: and so it was never uncertain who was designed by this remainder. *Noy.* 35.

If parents are married, and afterwards divorced, this gives the issue the reputation of children; and so doth a subsequent marriage of the parents. 6 *Co.* 65. *Hugh's Abr.* 363.

If a man, in consideration of natural affection and love, covenants to stand seised to the use of a bastard, this is not good; for he is not *de sanguine patris*; but it is said that a woman may give lands in frank marriage with her bastard, because he is of the blood of the mother; but he hath no father, but from reputation only. *Dyer.* 374. *And.* 79. 6 *Co.* 77. *Noy.* 35.

A court of equity will not supply the want of a surrender of a copyhold estate, in favour of a bastard, as it will for a legitimate child. *Preced. Chan.* 475.

The incapacity of a bastard consists principally in this, that he cannot be heir to any one, neither can he have heirs but of his own body; for being as was before said *nullius filius*, he is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived. But though bastards are not looked upon as children to any civil purposes, yet the ties of nature hold as to maintenance, and many other purposes; as particularly that a man shall not marry his bastard sister or daughter. 3 *Salk.* 66. 7. *Ld. Raym.* 68. *Comb.* 356. And see *post* II.

A bastard was, in strictness of law, incapable of holy orders, and though that were dispensed, yet he was utterly disqualified from holding any dignity in the church. *Fortesc. c.* 40. 5 *Rep.* 58. But this doctrine seems now obsolete; and there is a very ancient decision that a felon should have the benefit of clergy, though he were a bastard. *Bro. Clergy.* 20. In all other respects therefore, except those mentioned, there is no distinction between a bastard and another man. 1 *Comm.* 459.

A bastard may be made legitimate, and capable of inheriting by the transcendent power of an act of parliament, and not otherwise. 4 *Inst.* 36.; as was done in the case of John of Gaunt's bastard children, by a *stat. of R.* 2. 1 *Comm.* 459.

2. Bastardy, in relation to the several manners of its *trial*, is distinguished into general and special bastardy.

Till the *stat. of Merton*, 20 *H.* 3. the question, whether born before or after marriage, was examined before the ecclesiastical judge, and his judgment was certified to the king or his justices, and the king's court either abided by it or rejected it at pleasure. But after the solemn protest made by the *barons* at Merton, again the introduction of the doctrine of the civil and canon law in this respect, *special bastardy* has been always triable at common law; and *general bastardy* alone has been left to the judgment of the ecclesiastical judge, who in this case agrees with the temporal. 2 *Inst.* 99. *Reeves' Hist. Eng. Law.* 85. 201. and see 1 *Inst.* 126 *a.* note 2; and 245 *a.* note 1.

*General bastardy*, tried by the bishop, in its notion contains two things. 1st. It should not be a bastard made legitimate by a subsequent marriage. 2dly. That it should be a point collateral to the original cause of action. 1 *Rol. Abr.* 361.

Formerly bastards had a way in such issues to trick themselves into legitimation; for they used to bring feigned actions, and get suborned witnesses before the bishop to prove their legitimation, and then got the certificate returned of record; and after that their legitimation could never be contested; for being returned of record as a point adjudged by its proper judges, and remaining among the memorials of the court, all persons were concluded by it; but this created great inconveniencies, as is taken notice of in the preamble of *stat.* 9 *Hen.* 6. *c.* 11. in the case of several persons of quality; for the evidence of the contrary parties concerned were never heard at the trial, and yet their interest was concluded: to remedy this inconvenience without altering the rules of law, it was enacted, that, before any writ to the bishop, there should be a proclamation made in the court where the plea depends, and after that the issue should be certified into Chancery, where proclamation should be made once in every month for three months, and then the Chancellor should certify to the court where the plea depends, and afterwards it shall be again proclaimed in the same court, that all that are concerned may go to the Ordinary to make their allegations; and without these circumstances, any writ granted to the ordinary, and all proceedings thereupon, shall be utterly void. 1 *Rol. Abr.* 361.

If the ordinary certify or try bastardy without a writ from the king's temporal courts, it is void; for the spiritual jurisdiction within these kingdoms is derived from the King, and therefore it must be exercised in the manner the King hath appointed; for it would be injurious if they should declare legitimation where the rights of inheritance are so nearly concerned, without any apparent necessity. 1 *Rol. Abr.* 361.

The certificate must be under the seal of the ordinary, and not under the seal of the commissary only: for the command is to the bishop himself to certify, and therefore the execution of the command must appear to be by the bishop in proper person. 1 *Rol. Abr.* 362.

If a man be certified bastard, this binds perpetually, though the person so adjudged a bastard is not party to the action, for all persons are estopped to speak against the memorial of any judicatory; because the act of the public judicatory under which any person lives, is his own act; and were he not thus bound, there might be contradiction in certificates. 1 *Rol. Abr.* 362.

If a man be certified bastard, that doth not bind a stranger till returned of record, because it is no judicial act till recorded in the place appointed to record such transactions; nor doth it bind the party to the action till judgment thereon, because if he avoid the action he avoids all consequences of the action; and therefore if the defendant be certified bastard by the ordinary, yet if the plaintiff be non-suit they cannot go on to trial, and so the bishop's certificate never appears of record, and therefore is not binding. 1 *Rol. Abr.* 362.

If a man be certified *mulier*, no man is estopped to bastardize him, for though he may be a *mulier* by the spiritual law yet he may be a bastard by our law; and therefore any man, notwithstanding the certificate may plead the issue of special bastardy. 1 *Rol. Abr.* 362.

*Special bastardy* is two-fold: 1. Where the bastardy is the gist of the action, and the material part of the issue. 2dly. Where those are bastards by the common law that are *muliers* by the spiritual law. 1 *New Abr.* 314. *Co. Lit.* 134. 1 *Rol.* 367. *Hob.* 117.

If a man receives any temporal damage by being called a bastard, and brings his action in the temporal courts, and the defendant justifies that the plaintiff is a bastard, this must be tried at common law, and not by writ to the bishop; for otherwise you suppose an action brought in a court which hath not a capacity to try the cause of action. 1 *Brownl.* 1. *Hob.* 179. *Godol.* 479. *Co. Ent.* 29.

If it be found by an assise taken at large that a man is a bastard, the temporal courts are judges of it; for the jury cannot be estopped to speak truth which may fall within their own knowledge, and what they find becomes the record of the temporal courts, and so within their conuzance. *Bro. Bastardy* 97.

II. 1. By *stat.* 18 *Eliz. c.* 3. (and see *stat.* 3 *Car.* 1. *c.* 4.) two justices of peace may make an order on the *mother* or *reputed father* of a bastard to maintain the infant by weekly payments or otherwise: and if the party disobey such order, he or she may be committed to gaol, until they give security to perform it; or to appear at the sessions.—By *stat.* 7 *Jac.* 1. *c.* 4. § 7. the justices may commit the mother of a bastard, *likely to become chargeable*, to the house of correction for a year; or for a second offence till she give security for her good behaviour. This part of the stat. of 7 *Jac.* 1. is now repealed by 50 *Geo.* 3. *c.* 51. which enables *two* magistrates to punish such woman by committing her to the House of Correction, for any time not exceeding twelve calendar months nor less than six weeks, and the magistrates may at their discretion order her to be discharged after she has been confined for any space not less than six weeks. Such woman not to be committed until one month after her delivery.—By *stat.* 13 & 14 *Car.* 2. *c.* 12. § 19. if the putative father or lewd mother run away from the parish, the overseers may by authority of two justices, *seize*, and by order of the sessions, sell the effects of the father or mother to maintain the child.—By *stat.* 6 *Geo.* 2. *c.* 31. the mother of a bastard *may, before* or *after* it is born, swear it to any person; and the putative father shall then on application by the overseer of the parish be appre-

hended and committed; unless he give security to indemnify the parish; or to appear at the next sessions: but if the woman die or marry before delivery, or miscarry, or prove not to be with child, the reputed father shall be discharged. [So much of 6 *Geo.* 2. *c.* 31. as authorises the commitment of reputed fathers *before* the birth of the bastard is repealed by 49 *Geo.* 3. c. 68. § 6.] Any justice near the parish, on application of the reputed father in custody, shall summon the overseer to shew cause against his being discharged; and if no order be made in pursuance of *stat.* 43 *Eliz. c.* 2. (for the maintenance of the child) within six weeks after the woman's delivery, he shall be discharged.—By the said *stat.* 6 *Geo.* 2. *c.* 31. § 4. it is expressly provided that, "It shall not be lawful for the justice to send for any woman before she shall be delivered, or for a month after, in order to be examined concerning her pregnancy; or to *compel* any woman before her delivery to answer any question relating to her pregnancy.—By *stat.* 13 *Geo.* 3. *c.* 82. § 5. bastards born in any licensed hospital for pregnant women, are settled in the parishes to which their mothers belong. And the like provision is made by *stat.* 20 *Geo.* 3. *c.* 36. § 2. as to bastards born in houses of industry.

By *stat.* 49 *Geo.* 3. *c.* 68. the reputed father of a bastard is chargeable with the expenses incident to the birth, and of his own apprehension, and of the order of filiation. Reputed fathers may be apprehended and committed unless they give security to indemnify the parish, or enter into recognizance to appear at the next sessions, unless it shall be certified by one magistrate that the woman had not then been delivered, or been delivered only one month previous to such sessions. § 2. Upon nonpayment of sums ordered for maintenance of bastards, the mother or reputed father may be apprehended and committed for a month or till payment. § 3. Costs thereof to be subject to the discretion of justices in session, as under 18. *Eliz. c.* 3. § 4.

The putative father of a bastard, although no legal relationship subsists between them, is so far considered as its natural guardian, as to be entitled to the custody of it, for its maintenance and education. 2 *Stra.* 1162; and therefore while under his care and protection, and not likely to become chargeable to the parish, the parish officers have no concern with it. 1 *Mod.* 43. 1 *Sid.* 444. under the marriage act, *stat.* 26 *Geo.* 2. *c.* 33. which requires the consent of the father, mother or guardian, a bastard being a minor cannot be married without the consent of a guardian named by the court of chancery. See 1 *Term. Rep. K. B.* 96. and the case of *Homer* v. *Liddiard*, determined in Doctors' Commons in 1799, and reported by Dr. Croke, 8vo. pamph. 1800, and this Dict. title *Marriage*, *Guardian*.

As however, without the protection of its natural parents, a bastard is settled in the parish in which it is born; (*Salk.* 427. 3 *Burn. J. Paul's P. O.* 81;) [unless such birth be procured by fraud, *Sel. Ca.* 66; or happen under an order of removal, 1 *Sess. Ca.* 33: *Salk.* 121. 474. 532; or in a state of vagrancy, *stat.* 17 *Geo.* 2. *c.* 5; or in the house of correction. 2 *Bulst.* 358. or under a certificate, *Stra.* 186;] and the parish of consequence becomes charged with its maintenance, then and not before the authority of the church-wardens and overseers begins, *Say.* 93; and they may act without an order from the justices. 3 *Term Rep. C. P.* 253.—It seems however that until a bastard attain the age of seven years, it cannot be separated from its mother, *Cald.* 6; but may be removed to the place of her settlement, while the age of nurture continues. *Carth.* 279; and must under these circumstances be maintained by the parish where it was born. *Doug.* 7.

The Court of King's Bench granted *a habeas corpus*, to bring up a bastard child within the age of nurture, and restored it to the custody of the mother from whose quiet possession it had been taken. *R.* v. *Hopkins & ux.* 7 *East.* 579. *See* 5. *T. R.* 178. 5 *E. R.* 224. and 1 *N. R.* 148.

Bastards are within the meaning of the marriage act, which requires the consent of the father, guardian, or mother to the marriage of persons under age who are not married by banns. *R.* v. *Hodnett.* 1 *T. R.* 96. See title, *Marriage*.

An order of bastarday must be made by two justices, 2 *Salk.* 478. 1 *Stra.* 475; on complaint, 1 *Barn K. B.* 261; and the examination of the woman must be taken in the presence of both the justices, 6 *Mod.* 180. 2 *Black Rep.* 1027; but it is not necessary that the putative father should be present to hear what she deposes. *Cald.* 808; although he must be *summoned* before an order of filiation can be made, 8 *Mod.* 3. 1 *Sett. Ca.* 179; for he cannot be compelled to give security, or be committed until he has made default, *Ld. Raym.* 853. 8. 3 *Salk.* 66; but if an order of filiation is once made, the fact of bastardy is established until the order is reversed, *Cro. Jac.* 535. The justice may commit if the putative father neglect to pay the maintenance therein ordered for the support of the child, unless he give a bond to bear the parish harmless, or to appear at the sessions. 1 *Sid.* 363. 1 *Vent.* 41. *Ld. Raym.* 858. 1157. The order can only be reversed by an appeal to the sessions, which must be to the next sessions after notice of the order; 2 *Salk.* 480. 2; and if the sessions reverse the order of the two justices, yet they may on summons make another, on the same or on any other person; for in this respect they have an *original* jurisdiction. 2 *Bulst.* 355. 1 *Stra.* 475. *Doug.* 632.—The order however may before appeal to the sessions be removed by *certiorari*, into King's Bench, and there quashed for errors on the face of it. *Cald.* 172.—But no order of bastardy made at sessions can be quashed in King's Bench, unless the putative father is present in court. 2 *Salk.* 475; for on its being quashed, he shall enter into a recognizance to abide the order of the sessions below. 1 *Bl. Rep.* 198.

On this part of the subject see further, *Bott's Poor Laws*, *Const's Edit.* 1793.

In an ancient *MSS. temp. E.* 3. it is said that he who gets a bastard in the hundred of Middleton in Kent, shall forfeit all his goods and chattels to the king.

2. By *stat.* 21 *Jac.* 1. *c.* 27. (now repealed by 43 *Geo.* 3. *c.* 58. § 3.) it was enacted, "That if any woman be delivered of any issue of her body, which being born alive, should by the laws of this realm be a bastard, and she endeavour privately, either by drowning, or secret burying thereof, or any other way, either by herself or the procuring of others, so to conceal the death thereof, as it may not come to light, whether it were born alive or not, but be concealed; in every such case the said mother so offending shall suffer death, as in case of murder; except such mother can make proof by one witness at the least, that the child, whose death was by her so intended to be concealed, was born dead."

Under this act it was determined that where a woman appeared to have endeavoured to conceal the death of such child within the statute, there was no need of any proof that the child was born alive, or that there were any signs of hurt upon the body, but it should be undeniably taken that the child was born alive, and murdered by the mother. 2 *Hawk. P. C. ub. sup.*

But it was adjudged that where a woman lay in a chamber by herself, and went to bed without pain, and waked in the night, and knocked for help but could get none, and was delivered of a child, and put it in a trunk, and did not discover it till the following night, yet she was not within the statute, because she knocked for help. 2 *Hawk. P. C. ub. sub.*

Also it was agreed, that if a woman confess herself with child beforehand, and afterwards be surprised and delivered, no body being with her, she is not within the statute, because there was no intent of concealment, and therefore in such cases it must appear by signs of hurt upon the body, or some other way, that the child was born alive. 2 *Hawk. P. C. ub. sup.*

Also it was determined that if a woman were with child,

and any gave her a potion to destroy the child within her, and she took it, and it worked so strongly that it killed the woman, this was murder; 1 *Hal. H. P. C.* 429. 430.

Before the act 43 *Geo.* 3. *c.* 58. it was held that if a woman quick or great with child, took or any other gave her any potion to cause an abortion, or struck her, whereby the child within her was killed; it was not murder nor manslaughter by the law of England, the child is not yet *in rerum naturâ*, nor can it legally be; and so if such child were born alive, and after died of the stroke given to the mother. 1 *Hal. H. P. C.* 433.

By 43 *Geo.* 3. *c.* 58. it was enacted (§ 1.) that any person who shall wilfully, maliciously, and unlawfully administer any deadly poison or other noxious and destructive substance or thing, with intent thereby to cause and procure the miscarriage of any woman quick with child, shall be guilty of felony, without clergy.—And (§ 2.) that any person who shall wilfully and maliciously administer to any woman any medicine drug or thing, or employ any instrument or means whatever with intent to procure the miscarriage of any woman not being, or not being proved to be quick with child, shall be guilty of felony, and may be fined, imprisoned, pilloried, and whipped, or transported for 14 years.—It is also provided (§ 3.) that the trials of women charged with the murder of their bastard children shall proceed and be governed by the like rules of evidence and presumption as in other cases of murder, and also (§ 4.) that if the jury acquit the woman of the murder, they may find that by secret burying or otherwise she endeavoured to conceal the birth of the child: in which case she may be imprisoned for two years. This act extends to Ireland.

The Scotch act W. and M. *Sess.* 2. *Part.* 1. providing that a woman concealing her pregnancy during the whole space, and not calling for help at the birth, the child being found dead or missing shall be held as the murderer of the child, repealed. 49 *Geo.* 3. *c.* 14.

Any woman in Scotland concealing her pregnancy during the whole period, and not calling for help at the birth, if the child be found dead or missing, she shall be imprisoned not exceeding two years in the common goal. *s.* 2.

If a man procure a woman with child to destroy her infant when born, and the child is born, and the woman, in pursuance of that procurement, kill the infant; this is murder in the mother, and the procurer is accessary. 1 *Hal. H. P. C.* 433.

BASTARDY, *bastardia.*] The defect of birth, objected to one born out of wedlock. *Bract. lib.* 5. *c.* 19. See *Bastard.*

BASTARD EIGNE. See *Bastard.*

BASTON, *Fr.*] A staff, or club. In the statutes it signifies one of the wardens of the Fleet's servants or officers who attend the king's courts with a red staff for taking such into custody who are committed by the court. *Stats.* 1 *R.* 2. *c.* 12. 5 *Eliz. c.* 23. See *Tipstaff.*

BAS-VILE. The suburbs of a town, *Fr.*

BASUS, *per* basum *tolnetum capere*, To take toll by strike; and not by heap; *per basum* being opposed to *in cumulo vel cantello.* See *Consuetud. Domûs de Farendon, MS. f.* 42.

BATABLE GROUND. Land that lay between England and Scotland, heretofore in question, when they were distinct kingdoms, to which it belonged; litigious or *debatable* ground, *i. e.* land about which there is debate; and by that name Skene calls *ground* that is in controversy. *Camb. Britain.* title *Cumberland.*

BATTELLA, A *Boat.*

BATH, Lat, *Bathon*, called by the Britains *Badiza*, has been termed the city of sick men, Sax. *Accemannes Caester*;] It is a place of resort in Somersetshire famous for its medicinal waters. The chairmen are there to be licensed by the mayor and aldermen, by statute 7 *Geo.* 1. *c.* 19. And a public hospital or infirmary for poor is established in the city of Bath, the governors whereof have power to hold all charitable gifts, &c. and appoint physicians, surgeons and other officers: any persons not able to have the benefit of the Bath *waters*, may be admitted into this hospital, their case being attested by some physician, and the poverty of the patients certified by the minister and churchwardens of the place where they live, &c. Every person so admitted, shall have the use of the old hot *bath*, and be entertained and relieved in the hospital; and when cured or discharged, such persons shall be supplied with 3*l.* each, to defray the expence of removing them back to their parishes, &c. *Stat.* 12 *Geo.* 2. *c.* 31.

BATITORIA, A fulling mill. *Monasticon*, tom. 2. *p.* 32.

BATTEL, Fr. *battaile.*] A trial by combat, anciently allowed of in our laws, (among other cases,) where the defendant in appeal of murder or felony might fight with the appellant, and make proof thereby whether he be culpable or innocent of the crime. When an appellee of felony wages *battel*, he pleads that he is *not guilty*, and that he is ready to defend the same by his body, and then flings down his glove; and if the appellant will join *battel* he replies, That he is ready to make good his appeal by his body upon the body of the appellee, and takes up the glove: and then the appellee lays his right hand on the book, and with his left hand takes the appellant by the right, and swears thus: *Hear this thou who callest thyself John by the name of baptism, that I who call myself Thomas by the name of baptism, did not feloniously murder thy father W. by name, on the day and year of, &c. at B. as you surmise, nor am any way guilty of the said felony; so help me God.* And then he shall kiss the book and say; *And this I will defend against thee by my body, as this court shall award.* Then the appellant lays his right hand on the book, and with his left hand takes the appellee by the right, and swears to this effect: *Hear this, thou who callest thyself Thomas by the name of baptism, that thou didst feloniously on the day, and in the year, &c. at B. murder my father W. by name; so help me God.* And then he shall kiss the book, and say; *And this I will prove against thee by my body, as this court shall award.* This being done, the court shall appoint a day and place for the *battel*; and in the mean while the appellee shall be kept in custody of the marshal, and the appellant shall find sureties to be ready to fight at the time and place, unless he be an approver, in which case he shall also be kept by the marshal: and the night before the day of *battel*, both parties shall be arraigned by the marshal, and shall be brought into the field before the justices of the court where the appeal is depending, at the rising of the sun, bare-headed and bare-legged from the knee downwards and bare in the arms to the elbows, armed only with bastons an ell long, and four-cornered targets: and before they engage, they shall both make oath, *That they have neither eat nor drank, nor done any thing else by which the law of God may be depressed, and the law of the devil exalted:* and then, after proclamation for silence under pain of imprisonment, they shall begin the combat, wherein if the appellee be so far vanquished that he cannot or will not fight any longer, he may be adjudged to be hanged immediately; but if he can maintain the fight till the stars appear, he shall have judgment to be quit of the appeal: and if the appellant becomes a crying coward, the appellee shall recover his damages, and may plead his acquittal in bar of a subsequent indictment or appeal; and the appellant shall for his purjury lose his *liberam regem.* If an appellant becomes blind by the act of God after he has waged *battel*; the court will discharge him of the battel; in such case it is said that the appellee shall go free.

This trial by battel is at the defendant's choice; but if the plaintiff be under an apparent disability of fighting, as under age, maimed, &c. he may counterplead the wager of battel, and compel the defendant to put himself upon his country, no champions being allowed in criminal appeals; also any plaintiff may counterplead a wager of battel, by alleging such matters against the defendant, as induce a violent presumption

of guilt; as in appeal of death, that he was found lying upon the deceased with a bloody knife in his hand, &c. for here the law will not oblige the plaintiff to make good his accusation in so extraordinary a manner, when in all appearance he may prove it in the ordinary way. It is a good counterplea of battel that the defendant hath been indicted for the same fact; when if appeal be brought, the defendant shall not wage battel. And if a peer of the realm bring an appeal, the defendant shall not be admitted to wage battel, by reason of the dignity of the appellant.

The citizens of London are privileged by charter, that in appeals by any of them, there shall be no wager of battel; and by stat. 6 *R.* 2. *c.* 6. defendant shall not be received to wage battel in an appeal of rape. 2 *Hawk. P. C. c.* 45. This trial by battel is before the constable and marshal; but is now disused. See *Glanv. lib.* 14. *Bracton, lib.* 3. *Britton, c.* 22. *Smith, de Rep. Angl. lib.* 2. *Co. Lit.* 294, *&c.*

For the manner of waging battel in an appeal of treason, *Hawkins* cites *Rushw. Col. part* 2. *vol.* 1. 112—128. and 3 *Comm.* 338. cites *vol.* 2.

This species of trial by *wager of battel*, (says Blackstone) was introduced into England, among other Norman customs, by William the Conqueror; but was only used in three cases, one military, one criminal, and the third civil.—The first in the court martial or court of chivalry and honour; (*Co. Lit.* 261.;) the second in appeals of felony; [of which above;] and the third, upon issue joined in a writ of right, the last and most solemn decision of real property. For in writs of right the *jus proprietatis* which is frequently a matter of difficulty is in question; but other real actions being merely questions of the *jus possessionis*, which are usually more plain and obvious, our ancestors did not in them appeal to the decision of Providence. Another [and as it seems the juster] pretext for allowing it upon these final writs of right, was for the sake of such claimants as might have the true right, but yet by the death of witnesses or other defect of evidence, be unable to prove it to a jury.

Although the writ of right itself, and of course this trial thereof, is at present much disused, yet it is law at this day; and on that account as matter of curiosity the forms of proceeding therein are collected and preserved in 3 *Comm.* 338. &c. and the appendix thereto; and are similar to those above recited in criminal cases.

The last trial by battel that was waged in the court of Common Pleas at Westminster; [though there was afterwards one in the court of chivalry in 1631, 6 *Car.* 1. between Donald Lord Rey appellant, and David Ramsey, Esquire, defendant, which was compromised; see *Orig. Jurid.* 65. 19 *Raym.* 322.; and another in the county palatine of Durham in 1638; *Cro. Car.* 512.;] was in 13 *Eliz.* A. D. 1571, as reported by Dyer, and held in Tothill-fields, Westminster. See *Dy.* 301. and *Spelm.* in v. *Campus;* the latter of whom was present at the ceremony.

In this trial by battel, on a writ of right, the battel is waged by champions, and not by the parties themselves; because in civil actions, if any party to the suit dies, the suit must abate and be at an end for the present: and therefore no judgment could be given for lands in question, if either of the parties were slain; and also that no person might claim an exemption from this trial, as was allowed in criminal cases. *Co. Lit.* 294.

This form of trial by battel, the tenant or defendant in a writ of right, has it in his election at this day to demand. 3 *Comm.* 341. And it was the only decision of such writ of right from the Conquest, till Hen. 2. by consent of parliament introduced the *grand assise;* a particular species of trial by jury, in concurrence therewith, giving the tenant his choice of either the one or the other.—See *Glanv. lib.* 2. *c.* 7. See this Dict. title *Champion.*

4

BATELLUS. See *Batus.*

BATTERY. See title *Assault.*

BATTERY, PENDENTE LITE. The offence of attacking an adversary in a law-suit, while the suit is depending. By two Scotch acts 1584. *c.* 138. and 1594. *c.* 219. the plaintiff offending is to lose the sum sued for, and the defendant is condemned without further proof, in terms of the conclusion of the libel or declaration. These acts have been held in force as late as 1789.

BATUS, Lat. from the Sax. *bat.*] A boat, and *battellus* a little boat. *Chart. Ed.* 1. 20 *Julii* 18 *regni.* Hence we have an old word *batswain*, for such as we now call *boatswain* of a ship.

BAUBELLA, *baubles.*] A word mentioned in Hoveden in *R.* 1. and signifies jewels or precious stones.

BAUDEKIN, *baldicum*, and *baldekinum.*] Cloth of *baudekin*, or gold; it is said to be the richest cloth, now called *brokade*, made with gold and silk, or tissue, upon which figures in silk, &c. were embroidered.

BAWDY-HOUSE, *Lupanar fornix.*] A house of ill fame, kept for the resort and commerce of lewd people of both sexes. The keeping of a *bawdy-house* comes under the cognizance of the temporal law as a common nuisance, not only in respect of its endangering the public peace by drawing together dissolute and debauched persons, and promoting quarrels, but also in respect of its tendency to corrupt the manners of the people, by an open profession of lewdness. 3 *Inst.* 205. 1 *Hawk. P. C. c.* 74. Those who keep *bawdy-houses* are punishable with fine and imprisonment; and all such infamous punishment, as pillory, &c. as the court in discretion shall inflict; and a lodger who keeps only a single room for the use of *bawdry*, is indictable for keeping a *bawdy-house.* 1 *Salk.* 382. Persons resorting to a *bawdy-house* are punishable, and they may be bound to their good behaviour, &c. But if one be indicted for keeping or frequenting a *bawdy-house*, it must be expressly alleged to be such a *house*, and that the party knew it, and not by suspicion only. *Poph.* 208. A man may be indicted for keeping bad women in his own house. 1 *Hawk. P. C. c.* 61. § 2. A constable upon information, that a man and woman are gone to a lewd *house*, or about to commit fornication or adultery, may if he finds them together, carry them before a justice of peace without any warrant, and the justice may bind them over to the sessions. *Dalt.* 214.

Constables in these cases may call others to their assistance, enter bawdy-houses, and arrest the offenders for a breach of the peace; in London they may carry them to prison; and by the custom of the city, whores and bawds may be carted. 3 *Inst.* 206.

As to a married woman's being indicted for keeping a house of ill fame. See tit. *Baron and Feme* VII.

But it is said, a woman cannot be indicted for being a bawd generally; for that the bare solicitation of chastity is not indictable. 1 *Hawk. P. C. c.* 74. § 1. 1 *Salk.* 382.

It was always held infamous to keep a bawdy-house; yet some of our historians mention bawdy-houses, brothel houses, or stews, publicly allowed here in former times, till the reign of Hen. 8. by whom they were suppressed about A. D. 1546; and writers assign the number to be eighteen thus allowed on the bank-side in Southwark. See *Brothel-houses.*

By stat. 25 *Geo.* 2. *c.* 36. made perpetual by stat. 28 *Geo.* 2. *c.* 19. If two inhabitants, paying scot and lot, shall give notice to a constable of any person keeping a bawdy-house, the constable shall go with them before a justice of peace, and shall, (upon such inhabitants making oath, that they believe the contents of such notice to be true, and entering into a recognizance of 20*l.* each, to give material evidence of the offence,) enter into a recognizance of 30*l.* to prosecute with effect such person for such offence at the next sessions; the constable shall be paid his reasonable expenses by the overseers

of the poor, to be ascertained by two justices; and if the offender be convicted, the overseers shall pay to the two inhabitants 10*l.* each. On the constable's entering into such recognizance as aforesaid, the justice shall bind over the person accused to the next sessions, and if he shall think proper, demand security for such person's good behaviour in the mean time. A constable neglecting his duty forfeits 20*l.* Any person appearing as master or mistress, or as having the care or management of any bawdy-house, shall be deemed the keeper thereof, and liable to be punished as such.—The same act also directs the licensing by magistrates of all public places within 20 miles of the metropolis.

BAY, or *pen*, Is a pond-head made up of a great height, to keep in water for the supply of a mill, &c. so that the wheel of the mill may be driven by the water coming thence, through a passage or flood-gate. *Stat.* 27 *Eliz. c.* 19. A harbour where ships ride at sea, near some port, is also called a *bay*.

BEACON, from the Sax. *beacn*, *signum*, whence the English, *beckon* to nod or to make a sign.] A signal well known; being a fire maintained on some eminence near the coasts of the sea. 4 *Inst.* 148. Hence *beaconage (beaconagium)* money paid towards the maintenance of *beacons*. See stat. 5 *Hen.* 4. *c.* 3. as to keeping watch *on the sea coast*.

Barrington in his observations on this statute, introduces the copy of an order of ancient date cited by Prynne in his remarks on Coke's 4 *Inst.* showing the stations fixed on for beacons in Kent and Essex, viz. at the Isle of Shepey in Kent, at Shorebury in Essex; at Hoo in Kent; at Tolbing in Essex; at Cleve in Kent; at Tilbury in Essex; at Gravesend in Kent; and at Famedon in Essex. See *Barr. 5 edit. p.* 369.

The erection of beacons, light-houses, and sea-marks, is a branch of the royal prerogative; whereof the first was anciently used in order to alarm the country, in case of the approach of an enemy; and all of them are signally useful in guiding and preserving vessels at sea by night as well as by day. For this purpose the king hath the exclusive power, by commission under his great seal (3 *Inst.* 204. 4 *Inst.* 148.;) to cause them to be erected in fit and convenient places, (4 *Inst.* 136.) as well upon the lands of the subject as upon the demesnes of the crown: which power is usually vested by letters patent in the office of Lord High Admiral, (*Sid.* 158. 4 *Inst.* 149.) or the Admiralty board. And by stat. 8 *Eliz. c.* 13. the corporation of the Trinity House are empowered to set up any beacons or sea-marks wherever they shall think them necessary; and if the owner of the land or any other person shall destroy them, or shall take down any steeple, tree, or other known sea-mark, he shall forfeit 100*l.* or in case of inability to pay it, shall be *ipso facto* outlawed. 1 *Comm.* 265.—See the stats. 4 *Ann. c.* 20. and 8 *Ann. c.* 17. for building the Eddystone light-house near Plymouth, and raising the duties payable by ships for its support; and stat. 3 *Geo.* 2. *c.* 36. as to the light-house on the rock Skerries near Holyhead in the county of Anglesea.

BEAD, or *bede*, Sax. *bead*, *oratio*.] A prayer; so that to say over *beads*, is to say over one's prayers. They were most in use before printing, when poor persons could not go to the charge of a manuscript book: though they are still used in many parts of the world, where the Roman-Catholic religion prevails. They are not allowed to be brought into England, or any superstitious things, to be used here, under the penalty of a *præmunire*, by stat. 13 *Eliz. c.* 2.

BEADLE. See *Bedel*.

BEAM. That part of the head of a stag where the horns grow, from the Sax. *beam*, i. e. *arbor;* because they grow out of the head as branches out of a tree. *Beam* is likewise used for a common balance of weights in cities and towns.

BEAMS and BALLANCE, for weighing goods and merchandize in the city of London. See tit. *Weights and Measures*.

BEARERS. Such as bear down or oppress others, and is said to be all one with maintainors.—Justices of assise shall inquire of, hear, and determine maintainors, *bearers*, and conspirators, &c. *Stat.* 4 *Ed.* 3. *c.* 11.

BEASTS *of chase*, *feræ campestres*.] Are five, viz. the buck, doe, fox, marten, and roe. *Manw. part* 1. *page* 342. *Beasts of the forest (feræ silvestres)* otherwise called *beasts* of venary are the hart, hind, boar, and wolf. *Ibid. part* 2. *c.* 4. *Beasts* and *fowls* of the *warren* are the hare, coney, pheasant, and partridge. *Ibid. Reg. Orig.* 95, 96. &c. *Co. Lit.* 233.—See tit. *Game*.

BEAU-PLEADER, *pulchre placitando*, Fr. *beauplaider*, i. e. to plead fairly.] Is a writ upon the statute of Marlbridge, 52 *Hen.* 3. *c.* 11. whereby it is enacted, that neither in the circuit of justices nor in counties, hundreds, or courts-baron, any fines shall be taken for *fair pleading*, viz. for not pleading fairly or aptly to the purpose; upon which statute this writ was ordained, directed to the sheriff, bailiff, or him who shall demand such fine, and it is a prohibition not to do it: whereupon an *alias* and *pluries* and *attachment* may be had, &c. *New Nat. Br.* 596, 597. And *beau-pleader* is as well in respect of vicious *pleadings*, as of the *fair pleading*, by way of amendment. 2 *Inst.* 122.

BEDEL, *bedellus*, Sax. *bydel*, Fr. *bedeau*.] A cryer or messenger of a court, that cites men to appear and answer: and is an inferior officer of a parish or liberty, very well known in London, and the suburbs. There are likewise university *bedels* and church *bedels;* now called summoners and apparitors; and Manwood in his *Forest Laws*, saith there are forest *bedels*, that make all manner of garnishments for the courts of the forest, and all proclamations, and also execute the process of the forest, like unto bailiffs errant of a sheriff in his county. *Cowel*.

BEDELARY, *bedelaria*.] The same to a *bedel*, as bailiwick to a bailiff. *Lit. lib.* 3. *cap.* 5. *Blount. Cowel*.

BEDEREPE, alias *biderepe*, Sax.] A service which certain tenants were anciently bound to perform, viz. to *reap* their landlord's corn at harvest; as some yet are tied to give them one, two, or three days' work, when commanded. This customary service of inferior tenants was called in the Latin *præcaria bedrepium, &c.* See *Magna Præcaria*.

BEDEWERI. Those which we now call *banditti;* profligate and excommunicated persons. The word is mentioned in *Mat. Paris. anno* 1258.

BEER. As to the exporting, selling, measuring, &c. See tits. *Alehouses*, *Brewers*, *Navigation Acts*, *Weights and Measures*.

BEGGARS. See *Vagrants*.

BEHAVING AS HEIR, Is the same as *Gestio pro Harede* in the civil law. *Scotch Dict.*

BEHAVIOUR of Persons. Vide *Good behaviour*.

BELGÆ. The inhabitants of Somersetshire, Wiltshire, and Hampshire. *Blount*.

BELLS. See *Churchwardens*.

BENEFICE, *beneficium*.] Is generally taken for any ecclesiastical living or promotion; and benefices are by stat. 13 *R.* 2. *st.* 2. *c.* 2. divided into *elective* and *donative:* so also it is used in the canon law. 3 *Inst.* 155. *Duarenus de Beneficiis, lib.* 2. *c.* 3. All church preferments and dignities are benefices; but they must be given for life, not for years, or at will. Deancries, prebendaries, &c. are benefices with cure of souls, though not comprehended as such within the stat. 21 *H.* 8. *c.* 13. of residence: but, according to a more strict and proper acceptation, benefices are only rectories and vicarages.—The word benefice was formerly applied to portions of land, &c. given by lords to their followers for their maintenance; but afterwards, as these tenures became perpetual and hereditary, they left their name of *beneficia* to the livings of the clergy, and retained to themselves the name of *feuds*.—And

*beneficium* was an estate in land at first granted for life only, so called, because it was held *ex mero beneficio* of the donor; and the tenants were bound to swear fealty to the lord, and so serve him in the wars, those estates being commonly given to military men: but at length, by the consent of the donor, or his heirs, they were continued for the lives of the sons of the possessors, and by degrees past into an inheritance: and sometimes such *benefices* were given to bishops, and abbots, subject to the like services, viz. to provide men to serve in the wars; and when they as well as the laity had obtained a property in those lands, they were called *regalia* when given by the king; and on the death of a bishop, &c. returned to the king till another was chosen. *Spelm. of Feuds, c.* 21. *Blount, verb. Beneficium.* See tit. *Tenure.* For matter relating to Ecclesiastical Benefices, and the requisites of the clergy admitted thereto, &c. See titles *Advowson, Parson, Tithes.*

BENEFICIO PRIMO ECCLESIASTICO HABENDO. A writ directed from the king to the chancellor, to bestow the *benefice* that shall *first* fall in the king's gift, above or under such value, upon such a particular person. *Reg. Orig.* 307.

BENEFIT OF CLERGY. See *Clergy.*

BENEFIT SOCIETIES. See *Friendly Societies.*

BENEFIT OF DISCUSSION, Is that whereby the antecedent heir, such as the heir of line, in a pursuit against the heir of tailzie, &c. must be first pursued to fulfil the defunct's deeds, and pay his debts: this benefit is likewise competent in many cases to cautioners. *Scotch Dict.*

BENERTH. An ancient service which the tenant rendered to his lord with his plough and cart. *Lamb. Itin. p.* 222. *Co. Lit.* 86.

BENEVOLENCE, *benevolentia.*] Is used in the chronicles and statutes of this realm for a voluntary gratuity given by the subjects to the king. *Stow's Annals, p.* 701. And Stow saith that it grew from Edward the Fourth's days; you may find it also *anno* 11 *H.* 7. *c.* 10. yielded to that prince in regard of his great expenses in wars, and otherwise. 12 *Rep.* 19. And by act of parliament, 13 *Car.* 2. *c.* 4. it was given to his majesty King Charles II. but with a proviso that it should not be drawn into future example: as those benevolences were frequently extorted without a real and voluntary consent, so that all supplies of this nature are now by way of taxes, by grant of parliament; any other way of raising money for the crown is illegal. *Stat.* 1 *W. & M. st.* 2. *c.* 2. In other nations *benevolences* are sometimes given to lords of the fee by their tenants, &c. *Cassan de Consuet. Burg. p.* 134. 136.—See tit. *Taxes.*

BENEVOLENTIA REGIS HABENDA. The form of purchasing the king's pardon and favour, in ancient fines and submissions, to be restored to estate, title, or place. *Paroch. Antiq. p.* 172.

BENT. See tit. *Sea Banks.*

BERBIAGE, *berbiagium.*] *Nativi tenentes manerii de Calistoke reddunt per ann. de certo redditu vocat. berbiagg! ad le Hokeday,* xix. *s.* MS. Survey of the Duchy of Cornwall. *Blount.*

BERBICARIA. A sheep down, or ground to feed sheep. *Leg. Alfredi, c.* 9. *Monasticon, tom.* 1. *p.* 308. See the next article.

BERCARIA, *berchery,* from the Fr. *bergerie.*] A sheepfold, or other inclosure, for the keeping of sheep; in *Domesday* it is written *berquarium.* 2 *Inst.* 476. *Mon. Angl. tom.* 2. *p.* 599. *Bercarius* is taken for a shepherd; and *bercaria* is said to be abbreviated from *berbicaria,* and *berbex*; hence comes *berbicus* a ram, *berbica,* an ewe, *caro berbicina,* mutton. *Cowel.*

BEREFELLARII. There were seven churchmen so called, anciently belonging to the church of St. John of Beverley. *Cowel. Blount.*

BEREFREIT, BEREFREID. A large wooden tower. *Simeon Dunelm. anno* 1123. *Blount.*

BERGHMASTER, from the Sax. *berg.* a hill, *quasi,* master of the mountains.] Is a bailiff or chief officer among the Derbyshire miners, who also executes the office of a coroner. *Esc. de An.* 16 *Ed.* 1. *num.* 34, *in Turri London.* The Germans call a mountaineer, or miner, a *bergman. Blount.*

BERGMOTH, or BERGHMOTE. Comes from the Sax. *berg,* a hill, and *gemote,* an assembly; and is as much as to say, an assembly or court upon a hill, which is held in Derbyshire, for deciding pleas and controversies among the miners. And on this *court of berghmote,* Mr. Manlove, in his Treatise of the Customs of the Miners, hath a copy of *verses,* with *references* to statutes, &c. Vide *Squire* on the *Anglo Saxon Government.*

BERIA, *berie, berry,* A large open field.] Those cities and towns in England which end with that word, are built in plain and open places, and do not derive their names from boroughs, as Sir Henry Spelman imagines. Most of our glossographers, in the names of places, have confounded the word *beri* with that of *bury* and *borough,* as the appellatives of ancient towns; whereas the true sense of the word *berie* is a flat wide campaign, as is proved from sufficient authorities by the learned Du Fresne, who observes, that *Beria Sancti Edmundi,* mentioned by *Mat. Paris. sub ann.* 1174. is not to be taken for the town, but for the adjoining plain. To this may be added, that many flat and wide meads and other open grounds are called by the name of *beries,* and *berry-fields;* the spacious meadow between Oxford and Isley was, in the reign of king Athelstan, called *Bery.* As is now the largest pasture ground in Quarendon, in the county of Buckingham, known by the name of *Beryfield.* And though these meads have been interpreted demesne or manor meadows, yet they were truly any flat or open meadows, that lay adjoining to any vill or farm. *Cowel.*

BERRA. A plain open heath. *Berras assartare,* to grub up such barren heaths. *Cowel.*

BERNET, *Incendium,* comes from the Sax. *byran,* to burn.] It is one of those crimes which, by the laws of *Hen.* 1. *cap.* 15. *emendari non possunt.* Sometimes it is used to signify any capital offence. *Leges Canuti apud Brompt. c.* 90. *Leg. Hen.* 1. *c.* 12. 47.

BERQUARIUM. Vide *Bercaria.*

BERSA, Fr. *bers.*] A limit or bound. A park pale. *Blount.*

BERSARE, Germ. *bersn,* to shoot.] Bersare *in foresta mea ad tres arcus. Chart. Ranulf. Comit. Cestr. ann.* 1218. viz. to hunt or shoot with three arrows in my forest. *Bersarii* were properly those that hunted the wolf. *Blount.*

BERSELET, *berselleta.*] A hound. *Chart. Rog. de Quincy.*

BERTON. See *Barton.*

BEREWICHA, or BERWICA. Villages or hamlets belonging to some town or manor. This word often occurs in *Domesday: istæ sunt berewichæ ejusdem manerii.*

BERWICK. The town of Berwick upon Tweed was originally part of the kingdom of Scotland; and as such was, for a time, reduced by king Edward I. into the possession of the crown of England: and, during such its subjection, it received from that prince a charter, which (after its subsequent cession by Edward Baliol, to be for ever united to the crown and realm of England) was confirmed by king Edward III. with some additions; particularly that it should be governed by the laws and usages which it enjoyed during the time of king Alexander, that is, before its reduction by Edward I. Its constitution was new modelled, and put upon an English footing, by a charter of king James I. and all its liberties, franchises, and customs, were confirmed in parliament by stats. 22 *E.* 4. *c.* 8. and 2 *Jac.* 1. *c.* 28. Though, therefore, it hath some local peculiarities, derived from the ancient laws of Scotland; (see *Hale Hist. C. L.* 183. 1 *Sid.* 382. 462. 2 *Show.* 365.;) yet it is clearly part of the realm of England, being represented by burgesses in the House of Commons,

and bound by all acts of the British parliament, whether specially named or otherwise. And therefore it was perhaps superfluously declared by stat. 20 *Geo.* 2. *c.* 42. that where England only is mentioned in any act of parliament, the same, notwithstanding, hath been, and shall be, deemed to comprehend the dominion of Wales and town of Berwick upon Tweed. And though certain of the king's writs or processes of the courts of Westminster do not usually run into Berwick, any more than the principality of Wales, yet it hath been solemnly adjudged, that all prerogative writs (as those of *mandamus*, *prohibition*, *habeas corpus*, *certiorari*, &c.) may issue to Berwick, as well as to every other of the dominions of the crown of England; and that indictments and other local matters arising in the town of Berwick, may be tried by a jury of the county of Northumberland. *Cro. Jac.* 543. 2 *Ro. Ab.* 292. *Stat.* 11 *Geo.* 1. *c.* 4. 4 *Burr.* 834. 1 *Comm.* 99.

BERY, or BURY. The vill or seat of habitation of a nobleman, a dwelling or mansion-house, being the chief of a manor; from the Sax. *beorg*, which signifies a hill or castle; for, heretofore, noblemen's seats were castles, situate on hills, of which we have still some remains. As in Herefordshire, there are the *beries* of Stockton, Hope, &c. It was anciently taken for a sanctuary. See *Beria*.

BESAILE, or BESAYLE, Fr. *besayeul*, *proavus*.] The father of the grandfather; and in the common law it signifies a writ that lies where the great grandfather was seised the day that he died, of any lands or tenements in fee-simple; and, after his death, a stranger entereth the same day upon him, and keeps out the heir. *F. N. B.* 222. See tit. *Mort d'Ancestor*.

BESCHA, from the Fr. *bercher*, *fodere*, to dig.] A spade or shovel. Hence perhaps, *una bescata terra inclusa*.—*Mon. Ang. tom.* 2. *fol.* 642. may signify a piece of land usually turned up with a spade, as gardeners fit and prepare their grounds; or may be taken for as much land as one man can dig with a spade in a day.

BESTIALS, *bestiales*.] Beasts or cattle of any sort; *stat.* 4 *Ed.* 3. *c.* 3. it is written *bestayle*; and is generally used for all kinds of cattle, though it has been restrained to those anciently purveyed for the king's provision.

BETACHES. Laymen using glebe lands. *Parl.* 14 *E.* 2.

BEBERCHES. Bid-works, or customary services done at the bidding of the lord by his inferior tenants. *Cowel.*

BEWARED. An old Saxon word signifying *expended*; for, before the Britons and Saxons had plenty of money, they traded wholly in exchange of *wares*. *Blount.*

BIDALE, or BIDALL, *precaria potaria*, from the Sax. *biddan*, to pray or supplicate.] Is the invitation of friends to drink *ale* at the house of some poor man, who thereby hopes a charitable contribution for his relief: it is still in use in the West of England: and is mentioned stat. 26 *H.* 8. *c.* 6. And something like this seems to be what we commonly call *house warming*, when persons are invited and visited in this manner on their first beginning house-keeping.

BIDDING OF THE BEADE, *bidding* from the Sax. *biddan*.] Was anciently a charge or warning given by the parish priest to his parishioners at some special times to come to prayers, either for the soul of some friend departed, or upon some other particular occasion. And at this day our ministers, on the Sunday preceding any festival or holiday in the following week, give notice of them, and desire and exhort their parishioners to observe them as they ought, which is required by our canons.

BIDENTES. Two yearlings, tags, or sheep of the second year. *Paroch. Antiq. p.* 216.

BIDUANA. A fasting for the space of two days. *Matt. West. p.* 135.

BIGA, *bigata*.] A cart or chariot drawn with two horses coupled side to side; but it is said to be properly a cart with two wheels, sometimes drawn by one horse; and in our ancient records it is used for any cart, wain, or waggon. *Mon. Angl. tom.* 2. *fol.* 256.

BIGAMUS. One guilty of bigamy.

BIGAMY, *bigamia*.] A double marriage; this word properly signifies the being twice married; but is now used by an almost universal corruption, to signify the offence of *poligamy*, or the having a plurality of wives or husbands at once. 3 *Inst.* 88.

*Bigamy*, according to the Canonists, consisted in marrying two virgins successively, one after the death of the other, or in once marrying a widow. Such were esteemed incapable of holy orders; probably on the ground of St. Paul's words. 1 *Tim. c.* 5. *v.* 2. "That a bishop should be the husband of one wife," and they were by a canon of the council of Lyons, A. D. 1274, denied all clerical privileges. This canon was adopted and explained in England by the stat. 4 *E.* 1. *st.* 3. (commonly called the *Stat. de bigamis*,) *c.* 5.; and bigamy, thereupon, became no uncommon counterplea to the claim of the benefit of clergy. The cognizance of the plea of bigamy was declared by stat. 18 *E.* 3. *st.* 3. *c.* 2. to belong to the Court Christian, like that of bastardy. But by stat. 1 *E.* 6. *c.* 12. § 16. bigamy was declared to be no longer an impediment to the claim of clergy. See *Dal.* 21. *Dyer* 201. and 1 *Inst.* 80 *b. note* 1.

A second marriage, living the former husband or wife, is, by the ecclesiastical law of England, simply void, and a mere nullity; but the legislature has thought it just to make it felony, by reason of its being so great a violation of the public economy and decency of a well-ordered state. By stat. 1 *Jac.* 1. *c.* 11. it is enacted, "that if any person being married, do afterwards marry again, the former husband or wife being alive, it is felony," within the benefit of clergy; but now, by 35 *Geo.* 3. *c.* 67. such offenders are subject to the penalties of grand or petty larceny, (i. e. transportation, &c.) In Scotland by the act 1551, *c.* 19. this crime is punished as perjury.—In Ireland by 10 *Car.* 1. *st.* 2. *c.* 21. and 12 *Geo.* 1. *c.* 3. § 5. this offence is punishable as in England.

The acts 1 *Jac.* 1. *c.* 11. and 10 *Car.* 1. *c.* 21. however make exception to five cases, in which such second marriage, (though in the three first it is void,) is yet no felony. (See 3 *Inst.* 89. *Kel.* 27. 1 *Hal. P. C.* 694.)—1. Where either party has been continually *abroad* for seven years, whether the party in England hath notice of the other's being living or no. 2. Where either of the parties hath been absent from the other seven years *within* this kingdom; and the remaining party hath had no knowledge of the other's being alive within that time. 3. Where there is a divorce; (or separation *à mensâ & thoro*, 1 *Hawk. P. C.* 174.) by sentence in the ecclesiastical court. 4. Where the first marriage is declared absolutely void by any such sentence; and the parties loosed *à vinculo matrimonii*, or, 5. Where *either* of the parties was under the age of consent at the time of the first marriage. 1 *Hawk. P. C.* 174. 1 *Inst.* 79.

In the last case the first marriage was voidable by the disagreement of either party; which the second marriage very clearly amounts to. But if at the age of consent the parties had agreed to the marriage, which completes the contract, and is indeed the real marriage, and afterwards one of them should marry again, it seems undoubted that such second marriage would be within the reason and penalties of the act. 4 *Comm.* 164.

If the first marriage were beyond sea, and the latter in England, the party may be indicted for it here; because the latter marriage is the offence; but not *vice versâ*. See 1 *Hawk. P. C.* 174, 175. 1 *Hale's P. C.* 692. 1 *Sid.* 171. *Kel.* 80.—Lord Hale seems most precise on the question.—The other writers make a query. See also 3 *Inst.* 88. *Cro. Eliz.* 94.

A sentence in the ecclesiastical court against a marriage, in a suit for jactitation, does not preclude the proof of a marriage on an indictment on the statute.—And admitting such sentence were conclusive as to the fact of marriage, the effect may be avoided by evidence of fraud and collusion in obtaining the sentence. 11 *St. Tr.* 262. Dutchess of Kingston's case.

As to husband and wife being evidence against each other on trial for this offence, see tit. *Baron and Feme.* I. 2.

BIGOT, A compound of several old English words.] An obstinate person; or one that is wedded to an opinion, in matters of religion, &c. It is recorded that when Rollo the first duke of Normandy, refused to kiss the King's foot, unless he held it out to him, it being a ceremony required in token of subjection for that dukedom, with which the King invested him; those who were present taking notice of the duke's refusal, advised him to comply with the king's desire, who answered them *ne se bigot*; whereupon he was in derision called *bigot*, and the Normans are so called to this day. *Blount.*

BILAGINES, Lat.] By-laws of corporation, &c. See *By-laws.*

BILANCIIS DEFERENDIS, A writ directed to a corporation, for the carrying of weights to such a haven, there to weigh the wool that persons by our ancient laws were licensed to transport. *Reg. Orig.* 270.

BILINGUIS, Generally a double tongued man; or one that can speak two languages; but it is used in our law for a jury that passeth between an Englishman and a foreigner, whereof part ought to be English, and part strangers; properly a jury *de medietate linguæ*, under *stat.* 28 *Ed.* 3. *c.* 13. See title *Jury.*

BILL, *billa.*] Is diversely used in law proceedings, it is a declaration in writing, expressing either the wrong the complainant hath suffered by the party complained of, or else some fault committed against some law or statute of the realm; and this *bill* is sometimes addressed to the Lord Chancellor of England, especially for unconscionable wrongs done to the complainant; and sometimes to others having jurisdiction, according as the law directs. It contains the fact complained of, the damage thereby sustained, and petition of process against the defendant for redress; and it is made use of as well in criminal as civil matters. See titles *Chancery; Equity.*

In criminal cases, where a grand jury upon a presentment or indictment find the same to be true, they indorse on it *billa vera*; and thereupon the offender is said to stand indicted of the crime, and is bound to make answer unto it; and if the crime touch the life of the person indicted, it is then referred to the jury of life and death, *viz.* the petty jury, by whom if he be found guilty, then he shall stand convicted of the crime, and is by the judge condemned to death. *Terms de Ley.* 86. 3 *Inst.* 30. See *Ignoramus and Indictment.*

Many of the proceedings in the King's Bench are by *bill*; it is the ancient form of proceeding, and was, and yet should be filed in parchment, in all suits, not by original. The declaration is a transcript of it, or supposed so to be. See tits. *Amendment; Original Privilege; Process.*

*Bill* is also a common engagement for money given by one man to another; being sometimes with a penalty, called *penal bill*, and sometimes without a penalty, then called a *single bill*, though the latter is most frequently used. By a *bill* we ordinarily understand a single bond, without a condition; and it was formerly all one with an obligation, save only its being called a *bill* when in English, and an obligation when in Latin. West. Symbol. lib. 2. sect. 146. Where there is a *bill* of 100*l.* to be paid on demand, it is a duty presently, and there needs no actual demand. *Cro. Eliz.* 548. And a single obligation or *bill*, upon the sealing and delivery, is *debitum in præsenti*, though *solvendum in futuro.* On a collateral promise to pay money on demand, there must be a special demand; but between the parties it is a debt, and said to be sufficiently demanded by the action: it is otherwise where the money is to be paid to a third person; or where there is a penalty. 3 *Keb.* 176. If a person acknowlege himself by *bill* obligatory to be indebted to another in the sum of 50*l.* and by the same *bill* binds him and his heirs in 100*l.* and says not to whom he is bound, it shall be intended he is bound to the person to whom the *bill* is made. *Rol. Abr.* 148. A *bill* obligatory written in a book with the party's hand and seal to it is good. *Cro. Eliz.* 613.—See 2 *Rol. Abr.* 146.

These kinds of bills are now superseded in use, the single bills by the more modern traffick of *Bills of Exchange*, and the penal bills by *Bonds* or *Obligations.*—See those titles.

BILL IN CHANCERY. See tits. *Chancery; Equity.*

BILL OF EXCEPTIONS TO EVIDENCE. At Common law a writ of error lay, for an error in law, apparent in the record, or for error in fact, where either party died before judgment; yet it lay not for an error in law not appearing in the record; and therefore, where the plaintiff or demandant, tenant or defendant, alledged any thing *ore tenus*, which was over-ruled by the judge, this could not be assigned for error, not appearing within the record, not being an error in fact, but in law; and so the party grieved was without remedy. 2 *Inst.* 426. And therefore by the stat. of *Westm.* 2. 13 *E.* 1. *c.* 31, "When one impleaded before any of the justices, alledges an exception, praying they will allow it, and if they will not, if he that alledges the exception writes the same, and requires that the justices will put to their seals, the justices shall so do, and if one will not, another shall; and if, upon complaint made of the justice, the King cause the record to come before him, and the exception be not found in the roll, and the plaintiff show the written exception, with the seal of the justice thereto put, the justice shall be commanded to appear at a certain day, either to confess or deny his seal, and if he cannot deny his seal, they shall proceed to judgment according to the exception, as it ought to be allowed or disallowed."

This statute extends to the plaintiff as well as defendant, also to him who comes *in loco tenentis*, as one that prays to be received, or the vouchee; and in all actions whether real, personal, or mixt. 2 *Inst.* 427.

This statute extends not only to all pleas dilatory and peremptory, but to prayers to be received, *oyer* of records and deeds, &c. also to challenges of jurors, and any material evidence offered and over-ruled. 2 *Inst.* 427. *Dyer.* 231. *pl.* 3. *Raym.* 486.

The *exceptions* ought to be put in writing *sedente curia*, in the presence of the judge who tried the cause, and signed by the counsel on each side; and then the bill must be drawn up and tendered to the judge that tried the cause to be sealed by him; and when signed, there goes out a *scire facias* to the same judge *ad cognoscendum scriptum*, and that is made part of the record, and the return of the judge, with the bill itself, must be entered on the issue-roll; and if a writ of error be brought, it is to be returned as part of the record. 1 *Nels. Abr.* 373. If a bill of *exceptions* is drawn up, and tendered to the judge for sealing, and he refuses to do it, the party may have a compulsory writ against him, commanding him to seal it, if the fact alledged be truly stated: and if he returns that the fact is untruly stated, when the case is otherwise, an action will lie against him for making a false return. 3 *Comm.* 372. *Reg. Br.* 182. 2 *Inst.* 427.

If one of the justices sets his seal to the bill, it is sufficient; but if they all refuse, it is a contempt in them all. 2 *Inst.* 427. *Raym.* 182. *S. P.* 2 *Lev.* 327. *S. P.*

When a bill of exceptions is allowed, the court will not suffer the party to move any thing in arrest of judgment on the point on which the bill of exceptions was allowed. 1 *Vent.* 366. 367. 2 *Lev.* 237. 2 *Jones.* 117.

A bill of exceptions is in the nature of an appeal; examinable, not in the court out of which the record issues for the trial at *Nisi Prius*, but in the next immediate superior court, upon a writ of error after judgment given in the court below. 3 *Comm.* 372.

These bills of *exceptions* are to be tendered before a verdict given, 2 *Inst.* 427.; and extend only to civil actions, not to criminal. *Sid.* 85. 1 *Salk.* 288. 1 *Lev.* 68.

But in 1 *Leon.* 5. it was allowed in an indictment for trespass; and in 1 *Vent.* 366, in an information in nature of a *Quo warranto*.

For a precedent of a bill of exceptions, see *Bull. N. P.* 317.

Bills of exceptions are now seldom used, since the liberality practised by the courts in granting new trials.

BILL OF EXCHANGE, A negotiable security for money well known among merchants. The laws relating to this subject, and that of PROMISSORY (and *negotiable*) NOTES, being implicated together, are here considered under one head, and thus arranged:

I. *Of the Nature of*, 1. *Bills of Exchange*; 2. *Inland and Foreign*; 3. *Promissory Notes.*—4. *The Parties to them.*—5. *The Distinction and Resemblance between the several Kinds of Bills and Notes.*—6. *Bank and Bankers' Notes.*—7. *The essential Qualities of Bills and Notes.*

II. *Of the Acceptance of Bills; how, when, by and to whom made.*

III. *Of the Transfer of Bills and Notes by Indorsement, &c.*

IV. *Of the Engagements of the several Parties.*

V. *Of* 1. *The Action and Remedy on Bills and Notes*; 2. *Manner of declaring and pleading*; 3. *the Evidence*; *and* 4. *the Defence.*

VI. *Of Bills lost, stolen, or forged*; *and see* III.

I. 1. A BILL OF EXCHANGE is an open letter of request, addressed by one person to a second, desiring him to pay a sum of money to a third, or to any other to whom that third person shall order it to be paid: or it may be made payable to bearer.

The person who makes the bill is called the *drawer*; he to whom it is addressed, the *drawee*; and when he undertakes to pay the amount, he is then called the *acceptor*. The person to whom it is ordered to be paid is called the *payee*; and if he appoint another to receive the money, that other is called the *indorsee*, as the payee is, with respect to him, the *indorser*; any one who happens, for the time, to be in possession of the bill, is called the *holder* of it.

The time at which the payment is limited to be made is various, according to the circumstances of the parties, and the distance of their respective residences. Sometimes the amount is made payable at *sight*; sometimes at so many days *after* sight; at other times at a certain distance from the *date*. *Usance* is the time of one, two, or three months after the date of the bill, according to the custom of the places between which the exchanges run; and the nature of which must therefore be shown and averred in a declaration on such a bill.—Double or treble usance is double or treble the usual time; and half usance is half the time.—Where the time of payment is limited by months, it must be computed by calendar, not lunar, months: and where one month is longer than the succeeding one, it is a rule not to go in the computation into a third. Thus, on a bill dated the 28, 29, 30, or 31st of January, and payable one month after date, the time expires on the 28th of February in common years, and in the three latter cases in leap-year, on the 29th. [To which are to be added the *days of grace*. See *post*.]—Where a bill is payable at so many days after sight, or from the date, the day of presentment, or of the date, is excluded. Thus, where a bill, payable 10 days after sight, is presented on the first day of a month, the 10 days expire on the 11th; where it is dated the 1st, and payable 20 days after date, these expire on the 21st. *Ld. Raym.* 281. *Stra.* 829.

A custom has obtained among merchants, that a person to whom a bill is addressed, shall be allowed a few days for payment beyond the term mentioned in the bill, called *days of grace*.—In Great Britain and Ireland *three* days are given; in other places more. If the last of these three days happen to be Sunday, the bill is to be paid on Saturday. These days of grace are allowed to promissory notes: but not to bills payable at sight.

2. Bills of exchange are distinguished by the appellation of *Foreign* and *Inland* bills; the first being those which pass from one country to another, and the latter such as pass between parties residing in the *same* country; and the universal consent of merchants had long since established a system of customs relative to *Foreign* bills, which was adopted as part of the law in every commercial estate.

It does not appear that *Inland* bills of exchange were very frequent in England before the reign of Charles II. (see 6 *Mod.* 29.) And when they were introduced, they were not regarded with the same favour as foreign bills. At length the Legislature, by two different statutes, 9 & 10 *W.* 3. *c.* 17. and 3 & 4 *Ann. c.* 9. set both on nearly the same footing; so that what was the law and custom of merchants with respect to the one, is now, in most respects, the established law of the country with respect to the other.

The following are the most general forms of inland and foreign bills of exchange; but which are varied according to circumstances.

£. 100. London, January 1, 1793.

One month, [&c.] after date please to pay to A. B. or order [or to me or my order] the sum of one hundred pounds, and place the same to the account of

To Mr. C. D. T. T.
[Place of abode and business.]
Acc. C. D.

London, Jan. 1, 1793. Exchange for £50 sterling.

At sight [*Or* At sight of this my only bill of exchange] pay to Mr. A. B. or order, Fifty pounds sterling value received of him, and place the same to account, as *per* advice [*Or* without further advice] from

To Mr. C. D, &c. V. S.

London, Jan. 1, 1793.
Exchange for 10,000 liv. Tournoises.

At fifteen days after date [*Or*, at *one*, *two*, *&c.* usances] pay this my first bill of exchange, (second and third of the same tenor and date not paid) to Messrs. A. B. and Co. or order, Ten thousand livres Tournoises, value received of them, and place the same to account, as *per* advice from

To Mr. E. F. C. D.
Banker in Paris.

The two other bills of the foreign set are varied thus "first and third," and "first and second not paid."

3. *A Promissory Note*, is a less complicated kind of security, and may be defined to be an engagement in writing to pay a certain sum of money, mentioned in it, to a person named, or to his order, or to the bearer at large. At first these notes were considered only as written evidence of a debt; for it was held that a promissory note was not assignable or indorsible over, within the custom of merchants;

and that if, in fact, such a note had been indorsed or assigned, over, the person to whom it was so indorsed or assigned could not maintain an action within the custom against the drawer of the note; nor could even the person to whom it was in the first instance made payable, bring such action. 1 *Salk.* 129. 2 *Ld. Raym.* 757. 759. But at length they were recognized by the Legislature, and put on the same footing with *inland* bills of exchange, by *stat.* 3 & 4 *Ann. c.* 9. (made perpetual by *stat.* 7 *Ann. c.* 25. § 3.) which enacts that promissory notes, payable to order or bearer, may be assigned and indorsed, and action maintained thereon, as on inland bills of exchange.

FORM OF PROMISSORY NOTES.

£20 London, Jan. 1, 1793.

On demand [*Or* two months, &c. after date,] I promise to pay A. B. or bearer on demand Twenty pounds for value received. T. T.

£20 London, Jan. 1, 1793.

Two months, [&c.] after date, we and each of us promise to pay to Mr. C. B. or order, Twenty pounds value received. A. B.
C. D.

4. By the *stats.* 15 *Geo.* 3. *c.* 51. and 17 *Geo.* 3. *c.* 30. made perpetual by *stat.* 27 *Geo.* 3. *c.* 16. all negotiable notes and bills for less than 20*s.* are declared void; and notes or bills between that sum and 5*l.* must be made payable within 21 days after date; must particularize the name and descriptions of the payees: must bear date at the time and place they are made; must be attested by a subscribing witness, and the indorsement of them must be attended with the same strictness in all respects, and made before the notes or bills become due.

By the act 37 *Geo.* 3. *c.* 32. the acts 15 *Geo.* 3. *c.* 51. and 17 *Geo.* 3. *c.* 30. were suspended, *so far as related to notes under* 5*l. payable on demand to bearer.*—By § 8 of 39 *Geo.* 3. *c.* 107. (a stampt act,) the said acts 15 and 17 *Geo.* 3. were suspended, *respecting such notes for* 1 guinea and 1*l. each.* See the act 48 *Geo.* 3. *c.* 88. repealing 15 *Geo.* 3. *c.* 51. and declaring all notes under 20*s.* void.—And the act 56 *Geo.* 3. *c.* 21. continuing the act 37 *Geo.* 3. *c.* 32. (as amended) until two years after the expiration of the restriction on payments in cash by the Bank of England.

By 45 *Geo.* 3. *c.* 41. (repealing former acts as to small notes in Ireland,) all promissory notes for less than 20*s.* Irish currency are declared void.

Bills of exchange and promissory notes must now be drawn on stampt paper. The stamp is proportioned, under the various acts, to the amount of the bill.—If foreign bills are drawn here, the whole set must be stampt.—But bills drawn abroad, of necessity, are not liable to any stamp duty.

Bills of exchange having been first introduced for the convenience of commerce, it was formerly thought that no person could draw one, or be concerned in the negotiation of it, who was not an actual merchant; but it soon being found necessary for others, not at all engaged in trade, to adopt the same mode of remittance and security, it has been since decided that any person capable of binding himself by a contract, may draw or accept a bill of exchange, or be in any way engaged in the negotiation of it, (and, since the *stat.* 3 & 4 *Ann. c.* 9. be a party to a promissory note,) and shall be considered as a merchant for that purpose. *Carth.* 82. 2 *Vent.* 292. *Comb.* 152. 1 *Show.* 123. 2 *Show.* 501. *Lutw.* 891. 1585. 12 *Mod.* 36. 380. *Salk.* 126.



But an infant cannot be sued on a bill of exchange. *Carth.* 160.—Nor a feme covert; except in such cases as she is allowed to act as a feme sole. 1 *Ld. Raym.* 147. *Salk.* 116. See title *Baron and Feme.*

Where there are two joint-traders, and a bill is drawn on both of them, the acceptance of one binds the other, if it concern the joint-trade; but it is otherwise if it concern the acceptor only, in a distinct interest and respect. 1 *Salk.* 126. 1 *Ld. Raym.* 175.

Sometimes exchange is made in the name, and for the account, of a third person, by virtue of full power and authority given by him, and this is commonly termed *procuration*; and such bills may be drawn, subscribed, indorsed, accepted, and negotiated, not in the name or for the account of the manager or transactor of any or all of these branches of remittances, but in the name and for the account of the person who authorised him. *Lex. Merc.*

5. A promissory note, in its original form of a promise from one man to pay a sum of money to another, bears no resemblance to a bill of exchange. When it is indorsed, the resemblance begins, for then it is an order by the indorser to the maker of the note, who, by his promise, is his debtor, to pay the money to the indorsee.—The indorser of the note corresponds to the drawer of the bill; the maker to the drawee or acceptor; and the indorsee to the payee.—When this point of resemblance is once fixed, the law is fully settled to be exactly the same in bills of exchange and promissory notes: and whenever the law is reported to have been settled with respect to the acceptor of a bill, it is to be considered as applicable to the (drawer, or) maker of a note; when with respect to the drawer of a bill, then to the first indorser of a note; the subsequent indorsers and indorsees bear an exact resemblance to one another. 2 *Burr.* 676.

Both bills and notes are in two different forms, being sometimes made payable to such a man or his order, or to the order of such a man; sometimes to such a man or bearer, or simply to bearer.

The first kind have always been held to be nogotiable: but where they were made payable to the *order* of such a man, exception has been taken to an action brought by that man himself, on the ground that he had only an authority to indorse; but the exception was not allowed. 10 *Mod.* 286. 2 *Show.* 8. *Comb.* 401. *Carth.* 408.—And it is now decided law, that bills and notes payable to *bearer*, are equally transferrable as those payable to order; and the transfer in both cases equally confers the right of action on the *bonâ fide* holder. 1 *Black. Rep.* 485. 3 *Burr.* 1516. *Stat.* 3 & 4 *Ann. c.* 9. § 5. 1 *Burr.* 452, 9. The mode of transfer however is different; bills and notes payable to bearer are transferred by mere delivery, the others by indorsement.

6. The bills and notes mentioned above are considered merely as securities for money; but there is a species of each which is considered as money itself. These are *Bank-notes*, *bankers' cash-notes*, and *drafts on bankers* payable on demand.

*Bank-notes* are treated as money or cash in the ordinary course or transactions of business by common consent, which gives them the credit and currency of money to every effectual purpose; they are as much considered to be money as guineas themselves; 1 *Burr.* 457. and it seems are as lawful a tender. See *Stat.* 5 *W. & M. c.* 20. § 28. 3 *Term Rep.* 554.

*Bankers' cash-notes* and drafts on bankers, are so far considered as money among merchants, that they receive them in payment as ready cash; and if the party receiving them do not within a reasonable time demand the money he must bear the loss in case of the banker's failure. What shall be construed to be a reasonable time has been subject to much doubt; it was formerly considered as a question of fact depending on the circumstances of the case, to be determined by a jury; but is is now established to be a question of law to be decided

by the court, though the precise time is necessarily undetermined. 1 *Black. Rep.* 1. See 1 *Ld. Raym.* 744. 1 *Stra.* 415. 6. 550. 2 *Stra.* 910. 1175. 1248. And on the whole the best rule in these cases seems to be, that drafts on bankers, payable on demand, ought to be carried for payment on the very day on which they are received; if from the distance and situation of the parties that may conveniently be done.

A draft on a banker, post-dated, and delivered before the day of the date, though not intended to be used till that day, must be stamped, by the *stat.* 31 *Geo.* 3. *c.* 25. *Allen* v. *Keeves*, 1 *East.* 435.—See 55 *Geo.* 3. *c.* 184. § 12, 13.

Bills of exchange and promissory notes though according to the general principles of law, they are to be considered only as evidences of a simple contract, are yet in one respect regarded as specialties; and on the same footing with bonds; for unless the contrary be shown by the defendant, they are always presumed to have been made on a good consideration; nor is it incumbent on the plaintiff either to show a consideration in his declaration, or to prove it at the trial. 1 *Black. Rep.* 445: *Peckham* v. *Wood*, *K. B. East.* 18 *Geo.* 3.—However though foreign bills were always entitled to this privilege it was not without some difficulty that it was extended to inland bills: and notes are indebted for it to the statute. 2 *Ld. Raym.* 758. 1 *Black. Rep.* 487.

7. Bills of exchange, contrary to the general nature of *choses in action*, are by the custom of merchants assignable or negotiable without any fiction, and every person to whom they are transferred may maintain an action in his own name against any one, who has before him in the course of their negotiation rendered himself responsible for their payment. The same privilege is conferred on notes by the *Statute*. But the instrument or writing which constitutes a good bill of exchange according to the custom, or a good note under the *Statute* must have certain essential qualities. 3 *Wils.* 213.

One of these qualities is, that the bill or note should be for the payment of money *only*; and not for the payment of money *and* the doing some other act: (2 *Stra.* 1271;) for these instruments being originally adopted for the convenience of remittance, and now considered only as securities for the future payment of money must undertake *only* for that; and it must be money in specie, not in good East India *bonds*, or any thing else which can itself be only considered as a security. *Bull. N. P.* 273.

Another requisite quality is, that the instrument must carry with it a *personal* and certain credit, given to the drawer or maker, not confined to credit on any particular fund. 3 *Wils.* 213. But in the application of this principle there seems to be a material distinction between bills and notes. As to the former, where the fund is supposed to be in the hands of the drawee, the objection holds in its full force; not only because it may be uncertain whether the fund will be productive, but because the credit is not given to the *person* of the drawer; but where the fund on account of which the money is payable, either is in the hands of the drawer, or he is accountable for it, the objection will not hold, because the credit is personal to him, and the fund is only the consideration of his giving the bill.—With respect to a note, if the drawer promise to pay out of a particular fund, then within his power, the note will be good under the statute: the payment does not depend on the circumstance of the fund's proving unproductive or not, but there is an obligation on his *personal* credit; the bare making of the note being an acknowledgement that he has money in his hands. See *Joscelyne* v. *Lassere*, *Fort.* 281. 10 *Mod.* 294, 316. *Jenny* v. *Herle*, 1 *Stra.* 591. 2 *Ld. Raym.* 1361. 8 *Mod.* 265. *Dawkes & ux.* v. *Deloraine*, 3 *Wils.* 207. 2 *Black. Rep.* 782.—On the principle which governed these cases an order from an owner of a ship to the freighter to pay money *on account of freight*, was held to be no bill of exchange. 2 *Stra.* 1211.—But such a bill from the freighters of a ship, to any other person, if good in other respects would certainly not be bad, though made payable on account of freight; because indisputably there is a personal credit given to the drawer, the words "on account of freight," only expressing the consideration for which the bill was given. See *Pierson* v. *Dunlop. Doug.* 571.—And there may be cases where the instrument may appear at first sight to be payable out of a particular fund, but in reality be only a distinction how the drawee is to reimburse himself, or a recital of the particular species of value received by the maker of a note; in which cases their validity rests on the personal credit given to the acceptor of the bill, or drawer of the note. 2 *Ld. Raym.* 1481, 1545. 2 *Stra.* 762. *Barn. K. B.* 12.

Another essential quality to make a good bill or note is, that it must be absolutely payable at all events; and not depend on any particular circumstances which may or may not happen in the common course of things. 3 *Wils.* 213. 1 *Burr.* 325. See 2 *Ld. Raym.* 1362. 1396. 1563. 8 *Mod.* 363. 4 *Vin.* 240. *pl.* 16. 2 *Stra.* 1151. 4 *Mod.* 242. 1 *Burr.* 323. In the case of notes however it is not necessary, that the time of payment should be absolutely fixed; it is sufficient if, from the nature of the thing, the time must certainly arrive, on which their payment is to depend: (2 *Stra.* 1217. 1 *Burr.* 227; for here the words of engagement make the debt; and it is no direction to another person; the former part of the note is a promise to pay the money, and the rest is only fixing the particular time when it is to be paid. It is sufficient if it be certainly, and at all events payable at that time, whether the maker live till then, or die in the interim.—And it has been decided that a promise to pay "within two months after such a ship shall be paid off" will make a good note; for the paying off the ship is a thing of a publick nature and morally certain. See 1 *Stra.* 24. 1 *Wils.* 262, 3.—But this indulgence seems to have been carried almost too far; and such a latitude seems imcompatible with the nature and original intention of a bill of exchange; its allowance in favour of promissory notes arising entirely from a liberal construction of the statute on which the negotiability of those notes depends.

In most of the cases where the several instruments have been denied the privilege of bills and notes, it is not for that reason to be concluded that they are of no force: when the fund from which they are to be paid can be proved to have been productive, or the contingency on which they depend has happened, they may be used as evidence of a contract according to the circumstances of the case, or according to the relation in which the parties stand to one another. See 2 *Black. Rep.* 1072.

No precise form of words is necessary to make a bill of exchange or a note under the statute; any order which cannot be complied with, or promise which cannot be performed, without the payment of money, will make a good bill or note. Thus an order to deliver money, or a promise that such a one shall receive it. 10 *Mod.* 287. 2 *Ld. Raym.* 1396. 1 *Stra.* 629, 706. 1 *Wils.* 263. 3 *Wils.* 213. 8 *Mod.* 364. *All.* 1.

The words *value received* being in general inserted in bills and notes, there seems to have been some doubt, whether they were essential; in one case, (*Banbury* v. *Lisset*, 2 *Stra.* 1212,) where the want of these words was objected, a verdict was given on that account against the instrument, but that case seems a very doubtful authority.—On several occasions it appears to have been said incidentally by the court, and at the bar, that these words are unnecessary. *Fort.* 282. *Barn. K. B.* 88. 8 *Mod.* 267. 1 *Show.* 5. 497. 3 *Lord Raym.* 1556. 1481. *Lutw.* 889. 1 *Mod. Ent.* 310.—And the point is now fully settled that these words are not necessary; for as these instruments are always presumed to have been made on a valuable consideration, words which import no more, cannot be essential. *White* v. *Ledwick*, *K. B. Hill.* 25 *Geo.* 3.

Whether it be essential to the constitution of a bill of exchange, that it should contain words which render it negotiable, as *to order* or *to bearer*, seems not hitherto to have re-

ceived a direct judicial decision. There are two cases in which the want of such words was taken as an exception; but as there were other exceptions, the point was not decided. 2 *Stra.* 1212. 3 *Wils.* 212.—In another case, the same exception was taken and overruled, but under such circumstances that the point was not generally determined. 2 *Wils.* 353.—If in a doubtful point however it may be allowed to reason on general principles, it should seem, that it being the original intention and the actual use of bills of exchange that they should be negotiable, such drafts as want these operative words are not entitled to be declared on as specialties, however they may be sufficient as evidence to maintain an action of another kind. *Kyd.* 42.—But it has been ruled that such words are not necessary in notes, and that the person to whom they are made payable may maintain an action on them, within the statute against the maker. *Moor* v. *Paine*, *Hardw.* 288.

II. AN ACCEPTANCE is an engagement to pay a bill of exchange according to the tenor of the acceptance.—The circumstances which generally concur in an acceptance are that the party to whom it is addressed binds himself to the payment, after the bill has issued, before it has become due and according to its tenor; by either subscribing his name or writing the word *accepts*, or *accepted*, or *accepted* A. B. But a man may be bound as acceptor without any of these circumstances.

An acceptance may be either written or verbal; if the former, it may be either on the bill itself, or in some collateral writing, as a letter, &c. 1 *Stra.* 648. In foreign bills it has always been understood that a collateral or parol acceptance was sufficient. 1 *Stra.* 648. 3 *Burr.* 1674. *Hardw.* 75. And it is now settled that such acceptance is also good in cases of inland bills; as by word, *Lumley* v. *Palmer*, 2 *Stra.* 1000; or by letter, 1 *Atk.* 717, (613.)

The acceptance is usually made between the time of issuing the bill and the time of payment; but it may also be made before the bill has issued, or after it has become due; when it is made before the bill is issued, it is rather an agreement to accept, than an actual acceptance; but such agreement is equally binding as an acceptance itself. 3 *Burr.* 1663. *Doug.* 284. 1 *Atk.* 715. (611).—When the acceptance is made after the time of payment is elapsed, it is considered as a general promise to pay the money: and if it be to pay according to the tenor of the bill, this shall not invalidate the acceptance, though the time being past, it be impossible to pay according to the tenor; but these words shall be rejected as surplusage. 4 *Salk.* 127. 9. 1 *Ld. Raym.* 364. 574. 12 *Mod.* 214. 410. *Carth.* 459.

Acceptance is usually made by the drawee, and when before the issuing of the bill, is hardly ever made by any other person; but after the issuing the bill it often happens, either that the drawee cannot be found, or refuses to accept, or that his credit is suspected; or that he cannot by reason of some disability render himself responsible: in any of these cases an acceptance by another person, in order either to prevent the return of the bill, to promote the negotiation of it, or to save the reputation of, and prevent an action against, the drawer, or some of the other parties, is not uncommon; such an acceptance is called an acceptance for the honour of the person on whose account it is made.

That engagement which constitutes an acceptance, is usually made to the holder of the bill, or to some person who has it in contemplation to receive it; and then the acceptor must answer to him, and to every one who either has had the bill before, or shall afterwards have it by indorsement; but it is frequently made to the drawer himself; and then it may be binding on the party making the engagement or not, according to the circumstances of the case.

The mere answer of a merchant to the drawer "that he will duly honour his bill" is not of itself an acceptance, unless accompanied with circumstances which may induce a third person to take the bill by indorsement: but if there be any such circumstances, it may amount to an acceptance, though the answer be contained in a letter to the drawer. *Cowp.* 572. 4. 1 *Atk.* 715. (611). And an agreement to accept may be expressed in such terms as to put a third person in a better condition than the drawer. If one, meaning to give credit to another, make an absolute promise to accept his bill, the drawer or any other person may shew such promise on the exchange to procure credit, and a third person advancing his money on it has nothing to do with the equitable circumstances which may subsist between the drawer and acceptor. *Dougl.* 286. (299).

A. in consideration of having commissioned B. to receive certain African *bills* payable to him, drew a bill upon B. for the amount, payable to his own order; B. acknowledged by letter the receipt of the list of the African bills, and that A. had drawn for the amount, and assured him that it would meet due honour from him. This is an acceptance of the bill by B. and the purport of such letter having been communicated by A. to third persons, who, on the credit of it, advanced money on the bill to A. who indorsed it to them; held that B. was liable as acceptor in an action by such indorsees, although after the indorsement, in consequence of the African bills having been attached in B.'s hands, who was ignorant of his letter having been shown, A. wrote to B. advising him not to accept the bill when tendered to him; which as between A. B. would have been a discharge of B.'s acceptance if the bill had still remained in A.'s hands. *Clarke and others* v. *Cock.* 4 *East.* 57.

An acceptance is generally according to the tenor of the bill; and then it is called a general and absolute acceptance; but it may differ from the tenor in some material circumstances, and yet, as far as it goes, be binding on the acceptor.—Thus it may be for a less sum than that mentioned in the bill; or it may be for an enlarged period. 1 *Stra.* 214. *Marius* 21.—So the drawee may accept a bill which has no time mentioned for payment, and which is held to be payable at sight, to pay, at a distant period; which acceptance will bind him. 11 *Mod.* 190.

A bill was payable the 1st of January; the drawee accepted to pay the 1st of March: the holder struck out the 1st of March, and inserted the first of January, and when it was payable according to that date, presented it for payment, which the acceptor refused; on which the holder restored the acceptance to the original form; and the court held that it continued binding. *Price* v. *Shute*, *East.* 33 *Car.* 2.—So the acceptance may direct the payment to be made at a different place from that mentioned in the bill, as at the house of a banker. See 2 *Stra.* 1195.—So also the acceptance may differ from the tenor of the bill in its mode of payment, as to pay half in money, half in bills. *Bull. N. P.* 270.—An acceptance may also be conditional, as "to pay when certain goods consigned to the acceptor, and for which the bill is drawn, shall be sold." 2 *Stra.* 1152.

What shall be considered as an absolute or conditional acceptance is a question of law to be determined by the court, and is not to be left to the jury. 1 *Term. Rep.* 182. See 1 *Stra.* 648. 1 *Atk.* 717. (612).—If the acceptance be in writing and the drawee intend that it should be only conditional, he must be careful to express the condition in writing as well as the acceptance; for if the acceptance should, on the face of it appear to be absolute, he cannot take advantage of any verbal condition annexed to it, if the bill should be negotiated and come to the hands of a person unacquainted with the condition; and even against the person to whom the verbal condition was expressed, the burthen of proof will be on the acceptor. *Doug.* 286.—A conditional acceptance, when the conditions on which it depends are performed, becomes absolute. *Cowp.* 571.—But if the conditions on which the agreement to accept a bill is made, be not complied with, that agreement will be discharged. *Doug.* 297.

An acceptance by the custom of merchants as effectually binds the acceptor, as if he had been the original drawer; and, having once accepted it, he cannot afterwards revoke it. *Cro. Jac.* 308. *Hard.* 487.

A very small matter will amount to an acceptance; and any words will be sufficient for that purpose, which shew the party's assent or agreement to pay the bill; as if upon the tender thereof to him, he subscribes, *accepted*, or *accepted by me A. B.* or, *I accept the bill, &c.* these clearly amount to an acceptance. *Molloy, book* 2. *cap.* 10. *sect.* 15.

If the party under-writes the bill, *presented* such a day or only the day of the month: this is such an acknowledgement of bill as amounts to an acceptance. 3 *New Abr.* 610. *Comb.* 401. So if he ordered a direction to another person to pay it. *Bull. N. P.* 270.

If the party says, *Leave your bill with me and I will accept it*, or, *call for it to morrow and it shall be accepted;* these words, according to the custom of merchants, as effectually bind, as if he had actually signed or subscribed his name according to the usual manner.

But if a man says, *Leave your bill with me; I will look over my accounts, and books between the drawer and me, and call to morrow, and accordingly the bill shall be accepted;* this does not amount to a complete acceptance; for the mention of his books and accounts shows plainly that he intended only to accept the bill, in case he had effects of the drawer's in his hands. And so it was ruled by the Lord Chief Justice Hale, at Guildhall. *Molloy, book* 2. *cap.* 10. *sect.* 20.

A bare promise by a debtor to his creditor, that if he would draw a bill upon him at a certain date, for the amount of his demand, he should then have the money, and would pay it, does not amount in law to an acceptance when drawn. 1 *E. R.* 98.

A foreign bill was drawn on the defendant, and being returned for want of acceptance, the defendant said, that *if the bill came back again he would pay it;* this was ruled a good acceptance. 3 *New Abr.* 610. cites *Mich.* 6 *Geo.* 1. *B. R. Carr* v. *Coleman.*

If a merchant be desired to accept a bill, on the account of another, and to draw on a third, in order to reimburse himself, and in consequence he draw a bill on that third person; the bare act of drawing this bill, will not amount to an acceptance of the other. 1 *Term Rep.* 269.

An agreement to accept or honour a bill will in many cases be equivalent to an acceptance, and whether that agreement be merely verbal, or in writing, is immaterial: If A. having given or intending to give credit to B. write to C. to know whether he will accept such bills as shall be drawn on him on B.'s account; and C. return for answer, that he will accept them; this is equivalent to an acceptance; and a subsequent prohibition to draw on him on B.'s account will be of no avail, if in fact, previous to that prohibition, the credit has been given. 3 *Burr.* 1663.

A letter from the drawees of a bill in England to the drawer in America, stating that "their prospect of security being so much improved they shall *accept* or *certainly pay the bill*," is *an acceptance in law*; although the drawees had before refused to accept the bill when presented for acceptance by the holder, who resided in England, and again after the writing such letter refused payment of it when presented for payment; and although such letter written before were not received by the drawer in America, till after the bill became due. *Wynne* v. *Raikes, 5 East,* 514.

If a book-keeper or servant, or other person having authority or who usually transacts business of this nature for the master, accept a bill of exchange, this shall bind such master. 3 *New Abr.* 611.

If a bill be drawn on a servant (as a clerk of a corporation, &c.) with a direction to place the money to the account of his employer, and the servant accept it generally, this renders him liable to answer personally to an indorsee. 2 *Stra.* 955. *Hardw.* 1.

If a *bill* be accepted, and the person who accepted the same happens to die before the time of payment, there must be a demand made of his executors or administrators; and on non-payment, a protest is to be made, although the money becomes due before there can be administration, &c.

If the drawee of a bill goes abroad, leaving an agent in England with power to accept bills, who accepts a bill for him, when due it must be presented to the agent for payment if the drawee continues absent. 2 *W. P. T.* 206.

Forging the acceptance of any *bill of exchange*, or the number or principal sum of any accountable receipt, is made felony, by *stat.* 7 *Geo.* 2. *c.* 22.

III. According to the difference in the stile of negotiability of bills and notes, the modes of their transfer also differ. Bills and notes payable to bearer are transferred by delivery: if payable to A. B. or bearer they are payable to bearer, as if A. B. were not mentioned. 1 *Burr.* 452. 3 *Burr.* 1516. 1 *Black. Rep.* 485. But to the transfer of those payable to order, it is necessary in addition to delivery that there should be something, by which the payee may appear to express his order. This additional circumstance is an *indorsement;* so called from being usually (though not necessarily) written on the *back* of the note or bill.

Where no regulation is made by act of parliament (see ante I. 4.) relative to the negotiation of bills or notes, no particular form of words is necessary to make an indorsement; only the name of the indorsor must appear upon it, and it must be written or signed by him, or by some person authorized by him for that purpose.

Indorsements are either in full or in blank; a full indorsement is that by which the indorsor orders the money to be paid to some particular person, by name: a blank indorsement consists only of the name of the indorsor.—Blank indorsements are most frequent, indeed almost universal in business.—A blank indorsement renders the bill or note afterwards transferrable by delivery only, as if it were payable to bearer; for by only writing his name the indorsor shows his intention that the instrument should have a general currency, and be transferred by every possessor. *Doug.* 617. (639.) 611. (633).

Except where restrained by statute (See ante I. 4.) the transfer of a bill or note may be made at any time after it has issued, even after the day of payment; and in case of bills, where the acceptor resides at a distance from the drawer, is frequently made before acceptance. 1 *Ld. Raym.* 575. See 3 *Term Rep.* 80. 3 *Burr.* 1516. 1 *Black. Rep.* 485. *Doug.* 611. (633).

An indorsement may be made on a blank note, before the insertion of any date or sum of money, in which case the indorsor is liable for any sum, at any time of payment that may be afterwards inserted; and it is immaterial whether the person taking the note on the credit of the indorsement knew whether it was made before the drawing of the note or not; for in such a case the indorsement is equivalent to a letter of credit for any indefinite sum. *Doug.* 496. (514).

On a transfer by delivery, it is said that the person making it ceases to be a party to, or security for, the payment of a bill or note; (1 *Ld. Raym.* 442. 12 *Mod.* 241. 1 *Salk.* 128.) yet it seems there can be little doubt that he is liable in another sort of action; as for money had and received, &c. See 3 *Term Rep.* 757. 4 *Term Rep.* 177.

Though a blank indorsement be a sufficient transfer, and may enable the person, in whose favour it is made, to negotiate the instrument, yet it is in his option, to take it either as indorsee, or as servant or agent to the indorsor; and the latter may, notwithstanding his indorsement, declare as holder

in an action against the drawer or acceptor. Nothing is more usual than for the holder of a bill or note to indorse it in blank, and send it to some friend for the purpose of procuring the acceptance or the payment; in this case it is in the power of the friend, either to fill up the blank space over the indorsor's name, with an order to pay the money to himself, which shows his election to take as indorsee; or to write a receipt which shews he is only the agent of the indorsor. 1 *Salk.* 125. 128. 130. 1 *Show.* 163. 2 *Ld. Raym.* 871. And, on this principle, one to whom a bill was delivered with a blank indorsement, and who carried it for acceptance, was admitted in an action of trover for the bill against the drawee, to prove the delivery of it to the latter. 1 *Salk.* 130. 2 *Ld. Raym.* 871.

The original contract on negotiable bills and notes is to pay to such person or persons, as the payee, or his indorsees, or their indorsees shall direct; and there is as much privity between the last indorsor and the last indorsee, as between the drawer and the original payee. When the payee assigns it over, he does it by the law of merchants, for, as a thing in action, it is not assignable by the general law. The indorsement is part of the original contract, is incidental to it in the nature of the thing, and must be understood to be made in the same manner as the instrument was drawn; the indorsee holds it in the same manner and with the same privileges, qualities, and advantages as the original payee, as a transferrable negotiable instrument, which he may indorse over to another, and that other to a third, and so on at pleasure; for these reasons an indorsor *for a valuable consideration* cannot limit his indorsement by any restriction on the indorsee, so as to preclude him from transferring it to another as a thing negotiable. 2 *Burr.* 1222, 3, 6, 7—See also *Com.* 311. 1 *Stra.* 457. 2 *Burr.* 1216. 1 *Black. Rep.* 295. and as to the effect of Restrictive Indorsements, see *Doug.* 615. (637.) 617. (639. 640.)

Where the transfer may be by *delivery* only, that transfer may be made by any person who by any means, whether accident or theft, has obtained the possession; and any holder may recover against the drawer, acceptor or indorsor in blank, if such holder gave a valuable consideration without knowledge of the accident. 1 *Burr.* 452. 3 *Burr.* 1516. 1 *Black. Rep.* 485. The same principle applies also to the case of a bill negotiated with a blank indorsement. *Peacock* v. *Rhodes & al. Doug.* 611. (613); where the court held, that there was no difference between a bill or note indorsed blank, and one payable to bearer. They both pass by delivery, and possession proves property in both cases. The holder of either cannot with propriety be considered as assignee of the payee: an assignee must take the thing assigned, subject to all the equity to which the original party was subject: if this rule were applied to bills and notes, it would stop their currency, and would render it necessary for every indorsee to enquire into all the circumstances, and the manner in which the bill came to the indorsor; but the law is now clearly settled, that a holder coming fairly by a bill or note is not to be affected with the transaction between the original parties.

But a transfer by *indorsement* where that is necessary, can only be made by him who has a right to make it, and that is strictly only the payee, or the person to whom he or his indorsees have transferred it, or some one claiming in the right of some of these parties.—Bills and notes in favour of partners must be indorsed by them all, or at least by one in the firm of the house; and a bill drawn by two persons payable to them or order, must be indorsed by both. *Doug.* 630. (653.) in *note.*

If a bill or note be made or indorsed to a woman while single, and she afterwards marry, the right to indorse it over belongs to her husband, for by the marriage he is entitled to all her personal property. 1 *Stra.* 516. *Ca. L. E.* 246.

If a man become bankrupt, the property of bills and notes of which he is the payee or indorsee, vests in his assignees, and the right to transfer is in them only.—If the holder of a bill or note die, it devolves to his executors or administrators, and they may indorse it, and their indorsee maintain an action, in the same manner as if the indorsement had been made by the testator or intestate. But on their indorsement they are liable *personally* to the subsequent parties, for they cannot charge the effects of the testator.—They may also be the *indorsees* of a bill or note in their quality of executors or administrators; as where they receive one from their testator or intestate; and in that character they may bring an action on it against the acceptor, or any of the other parties. 3 *Wils.* 1. 2 *Stra.* 1260. 2 *Barnes* 137. 2 *Burr.* 1225. 1 *Term Rep.* 487. 10 *Mod.* 315.

When a bill payable to order is expressed to be for the *use* of another person than the payee, yet the right of transfer is in the payee, and his indorsee may recover against the drawer or acceptor. *Carth.* 5. 2 *Vent.* 309. 2 *Show.* 509.

It has been adjudged, that a bill of exchange cannot be indorsed for part, so as to subject the party to several actions. 3 *New Abr.* 610. *Carth.* 466. 1 *Salk.* 65.

IV. By the very act of drawing a bill, the drawer comes under an implied engagement to the payee, and to every subsequent holder, fairly entitled to the possession, that the person on whom he draws is capable of binding himself by his acceptance, that he is to be found at the place at which he is described to be, if that description be mentioned in the bill; that if the bill be duly presented to him, he will accept it in writing on the bill itself, according to its tenor; and that he will pay it when it becomes due, if presented in proper time for that purpose.

In default of any of these particulars, the drawer is liable to an action at the suit of any of the parties before mentioned, on due diligence being exercised on their parts, not only for the payment of the original sum mentioned in the bill, but also, in some cases, for damages, interest, and costs; and he is equally answerable whether the bill was drawn on his own account, or on that of a third person; for the holder of the bill is not to be affected by the circumstances that may exist between the drawer and another; the *personal credit* of the drawer being pledged for the due honour of the bill. *Beawes.* See ante I. 7.

If a man write his name on a blank piece of paper, and deliver it to another, with authority to draw on it a bill of exchange to any amount, at any distance of time, he renders himself liable to be called on as the drawer of any bill so formed by the person to whom he has given the authority. 1 *H. Black. Rep.* 313.

If acceptance be refused, and the bill returned, this is notice to the drawer of the refusal of the drawee; and then the period when the debt of the former is to be considered as contracted is the moment he draws the bill; and an action may be immediately commenced against him; though the regular time of payment, according to the tenor of the bill, be not arrived. For the drawee not having given credit, which was the ground of the contract, what the drawer had undertaken has not been performed. *Doug.* 55. *Mitford* v. *Mayor.* See also 2 *Stra.* 949. cited 3 *Wils.* 16. 17.

When a bill of exchange is indorsed by the person to whom it was made payable, as between the indorsor and indorsee, it is a new bill of exchange; as it is also between every subsequent indorsor and indorsee: the indorsor therefore, with respect to all the parties subsequent to him stands in the place of the drawer, being a collateral security for the acceptance and payment of the bill by the drawee; his indorsement imposes on him the same engagement that the drawing of the bill does on the drawer; and the period when that engagement attaches is the time of the indorsement. 1 *Salk.* 133. 2 *Show.* 441. 494. 2 *Burr.* 674.

Nothing will discharge the indorsor from his engagement but the absolute payment of the money, not even a judg-

ment recovered against the drawer, or any previous indorsor. 3 *Mod.* 86. 2 *Show.* 441. 494.—Neither is the engagement of an indorsor discharged by the ineffectual *execution* against the drawer, or any prior or subsequent indorsor. 2 *Black. Rep.* 1235. and see 4 *Term. Rep.* 825.

The engagement of the drawer and indorsors is, however, still but conditional.—The holder, in order to entitle himself to call upon them in consequence of it, undertakes to perform certain requisites on his part, a failure in which precludes him from his remedy against them.—Where the payment of a bill is limited at a certain time after sight, it is evident the holder must present it for acceptance, otherwise the time of payment would never come; it does not appear that any precise time, within which this presentment must be made, has in any case been ascertained: but it must be done as soon as, under all the circumstances of the case, that can conveniently be done; and what has been said on the presentment of bills and notes payable on demand, seems exactly to apply here. See *ante* I. 6.

Whether the holder of a bill, payable at a certain time after the date, be bound to present for acceptance immediately on the receipt of it, or whether he may wait till it become due, and then present it for payment, is a question which seems never to have been directly determined: in practice, however, it frequently happens that a bill is negotiated and transferred through many hands without acceptance; and not presented to the drawee till the time of payment, and no objection is ever made on that account. See 5 *Burr.* 2671. 1 *Term. Rep.* 713.

If, however, the holder in fact present the bill for acceptance, and that be refused, he is bound to give regular notice to all the preceding parties to whom he intends to resort for non-payment; to the drawer, that he may know how to regulate his conduct with respect to the drawee, and make other provision for the payment of the bill; and to the indorsors, that they may severally have their remedy in time against the parties on whom they have a right to call; and if, on account of the holder's delay, any loss accrue by the failure of any of the preceding parties, *he* must bear the loss. 5 *Burr.* 2670. 1 *Term. Rep.* 712.

It is also the duty of the holder of a bill, whether accepted or not, to present it for payment within a limited time; for otherwise the law will imply that payment has been made; and it would be prejudicial to commerce, if a bill might rise up to charge the drawer at any distance of time, when all accounts might be adjusted between him and the drawee.—For the old cases on this subject, see 1 *Salk.* 127. 132. 133. 1 *Show.* 155. 1 *Ld. Raym.* 743. 2 *Stra.* 829.—This time for demand of payment seems, at present, to be regulated by the cases as to notice to preceding indorsors immediately following.

A presentment either for payment or acceptance must be made at seasonable hours; which are the common hours of business in the place where the party lives to whom the presentment is to be made.

If acceptance or payment be refused, or the drawee of the bill, or maker of the note, has become insolvent, or has absconded, notice from *the holder* himself must be given to the preceding parties; and in that notice it is not enough to say that the drawee or maker refuses, is insolvent, or has absconded, but it must be added that the holder does not intend to give him credit. The purpose of giving notice is not merely that the indorsor should know default has been made, for he is chargeable only in a secondary degree; but to render him liable, it must be shown that the holder looked to him for payment, and gave him notice that he did so. See 1 *Stra.* 441. 515. 2 *Black. Rep.* 747; as to bills—and 1 *Stra.* 649. 2 *Stra.* 1087. 1 *Term Rep.* 170. as to notes.

What should be considered as a reasonable time within which notice should be given, either of non-acceptance or non-payment, has been subject to much doubt and uncertainty; it was once held, that a fortnight was a reasonable time, but that is now much narrowed. 1 *Mod.* 27.

With respect to acceptance, it is usual to leave a bill for that purpose with the drawee till the next day, and that is not considered as giving him time; it being understood to be the usual practice; but if on being called on the next day, he delay or refuse to accept according to the tenor of the bill, the rule now established, where the parties to whom notice is to be given reside at a different place from the holder and drawee, is, that notice must be sent by the next post.—Under the same circumstances, the same rule obtains in the case of *non-payment.* 1 *Term. Rep.* 169.—So also, in case the drawee or maker has absconded, or cannot be found, notice of these circumstances, either in case of non-acceptance or non-payment, must be sent by the first post.

The great difficulty has been to establish any general rule, where the party entitled to notice resides in the same place, or at a place at a small distance from that in which the holder lives. On this point, as well as on the question of what shall be considered as a reasonable time for making the *demand* of payment, it has been an object of no little controversy, whether it was the province of the jury or of the judge to decide; (see ante I. 6;) till lately it seems the jury had been permitted to determine on the particular circumstances of each individual case, what time was reasonably to be allowed, either for making demand or giving notice. *Doug.* 515. (681.)

But it having been found that this was productive of endless uncertainty and inconvenience, the court, on several occasions, have laid it down as a principle, that what shall be considered as a reasonable time in either case is a question of law: juries have, however, struggled so hard to maintain their privilege in this respect, that in two cases they narrowed the time for demand, contrary to the opinion of the court; and, on a second trial being granted, they, in both cases, adhered to their opinion, contrary to the direction of the judge. In one of them however, application being made for a third trial, the court would have granted it, had not the plaintiff precluded himself by proving his debt under a commission of bankrupt which had issued against the drawees of the bill between the time of the verdict and the application. See *Doug.* 515. 1 *Term. Rep.* 171. and the cases there cited.—In a third case, where the struggle by the jury was to give a longer time for notice than was necessary, the court adhered to their principle, and granted no less than three trials. 1 *Term. Rep.* 167. 9; *Tindal* v. *Brown.* It seems therefore fully established, that what shall be reasonable time is a question of law; and generally that a demand must be made, and notice given, as soon as, under all the circumstances, it is possible so to do.

The reason why the law requires notice is, that it is presumed that the bill is drawn on account of the drawee's having effects of the drawer in his hands; and that if the latter has notice that the bill is not accepted, or not paid, he may withdraw them immediately. But if he have no effects in the other's hands, then he cannot be injured for want of notice; and if it be proved on the part of the plaintiff, that from the time the bill was drawn, till the time it became due, the drawee never had any effects of the drawer in his hands, notice to the latter is not necessary in order to charge him, for he must know this fact; and if he had no effects in the drawee's hands, he had no right to draw upon him, and to expect payment from him; nor can he be injured by the non-payment of the bill, or the want of notice that it has been dishonoured. 1 *Term. Rep.* 410; and see 1 *Term. Rep.* 405.

Yet, though it appear that the drawer had no effects in the hands of the drawee, no action can be maintained against the *indorsor*, if no notice was given him of the bill being

dishonoured; for though the drawer may have received no injury, the indorsor, who must be presumed to have paid a valuable consideration for the bill, probably has. 2 *Term. Rep.* 714.

Though in the case where the drawer has effects in the hands of the drawee, the want of notice cannot be waived by a subsequent promise by the drawer, to discharge the bill; yet where he had no effects it may; though it appear that, in fact, he sustained an injury for want of such notice; such a subsequent promise is an acknowledgment that he had no right to draw on the drawee; and if he has in fact sustained damage, it is his own fault.—But where damage in such a case has been sustained, and no subsequent promise appears, it may be very doubtful whether want of notice can be waived. See 2 *Term Rep.* 713. 714.

In the manner in which notice, either of non-acceptance or non-payment, is given, there is a remarkable difference between inland and foreign bills; in the former no particular form of words is necessary to entitle the holder to recover against the drawer or indorsors the amount of the bill, on failure of the drawee or acceptor; it is sufficient if it appear the holder means to give no credit to the latter, but to hold the former to their responsibility. 1 *Term Rep.* 170.—But in foreign bills other formalities are required; if the person to whom the bill is addressed, on presentment, will not accept it, the holder is to carry it to a person vested with a public character, who is to go to the drawee and demand acceptance, and if he then refuse, the officer is there to make a minute on the bill itself, consisting of his initials, the month, the day, and the year, with his charges for minuting. He must afterwards draw up a solemn declaration, that the bill has been presented for acceptance, which was refused, and that the holder intends to recover all damages which he, or the deliverer of the money to the drawer, or any other, may sustain on account of the non-acceptance: the minute is, in common language, termed the *noting* of the bill; the solemn declaration, the *protest*, and the person whose office it is to do these acts, *a public notary*: and to his protestation all foreign courts give credit. *Mal.* 264. *Mar.* 16.

This *protest* must be made within the regular hours of business, and in sufficient time to have it sent to the holder's correspondent by the *very next post* after acceptance refused; for if it be not sent by that time, with a letter of advice, the holder will be construed to have discharged the drawer and the other parties entitled to notice; and noting alone is not sufficient; there must absolutely be a protest to render the preceding parties liable. *Bull. N. P.* 271. 2 *Term Rep.* 713.

But in this case the holder is not to send the bill itself to his correspondent; he must retain it, in order to demand payment of the drawee when it becomes due.

When the bill becomes due, whether it was accepted or not, it is again to be presented for payment within the days of grace, and if payment be refused, the bill must be protested for non-payment, and the bill itself, together with the protest, sent to the holder's correspondent, unless he shall be ordered by him to retain the bill, with a prospect of obtaining its discharge from the acceptor. *Beawes.*

As this protest on foreign bills must be made *on* the last day of grace, and immediate notice sent to the parties concerned, it seems established that such a bill is payable, *on demand made, at any time that day* within reasonable hours; and that the acceptor has not the whole day to pay the bill. 4 *Term. Rep.* 170.

Besides the protest for non-acceptance and non-payment, there may also be a protest for better security; this is usual when a merchant, who has accepted a bill, happens to become insolvent, or is publickly reported to have failed in his credit, or absents himself from 'Change, before the bill he has accepted becomes due; or when the holder has any reason to suppose it will not be paid; in such cases he may cause a notary to demand better security, and on that being refused, make protest for want of it; which protest must also be sent to the parties concerned by the next post. *Mar.* 27. 1 *Ld. Raym.* 743.

Where the original bill is lost, and another cannot be had of the drawer, a protest may be made on a copy, especially where the refusal of payment is not for want of the original bill, but merely for another cause. 1 *Show.* 164.

The effect of protest for non-acceptance or non-payment, is to charge the drawer or indorsors, not only with the payment of the principal sum, but with interest, damages, and expenses; which latter consist usually of the exchange, re-exchange, provision, and postage, together with the expenses of the protest. See *Stra.* 649.

Whenever interest is allowed, and a new action cannot be brought for it, which is the case on bills and notes, the interest is to be calculated up to the time of signing final judgment. 2 *Burr.* 1086. 1087. and see 2 *Term Rep.* 52.

The principal difference between foreign and inland bills of exchange at common law, seems to have been this. A protest for non-acceptance or non-payment of a foreign bill was, and still is, essentially necessary to charge the drawer on the default of a drawee; nothing, not even the principal sum, could or can, at this time, be recovered against him without a protest: no other form of notice having been admitted by the custom of merchants as sufficient: but on inland bills, simple notice, within a reasonable time of the default of the drawee, was held sufficient to charge the drawer, without the solemnity of a protest; the disadvantage arising from thence was this, that notice entitled the holder to recover only the sum in the original bill, which, in many cases, might be a very serious disadvantage: to remedy this inconvenience in some degree, the *stat.* 9 & 10 *W.* 3. *c.* 17. and afterwards the *stat* 3 & 4 *Anne c.* 9. were passed; the professed intention of which acts was, to put inland bills on the same footing as foreign ones; so far as relates to the recovery of damages, interest, and costs, (*i. e.* expenses) by means of the protest they have done it; but there are several minute particulars, in which, from an attentive perusal of the acts, it will appear they still differ.

To the constitution of a bill of exchange, as has been said before, it is not necessary that the words *value received* should be inserted; and the want of these in a foreign bill cannot deprive the holder of the benefit of a protest; but that benefit, in case of non-payment, is not given by the statutes to inland bills which want these words, and therefore they cannot be protested for non-payment; and the second act provides that "where these words are wanting, or the value is less than 20*l.* no protest is necessary either for non-acceptance or non-payment," the safest construction of which seems to be, that inland bills, without the words *value received*, or under 20*l.* shall continue as at common law, and shall not be entitled to the privilege of a protest, either for non-acceptance or non-payment.

An inland bill, payable at so many days after *sight*, cannot be protested at all; and no inland bill can be protested till *after* the expiration of the three days of grace; notice of which protest is, by the statute, to be sent within fourteen days after the protest. 4 *Term Rep.* 170.

There appears also to be another difference subsisting between foreign and inland bills of exchange; for where acceptance and payment both are refused on foreign bills, it seems necessary that there should be a protest for each; but, under the *stat.* 3 & 4 *Anne c.* 9. it seems that one protest for either, on an inland bill, is sufficient.

On inland bills, where damages, interest, and costs [expenses] are to be recovered, there is more indulgence in the

time allowed for notice of non-payment than were only the principal sum is to be recovered; for when there is no protest for non-payment, presentation for payment must be made so early on the last day of grace, that the holder may give notice of non-payment by the next post. *See before.*

That part of the *stat.* 3 & 4 *Anne c.* 9. which puts notes on the same footing with inland bills, makes no express provision for protesting them for non-payment; but there can be no doubt that the practice under which such a protest is frequently made is founded in justice.

As to several niceties relative to qualified acceptances, and protests under peculiar circumstances, see *Beawes Lex. Merc.* See also 1 *Wils.* 185. *Doug.* 249.

When a bill is once accepted absolutely, it cannot in any case be revoked, and the acceptor is at all events bound, though he hear of the drawer's having failed the next moment, even if the failure was before the acceptance.—The acceptor may, however be discharged by an express declaration of the holder, or by something equivalent to such declaration. *Doug.* 237. (249.)—But no circumstances of indulgence shown to the acceptor by the holder, nor an attempt by him to recover of the drawer, will amount to an express declaration of discharge. *Doug.* 235. (247.)—Neither will any length of time short of the statute of limitations, nor the receipt of part of the money from the drawer or indorsor, nor a promise by indorsement on the bill by the drawer to pay the residue, discharge the holder's remedy against the acceptor. *Doug.* 238. (250.) *in note*; but see *Stra.* 733.—See *ante* II.

Though the receipt of part from the drawer or indorsor be no discharge to the acceptor, yet the receipt of part from the acceptor of a bill, or the maker of a note, is a discharge to the drawer and indorsors in the one case, and to the indorsors in the other, unless due notice be given of the non-payment of the residue; for the receipt of part from the maker or acceptor without notice, is construed to be a giving of credit for the remainder, and the undertaking of the preceding parties is only conditional to pay, in default of the original debtor, on due notice given: but where due notice is given that the bill is not duly paid, the receipt of part of the money from an acceptor or maker, will not discharge the drawer or indorsors; for it is for their advantage that as much should be received from others as may be. 1 *Ld. Raym.* 744. 2 *Stra.* 745. 1 *Wils.* 48. *Bull. N. P.* 271.—So the receipt of part from an indorsor is no discharge of the drawer or preceding indorsor.

In *Ex parte Wilson*, in the matter of Portales, a bankrupt, it was determined by Lord Eldon, "that if a person held the security of a drawer upon an acceptor of a bill of exchange, and such holder gave the acceptor time upon the bill, he, from that moment, had no demand against the drawer, whether *solvent* or *not*." Petitions after Trin. Term 1805, (which had been frequently determined by Lord Thurlow in preceding cases of a similar nature.)

If the drawer of a note, or the acceptor of a bill, be sued by the indorsee, and the bail pay the debt and costs, this absolutely discharges the indorsor as much as if the principal had paid the note or bill; and the bail cannot afterwards recover against the indorsor in the name of the indorsee. 1 *Wils.* 46.

Though in order to entitle himself to call on any of the preceding parties, in default of the acceptor of a bill, or maker of a note, it be necessary that the holder should give due notice of such default, to the party to whom he means to resort, yet notice to that party alone is sufficient as against him; it is not necessary that any attempt should be made to recover the money of any of the other collateral undertakers; or, in case of such attempt being made, to give notice of its being without effect. Thus, in order to entitle himself to recover against an indorsor, it is not necessary for the indorsee to show an attempt to recover against the drawer of a bill of exchange, or the payee-indorsor of a promissory note. See 1 *Salk.* 131. 133. 1 *Stra.* 441. 1 *Ld. Raym.* 443.; and, finally, *Heylin* v. *Adamson*, 2 *Burr.* 669.; on the principles of all which cases it is now finally settled, that to entitle the indorsee to recover against the indorsor of an *inland* bill of exchange, it is not necessary to demand the money of the first drawer.

By the said *stat.* 3 & 4 *Anne c.* 9. § 7. it is enacted, "that if any person accept a bill of exchange for and in satisfaction of any former debt or sum of money formerly due to him, this shall be accounted and esteemed a full and complete payment of such debt; if such person accepting of any such bill for his debt, do not take his due course to obtain payment of it, by endeavouring to get the same accepted and paid, and make his protest according to the directions of the act, either for non-acceptance or non-payment."

V. 1. Before the doctrine of Bills of Exchange was well understood, and the nature and extent of the customs relative to them fully recognized by the courts, the remedy on them was sought in different forms of action, according to the opinions which were entertained of the applicability of the several forms to the respective situations of the parties. See *Hardr.* 485. 7. 1 *Mod.* 285. 1 *Vent.* 152. 1 *Freem.* 14. 1 *Lev.* 298. 11 *Mod.* 190. *Comb.* 204. 1 *Salk.* 125. 12 *Mod.* 37. 345. *Skinn.* 346. *Str.* 680. 8 *Mod.* 373. 1 *Mod. Ent.* 312. *pl.* 13. *Morg. Prec.* 548. *Kessebower* v. *Tims. B. R. E.* 22 *Geo.* 3. *Baily.* 47. The conclusion, resulting from all which cases seems to be, that where a privity exists between the parties, there an action of debt, or of *indebitatus assumpsit* may be maintained; but that where it does not exist, neither of these actions will lie.

A privity exists, between the payee and the drawer of a bill of exchange, the payee and drawer of a promissory note; the indorsee and his immediate indorsor of either the one or the other; and perhaps between the drawer and acceptor of a bill: provided that in all these cases, a consideration past respectively between the parties.

But it seems to be considered, that no privity exists between the indorsee and acceptor of a bill, or the maker of a note, or between an indorsee and a remote indorsor of either.

The action which is now usually brought on a bill of exchange, is a special action on the case, founded on the custom of merchants.

That custom was not at first recognized by the court, unless it was specially set forth, and therefore it was deemed necessary to set forth by way of inducement, so much of it as applied to the particular case, and imposed on the defendant a liability to pay. See 1 *Wils.* 189. 1 *Ld. Raym.* 21. 175. 3 *Mod.* 86. 4 *Mod.* 242.

But when the custom of merchants was recognized by the judges as part of the law of the land, and they declared they would take notice of it, as such, *ex officio*, it became unnecessary to recite the custom at full length; a simple allegation, that "the drawer mentioning him by his name, *according to the custom of merchants*, drew his bill of exchange, *&c.*" was sufficient. And if the plaintiff, still adhering to former precedents, thought proper to recite the custom in general terms, and did not bring his case within the custom so set forth; yet if by the law of merchants, as recognized by the court, the case as stated, entitled him to his action, he might recover; and the setting forth of the custom was reckoned surplusage and rejected. See 1 *Show.* 317. 2 *Ld. Raym.* 1542.

Whether the drawer of a bill, or the indorsor of a bill or of a note, receiving the bill or the note in the regular course of negotiation before it has become due, can maintain an action on it against the acceptor or maker, in the character of indorsee, seems undecided; but there is a case which clearly shows that a drawer or indorsor cannot maintain an action

against the acceptor in the character of indorsee, *where the indorsement is after the refusal of payment*; because when a bill is returned unpaid either on the drawer or indorsor, its negotiability is at an end. *Beck* v. *Robley, Tr.* 14 *Geo.* 3. 1 *H. Black. Rep.* 89. in the notes.

The action therefore in which the drawer or indorsor, after payment of the money in default of the acceptor, may recover, the first against the acceptor, and the latter against any of the preceding parties, must be brought in their original capacity as drawer or indorsor, and not as indorsee. *Vide Simonds* v. *Parminter*, 1 *Wils.* 185. *Vide Morg. Prec.* 43. 44. 50. 4 *Term Rep.* 82. 5.

If the drawee, without having effects of the drawer, accept and duly pay the bill without having it protested, he may recover back the money in an action for money paid, laid out, and expended to the use of the drawer. *Vide Smith* v. *Nissen, Term Rep.* 269.

Debt lies by the *payee* against the *maker* of a promissory note expressed to be for value received. 2 *B. & P.* 78.

An action lies by the indorsee against the indorser upon a bill of exchange, immediately on the non-acceptance by the drawee, though the time for which the bill was drawn be not elapsed. 3 *E. R.* 481.

Instead of bringing an action on the custom or on the statute, the plaintiff may in many cases use a bill or note, only as evidence in another action; and where the instrument wants some of the requisites to form a good bill or note, the only use he can make of it is to give it in evidence; or if the count on the instrument be defective he may give it in evidence, in support of some of the other counts for money had and received, or money lent and advanced, according to the circumstances of the transaction. *Tatlock* v. *Harris*, 3 *Term. Rep.* 174.

The holder of the bill or note may sue all the parties who are liable to pay the money; either at the same time, or in succession: and he may recover judgment against all, if satisfaction be not made by the payment of the money before judgment obtained against all; and proceedings will not be staid in any one action but on payment of the debt and costs in that action, and the costs in all the others in which he has not obtained judgment. *Vide Golding*, v. *Grace.* 2 *Bl. Rep.* 749.

But though he may have judgment against all, yet he can recover but one satisfaction: yet though he be paid by one he may sue out execution for the costs in the several actions against the others. 2 *Vesey* 115: and see 1 *Stra.* 515: see *ante* IV. and title *Bankrupt* IV. 5, *&c.*

To this action the defendant may plead the statute of limitations; and by the express provision of the statute of Queen Anne, all actions on promissory notes must be brought within the same time as is limited by the statute of James, with respect to actions on the case. And it is no good replication to this plea, that it was on account between merchants, where it appears to be for value received. *Comb.* 190. 392.

2. As the action on a bill of exchange is founded on the custom of merchants, so that on a promissory note is founded on the statute 3 & 4 *Anne c.* 9; and usually though perhaps not necessarily, refers to it. In both cases however it is necessary, that all those circumstances should either be expressly stated, or clearly and inevitably implied, which, according to the characters of the parties to the action must necessarily concur in order to entitle the plaintiff to recover.

An action lies by the indorsee against the indorsor upon a bill of exchange, immediately on the non-acceptance by the drawee, though the time for which the bill was drawn be not elapsed. *Balingalls* v. *Gloster*, 3 *East.* 481.

In stating the bill or the note, regard must be had to the legal operation of each respectively. 1 *Burr.* 324. 5. It has been decided that the legal operation of a bill, or of a note, payable to a fictitious payee, is, that it is payable to the *bearer*, and therefore it is proper in the statement of such a *bill*, to alledge that the drawer thereby requested the drawee to pay so much money to the bearer; in the statement of such a *note*, that the maker thereby promised to pay such a sum to the bearer. *Vere* v. *Lewis*, 3 *Term. Rep.* 183. *Minet & al.* v. *Gibson & al. Id.* 485. *Confirmed in Dom. Proc.* See *H. Black. Rep.* 569. *Collis* v. *Emett*, *H. Black. Rep.* 313. and more fully as to subject *post* 2. of this division.

Or in such a case, the plaintiff may state all the special circumstances, and if the verdict correspond with them he will be entitled to recover. See 1 *H. Black. Rep.* 569.

A bill or note payable to the order of a man, may, in an action by him, be stated as payable to himself, for that is its legal import: or it may be stated in the very words of it, with an averment that he made no order.

If a note purport to be given by two, and be signed only by one, a declaration generally, as on a note by that one who signed it, will be good; for the legal operation of such a note is, that he who signed, promised to pay. *Semb.* 1 *Burr.* 323.

On a note to pay jointly *and* severally, a declaration against one in the terms of the note will be good. *Burchill* v. *Slocock.* 2 *Ld. Raym.* 1545. So on a note to pay jointly *or* severally, *Cowp.* 832. contrary to former determinations.

Inland bills and notes may be stated to have been made at any place where the plaintiff chooses to lay his action, because the action on them is transitory, and may be stated to have arisen any where. In an action against the acceptor, it must be alleged that he accepted the bill, for the acceptance is the foundation of the action, but the manner of acceptance needs not to be alleged. 2 *Ld. Raym.* 1542. 1 *Ld. Raym.* 364. 5. 374. 5. 1 *Salk.* 127. 9. *Carth.* 459.

If the bill or note was payable to order, and the action by an indorsee, such indorsements must be stated as to show his title; an indorsement by the payee must at all events be stated, because without that, it cannot appear that he made any order, on the existence of which depends the title of the indorsee. If the first indorsement was special, to any person by name, in an action by an indorsee after him, his indorsement must, for the same reason, be stated: so also must all special indorsement.

But if the indorsement was in blank, and the action be against the drawer, acceptor, or payee, no other indorsement is necessary to be stated than that of the payee; in an action against a subsequent indorsor, his indorsement at least must be added: in an action on a bill or note payable to bearer, no indorsement need be stated, because it is transferrable without indorsement. See *ante* III.

In an action against the drawer or indorsor of a bill, or against the indorsor of a note, it is absolutely necessary, on account of non-payment of the bill or note, to state a demand of payment from the acceptor of the bill, or the maker of the note, and due notice of refusal given to the party against whom the action is brought; for these circumstances are absolutely necessary to entitle the plaintiff to maintain his action; and a verdict will not help him on a writ of error. The general rule of pleading in this case is, that where the plaintiff omits altogether to state his title or cause of action, it is not necessary to prove it at the trial; and therefore there is no room for presumption that there was actual proof. *Rushton* v. *Aspinall. Doug.* 679. (684.:) but if the title be only imperfectly stated, with the omission only of some circumstances necessary to complete the title, they shall, after a verdict, be presumed to have been proved; and in some cases no advantage can be taken of the want of them on a general demurrer. *Doug.* 684. in the notes.

3. Most part of what might be said as to the *proof* and *defence* in actions on bills or notes, necessarily arises out of the general doctrine already explained.

The plaintiff must in all cases prove so much of what is

necessary to entitle him to his action, and of what must be stated in his declaration, as is not, from the nature of the thing and the situation of the parties, necessarily admitted.

In an action against the acceptor, it is a general rule that the drawer's hand is admitted; because the acceptor is supposed to be acquainted with the writing of his correspondent; and by his acceptance he holds out to every one who shall afterwards be the holder, that the bill is truly drawn. 1 *Ld. Raym.* 444. *Stra.* 946. 3 *Burr.* 1354. See 1 *Bl.* 390.—In an action against the acceptor therefore, where the acceptance was on view of the bill, whether in writing on the bill, or by parole, it is not necessary to prove the hand-writing of the drawer.—That of the acceptor himself must of course be proved; and that of every person through whom the plaintiff, from the nature of the transaction, must necessarily derive his title.

On a bill payable to *bearer*, there is no person through whom the holder derives his title; in an action against the acceptor therefore, on such a bill, he has only to prove the hand-writing of the acceptor himself.—But in an action against the acceptor of a bill payable to *order*, the plaintiff must prove the hand-writing of the very payee who must be the first indorsor. See 4 *Term Rep.* 28.—If the indorsement of the payee be general, the proof of his hand-writing is sufficient; if special, that of his indorsee must be proved; but otherwise that of any other of the indorsors is not requisite, though all the subsequent indorsements be stated in the declaration.—Any subsequent holder may declare as the indorsee of the first indorsor; but in this case, in order to render the evidence correspondent to the declarations, all the subsequent names must be struck out, either at or before the trial. See *ante* III.

But the plaintiff in the case of a transfer by delivery (See *ante* III.) may be called upon to prove that he gave a good consideration for the bill or note, without the knowledge of its having been stolen, or of any of the names of the blank indorsors having been forged. 1 *Burr.* 542. *Dougl.* 633. *Peacock* v. *Rhodes.*—And though the acceptance be subsequent to the indorsements, yet the necessity of proving the payee's hand-writing is not, by this means, superseded. *Say.* 233. 1 *Term. Rep.* 654.

In an action by an indorsee against the drawer, the same rules obtain with respect to proof of the hand-writing of the indorsors as in an action against the acceptors. See *Collis* v. *Emett.* 1 *H. Black. Rep.* 313.—That of the drawer himself must of course be proved.—It must be also proved that the plaintiff has used due diligence. See *ante* IV.

From the rule, that in an action against the drawer or acceptor of a bill payable to order, there must be proof of the signature of the payee being the drawer or first indorsor,—and of all those to whom an indorsement has been specially made, arose the question which long, and greatly, agitated the commercial world, on the subject of indorsements in the name of *fictitious payees.* A bill payable to the order of a fictitious person, and indorsed in a fictitious name, is not a novelty among merchants and traders. See *Stone* v. *Freeland. B. R.* Sittings after Easter, 1769, alluded to in 3 *Term Rep.* 176. See also *Peacock* v. *Rhodes. Dougl.* 632. *Price* v. *Neal,* 3 *Burr.* 1354.—But in the years 1786, 7, and 8, two or three houses connected together in trade, entering into engagements far beyond their capital, and apprehending that the credit of their own names would not be sufficient to procure currency to their bills, adopted, in a very extensive degree, a practice which before had been found convenient on a smaller scale.—So long as the acceptors or drawer could either procure money to pay these bills, or had credit enough with the holder to have them renewed, the subject of these fictitious indorsements never came in question. But, when the parties could no longer support their credit, and a commission of bankrupt became necessary, the other creditors felt it their interest to resist the claims of the holders of these bills; and insisted that they should not be admitted to prove their debts, because they could not comply with the general rule of law requiring proof of the hand-writing of the first indorsor. The question came before the Chancellor by petition.—He directed trials at law, and several were had; three against the acceptor in the King's Bench, and one against the drawer in the Common Pleas, though not all expressly by that direction. See *Tatlock* v. *Harris,* 3 *Term Rep.* 174. *Vere* v. *Lewis,* 3 *Term Rep.* 183. *Minet & al.* v. *Gibson & al.* 3 *Term Rep.* 483. 1 *H. Black. Rep.* 569. *Collis* v. *Emett,* 1 *H. Black. Rep.* 313. From the decisions on these cases, the principal of which was affirmed in the House of Lords, and which have settled that such bills are to be considered as payable to *bearer*, (see *ante* 2, of this division V.) it follows, that proof of the *acceptor's hand only* is sufficient to entitle the holder to recover on the bill; and in the case of *Tatlock* v. *Harris,* where a bill was drawn by the defendant and others on the defendant, it was determined that a *bonâ fide* holder for a valuable consideration might recover the amount against the acceptor in an action for *money paid,* or money *had and received.*

[The principal case above alluded to, as affirmed in the House of Lords, is that of *Minet & al.* v. *Gibson & al.* already so often mentioned. It is better known by the name of *Gibson and Johnson* v. *Minet and Fector;* and the opinions of the judges in the House of Lords, are very fully and accurately reported in 1 *H. Black. Rep.* 561. 1 *Bro. P. C.* 48. The effect of the determination, as there stated, is as follows:

If a bill of exchange be drawn in favour of a *fictitious payee,* with the *knowledge,* as well of the *acceptor* as the drawer; and the name of such payee be indorsed on it by the drawer *with the knowledge of the acceptor,* which fictitious indorsement purports to be to the drawer himself or his order; and then the drawer indorses the bill to an innocent indorsee for a valuable consideration, and afterwards the bill is accepted; *but it does not appear that there was an intent to defraud* any particular person; such innocent indorsee for a valuable consideration may recover against the acceptor, as on a bill payable to bearer. Perhaps also, in such case, the innocent indorsee might recover against the acceptor, as on a bill payable *to the order of the drawee;* or on a count stating the special circumstances.

Other cases, *Master & al.* v. *Gibson & al.* and *Hunter* v. *Gibson & al.* were afterwards brought before the House of Lords, (June, 1793,) on demurrers to evidence; on which the judges gave their opinion, that it was not competent to the defendants to demur; and that on the record, as stated, no judgment could be given. See *Bro. P. C.*—A *venire de novo* was accordingly awarded, and a new trial had in *Hunter* v. *Gibson,* in which a bill of exceptions to evidence was tendered; on this the court of King's Bench gave judgment for plaintiff, and that judgment was affirmed in *dom. proc.* See *Bro. P. C.* tit. *Prom. Notes, ca.* 2, 3.—The whole disclosed a system of a bill negotiation to the amount of a *million a year,* on fictitious credit, which ended in the bankruptcy of many; but which had at least the good effect of showing that the obligations of *law* are not so easily eluded, as those of honour and conscience.]

In an action by an indorsee against an indorsor, it is not necessary to prove either the hand of the drawer or of the acceptor, or of any indorsor, before him against whom the action is brought; every indorsor being, with respect to subsequent indorsees or holders, a new drawer. 1 *Ld. Raym.* 174. *Str.* 444. 2 *Burr.* 675.—Where an action is by one indorsor who has paid the money, proof must be given of the payment. 1 *Ld. Raym.* 743.

An indorsor on a note, who has received money from the drawer to take it up, is a competent witness for the drawer, in an action against him by the indorsor, to prove that he had

satisfied the note; being either liable to the plaintiff on the note, if the action were defeated, or to the defendant for money had and received if the action succeeded. And his being also liable in the latter case to compensate the defendant for the costs incurred in the action by such non-payment makes no difference. *Birt* v. *Kershaw*, 2 *East* 458.

In an action by the *drawer* against the acceptor, where the bill has been paid away and returned, it is necessary to prove the hand-writing of the latter, demand of payment from him, and refusal, the return of the bill and payment by the plaintiff. 10 *Mod.* 36, 7. 1 *Wils.* 185. See *ante* 1, of this division V.

In an action on the case by the *acceptor* against the drawer, the plaintiff must prove the hand-writing of the defendant, and payment of the money by himself; or something equivalent, as his being in prison on execution. 3 *Wils.* 18.

Where a bill is accepted, or a bill or note is drawn or indorsed by one of two or more partners, on the partnership account, proof of the signature of the partner accepting, drawing, or indorsing, is sufficient to bind all the rest. 1 *Salk.* 126. 1 *Ld. Raym.* 175. See *Carrick* v. *Vickery*, *Doug.* 653.

Where a servant has a general authority to draw, accept, or indorse bills or notes, proof of his signature is sufficient against the master; but his authority must be proved, as that it was a general custom for him to do so, &c. See *Comb.* 450. 12 *Mod.* 346.

An action on a bill of exchange being by an executor, and upon a debt laid to be due to testator, it was held necessary to prove that the acceptance was in the testator's life-time. 12 *Mod.* 447.

Where the defendant suffers judgment by default, and the plaintiff executes a writ of inquiry, it is sufficient for the latter to *produce* the note or bill without any proof of the defendant's hand. See 2 *Str.* 1149. *Barnes* 233. 4. 2 *Black. Rep.* 748. 3 *Wils.* 155.; and finally, 3 *Term Rep.* 301. *Green* v. *Hearne*; in which the court said, that by suffering judgment to go by default, the defendant had admitted the cause of action to the amount of the bill, because that was set out on the record; and the only reason for producing it to the jury on executing the writ of inquiry, was to see whether any part of it had been paid.—And now it seems, on such judgment, a writ of inquiry is not necessary; for the court on application by the plaintiff, will, if no good reason be shown to the contrary, refer it to the proper officer, to ascertain the damages and costs, and calculate the interest.—Ruled *Anon. B. R. Hill.* 26 *Geo.* 3. *Bailey* 67. *Rashleigh* v. *Salmon*, *H. Black. Rep. C. P.* 252.

4. Besides the different subjects of *defence*, which may be collected from the whole of the general principles here so fully entered into, the most usual are those which arise either from the total want of consideration, or from the illegality of the consideration for which the bill or note was given. See this Dict. title *Consideration*.

In general no advantage can be taken of the illegality of the consideration, but as between the persons immediately concerned in the transaction; any subsequent holder of the bill or note, for a fair consideration, cannot be affected by it. —But there are cases in which it has been determined, that, by the construction of certain statutes, even the innocent indorsee shall not recover against the acceptor of the bill, or drawer of the note.—As on stat. 9 *Anne*, *c.* 14. § 1. which *absolutely invalidates* notes, bills, &c. given for money won at play. 2 *Stra.* 1155.—So, on stat. 12 *Anne*, *st.* 2. *c.* 16. § 1. as to securities on usurious contracts; *Lowe* v. *Waller*, *Doug.* 736. And reasoning by analogy, on stat. 5 *Geo.* 2. *c.* 30. § 11. against notes given by a bankrupt to procure his certificate. See this Dict. title *Bankrupt*.

It has however been repeatedly ruled at *Nisi Prius*, that wherever it appears that a bill or note has been indorsed over, *after it is due*, which is out of the usual course of trade, that circumstance alone throws such a suspicion on it, that the indorsee must take it on the credit of the indorsor, and must stand in the situation of the person to whom it was payable. See 3 *Term Rep.* 80. 83.

VI. See *ante* III. and the general principles already exemplified.

If a bank bill payable to A. B. or bearer, be lost, and it is found by a stranger, payment to him would indemnify the Bank; yet A. B. may have trover against the finder, though against his assignee, for valuable consideration, which creates a property. 3 *Salk.* 71.

If the possessor of a bill by any accident loses it, he must cause intimation to be made by a *notary public* before witnesses, that the bill is lost or mislaid, requiring that payment be not made of the same to any person without his privity. And by stat. 9 & 10 *W.* 3. *c.* 17. if any inland bill of exchange for five pounds or upwards, shall be lost, the drawer of the bill shall give another bill of the same tenor, security being given to indemnify him in case the bill so lost be found again.

If a bill lost by the possessor should afterwards come into the possession of any person paying a full and valuable consideration for it, without knowledge of its having been lost, the drawer (and acceptor, if the bill was accepted) must pay it when due to such fair possessor, so that the provision of the *statute* may, in many cases, be useless to the loser of the bill. —But against the person who finds the bill, the real owner may maintain an action of trover. 1 *Salk.* 126. 1 *Ld. Raym.* 738. See *Master* v. *Miller*, 4 *T. R.* 320.

If a bill payable to A. or order get into the hands of another person of *the same name* as the payee, and such person, knowing he is not the real person in whose favour it was drawn, indorse it, he is guilty of forgery. 4 *T. R.* 28.

An alteration of the date of a bill of exchange after acceptance, whereby the payment would be accelerated, avoids the instrument, and no action can be afterwards brought upon it, even by an innocent indorsee, for a valuable consideration. 4 *T. R.* 320. *affirmed in Cam. Scac:* 5 *T. R.* 367. 2 *H. B.* 141. 1 *Anstr.* 225.

If upon a bill being presented for acceptance the drawee alter it as to the time of payment, and accept it so altered, he vacates the bill as against the drawer and indorsers; but if the holder acquiesce in such alteration and acceptance, it is a good bill as against the holder and acceptor. 1 *W. P. T.* 420.

Stealing of bills of exchange, notes, &c. is felony in the same degree as if the offender had robbed the owner of so much money, &c. And the forging bills of exchange, or notes for money, indorsements, &c. is felony, by stat. 2 *Geo.* 2. *c.* 25. 9 *Geo.* 2. *c.* 18. And vide stat. 31 *Geo.* 2. *c.* 22. *s.* 78.

By stat. 43 *Geo.* 3. *c.* 139. persons forging, &c. foreign bills of exchange, &c. or uttering the same, guilty of felony; punished by fourteen years transportation. § 1.

No person shall engrave plates for foreign bills of exchange, &c. nor print them, &c. without written authority. Penalty misdemeanor, punished by imprisonment, fine, &c. and for the second offence by fourteen years transportation. *Idem.* § 2.

*** For the new and additional duties imposed on bills of exchange, &c. see 55 *Geo.* 3. *c.* 184. for Great Britain, and 56 *Geo.* 3. *c.* — for Ireland.

There are also BILLS OF CREDIT between merchants, of which the following is a form:

This present writing *witnesseth, That I, A. B, of London, merchant, do undertake, to and with C. D. of, &c. merchant, his executors and administrators, that if he the said C. D. do deliver, or cause to be delivered unto E. F. of, &c. or to his use, any sum or sums of money, amounting to the sum of, &c. of lawful British money, and shall take a bill under the hand and seal of the said E. F. confessing and showing the certainty thereof; that then I, my executors or administrators, having the same bill delivered to me or them, shall and will immediately,*

*upon the receipt of the same, pay, or cause to be paid, unto the said C. D., his executors or assigns, all such sums of money as shall be contained in the said bill; at, &c. For which payment, in manner and form aforesaid, I bind myself, my executors, administrators, and assigns, by these presents.* In witness, &c.

BILL OF LADING. A memorandum signed by masters of ships, acknowledging the receipt of the merchants' goods, of which there usually are three parts, one kept by the consignor, one sent to the consignee, and one kept by the captain. See titles *Factor*, *Merchant*.

BILL OF MIDDLESEX. See tit. *Process*.

BILL OF RIGHTS. The statute 1 *Wm. & Mary, stat.* 2. *cap.* 2. is so called, as declaring the true *rights* of British subjects. See title *Liberty*, where this important act is stated at large.

BILL OF SALE, Is a solemn contract under seal, whereby a man passes the right or interest that he hath in goods and chattels; for if a man promises or gives any chattels without valuable consideration, or without delivering possession, this doth not alter the property, because it is *nudum pactum, unde non oritur actio;* but if a man sells goods by deed under seal, duly executed, this alters the property between the parties, though there be no consideration, or no delivery of possession; because a man is estopped to deny his own deed, or affirm any thing contrary to the manifest solemnity of contracting. *Yelv.* 196. *Cro. Jac.* 270. 1 *Brown.* 111. *6 Co.* 18.

But what is chiefly to be considered under this head, is the statute of 13 *Eliz. cap.* 5. by which it is enacted, "That all fraudulent conveyances of lands, &c. goods and chattels, to avoid the debt or duty of another, shall (as against the party only, whose debt or duty is so endeavoured to be avoided) be utterly void, except grants made *bonâ fide*, and on a *good* (which is construed a *valuable*) *consideration*."

A. being indebted to B. in 400*l.* and to C. in 20*l.* C. brings debt against him, and, pending the writ, A. being possessed of goods and chattels to the value of 300*l.* makes a secret conveyance of them all, without exception, to B. in satisfaction of his debt; but, notwithstanding, continues in possession of them, and sells some of them, and others of them, being sheep, he sets his mark on; and resolved that it was a fraudulent gift and sale within the aforesaid statute, and shall not prevent C. of his execution for his just debt; for though such sale hath one of the qualifications required by the statute, being made to a creditor for his just debt, and consequently on a valuable consideration, yet it wants the other; for the owner's continuing in possession, is a fixed and undoubted character of a fraudulent conveyance, because the possession is the only *indicium* of the property of a chattel, and therefore this sale is not made *bonâ fide*. 3 *Co.* 80. *Mo.* 638. 2 *Bulst.* 226.

As the owner's continuing in possession of goods after his bill of sale of them is an undoubted badge of a fraudulent conveyance, because the possession is the only *indicium* of the property of a chattel, which is a thing unfixed and transitory; so there are other marks and characters of fraud; as a general conveyance of them all without any exception; for it is hardly to be presumed that a man will strip himself entirely of all his personal property, not excepting his bedding and wearing apparel, unless there was some secret correspondence and good understanding settled between him and the vendee, for a private occupancy of all, or some part of the goods for his support; also a secret manner of transacting such bill of sale, and unusual clauses in it: as that it is made honestly, truly, and *bonâ fide*, are marks of fraud and collusion; for such an artful and forced dress and appearance give a suspicion and jealousy of some defect varnished over with it. 3 *Co.* 81. *Mo.* 638.

If goods continue in the possession of the vendor after a bill of sale of them, though there is a clause in the bill that he shall account annually with the vendee for them, yet it is a fraud: since, if such colouring were admitted, it would be the easiest thing in the world to avoid the provisions and cautions of the aforesaid act. *Mo.* 638.

If A. makes a bill of sale of all his goods, in consideration of blood and natural affection, to his son, or one of his relations, it is a void conveyance in respect of creditors; for the considerations of blood, &c. which are made the motives of this gift, are esteemed in their nature inferior to valuable considerations, which are necessarily required in such sales, by 13 *Eliz. cap.* 5.

If A. makes a bill of sale to B. a creditor, and afterwards to C. another creditor, and delivers possession at the time of sale to neither; afterwards C. gets possession of them, and B. takes them out of his possession, C. cannot maintain trespass, because, though the first bill of sale is fraudulent against creditors, and so is the second, yet they both bind A. As therefore B.'s is the elder title, the naked possession of C. ought not to prevail against it.

See further on this subject title *Fraud*.—See also title *Bankrupt* II.

BILL OF STORE. A kind of license granted at the Custom-house to merchants, to carry such stores and provisions as are necessary for their voyage custom free. A *bill of sufferance* is a license granted to a merchant, to suffer him to trade from one English port to another without paying custom. See title *Navigation Acts*.

BILLETS OF GOLD, Fr. *billot*.] Are wedges or ingots of gold, mentioned in the statute 27 *E.* 3. *c.* 27.

BILLET WOOD, Is small wood for fuel, which must be three feet and four inches long, and seven inches and a half in compass, &c. Justices of peace, shall inquire, by the oaths of six men, of the assise of *billet*, and being under size, it is to be forfeited to the poor. *Stat.* 43 *Eliz. c.* 14. Vide 9 *Ann. c.* 15. 10 *Ann. c.* 6. See *Fuel*. 7 *E.* 6. *c.* 7.

BILLINGSGATE market to be kept every day, and toll is appointed by statute: all persons buying *fish* in this market may sell the same in any other market by retail; but none but fishmongers shall sell them in shops; if any person shall buy any quantity of fish at *Billingsgate* for others, or any fishmonger shall ingross the market, they incur a penalty of 20*l.* And fish imported by foreigners shall be forfeited, and the vessel, &c. See 10 & 11 *W.* 3. *c.* 24. 1 *Geo.* 1. *stat.* 2. *c.* 18. *s.* 1. 36 *Geo.* 3. *c.* 118. § 1. *&c.* Vide *Fish* and *Fishermen*.

BILLUS. A bill, stick, or staff, which in former times was the only weapon for servants.—It was long in use for watchmen, and we are told is still carried by those at Litchfield. See *Steevens's Shakspeare*.

BIOTHANETUS. One who deserves to come to an untimely end. Ordericus Vitalis, writing of the death of William Rufus, who was shot by Walter Tyrrel, tells us, that the bishops, considering his wicked life and bad *exit*, adjudged him *ecclesiasticâ veluti biothanetum absolutione indignum*. *Lib.* 10. *p.* 782.

BIRRETTUM. A thin cap fitted close to the shape of the head; and is also used for the cap or coif of a judge, or serjeant at law. *Spelm.*

BIRTHS, BURIALS, and MARRIAGES, &c. By statute, a duty was granted on *births* and *burials* of persons, from 50*l.* a duke, &c. down to 10*s.* and 2*s.* And the like on *marriages;* also *bachelors*, above twenty-five years of age, were to pay 1*s.* yearly. *Stat.* 6 § 7 *W.* 3. *c.* 6. Expired; as to the duties. See tit. *Stamps*, *Registers*, *Taxes*.

BISACUTUS. An iron weapon double-edged, so as to cut on both sides. *Fleta, lib.* 1. *c.* 33.

BISANTIUM, *besantine*, or *besant*. An ancient coin, first coined by the Western emperors at Bizantium or Constantinople. It was of two sorts, gold and silver; both which

were current in England. Chaucer represents the gold *besantine* to have been equivalent to a ducat; and the silver *besantine* was computed generally at two shillings. In some old leases of land there have been reserved, by way of rent, *unum* bisantium, *vel duos solidos*.

BI-SCOT. At a session of *sewers* held at Wigenhale, in Norfolk, 9 *Ed.* 3. it was decreed, That if any should not repair his proportion of the banks, ditches, and causeys by a day assigned, xii*d.* for every perch unrepaired should be levied upon him, which is called a *bilaw:* and if he should not, by a second day given him, accomplish the same, then he should pay for every perch 2*s.* which is called *bi-scot*. *Hist. of Imbanking and Draining, f.* 254.

BISHOPS and ARCHBISHOPS.—A Bishop (*Episcopus*) is the chief of the Clergy in his *diocese*, in England, Wales, or Ireland, and is the archbishop's suffragan or assistant.

An Archbishop (*Archiepiscopus*) is the chief of the clergy in his *province*, in England or Ireland, and is that spiritual secular person who hath supreme power under the king in all ecclesiastical causes: and the manner of his creation and consecration, by an *archbishop* and two other bishops, &c. is regulated by stat. 25 *H.* 8. *c.* 20. (See post *Bishop.*) An *archbishop* is said to be inthroned, when a bishop is said to be installed; and there are four things to complete a bishop or *archbishop*, as well as a parson; first, election, which resembles presentation; the next is confirmation, and this resembles admission; next, consecration, which resembles institution; and the last is installation, resembled to induction. 3 *Salk.* 72.

In ancient times the *archbishop* was bishop over all England, as Austin was, who is said to be the first *archbishop* here; but, before the Saxon conquest, the Britons had only one bishop, and not any *archbishop*. 1 *Roll. Rep.* 328. 2 *Roll.* 440.

But at this day, the ecclesiastical state of England and Wales is divided into two provinces or archbishopricks, to wit, Canterbury and York, and 24 Bishopricks (besides the Bishoprick of Sodor and Man, the bishop of which is not a Lord of Parliament.) Each archbishop hath within his province bishops of several dioceses. The archbishop of Canterbury hath under him, within his province, of ancient foundations, Rochester, London, Winchester, Norwich, Lincoln, Ely, Chichester, Salisbury, Exeter, Bath and Wells, Worcester, Coventry and Litchfield, Hereford, Llandaff, St. David's, Bangor, and St. Asaph; and four founded by King Henry 8. erected out of the ruins of dissolved monasteries, viz. Gloucester, Bristol, Peterborough, and Oxford. The archbishop of York hath under him four, *viz.* the bishop of the county palatine of Chester, newly erected by King Henry 8. and annexed by him to the archbishoprick of York; the county palatine of Durham; Carlisle; and the Isle of Man, annexed to the province of York by King Henry 8; but a greater number this archbishop anciently had, which time hath taken from him. *Co. Lit.* 94.

Westminster was one of the new bishopricks created by *Hen.* 8. in England, out of the revenues of the dissolved monasteries. 2 *Burn. E. L.* 78.—Thomas Thirlby was the only bishop that ever filled that see. He surrendered the bishoprick to *Ed.* 6. *A. D.* 1550, 30th March; and, on the same day, it was dissolved, and added again to the bishoprick of London. *Rym. Fæd.* 15. *p.* 222. Queen Mary afterwards filled the church with Benedictine monks, and Eliz. by authority of parliament, turned it into a collegiate church, subject to a dean.

The *archbishop* of Canterbury is now styled *metropolitanus & primus totius Angliæ;* and the *archbishop* of York styled *primus & metropolitanus Angliæ*. They are called *archbishops* in respect of the bishops under them; and metropolitans, because they were consecrated at first in the metropolis of the province. 4 *Inst.* 94. Both the *archbishops* have distinct provinces, wherein they have suffragan bishops of several dioceses, with jurisdiction under them. The archbishop hath also his own *diocese*, wherein he exercises episcopal jurisdiction, as in his *province* he exercises archiepiscopal; thus having two concurrent jurisdictions, one as Ordinary, or the bishop himself within his diocese; the other as superintendant, throughout his whole province, of all ecclesiastical matters, to correct and supply the defects of other bishops.

The archbishop is entitled to present, by lapse, to all the ecclesiastical livings in the disposal of his diocesan bishops, if not filled within six months. (See title *Advowson.*) And the archbishop has a customary prerogative, when a bishop is consecrated by him, to name a clerk or chaplain of his own, to be provided for by such suffragan bishop; in lieu of which it is now usual for the bishop to make over, by deed, to the archbishop, his executors and assigns, the next presentation of such dignity or benefice in the bishop's disposal within that see, as the archbishop himself shall choose; which is therefore called his *Option*, which options are only binding on the bishop himself who grants them, and not on his successors. The prerogative itself seems to be derived from the legatine power formerly annexed, by the Popes, to the Metropolitan of Canterbury.

The *Archbishop* of Canterbury hath the privilege to crown all the Kings of England; and to have prelates to be his officers; as for instance, the bishop of London is his provincial dean; the bishop of Winchester, his chancellor; the bishop of Lincoln, his vice-chancellor; the bishop of Salisbury, his precentor; the bishop of Worcester, his chaplain, &c. It is the right of the *archbishop* to call the bishops and clergy of his province to convocation, upon the king's writ: he hath a jurisdiction in cases of appeal, where there is a supposed default of justice in the ordinary; and hath a standing jurisdiction over his suffragans: he confirms the election of bishops, and afterwards consecrates them, &c. And he may appoint co-adjutors to a bishop that is grown infirm. He may confer degrees of all kinds; and censure and excommunicate, suspend, or depose, for any just cause, &c. 2 *Roll. Abr.* 223. And he hath power to grant dispensations in any case, formerly granted by the see of Rome, not contrary to the law of God: but if the case is new and extraordinary, the king and his council are to be consulted. *Stats.* 25 *H.* 8. *c.* 21. 28 *H.* 8 *c.* 16. § 6. This dispensing power is the foundation of the archbishop's granting special licenses to marry at any place or time, to hold two livings and the like; and in this also is founded the right he exercises of conferring degrees in prejudice of the two Universities. He may retain eight chaplains; and, during the vacancy of any see, he is guardian of the spiritualties. *Stats.* 21 *H.* 8. *c.* 13. 25 *H.* 8. *c.* 21. 28 *H.* 8. *c.* 16.

The archbishop of Canterbury hath the precedency of all the clergy; next to him the archbishop of York; next to him the bishop of London; next to him the bishop of Durham; next to him the bishop of Winchester; and then all the other bishops of both provinces, after the seniority of their consecration; but if any of them be a privy councillor, he shall take place next after the bishop of Durham. *Stat.* 31. *Hen.* 8. *c.* 10. *Co. Lit.* 94. 1 *Ought. Ord. Jud.* 486.

The first archbishop of York that we read of was Paulinus, who, by Pope Gregory's appointment, was made archbishop there, about the year of our Lord 622. *Godol.* 14.

The *Archbishop* of York hath the privilege to crown the Queen-consort, and to be her perpetual chaplain.

The *Archbishop* of Canterbury is the first peer of the realm, and hath precedence, not only before all the other clergy, but also (next and immediately after the blood royal) before all the nobility of the realm: and as he hath the precedence of all the nobility, so also of all the great officers of state. *God.* 13.

The *Archbishop* of York hath the precedence over all dukes, not being of the blood royal; as also before all the great officers of state, except the Lord Chancellor. *God.* 14.

In Ireland there are four archbishops, viz. Armagh, primate of all Ireland; 2. Dublin, primate of Ireland; 3. Cashel,

primate of Munster; and 4. Tuam, primate of Connaught: and eighteen bishops, viz. 1. Meath. 2. Kildare, 3. Derry, 4. Raphoe, 5. Limerick, Ardfert and Aghadoe. 6. Dromore. 7. Elphin. 8. Down and Connor. 9. Waterford and Lismore. 10. Leighlin and Ferns. 11. Cloyne. 12. Cork and Ross. 13. Killaloe and Kilfenora. 14. Kilmore. 15. Clogher. 16. Ossory. 17. Killala and Achonry. 18. Clonfert and Kilmaduagh.

By Irish act 17, 18 *Car.* 2. *c.* 10. a bishopric in Ireland is declared incompatible with any ecclesiastical dignity or benefice in England or Wales.

In Scotland after the Reformation, the titles of archbishop and bishop were introduced in 1572, and bestowed on clergymen ordained members of cathedral churches. By act of 1592, *c.* 116, Presbyterian Church government was established by Kirk sessions, presbyteries, provincial synods, and general assemblies. By act 1606, *c.* 2. bishops were restored; but in 1638 Presbytery was a second time introduced. By act 1662, *c.* 1. Presbytery was again displaced by Prelacy; and finally by acts 1689, *c.* 3. & 1690. *cc.* 5, 29. Presbytery was re-established and has since so continued.

A Bishop is elected by the king's *congé d'eslire*, or license to elect the person named by the king, directed to the dean and chapter; and if they fail to make election in twelve days, they incur the penalty of a *præmunire*, and the king may nominate whom he pleases by letters-patent. *Stat.* 25 *H.* 8. *c.* 20. This was to avoid the power of the see of Rome. This election or nomination, if it be of a bishop, must be signified by the king's letters-patent to the archbishop of the province; if it be of an archbishop, to the other archbishop and two bishops, or to four bishops; requiring them to confirm, invest, and consecrate the person so elected, which they are bound to perform immediately. After which the bishop elect shall sue to the king for his temporalties, shall make oath to the king and none other, and shall take restitution of his secular possessions out of the king's hands only. Archbishops and bishops refusing to confirm such election, incur the penalties of a *præmunire*. On confirmation, a bishop hath jurisdiction in his diocese; but he hath not a right to his temporalties till consecration. The consecration of bishops, &c. is confirmed by act of parliament.

It is directed in the form of consecrating bishops, that a bishop, when consecrated, must be full thirty years of age.

It is held a bishop hath three powers; 1st, His power of ordination, which is gained on his consecration, and not before; and thereby he may confer orders, &c. in any place throughout the world. 2. His power of jurisdiction, which is limited, and confined to his see. 3. His power of administration and government of the revenues; both which last powers he gains by his confirmation: and some are of opinion, that the bishop's jurisdiction, as to ministerial acts, commences on his election. *Palm.* 473—475.

The king may not seize into his hands the temporalties of bishops, but upon just cause, and not for a contempt, which is only finable. See title *Temporalties*. Bishops are allowed four years for payment of their first fruits, by *st.* 6 *Ann. c.* 27. Every bishop may retain four chaplains. Vide *stat.* 21 *Hen.* 8. *c.* 13. *s.* 16. 8 *Eliz. c.* 1.

A Bishop hath his consistory court, to hear ecclesiastical causes; and is to visit the clergy, &c. He consecrates churches, ordains, admits, and institutes priests; confirms, suspends, excommunicates, grants licenses for marriage, makes probates of wills, &c. *Co. Rit.* 96. 2 *Rol. Abr.* 230. He hath his archdeacon, dean and chapter, chancellor, and vicar-general, to assist him: may grant leases for three lives, or twenty-one years, of land usually letten, reserving the accustomed yearly rents. *Stats.* 32 *H.* 8. *c.* 28. 1 *El. c.* 19. *s.* 5. See this Dict. title *Leases*.

The chancellor to the bishop is appointed to hold his courts for him, and to assist him in matters of ecclesiastical law; who, as well as all other ecclesiastical officers, if lay or married, must be a doctor of the civil law, so created in some University. *Stat.* 37 *H.* 8. *c.* 17.

By *stat.* 24 *Geo.* 3. *sess.* 2. *c.* 35. the bishop of London, or any bishop by him appointed, may admit to the order of deacon or priest, subjects of countries out of his majesty's dominions, without requiring the oath of obedience.—But no person shall be thereby enabled to exercise such offices within his majesty's dominions.

By *stat.* 26 *Geo.* 3. *c.* 84, the Archbishops of Canterbury or York, with such other bishops as they shall call to their assistance, may consecrate subjects of countries out of his majesty's dominions to be bishops, without requiring the usual oaths; pursuing the forms prescribed by the act. But no such bishops or their successors, or persons ordained by them, shall exercise their functions within his majesty's dominions.

The right of trial by the Lords of Parliament, as their Peers, it is said, does not extend to bishops; who, though they are Lords of Parliament, (except the Bishop of Sodor and Man,) and sit there by virtue of their baronies, which they hold *jure ecclesiæ*, yet are not ennobled in blood, and consequently not peers with the nobility. 3 *Inst.* 30, 31.: see 1 *Comm.* 401. 4 *Comm.* 264. and this Dict. title *Parliament*.

*Archbishopricks* and *Bishopricks* may become void by death, deprivation for any very gross and notorious crime, and also by resignation. All resignations must be made to some superior. Therefore a bishop must resign to his metropolitan; but the archbishop can resign to none but the king himself. 1 *Comm.* 382.

The following are some of the popular distinctions between archbishops and bishops. The archbishops have the style and title of *Grace*, and *Most Reverend Father in God by Divine Providence*. The bishops, those of *Lord*, and *Right Reverend Father in God by Divine Permission*. Archbishops are *inthroned*; bishops *installed*.

Mr. Christian, in his notes on 1 *Comm.* 380, says, that the supposed answer of a bishop on his consecration, "*Nolo episcopari*," is a vulgar error. See tit. *Advowson*, *Coadjutor*, *Parson*, &c.

BISHOPRICK. The diocese of a bishop.

BISSA, Fr. *biche*, *cerva major*, A hind. *Mon. Angl. vol.* 1. *fol.* 648.

BISSEXTILE, *bissextilis.*] Leap year, so called because the sixth day before the calends of March is twice reckoned, making an additional day in the month of February; so that the bissextile year hath one day more than the others, and happens every fourth year. This intercalation of a day was first invented by Julius Cæsar, to make the year agree with the course of the sun. And, to prevent all doubt and ambiguity that might arise thereupon, it is enacted by the statute *de anno bissextili*, 21 *H.* 3. that the day increasing in the leap-year, and the day next before, shall be accounted but one day. *Brit.* 209. *Dyer* 17. See title *Year*.

BISUS, *bisius*, *mica* bisa, *panis* bisius, Fr. *pain bis.*] Brown bread, a brown loaf. *Cowel*.

BLACK ACT, or Waltham Black Act. The *stat.* 9 *Geo.* 1. *cap.* 22. is so called, having been occasioned by some devastations committed near Waltham, in Hampshire, by persons in disguise, or with their faces *blacked*.—By this act, persons hunting armed and disguised, and killing or stealing deer, or robbing warrens, or stealing fish out of any river, &c. or any persons unlawfully hunting in his majesty's forests, &c. or breaking down the head of any fish-pond, or killing, &c. of cattle, or cutting down trees, or setting fire to house, barn, or wood, or shooting at any person, or sending anonymous letters, or letters signed with fictitious names, demanding money, &c. or rescuing such offenders, or not surrendering, are guilty of felony without benefit of clergy. This act is made perpetual by 31 *Geo.* 2. *c.* 42. And see further, *stat.* 6 *Geo.* 2. *c.* 37. 27 *Geo.* 2. *c.* 15.

See also *stat.* 16 *Geo.* 3. *c.* 30. against deer-stealers; the milder punishment inflicted by which act has been thought a virtual repeal of the punishment inflicted by the Black Act above recited. *Leach's Hawk. P. C.* i. *c.* 49. § 7. and this Dict. titles *Forest*, *Game*, *Deer stealing*.

BLACK ACTS. Acts printed in the old black letter. This term is applied to the acts of the 5 Jameses of Scotland, and those of Mary and James VI.—See title *Statutes*.

BLACK BOOK, Is a book lying in the Exchequer. See *Stat. Annals.* 154.

BLACK LEAD. By *stat.* 25 *Geo.* 2. *c.* 10. Entering mines of black lead, with intent to steal, is made felony; and, by the same act, offenders committed or transported for entering mines of black lead with intent to steal, escaping, or breaking prison, or returning from transportation, are excluded from clergy. By various acts, a duty is imposed on foreign black lead imported.

BLACK MAIL, Fr. *maille*, a link of mail, or small piece of metal or money.] Signifies in the North of England, in the counties of Cumberland, Northumberland, &c. a certain rent of money, corn, or other thing, anciently paid to persons inhabiting upon or near the borders, being men of name and power, allied with certain robbers within the said counties, to be freed and protected from the devastations of those robbers. But by *stat.* 43 *Eliz. cap.* 13. to take any such money or contribution, called *black-mail*, to secure goods from rapine, is made a capital felony, as well as the offences such contribution was meant to guard against. See also the Scotch Acts 1567. *c.* 21. 1587. *c.* 102.

It is also used for rents reserved in work, grain, or baser money; which were called *reditus nigri*, in contradistinction to the *blanch farms*, *reditus albi*. See tits. *Alba Firma* and *Blanch Firmes*.

BLACK-ROD. The gentleman *usher of the black rod* is chief gentleman usher to the king; he belongs to the garter, and hath his name from the *black rod*, on the top whereof sits a lion in gold, which he carrieth in his hand. He is called, in the Black Book, fol. 255, *Lator virgæ nigræ, & hostiarius*; and in other places *virgæ bajulus*. His duty is *ad portandum virgam coram domino rege ad festum sancti Georgii infra castrum de Windsore*: and he hath the keeping of the chapter-house door, when a chapter of the order of the garter is sitting; and, in the time of parliament, he attends on the house of peers. His habit is like to that of the register of the order, and garter king at arms; but this he wears only at the solemn times of the festival of St. George, and on the holding of chapters. The *black rod* he bears is instead of a mace, and hath the same authority; and this officer hath anciently been made by letters patent under the great seal, he having great power; for to his custody all peers, called in question for any crime, are first committed.

BLACKS OF WALTHAM. See tit. *Black Act*.

BLACK WARD, Is when a vassal holds ward of the king; and a sub-vassal holds ward of that vassal. *Scotch Dict.*

BLACKWELL HALL. The public market of Blackwell Hall, London, is to be kept every Thursday, Friday, and Saturday, at certain hours; and the hall-keepers not to admit any buying or selling of *woollen cloth* at the said hall upon any other days or hours, on penalty of 100*l.* Factors selling cloth out of the market, shall forfeit 5*l.* &c. Registers of all the cloths bought and sold are to be weekly kept: and buyers of cloth, otherwise than for ready money, shall give notes to the *sellers* for the money payable; and factors are to transmit such notes to the *owners* in twelve days, or be liable to forfeit double value, &c. *Stat.* 8 & 9. *W.* 3. *cap.* 9.—See also *stat.* 4 & 5 *P. & M. c.* 5. § 26. 39 *Eliz. c.* 20. § 12. 1 *Geo.* 1. *c.* 15.

BLADARIUS, A corn-monger, meal-man, or corn-chandler. It is used in our records for such a retailer of corn. *Pat.* 1 *Ed.* 3. *par.* 3. *m.* 13. See tit. *Clothiers*.

BLADE, *bladum*.] In the Saxon signifies generally fruit, corn, hemp, flax, herbs, &c. Will. de Mohun released to his brother all the manor of T—. *Salvo instauro suo &* blado, &c. excepting his stock and corn on the ground. Hence *bladier* is taken for an ingrosser of corn or grain.

BLANCH FIRMES. In ancient times the crown-rents were many times reserved *in libris albis*, or *blanch firmes*: in which case the buyer was holden *dealbare firmam*, *viz.* his base money or coin, worse than standard, was molten down in the Exchequer, and reduced to the fineness of standard silver; or instead thereof, he paid to the King 12*d.* in the pound by way of addition. *Lowndes's Essay upon Coins*, *p.* 5.

BLANCH-HOLDING, Is one of the ancient tenures of the the Law of Scotland, the duty payable being generally trifling as a penny Scotch, or a pepper corn, &c. *if required*. On the abolition of ward-holding, by 20 *Geo.* 2. *c.* 50. all lands held formerly ward of the crown were converted into blanch holding: and so by 25 *Geo.* 2. *c.* 20. all lands held ward of the prince.

BLANDFORD. An act was passed for rebuilding the town of Blandford in the county of Dorset, burnt down by fire in the year 1731. *Stat.* 5 *Geo.* 2. *c.* 16.

BLANHORNUM. A little bell. *Leg. Adelstan. c.* 8.

BLANK BAR, Is used for the same with what we call a *common bar*, and is the name of a plea *in bar*, which, in an action of trespass, is put in to oblige the plaintiff to assign the certain place where the trespass was committed. 2 *Cro.* 594.

BLANK BONDS. Bonds heretofore known in the practice of the Scotch Law, where the creditor's name was left blank, and which passed like bills by mere delivery, the bearer being at liberty to put in his name and sue for payment; they were declared void by the act, 1696. *c.* 25.

BLANKS, Were a kind of white money coined by *Hen.* 5. in those parts of France which were then subject to England, the value whereof was 8*d.* *Stow's Annals*, *p.* 586. These were forbidden to be current in this realm. 2 *Hen.* 6. *c.* 9. See tit. *Alba Firma*. *Blanch firme*.

BLANKS, In judicial proceedings, certain void spaces sometimes left by mistake. A blank (supposing something material wanting) in a declaration, abates the same. 4 *Ed.* 4. 14. 20 *H.* 6. 18. And such a blank is a good cause of demurrer. *Blanks* in the imparlance-roll aided *after verdict* for the plaintiff. *Hob.* 76. *Parker* v. *Parker*.

BLASARIUS, Is a word used to signify an incendiary. *Blount*.

BLASPHEMY, *blasphemia*.] Is an injury offered to God, by denying that which is due and belonging to him, or attributing to him what is not agreeable to his nature. *Lindw. cap.* 1. And *blasphemies* of God, as denying his being, or providence; and all contumelious reproaches of Jesus Christ, &c. are offences by the Common Law, punished by fine, imprisonment, pillory, &c. 1 *Hawk. P. C.* And by statute 9 & 10. *W.* 3. *c.* 32. if any one shall by writing, speaking, &c. deny any of the persons in the Trinity to be God; assert there are more Gods than one, &c. he shall be incapable of any office; and, for the second offence, be disabled to sue any action, to be executor, &c. and suffer three years imprisonment. Likewise by *stat.* 3 *Jac.* 1. *c.* 21. persons jestingly or prophanely using the name of God, or of Jesus Christ, or of the Holy Ghost, or of the Trinity, in any stage-play, &c. incurs a penalty of 10*l.* See *Religion*.

BLE, Signifies sight, colour, &c. And *blee* is taken for corn: As *Boughton* under the *Blee*, &c.

BLENCH, BLENCH-HOLDING. See tit. *Alba Firma*.

BLENHEIM. See *Marlborough, Duke of*.

BLETA, Fr. *bleche*.] *Peat*, or combustible earth dug up and dried for burning. *Rot. Parl.* 35 *Ed.* 1.

BLINKS, Boughs broken down from trees, and thrown in a way where deer are likely to pass.

BLISSOM, Corruptly called *blossom*, is when a ram goes to the ewe, from the *Teutonick Blets*, the bowels.

BLOATED FISH OR HERRING, Are those which are half dried. See tit. *Fishery*.

BLODEUS, Sax. *blod.*] Deep red colour; from whence comes bloat and bloated, *viz.* sanguine and high-coloured, which, in Kent, is called a *blousing* colour; and a *blouse* is there a red-faced wench. The prior of *Burcester*, *A. D.* 1425, gave his liveries of this colour. *Paroch. Antiq.* 376.

BLOOD, *sanguis.*] Is regarded in descents of lands; for a person is to be the next and most worthy of *blood* to inherit his ancestor's estate. *Co. Lit.* 13. See *Jenk. Cent.* 203. See tit. *Descent*, *Heir*.

BLOODWIT, or *bloudwit*, compounded of the Sax. *blod*, i. e. *sanguis:* and *wyte*, old English, *misericordia.*] Is often used in ancient charters of liberties for an amercement for bloodshed. Skene writes it *bloudveit;* and says *veit* in English is *injuria;* and that *bloudveit* is an amerciament or *unlaw* (as the Scotch call it) for wrong or injury, as bloodshed is: for he that hath *bloudveit* granted him, hath free liberty to take all amerciaments of courts for effusion of blood. Fleta saith, *Quod significat quietantiam misericordiæ pro effusione sanguinis.* Lib. 1. cap. 47. And according to some writers, *blodwite* was a customary fine paid as a composition and atonement for shedding or drawing of blood; for which the place was answerable, if the party was not discovered: and therefore a privilege or exemption from this fine or penalty was granted by the King, or supreme Lord, as a special favour. So king Henry II. granted to all tenants within the honour of Willingford, *Ut quieti sint de Hidagio, &* blodewite, *&c.*—*Paroch. Antiq.* 114. In Scotland bloodwit is a riot wherein blood is spilt.

BLOODY-HAND, Is one of the four kinds of circumstances by which an offender is supposed to have killed deer in the king's forest: and it is where a trespasser is apprehended in the forest, with his *hands* or other parts *bloody*, though he be not found chasing or hunting of the deer. *Manwood.*—In Scotland, in such like crimes, they say taken in the fact, or with the *red hand.* See *Backberind.*

BLUBBER. Whale oil, before it is thoroughly boiled and brought to perfection. It is mentioned *stat.* 12 *Car.* 2. *c.* 18.

BOCK-HORD, or *book-hoard, librorum horreum.*] A place where books, evidences, or writings are kept.

BOCKLAND, Sax. *quasi bookland.*] A possession or inheritance held by evidence in writing. See *LL. Alluredi, cap.* 36. *Bockland* signifies *deed land* or *charter land;* and it commonly carried with it the absolute property of the *land;* wherefore it was preserved in writing, and possessed by the Thanes or nobler sort, as *Prædium nobile, liberum & immune à servitiis vulgaribus & servilibus*, and was the same as *allodium*, descendible unto all the sons, according to the common course of nations and of nature, and therefore called *gavelkind;* devisable only by will, and thereupon termed *Terræ Testamentales. Spelm. of Feuds.* This was one of the titles which the English Saxons had to their *lands*, and was always in writing: there was but one more, and that was *Folkland*, i. e. *Terra Popularis*, which passed from one to another without any writing. See *Squire* on the *Anglo Saxon Government*, and this Dict. tit. *Tenure.*

BOIA. Chains or fetters, properly what we call *bernicles*, Hist. Elien. apud Whartoni Angl. Sax. part. 1. p. 618.

BOIS, Fr.] Wood, and *sub-bois*, underwood. See *Boscus.*

BOLHAGIUM, or *boldagium*, a little house or cottage. *Blount.*

BOLT, A *bolt* of silk or stuff, seems to have been a long narrow piece: in the accounts of the priory of Burcester. It is mentioned, *Paroch. Antiq. p.* 574.

BOLTING. A term of art used in our Inns of Court, whereby is intended a private arguing of cases. The manner of it at Gray's Inn is thus: An ancient and two barristers sit as judges, three students bring each a case, out of which the judges chuse one to be argued, which done, the students first argue it, and after them the barristers. It is inferior to *mooting*, and may be derived from the Sax. *bolt*, a house, because done privately in the house for instruction. In Lincoln's Inn, Mondays and Wednesdays are the *bolting days*, in vacation time; and Tuesdays and Thursdays the *moot days.*

BONA FIDE. That we say is done *bonâ fide*, which is done really, with a *good faith*, without any fraud or deceit.

BONA GESTURA. Good abearing, or good behaviour. See *Good Behaviour.*

BONAGHT, or *bonaghty*, Was an exaction in Ireland, imposed on the people at the will of the lord, for relief of the knights, called *bonaghti*, who served in the wars. *Antiq. Hibern, p.* 60.

BONA NOTABILIA. See title *Executor*, V. 3.

BONA PATRIA. An assise of countrymen or good neighbours. It is sometimes called *assisa bonæ patriæ*, when twelve or more men are chosen out of any part of the county to pass upon an assise: otherwise called *juratores*, because they are to swear judicially in the presence of the party, &c. according to the practice of Scotland. *Skene.* See *Assisors.*

BONA PERITURA. Goods that are perishable. The *stat. Westm.* 1. 3 *E.* 1. *cap.* 4. as to wrecks of the sea, ordains, that if the goods within the ship be *bona peritura*, such things as will not endure a year and a day, the sheriff shall sell them, and deliver the money received to answer it. See this Dict. tit. *Wreck.*

BONCHA. A bunch from the old Lat. *bonna* or *bunna*, a rising bank, for the bounds of fields; and hence *bown* is used in Norfolk, for swelling or rising up a bunch or tumour, *&c.*

BOND, A *Bond* or *Obligation* is a deed whereby the *obligor* or person bound, obliges himself, his heirs, executors, and administrators, to pay a certain sum of money to another (the *obligee*) at a day appointed.

I. *General Rules as to the* Nature *and* Form *of this Security.*
II. *Who may be Obligors, and Obligees.*
III. *The Ceremonies necessary to constitute a Bond or Obligation.*
IV. *Of the Condition; and what shall be a Performance or Breach thereof.*
V. *Of the discharge and Satisfaction of Bonds*; 1, *by the Act of the Party*; or 2, *by the Act of Law.*
VI. *Of Actions and Pleadings, on Bonds.*

I. If the bond be without a condition, it is called a single one, *simplex obligatio*: but there is generally a condition added, that if the obligor does some particular act, the obligation shall be void or else shall remain in full force; as payment of rent, performance of covenants in a deed, or repayment of a principal sum of money borrowed of the obligee, with interest; which principal sum is usually one half of the penal sum specified on the bond. In case this condition is not performed, the bond becomes forfeited, or absolute at law, and charges the obligor while living, and after his death the obligation descends on his heir, who (on defect of personal assets) is bound to discharge it, provided he has real assets by descent as a recompence. So that it may be called, though not a *direct*, yet a *collateral* charge upon the lands.

The condition may be either in the same deed, or in another, and sometimes it is included within, and sometimes indorsed upon the obligation; but it is commonly at the foot of the obligation. *Bro. Obl.* 67. A *memorandum* on the back of a *bond* may restrain the same by way of exception. *Moor* 67.

This security is also called a *specialty*; the debt being therein particularly specified in writing, and the party's seal, acknowledging the debt or duty, and confirming the contract; rendering it a security of a higher nature than those entered into without the *solemnity* of a *seal.*

As to the Assignment of bonds, see tit. *Assignment*.

If the condition of a bond be impossible at the time of making it, or be to do a thing contrary to some rule of law that is merely positive; or if it be uncertain or insensible, the condition alone is void, and the bond shall stand single, and unconditional; for it is the folly of the obligor to enter into such an obligation, from which he can never be released. If it be to do a thing that is *malum in se*, the obligation itself is void; for the whole is an unlawful contract, and the obligee shall take no advantage from such a transaction. And if the condition be possible at the time of making it, and afterwards become impossible by the act of God, the act of law, or the act of the obligee himself, there the penalty of the obligation is saved; for no prudence or foresight of the obligor could guard against such a contingency. *Co. Lit.* 206. See post, IV; and tit. *Condition*.

On the forfeiture of a bond, or its becoming single, the whole penalty was formerly recoverable at law, but here the courts of equity interposed, and would not permit a man to take more than in conscience he ought, *viz.* his principal, interest, and expenses, in case the forfeiture accrued by non-payment of money borrowed, the damages sustained upon non-performance of covenants, and the like. And this practice having gained some footing in the courts of law, (See 2 *Keb.* 553. *Salk.* 596. 7. 6 *Mod.* 11. 60. 101): the *stat.* 4 & 5 *Ann. c.* 16. at length enacted, in the same spirit of equity, that in case of a bond conditioned for the payment of money, the payment or tender of the principal sum due, with interest and costs, even though the bond be forfeited, and suit commenced thereon, shall be a full satisfaction and discharge.

And this rule of compelling the party to do equity who seeks equity, seems to be the reason why an obligee shall have interest after he has entered up judgment; for though in strictness it may be accounted his own fault why he did not take out execution, and therefore not intitled to interest; yet, as by the judgment he is intitled to the penalty, it does not seem reasonable that he should be deprived of it, but upon paying him the principal and interest, which incurred as well before as after the entering up of the judgment. *Abr. Eq.* 92. 288.

The Court of Chancery will not generally carry the debt beyond the penalty of a bond. Yet where a plaintiff came to be relieved against such penalty, though it was decreed, it was on the payment of the principal money, interest, and costs; and notwithstanding they exceeded the penalty, this was affirmed. 1 *Verm.* 350. 1 *Eq. Ab.* 92. 16 *Vin.* tit. *Penalty*: 3 *Comm.* 435.—And where the condition of a bond is to perform a collateral act, damages may be recovered beyond the penalty, and the court of K. B. will not stay the proceedings on payment of the money into court. 2 *Term Rep.* 388. See *White* v. *Sealy*, *Doug.* 49, *Semb. contra*; but the authority of which is much shaken by the case in 2 *Term Rep.* 388, where Buller J. remarked that there were several cases where the judgment had been carried beyond the penalty. In *Elliot* v. *Davis* (*Bunb.* 23.) interest on a bond was decreed (*in Scac.*) to be paid, though it exceeded the penalty. See also *Collins* v. *Collins*, the case of an annuity. *Burr.* 820. *Holdip* v. *Otway*, 2 *Saund.* 106. *Dewall* v. *Price*, *Show. P. C.* 15.

FORM of a BOND or OBLIGATION, with Condition for the Payment of Money.

Know all men by these presents, *That I David Edwards, of Lincoln's Inn, in the county of Middlesex, Esquire, am held and firmly bound to Abraham Barker, of Dale Hall, in the county of Norfolk, Esquire, in the penal sum of ten thousand pounds, of lawful money of Great Britain, to be paid to the said Abraham Barker, or his certain attorney, executors, administrators, or assigns; for which payment well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents, sealed with my seal. Dated the fourth day of September, in the forty sixth year of the reign of our sovereign Lord George the Third, by the grace of God, of the United Kingdom of Great Britain and Ireland king, defender of the faith and so forth, and in the year of our Lord one thousand eight hundred and*——

*The Condition* of this obligation is such, that if the above bounden David Edwards, his heirs, executors or administrators, do and shall well and truly pay, or cause to be paid unto the above-named Abraham Barker, his executors, administrators, or assigns, the full sum of five thousand pounds of lawful money of Great Britain, with lawful interest for the same, on the fourth day of March next ensuing the date of the above written obligation, then this obligation shall be void, and of none effect, or else shall be and remain in full force and virtue.

Sealed and delivered being first duly stamped in the presence of } David Edwards (L S.)

A. B.

For irregular forms of bonds or obligations, See 1 *Leon.* 25. 3 *Leon.* 299. *Cro. Jac.* 208. 607. *Bro.* tit. *Obligation*, *&c.* from whence, and other authorities, which the regularity of modern practice has rendered uninteresting, it appears that the courts always inclined to support the justice of the plaintiff's case, without much regard to mere errors in form, or arising from accident.

II. All persons who are enabled to contract, and whom the law supposes to have sufficient freedom and understanding for that purpose may bind themselves in bonds and obligations. 5 *Co.* 119. 4 *Co.* 124. 1 *Rol. Abr.* 340.

But if a person is illegally restrained of his liberty, by being confined in a common gaol or elsewhere, and, during such restraint, enters into a bond to the person who causes the restraint, the same may be avoided for *duress* of imprisonment. *Co. Lit.* 253. 2 *Inst.* 482. *Vid.* tit. *Duress*.

So in respect of that power and authority which a husband has over his wife, the bond of a feme covert is *ipso facto* void, and shall neither bind her nor her husband. See tit. *Baron and Feme*.

So though an infant shall be liable for his necessaries, such as meat, drink, clothes, physic, schooling, &c. yet if he bind himself in an obligation, with a penalty for payment of any of those, the obligation is void. *Doct. and Stud.* 113. *Co. Lit.* 172. *Cro. Jac.* 494. 560. 1 *Sid.* 112. 1 *Salk.* 279. *Cro. Eliz.* 920. See tit. *Infants*.

So an infant cannot bind himself in a bond with a penalty conditioned for payment of interest as well as principal. 8 *East Rep.* 330.

Also though a person *non compos mentis* shall not be allowed to avoid his bond, by reason of insanity and distraction, yet may a privy in blood, as the heir, and privies in representation, as the executor and administrator, avoid such bonds; also if a lunatick after office found, enters into a bond, it is merely void. 4 *Co.* 124. Beverley's case. But see 2 *Stra.* 1104, that lunacy may be given in evidence on the general issue. See tit. *Lunaticks*.

But if an infant, feme covert, &c. who are disabled by law to contract, and to bind themselves in bonds, enter together with a stranger, who is under none of these disabilities, into an obligation, it shall bind the stranger, though it be void as to the infant, &c. 1 *Rol. Rep.* 41.

If a servant makes a bill in form, "*Memorandum*, that I have received of A. B. to the use of my master C. D. the sum of 40*l.* to be paid at Michaelmas following," and thereto

set his seal, this is a good obligation to bind himself; for though, in the beginning of the deed, the receipt is said to be to the use of his master, yet the repayment is general, and must necessarily bind him who sealed; and the rather, because otherwise the obligee would lose his debt, he having no remedy against the master. *Yelv.* 137, *Talbot* v. *Godbolt.*

Infants, idiots, as also feme coverts, may be *obligees*; and here the husband is supposed to assent, being for his advantage; but if he disagrees, the obligation hath lost its force; so that after the obligor may plead *non est factum*; but if he neither agrees nor disagrees, the bond is good, for his conduct shall be esteemed a tacit consent, since it is to his advantage. 5 *Co.* 119 *b. Co. Lit.* 3 *a.*—See tit. *Baron and Feme.*

An alien may be an obligee, for since he is allowed to trade and traffick with us, it is but reasonable to give him all that security which is necessary in his contracts, and which will the better enable him to carry on his commerce and dealings amongst us. *Co. Lit.* 129 *b. Moor.* 431. *Cro. Eliz.* 142. 683. *Cro. Car.* 9. 1 *Salk.* 46. 7 *Mod.* 15. See tit. *Alien.*

Sole Corporations, such as bishops, prebends, parsons, vicars, &c., cannot be obligees, and therefore a bond made to any of these, shall enure to them in their natural capacities; for no sole body politick can take a chattel in succession, unless it be by custom; but a corporation aggregate may take any chattel, as bonds, leases, &c. in its political capacity, which shall go in succession, because it is always in being. *Cro. Eliz.* 464. *Dyer.* 48 *a. Co. Lit.* 9 *a.* 46 *a. Hob.* 64. 1 *Rol. Abr.* 515.

If a drunken man gives his bond it binds him; and a *bond* without consideration is obligatory, and no relief shall be had against it, for it is voluntary, and as a gift. *Jenk. Cent.* 109. But see *Cole* v. *Robins*, *Hill.* 2 *Ann. per Holt*, referred to in *Bull. N. P.* 172. that on the general issue, defendant may give in evidence that they made him sign the bond when he was so drunk he knew not what he did. A person enters voluntarily into a *bond*, though there was not any consideration for it, if there be no fraud used in obtaining the same, the *bond* shall not be relieved against in equity: but a voluntary *bond* may not be paid in a course of administration, so as to take place of real debts, even by simple contract; yet it shall be paid before legacies. 1 *Chan. Cas.* 157. An heir is not bound, unless he be named expressly in the *bond*; though the executors and administrators are. *Dy.* 13.

It is clearly agreed that two or more may bind themselves jointly in an obligation, or they may bind themselves jointly and severally; in which last case, the obligee may sue them jointly, or he may sue any one of them at his election; but if they are jointly and not severally bound, the obligee must sue them jointly; also in such case, if one of them dies, his executor is totally discharged, and the survivor and survivors only chargeable. 2 *Rol. Abr.* 148. *Dyer.* 19. 310. 5 *Co.* 19. *Dal.* 85. *pl.* 42. 1 *Salk.* 393. *Carth.* 61. 1 *Lutw.* 696.

If three enter into an obligation, and bind themselves in the words following, *Obligamus nos et utrumque nostrum per se pro toto et in solido*, these make the obligation joint and several. *Dyer* 19 *b. pl.* 114.

III. It is said, that there are only three things essentially necessary to the making a good obligation, *viz. writing* on paper or parchment, *sealing* and *delivery*; but it hath been adjudged not to be necessary, that the obligor should sign or subscribe his name; and that therefore if in the obligation the obligor be named Erlin, and he signs his name Erlwin, that this variation is not material; because subscribing is no essential part of the deed, *sealing* being sufficient. 2 *Co.* 5 *a.* Godard's case. *Noy.* 21. 85. *Moor.* 28. *Stile.* 97. 2 *Salk.* 462. 5 *Mod.* 281.

And though the *seal* be necessary, and the usual way of declaring on a bond is, that the defendant by his bond or writing obligatory sealed with his seal, acknowledged, &c. yet if the word sealed be wanting, it is cured by verdict and pleading over, for all necessary circumstances shall be intended; and if it were not sealed, it could not be his deed or obligation. *Dyer* 19 *a. Cro. Eliz.* 571. 737. *Cro. Jac.* 420. 2 *Co.* 5. 1 *Vent.* 70. 3 *Lev.* 348. 1 *Salk.* 141. 6 *Mod.* 306.

Also though sealing and delivery be essential in an obligation, yet there is no occasion in the bond to mention that it was sealed and delivered; because as Lord Coke says, these are things which are done afterwards. 2 *Co.* 5 *a.*

The name of the obligor subscribed, 'tis said, is sufficient, though there is a blank for his christian name in the *bond*. *Cro. Jac.* 261. Vide *Cro. Jac.* 558. 1 *Mod.* 107. In these cases, though there be a verdict, there shall not be judgment. Where an obligor's name is omitted to be inserted in the *bond*, and yet he signs and seals it, the court of Chancery may make good such an *accident*; and in case a person takes away a *bond* fraudulently, and cancels it, the obligee shall have as much benefit thereby, as if not cancelled. 3 *Chan. Rep.* 99. 184.

An obligation is good though it wants a date, or hath a false or impossible date; for the date, as hath been observed, is not of the substance of the deed; but herein we must take notice, that the day of the delivery of a deed or obligation is the day of the date, though there is no day set forth. 2 *Co.* 5, Godard's case. *Noy.* 21. 85. 86. *Hob.* 249. *Stile.* 97, *Cro. Jac.* 136. 264. *Yelv.* 193. 1 *Salk.* 76.

If a man declare on a bond, bearing date such a day, but does not say when delivered, this is good: for every deed is supposed to be delivered and made on the day it bears date; and if the plaintiff declare on a date, he cannot afterwards reply that it was first delivered, at another day, for this would be a departure. *Cro. Eliz.* 773. 2 *Lev.* 348. 1 *Salk.* 141. Vide 1 *Brownl.* 104. 1 *Lev.* 196.

A plaintiff may suggest a date in a *bond*, where there is none, or it is impossible, &c. where the parties and sum are sufficiently expressed. 5 *Mod.* 282. A *bond* dated on the same day on which a release is made of all things up to the day of the date, is not thereby discharged. 2 *Rol. Rep.* 255.

If the bond was delivered before the date, on issue, *non est factum*, joined on such a deed, the jury are not estopped to find the truth, *viz.* that it was delivered before the date, and it is a good deed from the delivery. 2 *Co.* 4. 6. 3 *Keb.* 332.

A person shall not be charged by a *bond*, though signed and sealed, without delivery, or words, or other thing, amounting to a delivery. 1 *Leon.* 140. But a bond or deed may be delivered by words, without any act of delivery; as where the obligor says to the obligee, go and take the said writing, or take it as my deed, &c. So an actual delivery, without speaking any word, is sufficient: otherwise, a man that is mute could not deliver a deed. *Co. Lit.* 36 *a. Cro. Eliz.* 835. *Leon.* 193. *Cro. Eliz.* 122.

Interlineation in a bond in a place not material, will not make the bond void; but if it be altered in a part material, it shall be void. 1 *Nels. Abr.* 391. And a bond may be void by rasure, &c. As where the date, &c. is rased after delivery, which goes through the whole. 5 *Rep.* 23. If the words in a bond at the end of the condition, *That then this obligation to be void*, are omitted, the condition will be void; but not the obligation.

IV. The condition of a bond was, that A. L. should pay such a sum upon the 25th of December, or appear in Hilary term after in the court of B. R. He died after the 25th of December, and before Hilary term, and had not paid any thing: in this case the condition was not broken for non-payment, and the other part is become impossible by the act of God. 1 *Mod. Rep.* 265. And when a condition is doubtful, it is always taken most favourably for the obligor, and against the obligee; but so as a reasonable construction be made as

near as can be according to the intention of the parties. *Dyer* 51.

If no time is limited in a bond for payment of the money, it is due presently and payable on demand. 1 *Brownl.* 53. But the judges have sometimes appointed a convenient time for payment, having regard to the distance of place, and the time wherein the thing may be performed. And if a condition be made impossible in respect to time, as to make payment of money on the 30th of February, &c. it shall be paid presently. *Jones.* 143. See 1 *Leon.* 101.

A bond made to enfeoff two persons; if one dies before the time is past, wherein it should be done, the obligor must enfeoff the survivor of them, or the condition will be broken; and if it be that B. and others shall enjoy land, and the obligor and B. the obligee do disturb the rest; by this the condition is broken. 4 *Hen.* 7. 1. *Co. Lit.* 384. Where one is bound to do an act to the obligee himself, the doing it to a stranger by appointment of the obligee, will not be a performance of the condition. 2 *Bulst.* 149. But in such case equity would relieve; and probably a judge, on such action coming before him, would order plaintiff to be non-suited. If the act be to be done at a certain place, where the obligor is to go, to Rome, &c. and he is to do the sole act without limitation of time, he hath term during life to perform the same: if the concurrence of the obligor and obligee is requisite, it may be hastened by the request of the obligee. 6 *Rep.* 30. 1 *Rol. Abr.* 437. Where no place is mentioned for performance of a condition, the obligor is obliged to find out the person of the obligee, if he be in England, and tender the money, otherwise the bond will be forfeited: but when a place is appointed he need seek no further. *Co. Lit.* 210. *Lit.* 340. And if, where no place is limited for payment of money due on a bond, the obligor, at or after the day of payment, meets with the obligee, and tenders him the money, but he goes away to prevent it, the obligor shall be excused. 8 *E.* 4.

The obligor, or his servant, &c. may tender the money to save the forfeiture of the bond, and it shall be a good performance of the condition, if made to the obligee, though refused by him; yet if the obligor be afterwards sued, he must plead that he is still ready to pay it, and tender the money in court. *Co. Lit.* 208.

In the performance of the condition of an obligation, the intention of the parties is chiefly to be regarded: and therefore a performance in substance is sufficient, though it differ in words or some material circumstance; as if one be bound to deliver the testament of the testator, if he plead that he had delivered letters testamentary, it is sufficient. *Bro. Condition*, 158. 17 *E.* 4. 3. 1 *Rol. Abr.* 426.

If the condition of an obligation be to procure a lawful discharge, this must be by a *release*, or some *discharge*, that is *pleadable*, and not by *acquittance*, which is but evidence. 1 *Keb.* 739.

If the party, who is bound to perform the condition disables himself, this is a breach; as where the condition is, that the feoffee shall reinfeoff, or make a gift in tail, &c. to the feoffor, and the feoffee, before he performs it, make a feoffment or gift in tail, or lease for life or years in *præsenti* or *futuro* to another person, or marry or grant a rent-charge, or be bound in a statute, or recognisance, or become professed; in all those cases the condition is broken; for the feoffee has either disabled himself to make any estate, or to make it in the same plight or freedom in which he received it; and being once disabled, he is ever disabled, though his wife should die, or the rent, &c. should be discharged, or he should be deraigned, &c. before the time of the reconveyance. *Co. Lit.* 221, 222. *Poph.* 110. 1 *Co.* 25 *a*,. 1 *Rol. Abr.* 447. 5 *Co.* 21 *a.*

Where the condition is in the *conjunctive*, regularly both parts must be performed: yet, to supply the intention of the parties, it is held, that if a condition in the *conjunctive* be *not possible* to be performed, it shall be taken in the *disjunctive*; as if the condition be, that he *and* his executors shall do such a thing, this shall be taken in the *disjunctive*, because he cannot have an executor in his life-time; so if the condition be, that he *and* his assigns shall sell certain goods, this shall be taken in the *disjunctive*, because both cannot do it. 1 *Rol. Abr.* 444. *Owen* 52. 1 *Leon.* 74. *Goulds.* 71.

See further this Dict. tits. *Condition*, *Consideration*, *Gaming*, *Marriage*; as to *Resignation Bonds*, tit. *Parson.*

A bond made with condition not to give evidence against a felon, &c. is void; but the defendant must plead the special matter. 2 *Wilson* 341, &c. Condition of a bond to indemnify a person from any legal prosecution is against law, and void. 1 *Lutw.* 667. And if a sheriff takes a bond as a reward for doing of a thing, it is void. 3 *Salk.* 75.

V. 1. Where a lesser sum is paid before it is due, and the payment is accepted, it shall be good in satisfaction of a greater sum; but after the money is due, then a lesser sum though accepted, shall not be a satisfaction for a greater sum. Thus in debt upon bond conditioned to pay 8*l.* defendant pleaded payment of 5*l.* before the day mentioned in the condition, which the obligee accepted in satisfaction of the bond, and upon demurrer this was adjudged a good plea. *Moor* 677. Vide 3 *Bulst.* 301.—Payment after the day, of a *less* sum, is not good, as the bond is forfeited, at *common law*; and there is not any statute to relieve.

Debt upon bond of 16*l.* conditioned to pay 8*l.* 10*s.* on a certain day; the defendant pleaded, that, before that day, he, at the request of the plaintiff, paid to him 5*l.* which he accepted in satisfaction of the debt; and upon demurrer, the plaintiff had judgment, because the defendant had pleaded the payment of the 5*l.* *generally*, without alleging, that it was *in satisfaction* of the debt. It is true, he sets forth, that it was accepted in satisfaction of the debt, but it ought likewise to be *paid* in satisfaction. 5 *Rep.* 117. Debt upon bond, conditioned, that in consideration the plaintiff had paid 12*l.* to the defendant; he became bound to pay the plaintiff 12*l.* if he lived one month after the date of that bond; and if not paid at that time, then to pay him 14*l.* if he lived six months after the date of the bond; the defendant pleaded, that *after* the six months he paid the plaintiff 8*l.* and then gave him another bond in the penalty of 20*l.* conditioned to pay him 10*l.* on a certain day, in full satisfaction of the other bond, and that the plaintiff did accordingly accept the said bond; upon a demurrer to this plea it was held ill; for admitting that one bond might be given in satisfaction of another, yet it cannot be after the other is forfeited, as it was in this case; because after the forfeiture, the penalty is vested in the obligee, and a less sum cannot be a satisfaction for a greater. 1 *Lut.* 464.

It hath been adjudged, that the acceptance of one bond cannot be pleaded in satisfaction of another bond. *Cro. Car.* 85. *Moor* 872. *Cro. Eliz.* 716. 727. 2 *Cro.* 579. Thus in debt on a bond of 100*l.* conditioned for the payment of 52*l.* 10*s.* on a *certain day*, the defendant pleaded that *at the day*, &c. he and his son gave a *new bond* of 100*l.* conditioned for the payment of 52*l.* 10*s.* *at another day* then to come, which the plaintiff accepted in satisfaction of the *old bond*; and upon demurrer it was adjudged for the plaintiff, because the acceptance of a new bond to pay money at another day, could not be a present satisfaction for the money due on the day when it was to be paid on the old bond. *Hob.* 68. But it is otherwise where the second is not given by the obligor; as in debt upon bond against the defendant as heir, &c. he pleaded that his ancestor, the obligor, died intestate and that W. R. administered, who gave the plaintiff another bond in satisfaction of the former: there was a verdict for the defendant; and it being moved in arrest of judgment, this distinction was made; that if the obligor, who gave the first bond, had likewise given

the second, it would not have discharged the first; but in this case the second bond was not given by him who gave the first, but by his administrator, which had mended the security, because he may be chargeable *de bonis propriis;* and for that reason the second bond was held to be a discharge of the first. 1 *Mod.* 225.

2. A bond on which neither principle nor interest has been demanded for 20 years, will be presumed in equity to be satisfied, and be decreed to be cancelled; and a perpetual injunction granted to stay proceedings thereon. 1 *Ch. Rep.* 79. *Finch. Rep.* 78. See *Mod. Ca.* 22.—But satisfaction may be presumed within a less period, if any evidence be given in aid of the presumption; as if an account between the parties has been settled in the intermediate time, without any notice having been taken of such a demand.—Yet length of time is no *legal* bar, it is only a ground for the jury to presume satisfaction. 1 *Term Rep.* 270.

If several obligors are bound jointly and severally, and the obligee make one of them his executor, it is a release of the debt, and the executor cannot sue the other obligor. 8 *Co.* 136. 1 *Salk.* 300. And vide 1 *Jon.* 345. But though it be a release in law, in regard it is the proper act of the obligee, yet the debt by this is not absolutely discharged, but it remains *assets* in his hands, to pay both debts and legacies. *Cro. Car.* 373. *Yelv.* 160. See tit. *Executor*, IV. 8.

If a feme sole obligee take one of the obligors to husband, this is said to be a release in law of the debt, being her own act. 8 *Co.* 136 *a. March.* 128.

If one obligor makes the executor of the obligee his executor, and leaves assets, the debt is deemed satisfied, for he has power, by way of retainer, to satisfy the debt; and neither he nor the administrator *de bonis non, &c.* of the obligee can ever sue the surviving obligor. *Hob.* 10.

But if two are bound jointly and severally to A. and the executor of one of them makes the obligee his executor, yet the obligee may sue the other obligor. 2 *Lev.* 73. See tit. *Executor*, IV. 8.

If two are jointly and severally bound in an obligation, and the obligee release to one of them, both are discharged. *Co. Lit.* 232 *a.*

Three were bound jointly and severally in an obligation, and an action was brought against one of them, who pleaded, that the seal of one of the others was torn off, and the obligation cancelled, and therefore void against all. Upon *demurrer* it was adjudged, that the obligation, by the tearing off the seal of one of the obligors, became void against all, notwithstanding the obligors were severally bound. 2 *Lev.* 220. 2 *Show.* 289. *Sed. qu.*

If the condition of a bond be, that a clerk shall faithfully serve, and account for all money, &c. to the obligee and his executors; this does not make the obligor liable for money received by the clerk in the service of the executors of the obligee, who continue the business, and retain the clerk in the same employment, with the addition of other business, and an increase of salary. 1 *Term Rep.* 287.—But such a bond is not discharged by the obligee's taking another partner into their house; it is only a security to the house of the obligees. *Ib.* 291 *n.*

VI. In a *bond* where several are bound severally, the obligee is, at his election, to sue all the obligors together, or all of them apart, and have several judgments and executions; but he shall have satisfaction but once, for if it be of one only, that shall discharge the rest. *Dyer* 19. 310. Where two or more are bound in a joint *bond*, and only one is sued, he must plead in abatement, that two more sealed the *bond*, &c. and aver that they are living, and so pray judgment *de billa, &c.* And not demur to the declaration. *Sid.* 420.

If action be brought upon a *bond* against two joint and several obligors jointly, and both are taken by *capias*, here the death or escape of one shall not release the other; but the same kind of execution must be taken forth against them: it is otherwise when they are sued severally. *Hob.* 59.

Also, if two or more be jointly bound, though regularly one of them alone cannot be sued, yet if process be taken out against all, and one of them only appears, but the others stand out to an outlawry, he who appeared shall be charged with the whole debt. 9 *Co.* 119.

If a *bond* is made to three, to pay money to one of them, they must all join in the action, because they are but as one obligee. *Yelv.* 177.

So if an obligation be made to three, and two bring their action, they ought to show the third is dead. 1 *Sid.* 238. 420. 1 *Vent.* 34.

Though there be several obligees, yet a person cannot be bound to several persons severally; and therefore an obligation of 200*l.* to two, to pay 100*l.* to the one, and the other 100*l.* to the other, is a void condition. *Dyer* 350 *a. pl.* 20. *Hob.* 172. 2 *Brownl.* 207. *Yelv.* 177.

If A. bind himself in a sum to B. to pay to C., who is a stranger, a payment to C. is a payment to B., and in an action upon it, the count must be upon a bond payable to B. 1 *Sid.* 295. 2 *Keb.* 81.

In debt the declaration was, that the defendant became bound in a bond of ——, for the payment of —— to him, his attorney or assigns, and on oyer of the bond it appeared, that it was to pay to the plaintiff's attorney or assigns, without mention of himself; and on demurrer for this variance it was said, that the declaration must not be according to the letter of the obligation, but according to the operation of the law thereupon. 6 *Mod.* 228. *Robert* v. *Harnage.*

So if A. makes a bond to B. to pay to such person as he shall appoint; if B. does appoint one, payment to him is a payment to B., and if B. appoint none, it shall be paid to B. himself. 6 *Mod.* 228.

If A. by his bill obligatory, acknowledges himself to be indebted to B. in the sum of 10*l.* to be paid at a day to come, and binds himself and his heirs in the same bill in 20*l.* but does not mention to whom he is bound, yet the obligation is good, and he shall be intended to be bound to B to whom he acknowledged before the 10*l.* to be due. 2 *Rol. Abr.* 148. *Franklin* v. *Turner.*

If an infant seal a bond, and be sued thereon, he is not to plead *non est factum*, but must avoid the bond by special pleading; for this bond is only voidable, and not in itself void. 5 *Rep.* 119. But if a bond be made by a feme covert, she may plead her coverture, and conclude *non est factum, &c.* her bond being void. 10 *Rep.* 119. Or plead *non est factum*, and give coverture in evidence. If a bond depends upon some other deed, and the deed becomes void, the bond is also void.

*As to the pleading of performance*, the defendant must set forth in what manner he hath performed it. Thus, in debt on a bond, with condition for performance of several things, the defendant pleads that the condition of the said deed was never broken by him, and held an ill plea: because, for saving the bond, it is necessary for the defendant to show how he hath performed the condition; and this sort of pleading was never admitted. 2 *Vent.* 156.

So if he had pleaded that he performed every thing, it had been ill; for the particulars being expressed in the condition, he ought to plead to each particularly; but if the condition were for performance of covenants in an indenture, performance were generally a good plea. 1 *Lev.* 302. This must be understood where the covenants are set forth, and appear to be all in the *affirmative*. For if some are in the *affirmative*, some in the *negative*, or any in the *disjunctive*, the defendant should plead *specially*.

In debt on an obligation for payment of money, &c. the defendant pleads, that at the time and place he was ready to pay the money, but that nobody was there to receive it; and held ill on a general demurrer, for want of stating a tender, for the *tender* only is traversable. 3 *Lev.* 104.

In debt on a bond with condition, the defendant pleads a collateral plea, which is insufficient; the plaintiff demurs, and hath judgment, without assigning a breach; for the defendant, by pleading a defective plea, by which he would excuse his non-performance of the condition, saves the plaintiff the trouble of assigning a breach, and gives him advantage of putting himself on the judgment of the court, whether the plea be good or not; but if the plaintiff had admitted the plea, and made a replication which showed no cause of action, it had been otherwise; but if the replication were idle, and the defendant demurred, yet the plaintiff should have judgment without assigning a breach. 1 *Lev.* 55. 84. 3 *Lev.* 17. 24. This must mean, if the plea was bad in substance.

And in all cases of debt on an obligation with condition, (that of a bond to perform an award only excepted,) if the defendant plead a special matter, that admits and excuses a non-performance, the plaintiff need only answer, and falsify the *special matter alleged;* for he that excuses a non-performance admits it, and the plaintiff need not show that which the defendant hath supposed and admitted. *Salk.* 138.

But if the defendant pleads a performance of the condition, though it be not well pleaded, the plaintiff, in his replication, must show a breach; for then he has no cause of action, unless he show it: and this difference will give the true reason, and reconcile the following cases. 1 *Salk.* 138. 1 *Lev.* 55. 84. 226. 1 *Saund.* 102. 159. 317. 3 *Lev.* 17. 24. 1 *Vent.* 114. *Cro. Eliz.* 320. *Yelv.* 78.

But by stat. 4 *Ann. c.* 16. if an action of debt be brought on single bill, or judgment, after money paid, such payment may be pleaded in bar. So of a bond with a condition, upon payment of principal and interest due by the condition, though such payment was not strictly made according to the condition, yet it may be pleaded in bar.

By stat. 8 & 9 *Wm.* 3. *c.* 11. § 8. in actions on bonds for performance of covenants, the plaintiff may assign as many breaches as he pleases, and the jury may assess damages. The defendant paying the damages, execution may be staid; but the judgment to remain to answer any future breach, and plaintiff may then have *scire facias* against the defendant; and so *toties quoties*.

In debt on a bond, the defendant may have several pleas in bar; as if the plaintiff sue as executor, the defendant may plead the release of the testator for part, and for the residue the release of the plaintiff, so he may plead payment as to part, and as to the rest an *acquittance*. 1 *Salk.* 180.

But a defendant in an action on a bond cannot plead *non est factum*, and a tender as to part. 5 *Term Rep.* 97.

In debt on an obligation the defendant cannot plead *nil debet*, but must deny the deed by pleading *non est factum;* for the seal of the party continuing, it must be dissolved *eo ligamine quo ligatur*. *Hard.* 332. *Hob.* 218.

In bonds to save harmless, the defendant being prosecuted, is to plead *non damnificatus, &c.*

The stealing of any bond or bill, &c. for money, being the property of any one, made felony, as if offenders had taken other goods of like value. *Stat.* 2 *Geo.* 2. *c.* 25. See tit. *Felony*.

BONDAGE. Is slavery; and *bondmen*, in *Domesday*, are called *servi*, but rendered different from *villani.—Et de toto tenemento, quod de ipso tenet in bondagio in soca de Nortone cum pertin. Mon. Angl.* 2. *par. fol.* 609. See *Nativus*.

BOND-TENANTS, *copyholders*, and *customary-tenants*, are sometimes so called. *Calthorpe on Copyholds*, 51. 54. See title *Copyhold Tenures*.

BONIS NON AMOVENDIS. A writ directed to the sheriffs of London, &c. where a writ of error is brought; to charge them that the person against whom judgment is obtained be not suffered to remove his goods, till the error is tried and determined. *Reg. Orig.* 131.

BOOKS. By stat. 25 *Hen.* 8. *c.* 15. no person shall buy any printed books brought from beyond sea to sell the same again, and no one shall buy books by retail brought from beyond sea by any stranger. Likewise the prices of books, excessively increased, shall be qualified by the king's great officers.—See title *Literary Property*.

By stat. 7 *Ann. c.* 14. *sect.* 10. if any book shall be taken or otherwise lost out of any parochial library, any justice may grant his warrant to search for it; and if it shall be found, it shall, by order of such justice, be restored to the library.

The sole right of printing books, bequeathed to the two Universities of England, the four Universities of Scotland, and the Colleges of Eton, Westminster, and Winchester is secured to them by stat. 15 *Geo.* 3. *c.* 53.

From the seventh to the eleventh century, books were very scarce. To that was chiefly owing the universal ignorance which prevailed during that period. After the Saracens conquered Egypt in the seventh century, the communication with that country (as to Europe, &c.) was almost entirely broken off, and the *papyrus* no longer in use. So that paper was used, and as the price of that was high, books became extremely rare, and of great value. Vide *Robertson's History of Charles the Fifth*, 1 *vol.* 233, 234.

In the eleventh century the art of making paper was invented, the number of manuscripts was thereby increased, and the study of the sciences greatly facilitated. See further as to Books, title *Literary Property*.

BOOK OF RATES. See title *Customs*.

BOOK OF RESPONSES, Is that which the director of the chancery keeps, particularly to note a seizure, when he gives order to the sheriff in that part to give it to an heir, whose service has been returned to him. The form of it is *respondeat vice comes, &c. Scotch Dict.*

BOOKSELLERS, And authors of books, &c. See title *Literary Property*.

BOOTING, or BOTING-CORN, Rent-corn, anciently so called. The tenants of the manor of Haddenham in com. Bucks, formerly paid *booting corn* to the prior of Rochester. *Antiq. of Purveyance, fol.* 418. It is thought to be so called, as being paid by the tenants by way of *bote*, or *boot*, viz. as a compensation to the lord for his making them leases, &c.

BORDAGIUM. See *Bordlode*.

BORDARIA. A cottage, from the Sax. *bord*, *domus*.

BORDARII, or BORDIMANNI. These words often occur in *Domesday*, and some think they mean *boors*, husbandmen, or cottagers. In the *Domesday* inquisition they were distinct from the *villani;* and seemed to be those of a less servile condition, who had a *bord* or cottage, with a small parcel of land allowed to them, on condition they should supply the lord with poultry and eggs, and other small provisions, for his *board* or entertainment. Some derive the word *bordarii* from the old Gall. *bords*, the limits or extreme parts of any extent; as the *borders* of a country, and the *borderers* inhabitants in those parts. *Spelm.*

BORDER WARRANT. The judge ordinary on either side of the border betwixt England and Scotland, gives warrant for arresting the person or effects of an inhabitant of the opposite side, until he finds security *judicio sisti*.

BORD-HALFPENY, Sax. *bord*, a table, and *halpeny*, or half-penny. *Spelm.*] A small toll, by custom paid to the lord of the town for setting up *boards*, tables, booths, &c. in fairs and markets.

BORDLANDS. The demesnes which lords keep in their hands for the maintenance of their *board* or table. *Bract. lib.* 4. *tract.* 3. *c.* 9. *Spelm.*

BORDLODE, or BORDAGE. A service required of tenants to carry timber out of the woods of the lord to his house: or it is said to be the quantity of food or provision, which the *bordarii*, or *bordmen*, paid for their *bord lands*. The old Scots had the term of *burd*, and *meet-burd* for victuals and provisions; and *burden sack*, for a sack full of provender: from whence it is probable came our word burden. *Spelm.*

BORD-SERVICE. A tenure of *bord-lands;* by which some lands in the manor of Fulham in com. Mid. and elsewhere, are held of the bishop of London, and the tenants do now pay six-pence per acre in lieu of finding provision, anciently for their lord's *board* or table. *Blount.*

BORD-BRIGCH, *borg-bryce*, or *burg-brych*, Sax.] A breach or violation of surety-ship, pledge-breach, or breach of mutual fidelity.

BOREL-FOLK, i. e. Country people, from the Fr. *boure*, *floccus*, because they covered their heads with such stuffs. *Blount.*

BORGH UPON WEIR OF LAW, Is to find caution to answer as law will. *Scotch Dict.*

BOROUGH, Fr. *burg*, Lat. *burgus*, Sax. *borhoe.*] Signifies a corporate town, which is not a city; and also such a town or place as sends burgesses to parliament. Verstegan saith, that *burg*, or *burgh*, whereof we make our *borough*, metaphorically signifies a town having a wall, or some kind of inclosure about it: and all places that, in old time, had among our ancestors the name of *borough*, were one way or other fenced or fortified. *Lit. sect.* 164. But sometimes it is used for *villa insignior*, or a country town of more than ordinary note, not walled. A borough is a place of safety, protection, and privilege, according to Somner; and in the reign of king Hen. II. *burghs* had so great privileges, that if a bond-man or servant remained in a *borough* a year and a day, he was by that residence made a freeman. *Glanville.* And why these were called *free burghs*, and the tradesmen in them *free burgesses*, was from a freedom to buy and sell, without disturbance, exempt from toll, &c. granted by charter. It is conjectured that *borhoe*, or *borough*, was also formerly taken for those companies consisting of ten families, which were to be pledges for one another: and we are told by some writers that it is a street or row of houses close to one another. *Bract. lib.* 3. *tract.* 2. *cap.* 10. *Lamb. Duty of Const. p.* 8. Vide *Squire's Anglo-Saxon Government*, 236. 247. 251. 254. 258. 262. 264. *Trading boroughs* were first formed in the time of Alfred. *Squire* 247. 251.

In Scotland boroughs are divided into *royal boroughs* and *boroughs of barony;* the former holding of the king, the latter of a subject. The magistrates of royal boroughs have the same jurisdiction within the borough as sheriffs in their counties.

A borough is now generally understood to be a town, either corporate or not, that sends burgesses to parliament. 1 *Comm.* 114. See title *Burgage-Tenure*, *Parliament.*

BOROUGH COURTS. Vide *Courts.*

BOROUGH-HEADS, BOROUGH-HOLDERS, BORSHOLDERS, or BURSHOLDERS, *quasi borh-ealders.* See title *Headborough.*

BOROUGH-ENGLISH. A custom relative to the descent of lands, in some ancient *boroughs*, and copyhold manors, that estates shall descend to the *youngest son;* or, if the owner hath no issue, to his *younger brother; Litt.* § 165.; as in Edmunton, &c. *Kitch.* 102.

This is so named, in contradistinction as it were to the Norman customs, and is noticed by *Glanville*, *lib.* 7. *c.* 3.

Littleton gives the following reason for this custom. Because the younger son, by reason of his tender age, is not so capable as the rest of his brethren to help himself. Other authors have, indeed, given a much stranger reason for this custom, as if the lord of the fee had anciently a right of concubinage with his tenant's wife on her wedding night; and that therefore the youngest son was most certainly the tenant's offspring. But it does not appear that this custom ever prevailed in England, (nor even in Scotland,) though that error for a long time prevailed. See this Dict. tit. *Mercheta Mulierum.*—Possibly this custom of *borough-english* may be the remnant of the pastoral state of our British and German ancestors, in which the youngest child was necessarily most helpless. See 2 *Comm.* 83.

This custom goes with the land, and guides the descent to the *youngest son*, although there be a devise to the contrary. 2 *Lev.* 138. If a man, seised in fee of lands in borough-english, makes a feoffment to the use of himself and the heirs male of his body, according to the course of the common law, and afterwards die seised, having issue two sons, the *youngest son* shall have the lands by virtue of the custom, notwithstanding the feoffment. *Dyer* 179.

If a copyhold in borough-english be surrendered to the use of a person and his heirs, the right will descend to the *youngest son* according to the custom. 1 *Mod.* 102. And a *youngest son* shall inherit an estate in tail in borough-english. *Noy* 106. But an heir at common law shall take advantage of a condition annexed to borough-english land; though the youngest son shall be entitled to all actions in right of the land, &c. 1 *Nels. Abr.* 396. And the eldest son shall have tithes arising out of land borough-english; for tithes of common right are not inheritances descendible to an heir, but come in succession from one clergyman to another. *Ibid.* 347.

Borough-english land being descendible to the youngest son, if a younger son dies without issue male, leaving a *daughter*, such *daughter* shall inherit *jure repræsentationis.* 1 *Salk.* 243. It hath been adjudged where a man hath *several brothers*, the *youngest* may inherit lands in Borough-English: yet it is said where a custom is, that land shall go to the *youngest son*, it doth not give it to the *youngest uncle*, for customs shall be taken strictly; and those which fix and order the descents of inheritance, can be altered only by parliament. *Dyer* 179. 4 *Leon.* 384. *Jenk. Cent.* 220.

By the custom of borough-english, the *widow* shall have the *whole* of her husband's lands in dower, which is called her *free-bench;* and this is given to her the better to provide for the younger children, with the care of whom she is entrusted. *Co. Lit.* 33. 111. *F. N. B.* 150. *Mo. pl.* 566.

*Borough-english* is one of those customs of which the law takes particular notice; there is no occasion to prove that such custom actually exists, but only that the lands in question are subject thereto. 1 *Comm.* 76.—But the extension of the custom to the collateral line must be specially pleaded. *Robins. on Gavelk.* 38. 43. 93.—And as borough-english may be extended by special custom, so may it be restrained; and therefore the customary descent may be confined to fee-simple. *Mar.* 54. cited *Robins. Appendix.*—See 1 *Inst.* 110 *b.* in *n.*

BOROUGH GOODS. As to their being *devisable*, See titles *Will*, *Executor.*

BORROWING. See title *Bailment.*

BORSHOLDERS. See title *Headborough.*

BORTMAGAD, Sax. *Bord*, *domus & Magad. ancilla.*] A house-maid. *Spelm.*

BOSCAGE, *boscagium.*] That food which wood and trees yield to cattle; as mast, &c. from the Ital. *bosco*, *silva;* but Manwood observes, to be quit *de boscagio*, is to be discharged of paying any duty of wind-fall wood in the forest. See *Spelm.* in *n.*

BOSCARIA. Wood-houses, from *boscus;* or ox-houses, from *bos.* See *Bostar. Mon. Angl. tom.* 2. *fol*, 302.

BOSCUS. An ancient word, signifying all manner of wood: *Bosco*, Italian, *bois* French. *Boscus* is divided into high wood or timber, *hautboys*, and coppice or under-woods, *sub-boscus*, *sub-bois:* but the high wood is properly called *saltus*, and in Fleta we read it *maeremium. Cum una carecta de mortuo bosco. Pat.* 10 *H.* 6.

BOSINNUS. A certain rustical pipe, mentioned in ancient tenures.

BOSTAR. An ox stall. *Mat. Paris. anno* 1234.

BOTE, Sax.] A recompense, satisfaction, or amends. The Saxon *bote* is synonimous to the word *estovers*. See title *Common of Estovers.—House-bote* is a sufficient allowance of wood to repair, or burn in the house; which latter is sometimes called *fire-bote*. *Plough-bote*, and *cart-bote*, are wood to be employed in making and repairing all instruments of husbandry: and *hay-bote* or *hedge-bote*, is wood for repairing of hays, hedges, or fences. 2 *Comm.* 35. Hence also comes *man-bote*, compensation, or amends for a man slain, &c. In King Ina's laws it is declared what rate was ordained for expiation of this offence, according to the quality of the person slain. *Lamb. cap.* 99. From hence, likewise we have our common phrase *to-boot*, i. e *compensationis gatiâ*.

BOTELESS. In the charter of *H.* 1, to Tho. archbishop of York, it is said, that no judgment or sum of money shall *acquit* him that commits sacrilege; but he is in English called *boteless*, *viz.* without emendation. *Lib. Albus penes Cap. de Suthnet. int. Plac. Trin.* 12 *Ed.* 2. *Ebor.* 48. We retain the word still in common speech; as it is *bootless* to attempt such a thing; that is, it is in vain to attempt it.

BOTELLARIA. A buttery or cellar, in which the *butts* and *bottles* of wine, and other liquors are deposited.

BOTHA. A booth, stall, or standing in a fair or market. *Mon. Angl.* 2. *par. fol.* 132.

BOTHAGIUM. *Boothage*, or customary dues paid to the lord of the manor or soil, for the pitching and standing of booths in fairs or markets. *Paroch. Antiq. p.* 680.

BOTHNA, or *buthna*, Seems to be a park where cattle are inclosed and fed. *Hector Boethius*, *lib.* 7. *cap.* 123. *Bothena* also signifies a barony, lordship, &c. *Skene.*

BOTILER OF THE KING, *(pincerna regis)*, Is an officer that provides the king's wines, who, (according to Fleta) may by virtue of his office, choose out of every ship laden with sale wines, one cask before the mast, and one behind. *Fleta*, *lib.* 2. *cap.* 21. This officer shall not take more wine than he is commanded, of which notice shall be given by the *steward* of the king's house, &c. on pain of forfeiting double damages to the party grieved; and also to be imprisoned and ransomed at the pleasure of the king. *Stat.* 25 *Ed.* 3. *st.* 5. *cap.* 21. See title *Customs.*

BOTTOMRY, or *bottomree*, *fœnus nauticum.*] Is generally where a person lends money to a merchant, who wants it to traffick, and is to be paid a greater sum at the return of a certain ship, standing to the hazard of the voyage; and in this case, though the interest be greater than that allowed by law, it is not usury. See this subject more fully treated under title *Insurance.*

BOVATA TERRÆ. As much land as one ox can plough. *Mon. Angl. par.* 3. *fol.* 91. See *Oxgang.*

BOUCHE OF COURT, Commonly called *budge of court*, was a certain allowance of provision from the king, to his knights and servants that attended him in any military expedition. The French *avoir bouche à court*, is to have an allowance at court, of meat and drink: from *bouche*, a mouth. But sometimes it extended only to bread, beer, and wine. And this was anciently in use as well in the houses of noblemen, as in the king's court.

BOVERIUM, or *boveria*. An ox-house. *Mon. Angl. par.* 2. *fol.* 210.

BOVETTUS. A young steer or castrated bullock. *Paroch. Antiq. p.* 287.

BOVICULA. An heifer or young cow; which, in the East Riding of Yorkshire, is called a *whee*, or *whey.*

BOUGH OF A TREE. Seisin of land given by it, to hold of the donor, *incapite. Mad. Exch.* i. 62. See tit. *Entry.*

BOUND, or *boundary*, *bunda.*] The utmost limits of land, whereby the same is known and ascertained. See 4 *Inst.* 318, and title *Abuttals.*

BOUND BAILIFFS. See title *Bailiffs.*

BOUNTIES ON EXPORTATION. See title *Navigation Act.*

BOUNTY OF Q. ANNE, for maintaining poor clergymen. See *First Fruits.*

BOW-BEARER. An under officer of the *forest*, whose office is to oversee, and true inquisition make, as well of sworn men as unsworn, in every bailiwick of the forest; and of all manner of trespasses done, either to vert or venison, and cause them to be presented, without any concealment, in the next court of attachment, &c. *Crompt. Juris. fol.* 201.

BOWYERS. One of the ancient companies of the city of London. By stat. 8 *Eliz. c.* 10, a *bowyer* dwelling in London, was to have always ready fifty *bows* of elm, witchhasle, or ash, well made and wrought, on pain of 10*s.* for every *bow* wanting; and to sell them at certain prices, under the penalty of 40*s.* And by stat. 12 *E.* 4. *c.* 2. parents and masters were to provide for their sons and servants, a *bow* and two *shafts*, and cause them to exercise shooting, on pain of 6*s.* 8*d.* &c. See also *stat.* 33 *H.* 8. *c.* 6; and title *Game.*

BRACELETS. Hounds, or rather beagles of the smaller and slower kind. *Pat.* 1 *Rich.* 2. *p.* 2. *m.* 1.

BRACENARIUS, Fr. *braconnier.*] A huntsman, or master of the hounds. *Anno* 26 *Ed.* 1. *Rot.* 10. *in dorso.*

BRACETUS. A hound: *brachetus* is in Fr. *brachet*, braco *canis sagax*, *indagator leporum*; so *braco* was properly the large fleet hound; and *brachetus*, the smaller hound; and *brachete* the bitch of that kind. *Monastic. Ang. tom.* 2. *pag.* 283.

BRACINUM. A brewing: the whole quantity of ale brewed at one time, for which *tolsestor* was paid in some manors. *Brecina*, a brew-house, *MS.*

BRANDING *in the hand*, or *face*, with a hot iron. A punishment inflicted by law, for various offences, after the offender hath been allowed *clergy.* See title *Clergy*, benefit of.

BRANDY. A liquor made chiefly in France, and extracted from the lees of wine. In the *stat.* 20 *Car.* 2. *cap.* 1. upon an argument in the Exchequer, *Anno* 1668, whether *brandy* were a *strong water* or *spirit*, it was resolved to be a *spirit*: but in the year 1669, by a grand committee of the whole House of Commons, it was voted to be a *strong water* perfectly made. See the *stat.* 22 *Car.* 2. *cap.* 4.—See titles *Customs*, *Excise*, *Navigation Act.*

BRASIUM, Malt: in the ancient statutes *brasiator* is taken for a brewer, from the Fr. *brasseur*; and at this day is used for a maltster or malt-maker. *Paroch. Antiq. p.* 496.

BRASS, Is to be sold in open friars and markets, or in the owners' houses, on pain of 10*l.* and to be worked according to the goodness of metal wrought in London, or shall be forfeited: also searchers of *brass* and pewter are to be appointed in every city and borough by head officers, and in counties by justices of peace, &c. and in default thereof, any other person skilful in that mystery, by oversight of the head officer, may take upon him the search of defective *brass*, to be forfeited, &c. *Stat.* 19 *H.* 7. *c.* 6. *Brass* and pewter, bell-metal, &c. shall not be sent out of the kingdom, on pain of forfeiting double value, &c. *Stats.* 33 *Hen.* 8. *c.* 7. 2 & 3 *Ed.* 6. *c.* 37.

BRAWLING OR QUARRELLING IN THE CHURCH. See *Church*, *Churchwarden.*

BREACH OF CLOSE. See title *Trespass.*

BREACH OF COVENANT. The not performing of any covenant, expressed or implied, in a deed; or the doing an act, which the party covenanted not to do. See title *Covenant.*

BREACH OF DUTY. The not executing any office, employment, or trust, &c. in a due and legal manner.

BREACH OF PEACE. Offences against the *public peace*, are either such as are an *actual* breach of the peace, or constructively so, by aiding to make others break it. See title *Peace.*

BREACH or POUND, The breaking any pound or place where cattle or goods distrained are deposited, to rescue such distress. See title *Distress; Pound-breach.*

BREACH OF PRISON. See title *Escape; Prison-breaking.*

BREACH OF PROMISE, *violatio fidei.*] A breaking or violating a man's word, or undertaking; as where a person commits any breach of the condition of a bond, or his covenant, &c. entered into, in an action on the bond, &c. the *breach* must be assigned. In debt on bond, conditioned to give account of goods, &c. a *breach* must be alleged, or the plaintiff will have no cause of action. 1 *Saund.* 102. See titles *Bond, Condition, Covenant.*

BREAD AND BEER. The assise of *bread, beer,* and *ale,* &c. is granted to the Lord Mayor of London and other corporations. Bakers &c. not observing the assise to be set in the pillory. *Stat.* 51 *H.* 3. *st.* 1. *Ord. Pistor. &* 51 *H.* 3. *st.* 6. *Vide* 2 *&* 3 *Ed.* 6. *c.* 15.

By *Stat.* 31 *Geo.* 2. *c.* 29. (explained and restrained as to time of prosecution to seven days, 33 *Geo.* 3. *c.* 37.) containing regulations concerning the assise of bread, and to prevent adulteration, so much of *stat.* 51 *H* 3. *st.* 6. intitled, *assisa panis & cervisiæ,* as relates to the assise of bread, and the *stat.* 8 *Ann. c.* 18., and all amendments by subsequent acts are *repealed.*—The weight of the peck loaf, when well baken, is fixed at 17*lb.* 6*oz. Avdps.* and the rest in proportion. —The weight of a sack of flour, at 2 *cwt.* 2 *qrs.* or 280*lb. net,* which is to produce twenty peck loaves, weighing 347*lbs.* 8*oz.* So that 3*lb.* 6*oz.* is added to the weight of the flour by the materials of each peck loaf, when baked. And see farther *stat.* 32 *Geo.* 2. *c.* 18. how penalties not appropriated by *stat.* 31 *Geo.* 2. *c.* 29. shall be distributed. See also *stat.* 3 *Geo.* 3. *c.* 6. (for Scotland) &c. and *c.* 11. wherein there are farther regulations concerning the assise of bread, and for preventing the adulteration thereof.

See also *stat.* 13 *Geo.* 3. *c.* 62. as to *standard wheaten bread.* And see title *Corn.*

See the Statute 36 *Geo.* 3. *c.* 22. amended by 41 *Geo.* 3. (*U. K.*) *c.* 12. respecting inferior sorts of bread—37 *Geo.* 3. *c.* 98. 38 *Geo.* 3. *c.* 62, *& c.* v. 39 *&* 40. *Geo.* 3. *c.* 74. *& c.* 97. and 45 *Geo.* 3. *c.* xxiii. as to the assise and price of bread in London and its environs, but which are all repealed by a local act, 55 *Geo.* 3. *c.* xcix. As to the assise of bread out of London, &c. see 31 *Geo.* 2. *c.* 29. 13 *Geo.* 3. *c.* 62. 37 *Geo.* 3. *c.* 98. 45 *Geo.* 3. *c.* 23. *&* 53 *Geo.* 3. *c.* 116. See also 39 *&* 40 *Geo.* 3. *c.* 18. *& c.* 74. 41 *Geo.* 3. *st.* 1. *c.* 16. 17. and 41 *Geo.* 3. (*U. K.*) *c.* 1. 2. for temporary regulations to prevent the sale of bread till baked twenty-four hours.

By *stat.* 34 *Geo.* 3. *c.* 61. bakers are prohibited from carrying on their trade during Sundays, except at certain hours.

Under these statutes, bread deficient in weight or quality, may be seized by *justices, mayors, &c.* and bread is to be marked by the bakers according to its quality, W. for wheaten, and H. for household.

BREAD OF TREET, or TRITE, *panis tritici.*] Is bread mentioned in the statute 51 *Hen.* 3. of assise of bread and ale, wherein are particularised *wastel-bread, cocket-bread,* and *bread of treet,* which answer to the three sorts of bread mentioned in the statute of Anne, called white, wheaten, and house-hold bread. In religious houses they heretofore distinguished bread by these several names, *panis armigerorum, panis conventualis, panis puerorum, & panis famulorum. Antiq. Not.*

BREAKING OF ARRESTMENT, Is an action wherein it is narrated, that though arrestment was laid on, payment, nevertheless, was made; the pursuer therefore concludes, that the breaker should refound him, and besides, should be punished according to law. *Scotch Dict.*

BRECCA, from the Fr. *breche.*] A breach or decay. In some ancient deeds there have been covenants for repairing *muros &* breccas, *portas & fossata, &c.*——*De* brecca *aquæ inter* Woolwich *&* Greenwich *superviend. Pat.* 16 *Ric.* 2. A duty of 3*d per* ton on shipping was granted for amending and stopping of *Dagenham breach,* by *stat.* 12 *Ann. c.* 17.

BRECINA. Vide *Bracinum.*

BREDE. A word used by Bracton for broad: as too large and too *brede,* is proverbially too long and too broad. *Bract. lib.* 3. *tract.* 2. *c.* 15. There is also a Saxon word *brede* signifying deceit. *Leg. Canut. c.* 44.

BREDWITE, Sax. *bread* and *wite.*] A fine or penalty imposed for defaults in the assise of bread: to be exempt from which was a special privilege granted to the tenants of the honour of Wallingford by king Henry II. *Paroch. Antiq.* 114.

BREHON and BREHON LAW. See tit. *Ireland.*

BREISNA. Wether-sheep. *Mon. Angl.* 1. *c.* 406.

BRENAGIUM. A payment in bran, which tenants anciently made to feed their lord's hounds. *Blount.*

BRETOYSE, or BRETOISE. The law of the marches of Wales, in practice among the ancient Britons.

BREVE, A writ; by which a man is summoned or attached to answer in action; or whereby any thing is commanded to be done in the King's courts, in order to justice, &c. It is called *breve* from the brevity of it; and is directed either to the chancellor, judges, sheriffs, or other officers. *Bract. lib.* 5. *Tract.* 5. *cap.* 17. See *Skene de verb. Breve,* and this Dict. tit. *Writ.*

BREVE PERQUIRERE. To purchase a writ or license of trial, in the King's courts, by the plaintiff, *qui* breve *perquisivit*; and hence comes the usage of paying 6*s.* 8*d.* fine to the king, where the debt is 40*l.* and of 10*s.* where the debt is 100*l.* &c. in suits and trials for money due upon bond, &c.

BREVE DE RECTO. A writ of right, or license for a person ejected out of an estate, to sue for the possession of it when detained from him. See tit. *Right.*

BREVIA TESTATA. It is mentioned by the feodal writers. Vide *Feud. l.* 1. 64. Our modern deeds are in reality nothing more than an improvement or amplification of the *brevia testata.* See tit. *Deed.*

BREVIBUS & ROTULIS LIBERANDIS. A writ or mandate to a sheriff to deliver unto his successor the county, and the appurtenances, with the rolls, briefs, remembrances, and all other things belonging to that office. *Reg. Orig. fol.* 295.

BREWERS.—As to the dimensions of their casks, see tit. *Coopers.*—By *stat.* 24 *Geo.* 3. *st.* 2. *c.* 41. brewers of strong and small beer are to take out annual licenses from the officers of excise.—Brewers are by this and other acts subject to various regulations under the excise laws.—Duties of excise are imposed on beer and ale by various acts.—Notice to the Excise Office must be given, and entry made, of places for brewing beer and ale. See *stats.* 12 *C.* 2. *c.* 24. 15 *C.* 2. *c.* 11; and 5 *Geo.* 3. *c.* 43.—See also *stats.* 1. *W. & M. st.* 1. *c.* 24. 7 *&* 8 *W.* 3. *c.* 30. 8 *&* 9 *W.* 3. *c.* 19. 33 *Geo.* 3. *c.* 23. 42 *Geo.* 3. *c.* 38. to prevent frauds by brewers.—Private persons may brew beer in their own houses, for their family, or to give away, but must not lend their brewhouse for other purposes, on penalty of 50*l.* *Stat.* 22 *&* 23 *Car.* 2. *c.* 5. § 10. —By *stat.* 32 *Geo.* 3. *c.* 8. § 1. common brewers must not sell beer in less quantities than casks of 4½ gallons.—By a by-law of the common council, brewers' drays shall not be in the streets of London after eleven in the forenoon in summer, and one in winter. 2 *Stra.* 1085. *Hardw.* 405. *Andr.* 91.

BRIBERY, From the Fr. *briber,* to devour or eat greedily.] Is a high offence, where a person, in a judicial place, takes any fee, gift, reward, or brocage, for doing his office, or by colour of his office, but of the king only. 3 *Inst.* 145. *Hawk. P. C.* i. *c.* 67.

Taken more largely, it signifies the receiving, or offering, any undue reward, to or by any person concerned in the administration of public justice, whether judge, officer, &c. to influence his behaviour in his office; and sometimes it signifies

the taking or giving a reward for appointing another to a public office. 3 *Inst.* 9. 4 *Comm.* 139. To take a bribe of money, though small, is a great fault; and judges' servants may be punished for receiving bribes. If a judge refuse a bribe offered him, the offerer is punishable. *Fortescue, cap.* 51.

*Bribery* in inferior judicial or ministerial officers is punished by fine and imprisonment, which may also be inflicted on those who *offer* a bribe, though not taken. 4 *Comm.* 140. 3 *Inst.* 147. Bribery in a judge was anciently looked upon as so heinous an offence, that it was sometimes punished as high treason; and it is at this day punishable with forfeiture of office, fine, and imprisonment; and chief Justice Thorpe was hanged for this offence in the reign of Edw. III.—And by a *stat.* 11 *H.* 4. all judges and officers of the king, convicted of bribery, shall forfeit treble the bribe, be punished at the king's will, and be discharged from the king's service for ever. 4 *Comm.* 140. cites 3 *Inst.* 146.—In the reign of King James I. the earl of Middlesex, lord treasurer of England, being impeached by the commons for refusing to hear petitions referred to him by the king, till he had received great *bribes*, &c. was, by sentence of the lords, deprived of all his offices, and disabled to hold any for the future, or to sit in parliament; also he was fined fifty thousand pounds, and imprisoned during the king's pleasure. 1 *Hawk. P. C. c.* 67. § 7. but the fine was remitted on the accession of C. I. and the proceeding appears to have been instigated rather by revenge than justice. In 11th King George I. the lord chancellor was impeached by the commons with great zeal, for bribery, in selling the places of masters in chancery, for exorbitant sums, and other corrupt practices, tending to the great loss and ruin of the suitors of that court: and the charge being made good against him, being before divested of his office, he was sentenced by the lords to pay a fine of thirty thousand pounds, and imprisoned 'till it was paid. See 6 *S. T.* 112.

By *stat.* 12 *R.* 2. *c.* 2. the chancellor, treasurer, justices of both benches, barons of the exchequer, &c. shall be sworn not to ordain or nominate any person in any office for any gift, brocage, &c. And the sale of offices concerning the administration of public justice, &c. is prohibited on pain, forfeiture, and disability, &c. by 5 & 6 *Ed.* 6. *c.* 16.—In the construction of the last mentioned statute, it has been resolved that the offices of the ecclesiastical courts are within the meaning of that act, as well as the offices in the courts of Common law; but no office in fee is within the statute, and it hath been adjudged, that one who contracts for an office, contrary to the purport of the said statute 5 & 6 *Ed.* 6. *c.* 16. is so disabled to hold the same, that he cannot be restored to a capacity of holding it by any grant or dispensation whatsoever. *Cro. Jac.* 269. 386. 1 *Hawk. P. C. c.* 67.—It is said the stat. does not extend to the plantations. *Salk.* 411. 1 *Hawk. P. C. c.* 67. § 5.

To bribe persons either by giving money or promises, to vote at elections of members of corporations, which are erected for the sake of publick government, is an offence for which an information will lie. 12 *Mod.* 314. 2 *Ld. Raym.* 1377. 1 *Blackst.* 383.—But the Court will grant such information very cautiously, since the additional penalties by stat. 1 *Black.* 380. See title *Parliament.*

An attempt to induce a man to advise the king, under the influence of a bribe, is criminal, though never carried into execution. 4 *Burr.* 2499.—Offering money to a privy councillor, to procure the reversion of an office in the gift of the crown, has been adjudged a misdemeanor and punishable by information. *Rex* v. *Vaughan*, 1 *Hawk. P. C. c.* 67. § 7: *in note.*

As to officers of the Customs, &c. taking *bribes*, See tit. *Customs.*

Taking money to excuse persons from serving on juries subjects the offender to a fine, not exceeding ten pounds, at the discretion of the judge. *Stat.* 3 *Geo.* 2. *c.* 25. *sect.* 6.

As to bribery in elections to parliament. See title *Parliament.* VI. (B. 3.) and further in general tit. *Extortion.*



BRIBOUR, Fr. *bribeur.*] Seems to signify in some of our old statutes, one that pilfers other men's goods. 28 *Ed.* 2. *cap.* 1.

BRICOLLS. An engine mentioned in *Blount* by which walls were beaten down.

BRICKS AND TILES.—By *statute* 17 *E.* 4. *c.* 4. the earth for tiles is to be digged and cast up before the 1st of November yearly, stoned and turned before the 1st of February, and wrought before the 1st of March following.—Every common tile must be 10½ inches long 6¼ broad and ½ an inch thick.—Roof tiles 13 inches long, &c. And persons selling tiles contrary hereto, forfeit double the value, and are liable to fine.

By *stat.* 17 *Geo.* 3. *c.* 42. bricks when burnt are to be 8½ inches long, 2½ thick, and 4 wide.—Contracts for ingrossing and enhancing the price of bricks made void, and a penalty of 20*l.* imposed on the parties, and directions are given as to pan-tiles.

BRICKS AND TILES, Are liable to duties of excise and to regulations for securing that duty in Great Britain and Ireland. See 24 *Geo.* 3. *st.* 2. *c.* 24. 25 *Geo.* 3. *c.* 66. 34 *Geo.* 3. *c.* 15. 37 *Geo.* 3. *c.* 14. 15. 41 *Geo.* 3 *U. K. c.* 91. 43 *Geo.* 3. *c.* 69. 45 *Geo.* 3. *c.* 30. *&c.*

BRIDGE, *pons.*] A building of stone or wood erected across a river, for the common ease and benefit of travellers. Public bridges, which are of general convenience, are of common right to be repaired by the whole inhabitants of that county in which they lie. *Hale's P. C.* 143. 13 *Co.* 33. *Cro. Car.* 365.

Where a particular district re-built a foot-bridge over a more convenient part of the stream, and converted it into a bridge for horses, carts and carriages; as the district was not bound by custom to build or repair such a bridge, but a foot-bridge only, and as they built quite a different bridge in a different place, which proved of common public utility to the county, the *County*, and not the district, are bound to repair it. *Burr.* 2594. *Blackst.* 685.

But a corporation aggregate, either in respect of a special tenure of certain lands, or in respect of a special prescription; also any other person, by reason of such a special tenure, may be compelled to repair them. *Hale's P. C.* 143. *Dalt. c.* 14. 6 *Mod.* 307.

A tenant at will of a house which adjoins to a common bridge, although he is not bound as between landlord and tenant to repair the house, yet if it become dangerously ruinous to the necessary intercourse of the bridge, the tenant is bound by reason of his possession, to repair it so far as to prevent the public being prejudiced. *Ld. Raym.* 856.

At Common law those who are bound to repair public bridges, must make them of such heighth and strength as shall be answerable to the course of the water; and they are not trespassers if they enter on any land adjoining to repair them, or lay the materials necessary for the repairs thereon. *Dalt. cap.* 16. If a man erects a bridge for his own use, and the people travel over it as a common bridge, he shall notwithstanding repair it: though a person shall not be bound to repair a bridge, built by himself for the common good and public convenience, but the county must repair it. 2 *Inst.* 701. 1 *Salk.* 359. Where the inhabitants of a county are indicted for not repairing a bridge, they must set forth who ought to repair the same, and traverse that they ought. 1 *Vent.* 256. Unless perhaps, where the real question is, whether it be a public or a common bridge.

A vill may be indicted for a neglect in not repairing a bridge; and the justices of peace in their sessions may impose a fine for defaults. And any particular inhabitant of a county, or tenant of land charged to repairs of a bridge, may be made defendants to an indictment for not repairing it, and be liable to pay the fine assessed by the court for the default of the repairs, who are to have their remedy at law for a contribution from those who are bound to bear a proportionable share of the charge. 6 *Mod.* 307.

If a manor is held by tenure of reparing a bridge or highway, which manor afterwards comes into several hands, in such case every tenant of any parcel of the demesnes and services, is liable to the whole charge, but shall have contribution of the rest: and this though the lord may agree with the purchasers to dicharge them of such repairs, which only binds the lord, and doth not alter the remedy which the Public hath. 1 *Danv. Abr.* 744. 1 *Salk.* 358.

So if a manor, subject to such charge, comes into the hands of the crown, yet the duty upon it continues; and any person claiming afterwards under the crown, the whole manor, or any part thereof, shall be liable to an indictment or information, for want of due repairs. 1 *Salk.* 358.

If part of a bridge lie within a franchise, those of the franchise may be charged with the repairs for so much: also, by a special tenure, a man may be charged with the repairs of one part of a bridge, and the inhabitants of a county are to repair the rest. 1 *Hawk. P. C. c.* 77. § 2. *Raym.* 384, 385.

Indictments for not repairing of bridges, will not lie but in case of common bridges on highways; though it hath been adjudged they will lie for a bridge on a common footway. *Mod. Cas.* 256. Not keeping up a ferry, being a common passage for all the King's people, is indictable, as well as not keeping up bridges. 1 *Salk.* 12.

By *stat.* 22 *H.* 8. *c.* 5. all householders dwelling in any county or town, whether they occupy lands or not: and all persons who have land in their own possession, whether they dwell in the same county or not, are liable to be taxed as inhabitants, towards the repairs of a public bridge. Where it cannot be discovered who ought to repair a bridge, it must be presented by the grand jury in quarter-sessions; and after inquiry, and the order of sessions upon it, the justices may send for the constables of every parish, to appear at a fixed time and place, to make a tax upon every inhabitant, &c. but it has been usual, in the levying of money for repairs of bridges, to charge every hundred with a sum in gross, and to send such charge to the high constables, of each hundred, who send their warrants to the petty constables, to gather it, by virtue whereof they assess the inhabitants of parishes in particular sums, according to a fixed rate, and collect it; and then they pay the same to the high constables, who bring it to the sessions.

This method of raising money was long observed; but by stat. 1 *Ann. cap.* 18. justices in sessions, upon presentment made of want of reparations, are to assess every town, parish, &c. in proportion, towards the repairs of a bridge; and the money assessed is to be levied by the constables of such parishes, &c. and being demanded, and not paid in ten days, the inhabitants shall be distrained; and when the tax is levied, the constables are to pay it to the high constable of the hundred, who is to pay the same to such persons as the justices shall apppoint, to be employed according to the order of the justices, towards repairing of the bridge: and the justices may allow any person concerned in the execution of the act, 3*d. per* pound out of the money collected. All matters relating to the repairing and amending of bridges, are to be determined in the county where they lie, and no presentment or indictment shall be removed by *certiorari*. And by this statute, the evidence of the inhabitants of those places where the bridges are in decay, shall be admitted at any trial upon an information or indictment, &c.

Where the inhabitants of a county are liable to the repair of a public bridge, they are also liable to repair 300 feet of the highway at each end of the bridge. *R.* v. *Inhabitants of the west riding of Yorkshire.* 7 *E. R.* 388.

The county or riding is liable to the repair of a bridge built by trustees under a turnpike act, there being no special provision for exonerating them from the common law liability, or transferring it to others, though the trustees were enabled to raise tolls for the support of the roads. 2 *E. R.* 342.

The county is liable to repair a bridge built in the highway and used by the public above 40 years, though originally erected for the convenience of an individual. 2 *E. R.* 356 *n.* See *R.* v. *Buckinghamshire inhabitants.* 12 *E. R.* 192.

By 14 *Geo.* 2. *c.* 33. the justices at their general sessions, may purchase or agree with persons for any piece of land, not above one acre, near to any county-bridge, in order to enlarge or more conveniently rebuild it; and the ground shall be paid for out of the money raised by statute of 12 *Geo.* 2. *c.* 29. for better assessing, collecting and levying of county rates, &c. See tit. *County-rates.*

By the said *stat.* 12 *Geo.* 2. *c.* 29. § 14. when any public bridges, &c. are to be repaired at the expense of the county, the justices at their general or quarter sessions, after presentment made by the grand jury of their want of reparation, may contract with any person for rebuilding or repairing the same, for any term not exceeding 7 years, at a certain annual sum.—They are to give public notice of their intention to make such contracts, which are to be made at the most reasonable prices, and security given by the contractors for performance; which contracts are to be entered with the clerk of the peace.

43 *Geo.* 3. *c.* 51. surveyors of county bridges, &c. in England, empowered to get materials for the repair of bridges in the same manner as surveyors of highways, under 13 *Geo.* 3. *c.* 78.—Quarter sessions may widen and improve or alter the situation of county bridges, &c. *Id.* § 2.—Tools and materials provided by the quarter sessions vested in the surveyor. *Id.* § 3.—Inhabitants of counties may sue for damage done to bridges in the name of surveyors. *Id.* § 4.—What sort of bridges inhabitants of counties shall be liable to repair. *Id.* § 5.—Act shall not extend to bridges repaired by tenure. § 7.

No persons are compellable to make a new bridge but by act of parliament: and the inhabitants of the whole county cannot, of their own authority, change a bridge from one place to another.

If a man has toll for men and cattle, passing over a bridge, he is to repair it; and toll may be paid in these cases, by prescription, or statute.

An action will not lie by an individual against the inhabitants of a county for an injury sustained from a county bridge being out of repair. *Russell* v. *Men of Devon*, 2 *T. R.* 667.

BRIDGE-MASTERS. There are *bridge-masters* of London-bridge, chosen by the citizens, who have certain fees and profits belonging to their office, and the care of the said *bridge*, &c. *Lex. Londin.* 283.



BRIEF, *brevis.*] An abridgement of the client's case, made out for the instruction of counsel, on a trial at law; wherein the case of the party is to be *briefly* but fully stated, the proofs must be placed in due order, and proper answers made to whatever may be objected against the client's cause, by the opposite side; and herein great care is requisite, that nothing be omitted to endanger the cause.

An attachment has been granted against a party and his attorney for surreptitiously getting possession of the brief of a counsel on the other side, and applying the same to an improper purpose in his defence. See *Bateman* v. *Conway*, 1 *Bro. P. C.* 519. 8vo. ed.

Though a brief is not of itself evidence against the party for whom it is prepared, yet, as a discovery of the secrets and merits of his case, may be productive of perjury, or subornation of perjury, and thereby obstruct the justice of the court in which the suit is depending; the obtaining of it in a surreptitious manner is an offence highly deserving censure and punishment. *Id.*

BRIEF AL 'EVESQUE. A writ to the bishop, which in *Quare Impedit*, shall go to remove an incumbent, unless he recover or be presented *pendente lite.* 1 *Keb.* 386.

BRIEF OUT OF THE CHANCERY, Is a writ or command from the King to a judge, to examine by an inquest, whether a man be nearest heir. *Scotch Dict.*

BRIEF OF DISTRESS, Is a writ out of the chancery, after decree obtained against any landlord to distress his readiest goods, according to the old custom, now obsolete. *Scotch Dict.*

BRIEF OF MORTANCESTRY, Is that which is used for entering of all heirs of defuncts. *Scotch Dict.*

BRIEFS, or licenses to make collection for repairing churches, restoring loss by fire, &c. See tit. *Church-wardens*, III. 1.

BRIGA, Fr, *brigue.*] Debate or contention.

BRIGANDINE. Fr. Lat. *lorica.*] A coat of mail or ancient armour, consisting of many jointed and scale-like plates, very pliant and easy for the body. This word is mentioned in *Stat. 4 & 5 P. & M. cap.* 2. and some confound it with *haubergeon*; and others with *brigantine*, a long but low-built vessel, swift in sailing.

BRIGANTES. The antient name for the inhabitants of Yorkshire, Lancashire, bishoprick of Durham, Westmorland and Cumberland. *Blount.*

BRIGBOTE, or BRUG-BOTE, Sax. *brig. pontus*, and *bote, compensatio.*] The contribution to the repair of bridges, [walls and castles] which, by the old laws of the Anglo-Saxons, might not be remitted; but, by degrees, immunities were granted by our kings, even against this duty; and then to be quit of *brig-bote* signified to be exempt from tribute or contribution towards the mending or re-edifying of bridges. *Fleta, lib.* 1. *c.* 47. *Selden's Titles of Honour, fol.* 622.—*Spelm* v. *Brigbote* and *Burgbote.*

BRISTOL. A great city, famous for trade: the mayor, burgesses, and commonalty of the city of Bristol are conservators of the river Avon, from above the bridge there, to King-road, and so down the Severn to the two islands called Holmes; and the mayor aud justices of the said city may make rules and orders for preserving the river, and regulating pilots, masters of ships, &c. Also for the government of their markets: and the streets are to be kept clean and paved; and lamps or lights hung out at night. *Stat.* 11 & 12 *W.* 3. *c.* 23.—No person shall act as a broker in the city of Bristol, till admitted and licensed by the mayor and aldermen, &c. on pain of forfeiting 500*l.* and those who employ any such, to forfeit 50*l.* &c. by *stat.* 3 *Geo.* 2. *c.* 31.—By the *stat.* 22 *Geo.* 2. *c.* 20, the *stat.* 11 & 12 *W.* 3. is rendered more effectual, so far as it relates to the paving and enlightening the streets; and divers regulations are made in relation to the hackney-coachmen, halliers, draymen, and carters, and the markets and sellers of hay and straw, within the said city, and liberties thereof.

BROCAGE, *brocagium.*] The wages or hire of a broker, which is also termed *brokerage.* 12 *R.* 2. *c.* 2.

BROCELLA. This word, as interpreted by Dr. Thoroten, signifieth a wood; and it is said to be a thicket or covert of brushes and brush-wood, from the obselete Lat. *brusca, terra* bruscosa et brocia, Fr. *broce, brocelle*: and hence is our *brouce* of wood, and *brousing* of cattle.

BROCHA. Fr. *broche.*] An awl, or large packing-needle. A spit in some parts of England is called a *broche*; and from this word comes to pierce or *broach* a barrel.

BROCHIA. A great can or pitcher. *Bract. lib.* 2. *tract.* 1. *cap.* 6. Where it seems that he intends *saccus* to carry dry, and *brochia* liquid things.

BRODEHALFPENY, or BROADHALFPENY. See *Bordhalfpeny.*

BROKERS, *broccatores, broccarii et auxionarii.*] Are those that contrive, make, and conclude bargains and contracts between merchants and tradesmen, in matters of money and merchandize, for which they have a fee or reward. These are *Exchange brokers*; and by the *stat.* 10 *R.* 2. *cap.* 1. they are called *broggers*; also *broggers of corn* is used in a proclamation of Queen Elizabeth, for badgers. *Baker's Chron. fol.* 411. The original of the word is from a trader broken, and that from the Sax. *broc*, misfortune, which is often the true reason of a man's breaking; so that the name of broker came from one who was a broken trader by misfortune, and none but such were formerly admitted to that employment; and they were to be freemen of the city of London, and allowed and approved by the lord mayor and aldermen, for their ability and honesty.

By the *stat. c.* 16. they are to be annually licensed in London by the lord mayor and aldermen, who administer an oath, and take bond for the faithful execution of their offices: if any persons shall act as brokers, without being thus licensed and admitted, they shall forfeit the sum of 500*l.* And persons employing them 50*l.* and brokers are to register contracts, &c. under the like penalty: also brokers shall not deal for themselves, on pain of forfeiting 200*l.* they are to carry about them a silver medal, having the king's arms, and the arms of the city, &c. and pay 40*s.* a year to the chamber of the city.

As to brokers in Bristol, see tit. *Bristol.*—And as to *Pawnbrokers*, see that title. As to Brokers illegally dealing in the funds or stocks, who are usually known by the appellation of stock-jobbers, see title *Funds.*

BROK, An old sword or dagger.

BROSSUS. Bruised or injured with blows, wounds, or other casualty. *Cowel.*

BROTHEL-HOUSES, Lewd places, being the common habitations of prostitutes. A *brothelman* was a loose idle fellow; and a *feme bordelier* or *brothelier*, a common whore. And *borelman* is a contraction of *brothelman. Chaucer.* See *Bawdy House.*

BRUDBOTE. See *Brigbote.*

BRUERE, Lat. *erica.*] Signifies heath-ground; and *brueria*, briars, thorns, or heath, from the Sax. *brær, briar. Paroch. Antiq.* 620.

BRUILLUS. A wood or grove; Fr. *breil, breuil*, a thicket or clump of trees in a park or forest. Hence the abbey of Bruer, in the forest of Whichwood, in com. Oxon. and Bruel, Brehull, or Brill, a hunting seat of our ancient kings in the forest of Burnwood, in com. Bucks.

BRUILLETUS. A small coppice or wood.

BRUNETA. Properly *Burneta*, which see.

BRUSCIA, Seems to signify a wood. *Monast. tom.* 1. *pag.* 773.

BRUSUA and BRUSULA, Brouse or brushwood. *Mon. Angl. tom.* 1. *fol.* 773.

BUBBLES. The South-sea project, and various other schemes, similar in the end intended, that of defrauding the subject, though different as to the means, were called by the name of *bubbles.* The *stat.* 6 *Geo.* 1. *c.* 18. makes all unwarrantable undertakings, by unlawful subscriptions, subject to the penalties of a *præmunire.*—See title *Funds.*

BUCKLARIUM, A buckler. *Claus.* 26 *Ed.* 1. *m.* 8. *intus.*

BUCCSTALL, A toil to take deer, which, by the *stat.* 19 *Hen.* 7. *c.* 11, is not to be kept by any person that hath not a park of his own, under *penalties.* See also 3 *Jac.* 1. *c.* 13. There is a privilege of being quit of amerciaments for *buckstalls. Privileg. de Semplingham.* See 4 *Inst.* 306.

BUCKWHEAT. French wheat, used in many counties of this kingdom: in Essex, it is called *brank*; and in Worcestershire, *crap.* It is mentioned in the *stat.* 15 *Car.* 2. *c.* 5.

BUCINUS. A military weapon for a footman. *Tenures, pag.* 74.

BUGGERY, or *Sodomy*, Comes from the Italian *bugarone* or *buggerare*, and it is defined to be a carnal copulation against nature, and this is either by the confusion of species; that is to say, a man or a woman with a brute beast; or of sexes, as a man with a man, or man unnaturally with a woman. 3 *Inst.*

58. 12 *Co. Rep.* 36. This sin against God, nature, and the law, it is said, was brought into England by the Lombards. *Rot. Parl.* 50 *Ed.* 3. *numb.* 58. In ancient times, according to some authors, it was punishable with burning, though others say with burying alive: but at this day it is felony excluded clergy, and punished as other felonies, by *stat.* 25 *H.* 8. *cap.* 6. enforced by 5 *Eliz. c.* 17.

By the articles of the navy, (*Art.* 29. *stat.* 22 *Geo.* 2. *c.* 33.) If any person in the fleet shall commit the unnatural and detestable sin of buggery or sodomy, with man or beast; he shall be punished with death by the sentence of a court martial.

It is felony both in the agent and patient consenting, except the person on whom it is committed be a boy under the age of discretion; (which is generally reckoned at fourteen;) when it is felony only in the agent; all persons present, aiding and abetting to this crime, are all principals, and the statutes make it felony generally: there may be accessaries before and after the fact; but though none of the principal offenders shall be admitted to clergy, the accessaries are not excluded it. 1 *Hale's Hist. P. C.* 670.

In every indictment for this offence, there must be the words *rem habuit veneream et carnaliter cognovit*, &c. and of consequence some kind of penetration and emission must be proved; but any the least degree is sufficient. 1 *Hawk. P. C. c.* 4. The general words of these indictments are, that A. B. on such a day, at, &c. with force and arms, made an assault upon C. D. and then and there wickedly, devilishly, feloniously, and against the order of nature, committed the venereal act with the said C. D. and carnally knew him, and then and there wickedly, &c. did with him that sodomitical and detestable sin called buggery, (not to be named among Christians,) to the great displeasure of God, and disgrace of all mankind, &c. This crime is excepted out of our acts of general pardon.—This, says Blackstone, is a crime which ought to be strictly and impartially proved, and then as strictly and impartially punished. But it is an offence of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out: for, if false, it deserves a punishment inferior only to that of the crime itself.

BUILDINGS. If a house new built exceeds the ancient foundation, whereby that is the cause of hindering the lights or air of another house, action lies against the builder. *Hob.* 131. In London a man may place ladders or poles upon the ground, or against houses adjoining, for building his own; but he may not break ground: and builders of houses ought to have licence from the mayor and aldermen, &c. for a *board* in the streets, which are not to be incumbered. *Cit. Lib.* 30. 146. In new building of London it was ordained, that the outsides of the buildings be of brick or stone, and the houses for the principal streets to be four stories high, having, in the front, balconies, &c. by *stat.* 19 *Car.* 2. *c.* 3.

The laws for regulating of all buildings in the cities of London and Westminster, and other parishes and places in the weekly bills of mortality, the parishes of St. Mary-le-bone, and Paddington, St. Pancras, and St. Luke at Chelsea, for preventing mischiefs by fire, are reduced into one act by *stat.* 14 *Geo.* 3. *c.* 78. The regulations of this law being very minute and technical, we must refer the reader to the statute itself.—See title *Fire.*

BULL, *bulla.*] A brief or mandate of the pope or bishop of Rome, from the lead, or sometimes gold, seal affixed thereto, which Mat. Paris, *anno* 1237, thus describes: *In* bulla *domini papæ stat imago Pauli a dextris crucis in medio bullæ figurata et Petri a sinistris.* These decrees of the pope are often mentioned in our statutes, as 25 *Ed.* 3. 28 *H.* 8. *cap.* 16. 1 & 2 *P. & M. c.* 8. and 13 *Eliz. cap.* 2. They were heretofore used, and of force, in this land: but by the statute 28 *Hen.* 8. *c.* 16. it was enacted, That all bulls, briefs, and dispensations had or obtained from the bishop of Rome, should be void. And by *stat.* 13 *Eliz. c.* 2. (see *stat.* 23 *Eliz. c.* 1.) If any person shall obtain from Rome any bull or writing, to absolve or reconcile such as forsake their due allegiance, or shall give or receive absolution by colour of such bull, or use or publish such bull, &c. it is high treason. By 7 *Ann. c.* 21. § 1. 2. 3. this extends to Scotland. See *Rome, Papist.*

BULL AND BOAR. By the custom of some places, a parson may be obliged to keep a *bull and a boar* for the use of the parishioners, in consideration of his having tithes of calves and pigs, &c. 1 *Rol. Abr.* 559. 4 *Mod.* 241.

BULLIO SALIS. As much *salt* as is made at one *wealing* or *boiling*: a measure of salt, supposed to be twelve gallons. *Mon. Ang. tom.* 2.

BULLION, Fr. *billon.*] The ore or metal whereof gold is made: and signifies with us gold or silver in *billet*, in the mass before it is coined. *Anno* 9 *Ed.* 3. *st.* 2. *c.* 2. See titles *Coin; Money.* See 43 *Geo.* 3. *c.* 49.

BULTEL. The bran or refuse of meal after dressed: also the bag wherein it is dressed is called a *bulter*, or rather *boulter*. The word is mentioned in the statute *de assisâ panis et cervisiæ, anno* 51 *Hen.* 3. Hence comes *bulted* or *boulted bread*, being the coarsest bread.

BUNDLES. A sort of records of the Chancery, lying in the office of the Rolls; in which are contained, the *files* or bills and answers; of *hab. cor. cum causâ*; *certiorari's*; attachments, &c. *scire facias's*; certificates of statute-staple; extents and liberates; *supersedeas's*; bails on special pardons; bills from the Exchequer of the names of sheriffs; letters patent surrendered; and deeds cancelled; inquisitions; privy seals for grants; bills signed by the king; warrants of escheators; customers, &c.

BURCHETA, from the Fr. *berche.*] A kind of gun used in forests.

BURCIFER REGIS. Purse-bearer, or keeper of the king's privy purse. *Pat.* 17 *Hen.* 8.

BURDARE. To jest or trifle. *Mat. Paris, Addit. p.* 149.

BURGAGE TENURE. See title *Tenures*, III. 11.

Tenure in Burgage, is described by Glanvil, (*lib.* 7. *c.* 3.) and is expressly said by Littleton, § 162. to be but tenure in socage: And it is where the king or other person is lord of an ancient borough, in which the tenements are held by a rent certain. *Litt.* § 162. 163.

It is indeed only a kind of town-socage; as common socage by which other lands are holden, is usually of a rural nature. A borough is usually distinguished from other towns by the right of sending members to parliament, (see title *Borough*;) and where the right of election is by burgage-tenure, that alone is a proof of the antiquity of the borough. *Tenure in Burgage*, or *Burgage Tenure*, therefore, is, where houses, or lands which were formerly the site of houses, in an ancient borough, are held of some lord in common socage by a certain established rent. 2 *Comm.* 82.

The free socage in which these tenements are held seems to be plainly a remnant of Saxon liberty: which may also account for the great variety of customs affecting many of these tenements so held in ancient burgage, the principal and most remarkable of which is, that called *Borough-English.*—See that title.

Other special customs there are, in different burgage-tenures: as in some, that the wife shall be endowed of *all* her husband's tenements, and not of the third part only, as at common law. *Litt.* § 166.—In others that a man might (previous to *stat. H.* 8.) dispose of his tenements by will. *Litt.* § 167.—though this power of disposal was allowable in the Saxon times—a pregnant proof that these liberties of socage-tenure were fragments of Saxon liberty. 2 *Comm.* 84.

BURGAGE HOLDING in Scotch law is the tenure by which royal boroughs hold of the sovereign. The service is

watching and warding, and is done by the Burgesses within the territory of the borough, whether expressed in the charter or not. *Scotch Dict.*

BURG. A small walled town, or place of privilege, &c. See *Borough.*

BURGBOTE, from *burg, castellum,* and *bote, compensatio.*] Is a tribute or contribution towards the building or repairing of castles, or walls of a borough or city: from which divers had exemption by the ancient charters of the Saxon kings. *Rastal.* burg-bote *significat quietantium reparationis murorum civitatis vel* burgi. *Fleta, lib.* 1. *c.* 47. *Spelm.* v. *Burghbote.*

BURGESSES, *burgarii et burgenses.*] Properly men of trade, or the inhabitants of a borough or walled town; but this name is usually given to the magistrates of corporate towns.

In Germany, and other countries, they confound *burgess* and *citizen*; but we distinguish them, as appears by the *stat.* 5 *R.* 2. *c.* 4, where the classes of the commonwealth are thus enumerated, *count, baron, banneret, chivaleer de countée; citizein de citée; burgess de burgh.* See *Co. Lit.* 80. Those are also called *burgesses,* who serve in parliament for any borough or corporation. See title *Parliament.* Burgesses of our towns are called, in Domesday, the *homines* of the king, or of some other great man; but this only shows whose protection they were under, and is not any infringement of their *civil liberty. Squire, Ang. Sax. Gov.* 260. *n. Burgenses et homines burgorum et villarum, Madox. Excheq.* 1 *V.* 333. The aid of burghs, *ib.* 1 *V.* 600. 601. See title *Borough.*

BURGH-BRECHE, *Fidejussionis violatio.* A breach of pledge, *Spelm.*] It is used for a fine imposed on the community of a town, for a breach of the peace, &c. *Leg. Canuti, cap.* 55.

BURGHERISTHE or *burgberiche,* used in *Domesday-book* for a breach of the peace in a city. *Blount.*

BURGHBOTE. See *Burgbote.*

BURGMOTE. A court of a borough. *LL. Canuti, MS. cap.* 44.—*Berghmote* is different; which see.

BURGHWARE, *quasi burgiver.*] A citizen or *burgess.*

BURGLARY, *Burgi latrocinium*; by our ancient law called *bamesecken,* as it is in Scotland to this day. 4 *Comm.* 233.] A Felony at common law, in (1.) *breaking and entering* (2.) the *mansion house* of another, or the walls or gates of a walled town, or *a church,* (see *Sacrilege,*) (3.) *in the night,* (4.) to the intent to commit some *felony* within the same; whether the felonious intent be executed or not. 1 *Hawk. P. C. c.* 38. § 1. 10. 4 *Comm.* 224.

It seems the plainest method to consider the subject according to the four parts of the above definition; and (5.) to add something on the punishment of this offence.

1. There must be both a *breaking* and an *entry* to complete this offence. 1 *Hawk. P. C. c.* 38. § 3.

Every entrance into the house by a trespasser is not a *breaking* in this case, but there must be an *actual breaking.* As if the door of a mansion-house stand open, and the thief enters, this is no breaking. So it is if the window of the house be open, and a thief, with a hook or other engine, draweth out some of the goods of the owner, this is no burglary, because there is no actual breaking of the house. But if the thief breaketh the glass of the window, and with a hook or other engine, draweth out some of the goods of the owner, this is burglary, for there was an actual breaking of the house. 3 *Inst.* 64. But the following acts amount to an actual breaking, *viz.* opening the casement, or breaking the glass window, picking open the lock of a door, or putting back the lock, or the leaf of a window, or unlatching the door that is only latched. 1 *Hal. H. P. C.* 552.

Having entered by a door which he found open, or having lain in the house by the owner's consent, unlatching a chamber-door; or coming down the chimney. 1 *Hawk. P. C. c.* 38. § 4.

If thieves pretend business to get into a house by night, and thereupon the owner of the house opens his door, and they enter and rob his house, this is burglary. *Kel.* 42.

So if persons designing to rob a house, take lodgings in it, and then fall on the landlord and rob him; or where persons intending to rob a house, raise a hue and cry, and prevail with the constable to make a search in the house, and having got in by that means, with the owner's consent, bind the constable, and rob the inhabitants; in both these instances they are guilty of burglary, for these evasions rather increase the crime. 1 *Hawk. P. C. c.* 38. § 5.

If a person be within the house, and steal goods, and then open the house on the inside, and go out with the goods, this is burglary, though the thief did not break the house. 3 *Inst.* 64. But this was not admitted to be law with any certainty; and therefore, by *stat.* 12 *Ann. st.* 1. *c.* 7. it is enacted, "that if any person shall enter into the mansion-house of another, by day or by night, without breaking the same, with an intent to commit felony, or being in such house shall commit any felony, and shall, in the night-time, *break* the said house to get out, he shall be guilty of burglary, and ousted of the benefit of clergy, in the same manner as if he had broken and entered the house in the night-time, with intent to commit felony."

Any the least *entry,* either with the whole, or with but part of the body, or with any instrument or weapon, will satisfy the word *entered* in an indictment for burglary: as if one do put his foot over the threshold, or his hand, or a hook, or pistol, within a window, or turn the key of a door which is locked on the inside, or discharge a loaded gun into a house, &c. 1 *Hawk. P. C. c.* 38. § 7. and the authorities there cited. —But where thieves had bored a hole through the door, with a *centre-bit,* and part of the chips were found in the inside of the house, yet as they had neither got in themselves, nor introduced a hand or instrument for the purpose of taking the property, the entry was ruled incomplete. *Id. ib. in note.*

When several come with a design to commit burglary, and one does it while the rest watch near the house, here his act is, by interpretation, the act of all of them. And, upon a like ground, if a servant confederating with a rogue, let him in to rob a house, it has been determined by all the judges, upon a special verdict, that it is burglary both in the servant and the thief. *Leach's Hawk. P. C.* i. *c.* 38. § 9. and *n.*

2. It is certainly a dangerous, if not an incurable fault, to omit the word *dwelling* house in an indictment for burglary in a house. But it seems not necessary or proper, in an indictment for burglary in a church, which, by all the ancient authorities, is taken as a distinct burglary. See 1 *Hawk. P. C. c.* 38. § 10. and the authorities there cited.

If a man hath two houses, and resides, sometimes in one of the houses, and sometimes in the other, if the house he doth not inhabit is broken in by any person in the night, it is burglary. *Poph.* 52.

A chamber in an inn of court, &c. where one usually lodges, is a mansion-house; for every one hath a several property there. But a chamber where any person doth lodge as an inmate, cannot be called his mansion; though, if a burglary be committed in his lodgings, the indictment may lay the offence to be in the mansion-house of him that let them. 3 *Inst.* 65. *Kel.* 83. If the owner of the house breaks into the rooms of his lodgers, and steals their goods, it cannot be burglary to break into his own house, but it is felony to steal their goods. *Wood's Inst.* 378. But see *contrà,* 1 *Hawk. P. C. c.* 38. § 13. 14. 15.

If the owner live under the same roof with the inmates, there must be a separate *outer* door, or the whole is the mansion of the owner; but if the owner inhabit no part of the house; or even if he occupy a shop, or a cellar in it, but do not sleep therein, it is the mansion of each lodger, although there be but one outer door. *Leach's Hawk. P. C. c.* 38. § 15. *in n.*—There being only one door, in common to all the

inhabitants, makes no difference, where the owner does not sleep in any part of the house, for, in that case, each apartment is a *separate mansion*. *Id. ib.* § 14. *n.*

Chambers in inns of court, &c. have separate outward doors, which are the extremity of obstruction, and are enjoyed as separate property, as estates of inheritance for life, or during residence.—So a house divided into separate tenements, with a distinct outward door to each, will be separate houses. *Id. ib.* § 13. *n.*

Part of a house divided from the rest, having a door of its own to the street, is a mansion-house of him who hires it. *Kel.* 84.

To break and enter a *shop*, not parcel of the mansion-house, in which the shop-keeper never lodges, but only works or trades there in the day-time, is not burglary, but only larceny; but if he, or his servant, usually or often lodge in the shop at night, it is then a mansion-house, in which a burglary may be committed. 1 *H. H. P. C.* 557. 558.—But see *stat.* 13 *Geo.* 3. *c.* 38. respecting burglary in the work-shops of the plate-glass manufactory, which is made single felony, and punishable with transportation for seven years.—If the shop-keeper sleep in any part of the building, however distinct that part is from the shop, it may be alleged to be his mansion-house; provided the owner does not sleep under the same roof also. *Leach's Hawk. P. C.* i. *c.* 38. § 16. *in n.*

A lodger in an inn hath a special interest in his chamber, so that if he opens his chamber-door, and takes goods in the house, and goes away, it seems not to be burglary. And where A. enters into the house of B. in the night, by the doors open, and breaks open a chest, and steals goods, without breaking an inner door, it is no burglary by the common law, because the chest is no part of the house; though it is felony, ousted of clergy, by statute 3 *W. & M. c.* 9; and if one break open a counter or cupboard, fixed to a house, it is burglary. 1 *Hale's Hist. P. C.* 554.

All out-buildings, as barns, stables, warehouses, &c. adjoining to a house, are looked upon as part thereof, and consequently burglary may be committed in them. And if the warehouse, &c. be parcel of the mansion-house, and within the same, though not under the same roof, or contiguous, a burglary may be committed therein.—But an out-house occupied with, but separated from the dwelling-house by an open passage, eight feet wide, and not within or connected by any fence, inclosing both, is not within the curtilage or homestall. *Leach's Hawk. P. C.* i. *c.* 38. § 12. *n.* 4 *Comm.* 225.

No burglary can be committed by breaking into any ground inclosed, or booth or tent, &c. but by *stat.* 5 & 6 *E.* 6. *c.* 9. clergy is taken from this offence. See *Larceny*, II. 1.

3. In the day-time there is no burglary.—As to what is reckoned night, and what day, for this purpose, anciently the day was accounted to begin only at sun-rising, and to end immediately upon sun-set; but the better opinion seems to be, that if there be day light, or *crepusculum*, enough begun or left to discern a man's face withal, it is no burglary. But this does not extend to moon-light; the malignity of the offence, not so properly arising from its being done in the dark, as at the dead of night, when sleep has disarmed the owner, and rendered his castle defenceless. 4 *Comm.* 224. 1 *Hawk. P. C. c.* 38. § 1.

4. The breaking and entry must be with a felonious intent, otherwise it is only a trespass; and it is the same whether such intent be actually carried into execution, or only demonstrated by some attempt, of which the jury is to judge. And therefore such breaking and entry, with intent to commit a robbery, a murder, a rape, or any other felony, is burglary. Nor does it make any difference, whether the offence were felony at common law, or only created so by statute. 4 *Comm.* 227. 1 *Hawk. P. C. c.* 38. § 18. 19.

One of the *servants* of the house opened his lady's chamber-door, which was fastened with a brass bolt, with design to commit a rape; and it was ruled to be burglary, and the defendant was convicted and transported. *Stran.* 481. *Kel.* 67.

A servant embezzled money intrusted to his care; left ten guineas in his trunk; quitted his master's service; returned; broke and entered the house in the night, and took away the ten guineas, and adjudged no burglary. *Leach's Hawk. P. C.* i. *c.* 38. § 18. *n.* *Sed vide* 1 *Show.* 53.

5. Every man's house is considered as his castle, as well for defence against injury and violence, as for repose. 4 *Co.* 92.—To violate this security is considered of so atrocious a nature, that the alarmed inhabitant, whether he be an owner or a mere inmate, (*Cro. Car.* 544.) is by *stat.* 24 *H.* 8. *c.* 5. expressly permitted to repel the violence by the death of the assailants, without incurring the penalties even of excusable homicide.—For a course of time, however, the life of a burglar was saved by the plea of clergy; but as the increase of national opulence furnished further temptations, additional terrors became necessary; therefore, by *stat.* 18 *Eliz. c.* 7. clergy is taken away from the *offence*; and by *stat.* 3 & 4 *W. & M. c.* 9. from accessaries before the fact.

Still further to encourage the prosecution of offenders, it is enacted by *stat.* 10 & 11. *W.* 3. *c.* 23. that whoever shall convict a burglar shall be exempted from parish and ward offices where the offence was committed. To this, *stats.* 5 *An. c.* 31. and 6 *Geo.* 1. *c.* 23. have superadded a reward of 40*l.* And if an accomplice, being out of prison, shall convict two or more offenders, he is entitled also to a pardon of the felonies as enumerated in the act. See titles *Accessary*, *Rewards*.

See likewise *stats.* 25 *Geo.* 2. *c.* 36. 27 *Geo.* 2. *c.* 3. and 18 *Geo.* 3. *c.* 19. which provide, That the charges of prosecuting and convicting a burglar shall be paid by the treasurer of the county where the burglary was committed, to the prosecutor and poor witnesses.

A certificate granted upon the conviction of an offender for burglary, exempts the party from serving the office of petty constable for a township within, but not co-extensive with the parish where the burglary was committed. 7 *East's Rep.* 174.

To remove one inducement to the frequent commission of burglaries, *stat.* 10 *Geo.* 3. *c.* 48. provides that buyers or receivers of stolen jewels, gold, or silver plate, where the stealing shall have been accompanied by burglary, (or robbery) may be tried and transported for fourteen years, before the conviction of the principal.

And to check this offence in its progress, *stat.* 23 *Geo.* 3. *c.* 88. enacts, That any person apprehended, having upon him any pick-lock key, &c. or other implement, with intent to commit a burglary, shall be deemed a rogue and vagabond, within *stat.* 17 *Geo.* 2. *c.* 5.

For further matter, see titles *Clergy*, *Felony*, *Larceny*.

BURI. Husbandmen. *Mon. Angl. tom.* 3. *p.* 183.

BURIALS. Formerly persons dying were to be buried in woollen on pain of 5*l. stat.* 30 *Car.* 2. *c.* 1. but this provision is repealed by 54 *Geo.* 3. *c.* 108.—34 *Geo.* 3. *c.* 11. repeals the duty imposed by 23 *Geo.* 3. *c.* 67. 25 *Geo.* 3. *c.* 75. on the registry of burials, &c. See *Registry*.

BURNETA. Cloth made of dyed wool. *A burnet* colour must be dyed; but *brunus color* may be made with wool without dyeing, which are called medleys or russets. *Lyndewood*. Thus much is mentioned because this word is sometimes wrote *bruneta*.

BURNING IN THE HAND. Vide *Branding*.

BURNING of houses, out-houses, malicious burnings, &c. See title *Arson*.—To the malicious burnings mentioned under title *Arson*, may be added, that by stat. 6 *Geo.* 1. *c.* 23. assaulting with intention to burn *the garments* of another in the public street, (by aqua-fortis, &c.) is punishable with transportation.—By stat. 22 & 23 *Car.* 2. *c.* 11. and 1 *Ann. st.* 2. *c.* 9.

to burn any *ship* to the prejudice of the owners or freighters; and by stat. 4 *Geo.* 1. *c.* 12. to the prejudice of the underwriters, is made felony without clergy.—By stat. 12 *Geo.* 3. *c.* 24. to burn the king's ships of war afloat or building, dock yards, or any of the arsenals or stores, &c. therein, is also made felony without clergy.—By stat. 27 *Geo.* 2. *c.* 15. *threatening*, by anonymous or fictitious letters, to burn houses, barns, &c. is felony without clergy.—As to penalty on servants setting fire to houses by negligence, see title *Fire*. See further titles *Felons, Navy, Ships, Insurance.*

BURNING TO DEATH. See titles *Felony, Treason.*

BURROCHIUM. A burrock, or small wear over a river, where wheels are laid for the taking of fish. *Cowel.*

BURROWS OR BURGH. By our ancient style, signifies caution. *Scotch Dict.*

BURSA. A purse. *Ex. Chart. vet.*

BURSARIA. The *bursery*, or exchequer of collegiate and conventual bodies; or the place of receiving and paying, and accounting by the *bursarii*, or *bursers*. *Parock. Antiq. p.* 288. But the word *bursarii* did not only signify the *bursars* of a convent or college; but formerly stipendiary scholars were called by the name of *bursarii*, as they lived on the *burse* or fund, or public stock of the University. At Paris, and among the *Cistertian monks*, they were particularly termed by this name. *Johan. Major. Gest. Scot. lib.* 1. *c.* 5.

BURSE, *bursa, cambium, basilica.*] An exchange or place of meeting of merchants.

BURSHOLDERS. See title *Headborough.*

BUSONES COMITATUS. *Bract. lib.* 3. *tract.* 2. *cap.* 1. Blount says *busones* is used for *barons.*

BUSSA. A ship. *Blount's Dict.*—The vessels used in the herring fisheries are called *Busses* and *Smacks.*

BUSSELLUS. A bushel; from *buza, butta, buttis*, a standing measure: and hence *butticella, butticellus, bussellus*, a less measure. Some derive it from the old Fr. *bouts*, leather continents of wine; whence come our leather *budget* and *bottles. Kennet's Gloss.*

BUSTA AND BUSTUS, *busca*, and *buscus*, &c. See *Brucia* and *Brusula.*

BUSTARD. A large bird of game, usually found on downs and plains, mentioned in the stat. 25 *Hen.* 8. *c.* 11. See title *Game.*

BUTCHERS. These were anciently compelled by statute to sell their meat at reasonable prices, or forfeit double the value, to be levied by warrant of two justices of peace, &c. And were not to buy any fat cattle to sell again, on pain of forfeiting the value; but this not to extend to selling calves, lambs, or sheep, dead, from one butcher to another. *Stat.* 23 *Ed.* 3. *c.* 6.—By stat. 2 & 3 *Ed.* 6. *c.* 15. (revived, continued, and confirmed by stat. 22 & 23 *Car.* 2. *c.* 19. which is now expired,) butchers (and others) conspiring to sell their victuals at certain rates, are liable to 10*l.* penalty, or twenty days' imprisonment for the first offence—20*l.* or pillory for the second—and 40*l.* or pillory, and loss of ear, for the third.—The offence to be tried by the sessions or leet.—See title *Conspiracy.*—By stat. 4 *H.* 7. *c.* 3. no butcher shall slay any beast within any walled town, except Carlisle and Berwick.—By the *ordinance for bakers, incert. temp.* butchers are not to sell swine's flesh meazled, or flesh dead of the murrain.—By stat. 3 *Car.* 1. *c.* 1. butchers are not to sell or kill meat on Sunday.—By stats. 1 *Jac.* 1. *c.* 22. and 9 *Ann. c.* 11. regulations are made as to the watering and gashing hides; and the selling putrefied and rotten hides by butchers; and by the said stat. 1 *Jac.* no butcher shall be a tanner, or currier. See further titles *Cattle, Forestalling, Victuals.*

BUTLER. See *Botiler.*

BUTLERAGE. See *Prisage.*

BUTHSCARLE, *butsecarl, buscarles, (buscarli et buthsecarli.)* Mariners or seamen. *Selden's Mare Clausum, fol.* 184.

BUTT, *buttica.*] A measure of wine, &c. well known among merchants, and containing 126 gallons of Malmsey wine, by stat. 1 *R.* 3. *c.* 13.

BUTTER AND CHEESE.—By stat. 9 *H.* 6. *c.* 8. a weigh of cheese shall contain 32 cloues, each cloue 7*lb.* = 2 *cwt.* Every kilderkin of butter shall contain 112 pounds, the firkin 56, and pot 14 pounds of good butter, (every pound 16 *oz.*) besides the casks and pots; and old bad butter shall not be mixed with good, nor shall butter be repacked for sale, which incurs forfeiture of double value, &c. And sellers and packers of butter shall pack it in good casks, and set their names thereon, with the weight of the cask, and butter, on pain of 10*s. per cwt. stat.* 13 & 14 *Car.* 2. *cap.* 26.—Buyers of butter are to put marks on casks; and persons opening them afterwards, or putting in other butter, &c. shall forfeit 20*s.* 4 & 5 *W. & M. c.* 7. The said stat. 4 & 5 *W. & M. c.* 7. also contains regulations to compel warehouse-keepers, weighers, searchers, and shippers, to receive all butter and cheese for the London market, without undue preference.—The stats. 8 *Geo.* 1. *c.* 27. and 17 *Geo.* 2. *c.* 8. regulate the sale of butter; the former in the city of York, the latter at New Malton,—explained by § 18. of stat. 36 *Geo.* 3. *c.* 86.—38 *Geo.* 3. *c.* 73. § 1. such regulations not to extend to vessels not containing more than 14 *lb.* nor to Scotland. See titles *Weights and Measures.*

BUTTONS. Foreign buttons are not to be imported on penalty of 100*l.* on the importer, and 50*l.* on the seller, by stats. 13 & 14 *C.* 2. *c.* 13. and 4 *W. & M. c.* 10.—And by the same statutes, a justice may issue his warrant to search for and seize the same.

By stat. 10 *W.* 3. *c.* 2. no person shall *make, sell*, or *set on*, any buttons made of wood only, and turned in imitation of other buttons, under penalty of 40*s.* a dozen. A shank of wire being added to the button makes no difference. *Ld. Raym.* 712.

By the said stat. *W.* 3. no person shall *make, sell*, or *set on*, buttons made of cloth, or other stuffs of which clothes are usually made, on penalty of 40*s.*

By stat. 8 *Ann. c.* 6. no *taylor*, or *other person*, shall make, sell, set on, *use*, or bind, on any clothes, any buttons or button holes of cloth, &c. on pain of 5*l.* a dozen.—By this act no power is given to make distress.

*Stat.* 4 *Geo.* 1. *c.* 7. is said in *Burn's* Justice, (title *Buttons*) to be a loose, injudicious, ungrammatical act, and which, by its *garb* may seem to have been drawn up by taylors, or button-makers. This act imposes (indistinctly enough,) 40*s.* a dozen, on all such buttons and button holes, with an exception of velvet; it seems levelled against the taylors only, but clothes with such buttons and button holes exposed to sale, are to be forfeited and seized.

By stat. 7 *Geo.* 1. *st.* 1. *c.* 12. no person shall *use, or wear*, on any clothes, (velvet excepted) any such buttons or button holes, on pain of 40*s.* a dozen, half to the witness on whose oath they are convicted; an application of the penalty deservedly reprobated as nearly singular, and on a principle not reconcileable to the usual rules of evidence.—This statute is also incorrect, particularly in making no disposal of a moiety of the penalty, in case of conviction or confession by the party.

These acts are seldom enforced, and do not seem very consistent with general policy. See title *Taylors.*—See 36 *Geo.* 3. *c.* 60. regulates the making and vending of metal buttons.

BUTTS. The place where archers meet with their bows and arrows to shoot at a mark, which we call shooting at the *butts.* Also *butts* are the ends or short pieces of land in arable ridges and furrows: *buttum terræ*, a *butt* of land. See title *Abbuttals.*

BUTLERAGE OF WINES. See title *Customs.*

BUYING OF PLEAS. See title *Maintenance*, and *Scotch Act* 1594, *c.* 216.

BUZONIS. The shaft of an arrow, before it is fledged or feathered. *Stat. Ed.* 1.

BYE. Words ending in *by* or *bee*, signify a dwelling place or habitation, from the Sax. *by*, *habitatio*.

BY-LAWS, *bilagines*, from Sax. *by*, *pagus*, *civitas*, and *lagen*, *lex*, i. e. the laws of cities, *Spelm.* v. *Bellagines*. Or perhaps laws made *obiter*, or by the *by*.] Certain orders and constitutions of corporations, for the governing of their members; of courts-leet and court-baron; commoners or inhabitants in vills, &c. made by common assent, for the good of those that made them, in particular cases, whereunto the public law doth not extend; so that they lay *restrictions* on the parties, not imposed by the common or statute law: guilds and fraternities of trades, by letters patent of incorporation, may likewise make *by-laws*, for the better regulation of trade among themselves, or with others. *Kitch.* 45, 72. 6 *Rep.* 63.

In Scotland those laws are called laws of *birlaw*, or *burlaw*; which are made by neighbours elected by common consent in the *birlaw-courts*, wherein knowledge is taken of complaints betwixt neighbour and neighbour; which men so chosen are judges and arbitrators, and styled *birlaw-men*. And *birlaws*, according to Skene, are *leges rusticorum*, laws made by husbandmen, or townships, concerning neighbourhood amongst them. *Skene*, *p.* 33.

The power of making *by-laws*, being included in the very act of incorporating a corporation; and most by-laws being made by corporations, it seems more regular to consider the nature and effect of them under that head. See title *Corporations*.

In this place therefore we shall chiefly consider, 1, who may make by-laws, and 2, the general requisites of them.

1. The inhabitants of a town, without any custom, may make ordinances or *by-laws*, for repairing of a church, or highway, or any such thing, which is *for the general good* of the public; and in such cases, the greater part shall bind all: though if it be for their own private profit, as for the well ordering of their common, or the like, they cannot make *by-laws* without a custom to warrant it; and if there be a custom, the greatest part shall not bind the rest in these cases, unless it be warranted by the custom. 5 *Rep.* 63.—A custom to make a *by-law*, may be alleged in an ancient city or borough.—So in an upland town, which is neither city nor borough. 1 *Inst.* 110 *b.* *Cro. Car.* 498. *Hob.* 212.

The freeholders in a court-leet may make by-laws relating to the public good, which shall bind every one within the leet. 2 *Danv.* 457. *Mo.* 579. 584. And a court-baron may make by-laws, by custom, and add a penalty for the non-performance of them.—So by custom the tenants of a manor may make by-laws, for the good order of the tenants. 1 *Ro. Ab.* 366 *l.* 35. *Mo.* 75. *Hob.* 212.—So may the homage. 1 *Ro. Ab.* *Dy.* 322. (*a.*) But not without a custom. *Sav.* 74.—And a custom that the steward with the consent of the homage may make them, is not good. 3 *Lev.* 49.

2. All by-laws are to be *reasonable*; and ought to be for the *common benefit*, and not private advantage of any particular persons; and must be consonant to the public laws and statutes, as subordinate to them. And by stat. 19 *H.* 7. *c.* 7. by-laws made by corporations are to be approved by the Lord Chancellor, or Chief Justices, &c. on pain of 40*l.*

A by-law may be reasonable, though the penalty be to be paid to those who make the by-law. 1 *Salk.* 397. And generally it shall be reasonable, if it be for the public good of the corporation. *Carth.* 482.

By-laws made in *restraint* of trade are not favoured, but the distinction between such as are made to *restrain*, and those made to *regulate* trade seems very nice. See tit. *Corporation*.—Under a general power to make *by-laws*, a by-law cannot be made to restrain trade. 1 *Burr.* 12.—A *custom* that no foreign tradesman shall use or exercise a trade in a town, &c. will warrant that which a *grant* cannot do; and where custom has restrained, a by-law may be made that upon composition foreigners may exercise a trade. *Carter* 120. See 4 *Burr.* 1951.

So by-laws may regulate, but not totally restrain a private right, as in cases of *common*, &c. See *Com. Dig.* title *By-law*, (B. 2.) and (C. 4.)

If a by-law impose a charge without any apparent benefit to the party, it will be void. *R. Raym.* 328.—And a by-law being entire, if it be unreasonable for any particular, shall be void for the whole. 2 *Vent.* 183.

A by-law cannot impose an oath, nor impower any person to administer it. *Stra.* 536.

Where by-laws are good, notice of them is not necessary; because they are presumed for the better government and benefit of all persons living in those particular limits where made, and therefore all persons therein are bound to take notice of them. 1 *Lutw.* 404. *Cro. Car.* 498. 5 *Mod.* 442. *Salk.* 142. *Carth.* 484.

If a by-law does not mention how the penalty shall be recovered, *debt* lies for it. 1 *Ro. Ab.* 366 *l.* 48. See 5 *Co.* 64. *Hob.* 279.—Or action on the case on *assumpsit*. 2 *Lev.* 252.—It seems that a by-law to levy the penalty by *distress*, *sale*, or *imprisonment*, is void, unless by custom. See *Com. Dig.* title *By-law*, (D. 2.) (E. 1, 2.)

The court of King's Bench will not enter into a question on the validity of a by-law, on the return of a *hab. cor. cum causâ*, from any corporation except the city of London, where it always doth; but the plaintiff must declare there, and defendant may demur if he has objections to the by-law. 2 *Burr.* 775.

# C.



CABALLA, from the Lat. *caballus.*] Belonging to a horse. *Domesday.*

CABBAGES. See *Turnips.*

CABINET COUNCIL. See *Privy Council.*

CABLISH, *cablicium.*] Brushwood, according to the writers on the forest laws; but *Spelman* thinks it more properly windfall-wood, because it was written of old *cadibulum*, from *cadere:* or from the Fr. *chabilis.*

CABLES. For shipping; made of old or damaged materials, liable to forfeiture; and the regulations for manufacturing them settled by *stat.* 25 *Geo.* 3. *c.* 56.

CACHEPOLUS or CACHERELLUS. An inferior bailiff, a catchpole. See *Consuetud. Domûs de Farendon MS. fol.* 23; and *Thorn.*

CADE. Of herrings is 500, of sprats 1000. But it is said, that anciently 600 made the *cade* of herrings, and six score to the hundred, which is called *Magnum Centum.*

CADET. The younger son of a gentleman; particularly applied to a volunteer in the army, waiting for some post.

CAEP GILDUM. See *Ceapgilde.*

CAGIA. A cage or coop for birds. *Rot. Claus.* 38. *H.* 3.

CALANGIUM AND CALANGIA. A challenge, claim, dispute. *Mon. Angl. tom.* 2. *fol.* 252.

CALCETUM, CALCEA. A causey or common hard way, maintained and repaired with stones and rubbish, from the Lat. *calx*, chalk, Fr. *chaux*, whence their *chaussée* and our *causeway*, or path raised with earth, and paved with chalk-stones, or gravel. *Calcearium operationes* were the work and labour done by the adjoining tenants: and *calcagium* was the tax or contribution paid by the neighbouring inhabitants towards the making and repairing such common roads; from which some persons were especially exempted by royal charter. *Kennet's Gloss.*

CALEFAGIUM. A right to take fuel yearly. *Blount.*

CALENDAR. See *stat.* 24 *Geo.* 2. *c.* 23. for the establishment of the new style, and *stat.* 25 *Geo.* 2. *c.* 30. which enacts, that the opening of common lands, and other things depending on the moveable feasts, shall be according to the new calendar. See titles *Bissextile*, *Year.*

CALENDAR MONTH. Consists of 30 or 31 days, (except *Feb.* 28, and in Leap year 29,) according to the calendar. See *stat.* 16 *Car.* 2. *c.* 7. See titles *Time*, *Month*, *Year.*

CALENDAR OF PRISONERS. A list of all the prisoners' names, in the custody of each respective sheriff. Where prisoners are convicted at the assizes, the judge may command execution to be done, without any writ. And the usage now is, for the judge to sign the calendar, which contains all the prisoners' names, with their several judgments in the margin, and this calendar is left with the sheriff. As, for a capital felony, it is written opposite to the prisoner's name, "hanged by the neck." Formerly in the days of Latin and abbreviation, "*sus. per coll.*" for "*suspendatur per collum.*" *Staundeford, P. C.* 182. See 4 *Comm.* 403. and tit. *Trial*, *Felon*, *Pardon.*

CALENDS, *calendæ.*] Among the Romans was the first day of every month, being spoken of it by itself, or the very day of the new moon, which usually happen together; and if *pridie*, the day before, be added to it, then it is the last day of the foregoing month; as *pridie calend.* Septemb. is the last day of August. If any number be placed with it, it signifies that day in the former month, which comes so much before the month named; as the tenth *calends* of October is the 20th day of September: for if one reckons backwards, beginning at October, the 20th day of September makes the 10th day before October. In March, May, July, and October, the *calends* begin at the sixteenth day, but in other months at the fourteenth; which *calends* must ever bear the name of the month following, and be numbered backwards from the first day of the said following months. *Hopton's Concord. p.* 69. In the dates of deeds, the day of the month, by *nones*, *ides*, or *calends*, is sufficient. 2 *Inst.* 675. See *Ides.*

CALIBURNE. The famous sword of the great King Arthur. *Hoveden* and *Brompton in vita R.*

CALLICO. No person shall wear in apparel any printed or dyed callico, on pain of forfeiting 5*l.* And drapers selling any such callico, shall forfeit 20*l.* But this does not extend to callicoes dyed all blue; *Stat.* 7. *Geo.* 1. *c.* 7. Persons may wear stuff, made of linen yarn and cotton wool, manufactured and printed with any colours in Great Britain; so as the warp be all linen yarn, without incurring any penalty, by *stat.* 9 *Geo.* 2. *c.* 4.—By *stat.* 14 *Geo.* 3. *c.* 72. stuffs wholly made of raw cotton wool within this kingdom, are not to be considered as callicoes, and every person may use the same. These are distinguished by three blue stripes in the selvedge. For the duties on British and Irish callicoes, on their importation from either country to the other, (until 5th January, 1821,) see *stat.* 47 *Geo.* 3. *stat.* 2. *c.* 47. See further title *Linen.*

CALLING THE PLAINTIFF. It is usual for a plaintiff, when he or his counsel perceives that he has not given evidence sufficient to maintain his issue, to be voluntarily *nonsuited*, or withdraw himself: whereupon the crier is ordered to *call the plaintiff;* when neither he nor any for him appears. See titles *Nonsuit*, *Trial.*

CALLIS. The king's highway mentioned in some of our ancient authors. *Huntington, lib.* 1.

CAMBRICK. There were formerly several statutes against the importation and use of *Cambricks*, or French lawns, (*Stats.* 18 *Geo.* 2. *c.* 36. 21 *Geo.* 2. *c.* 26.:) but now by 46 *Geo.* 3. *c.* 68. § 31. & 49 *Geo.* 3. *c.* 98. *Sched. A.* the duty payable on the importation of cambricks and lawns, commonly called French lawns, is regulated; and French lawns (commonly called cambricks or French lawns) legally imported, and having paid duty, may be worn and sold in Great Britain; and by 57 *Geo.* 3. *c.* 86. in Ireland also.

By *stats.* 4 *Geo.* 3. *c.* 37. and 7 *Geo.* 3. *c.* 43. several regulations are made concerning the manufacturing and stamping cambricks and lawns made in England; and forging or counterfeiting the stamp is felony without clergy. See further title *Linen.*

CAMERA. From the old Germ. *Cam. Cammer*, crooked; whence comes our English, *kembo*, arms in kembo. But *camera* at first signified any winding or crooked plat of ground; as *unam* cameram *terræ*, *i. e.* a nook of land. *Du Fresn.* Afterwards the word was applied to any vaulted or arched building; and it was used in the Latin law proceedings, for the judge's chamber, &c. *Camera Stellata*, the Star Chamber, &c.

CAMISIA. A garment belonging to priests, called the *Alb. Pet. Blesenis.*

CAMOCA. A garment of silk, or something better. *Mon. Angl. tom.* 3. *p.* 81.

CAMPANA BAJULA. A small hand-bell, much in use in the ceremonies of the Roman church; and retained among us by sextons, parish clerks and criers. *Girald. Camb. apud Wharton. Angl. Sacr. par.* 2. *p.* 637.

CAMPARTUM. Any part or portion of a larger field or ground; which would otherwise be in gross or common. *Prinne Histor. Collect. vol.* 3. *p.* 89.

CAMPERTUM. A corn-field. *Pet. in Parl.* 30 *Ed.* 1.

CAMP-FIGHT. The fighting of two champions or combatants in the field. 3 *Inst.* 221. See *Acre-Fight*, *Battel*, *Champion*.

CAMPUS MAII, or MARTII. An Assembly of the people every year in March or May, where they confederated together to defend the country against all enemies. *Leges Edw. Confessor*, *cap.* 35. *Sim. Dunelm. Anno* 1094.

CANCELLING DEEDS AND WILLS. See those titles.

CANDLES AND CHANDLERS. If any wax-chandlers mix with their wares any thing deceitfully, &c. the candles shall be forfeited. *Stat.* 23 *Eliz. c.* 8. Tallow-chandlers and wax chandlers are by *stat.* 24 *Geo.* 3. *st.* 2. *c.* 41. to take out annual licences. And by *stat.* 25 *Geo.* 3. *c.* 74. makers of candles shall be only such persons as are rated to the parish rates.—These duties of Excise on candles, and the various regulations to enforce them, form one of the numerous branches of the Excise laws, and depend on a variety of statutes. See 27 *Geo.* 3. *c.* 13.; 32 *Geo.* 3. *c.* 7. &c. and a provision in one law is not much known, though generally interesting, *viz.* "during the continuance of the duties upon candles, no person shall use in the inside of his house any lamp, wherein any oil or fat, (other than oil made of fish within Great Britain) shall be burned for giving light, on pain of 40*s.*" *Stat.* 8 *An. c.* 9. § 18. The makers of candles are not to use melting-houses without making a true entry, on pain of 100*l.* and to give notice of making candles to the Excise officer for the duties, and of the number, &c. or shall forfeit 50*l.* *Stats.* 8. *An. c.* 9. 11 *Geo.* 1. *cap.* 30. *Vide stat.* 23. *Geo.* 2. *c.* 21. 20 *Geo.* 3. *c.* 5. prohibited the exportation of candles for a limited time.

CANDLEMAS-DAY. The feast of the Purification of the Blessed Virgin Mary, being the second day of February, instituted in memory and honour of the purification of the virgin in the temple of Jerusalem, and the presentation of our blessed Lord. It is called Candlemas, or a Mass of candles, because before mass was said that day, the Romish Church consecrated and set apart, for sacred use, *candles* for the whole year; and made a procession with hallowed *candles* in remembrance of the divine light, wherewith our Saviour illuminated the whole church at his presentation in the temple.

This festival is no day in court, for the judges sit not; and it is the grand day in that term of all the inns of court, whereon the judges anciently observed many ceremonies, and the societies seemed to vie with each other, in sumptuous entertainments, accompanied with musick, and almost all kinds of diversions.

CANES OPERTIÆ. Dogs with whole feet, not lawed. *Antiq. Custumar. de Sutton Colfield.*

CANESTELLUS. A basket. In the inquisition of serjeancies, and knight's fees, *anno* 12 & 13 of King John, for Essex and Hertford, it appears that one John of Listen held a manor by the service of making the king's baskets. *Ex Libro Rub. Scacc. fol.* 137.

CANFARA. A trial by hot iron formerly used in this kingdom. See *Ordeal*.

CANIPULUS. A short sword. *Blount.*

CANA. A rod or distance in the measure of ground. *Ex Registr. Walt. Giffard Archiepisc. Ebor. f.* 45.

CANON. A law or ordinance of the church; from the Greek word *canon*, a rule.

The Canon Law consists partly of certain rules taken out of the scripture; partly of the writings of the ancient fathers of the church; partly of the ordinance of the general and provincial councils; and partly of the decrees of the Popes in former ages. And it is contained in two principal parts, the decrees and the decretals: the decrees are ecclesiastical constitutions made by the Pope and Cardinals, and were first gathered by Ivo bishop of Carnat, who lived about the year 1114, but afterwards perfected by Gratian, a Benedictine monk, in the year 1149, and allowed by Pope Eugenius, to be read in schools, and alledged for law. They are the most ancient, as having their beginning from the time of Constantine the Great, the first Christian Emperor of Rome.

The *decretals* are canonical epistles written by the Pope, or by the pope and cardinals, at the suit of one or more persons for the ordering and determining of some matter of controversy, and have the authority of a law; and of these there are three volumes, the first whereof was compiled by Raymundus Barcinius, chaplain to Gregory the Ninth, and at his command about the year 1231. The second volume is the work of Boniface the Eighth, collected in the year 1298. And the third volume, called the *Clementines*, was made by Pope Clement the Fifth, and published by him in the council of Vienna, about the year 1308. And to these may be added some novel constitutions of John the 22d, and some other bishops of Rome.

As the *decrees* set out the origin of the canon law, and the rights, dignities and decrees of ecclesiastical persons with their manor of election, ordination, &c. so the *decretals* contain the law to be used in the ecclesiastical courts; and the first title in every of them, is the title of the Blessed Trinity, and of the catholick faith, which is followed with constitutions and customs, judgments and determinations in such matters and causes as are liable to ecclesiastical cognizance, the lives and conversation of the clergy, of matrimony and divorces, inquisition of criminal matters, purgation, penance, excommunication, &c. But some of the titles of the canon law are now out of use, and belong to the common law: and others are introduced, such as trials of wills, bastardy, defamation, &c.

*Trials of tithes* were anciently in all cases had by the ecclesiastical law; though at this time this law only takes place in some particular cases.

Thus much for the canon law in general; and as to the *canon laws of this kingdom*, by the *stat.* 25 *Hen.* 8. *c.* 19. revived and confirmed by *stat.* 1 *Eliz. c.* 1. it is declared that all canons not repugnant to the king's prerogative, nor to the laws, statutes and customs of the realm, shall be used and executed.

As for the canons enacted by the clergy under *Jac.* 1. *A. D.* 1603, and never confirmed in parliament, it has been solemnly adjudged upon the principles of law and the constitution, that where they are not merely declaratory of the ancient canon law, but are introductory of new regulations, they do not bind the laity; whatever regard the clergy may think proper to pay them. *Stra.* 1057.

Lord Hardwicke cites the opinion of Lord Holt, and declares it is not denied by any one, that it is very plain all the clergy are bound by the canons, confirmed by the king only; but they must be confirmed by the parliament to bind the laity. 2 *Atk.* 605. Hence if the Archbishop of Canterbury grants a dispensation to hold two livings distinct from each other, more than thirty miles, no advantage can be taken of it by lapse, or otherwise, in the temporal courts; for the restriction to thirty miles was introduced by a canon made since the *stat.* 25 *H.* 8. See 2 *Black. Rep.* 968.

There are four species of courts in which the canon laws (and the *civil laws* also, see title *Civil Laws*) are permitted, under different restrictions, to be used. 1. The courts of the archbishops and bishops, and their derivative officers; usually called in our law Courts Christian, or *the Ecclesiastical Courts*. 2. The military courts, or *Courts of Chivalry*. 3. The *Courts of Admiralty*. 4. The *Courts* of the two *Universities*. In all, the reception of those laws in general, and the different degrees of that reception, are grounded entirely upon custom; corroborated, as to the Universities, by act of

parliament, ratifying those charters which confirm their customary laws. 1 *Comm.* 83.

For the peculiar jurisdiction, &c. of these courts, see this Dict. title *Courts*. The following particulars relate to them all, and to this subject in general.

1. The courts of common law have the *superintendency* over these courts: to keep them within their jurisdictions, to determine wherein they exceed them, to restrain and prohibit such excess; and in case of contumacy, to punish the officer who executes, and in some cases the judge who enforces the sentence so declared to be illegal. See titles *Jurisdiction*, *Prohibition*.

2. The common law has reserved to itself the exposition of all such *statutes*, as concern either the extent of these courts, or the matters depending before them; and therefore, if the courts either refuse to allow those acts of parliament, or will expound them in any other sense than what the law puts on them, the courts at Westminster will grant prohibitions to restrain and controul them. See title *Statutes*.

3. An *appeal* lies from all these courts to the king in the last resort; which proves that the jurisdiction exercised in them is derived from the crown of England, and not from any foreign potentate, or intrinsic authority of their own. See *stat.* 25 *H.* 8. *c.* 21.

From these three strong marks and ensigns of superiority, it appears beyond a doubt that the canon (and civil) laws, though admitted in some cases by custom in some courts, are only subordinate, *et leges sub graviore lege;* and that thus admitted, restrained, altered, new-modelled, and amended, they are by no means a distinct independent species of laws, but inferior branches of the customary or unwritten laws of England, properly called *the King's ecclesiastical, military, maritime*, or *academical* laws. 1 *Comm.* 84.

CANON RELIGIOSORUM. A book wherein the *Religious of convents* had a fair transcript of the rules of their order, which were frequently held among them as their local statutes; and this book was therefore called *Regula* and *Canon*. The public books of the religious were the four following. 1. *Missale*, which contained all their offices of devotion. 2. *Martyrologium*, a register of their peculiar saints and martyrs, with the place and time of passion. 3. *Canon* or *Regula*, the institutions and rules of their order. 4. *Necrologium* or *Obituarium*, in which they entered the deaths of their founders and benefactors, to observe the days of commemoration of them. *Kennet's Groff.*

CANTEL, *cantellum.*] Seems to signify the same with what we now call lump, as to buy by measure, or by the lump; but, according to Blount, it is that which is added above measure. *Stat. de Pistor. cap.* 9. Also a piece of any thing, as a *cantel* of *bread*, and the like.

CANTRED, *cantredus*, a British word, from *cant*, or *cantre*, Brit. *centum*, and *tret*, a town or village.] In Wales an hundred villages; for the Welsh divide their counties into *cantreds*, as the English do into hundreds. This word is used *stat.* 28 *H.* 8. *c.* 3. See *Mon. Angl. part* 1. *fol.* 319, where it is written *Kantrep*.

CAPACITY, *capacitas.*] An ability, or fitness to receive: and in law it is where a man, or body politic, is able to give or take lands, or other things, or to sue actions. Our law allows the king two capacities, a natural and a politic: in the first, he may purchase lands to him and his heirs; in the latter, to him and his successors. An alien born hath sufficient *capacity* to sue in any personal action, and is capable of personal estate; but he is not capable of lands of inheritance. See title *Alien*. Persons attainted of treason or felony, ideots, lunatics, infants, feme coverts without their husbands, &c. are not capable to make any deed of gift, grant, or conveyance, unless it be in some special cases. *Co. Lit.* 171, 172. See titles *Age*, *Infant*, and other suitable titles.

CAPE, *Lat.* A writ judicial, touching plea of lands or tenements; so termed, as most writs are, of that word in it which carries the chief intention or end thereof: and this writ is divided into *cape magnum* and *cape parvum*, both of which concern things immoveable. *Termes de la ley.*

CAPE MAGNUM, or the *grand cape.* A writ that lies before appearance to summon the tenant to answer the default, and also over to the demandant: and in the *Old Nat. Brev.* it is defined to be, where a man hath brought a *præcipe quod reddat* of a thing touching plea of land, and the tenant makes default at the day to him given in the original writ, then this writ shall go for the king to take the land into his hands; and if the tenant come not at the day given him thereby, he loseth his land, &c. See *Reg. Jud. fol.* 1. *Bract. lib.* 3. *tract.* 3. *c.* 1.

CAPE PARVUM, or *petit cape.* Where the tenant is summoned in plea of land, and comes on the summons, and his appearance is recorded; if at the day given him he prays the view, and having it granted makes default, then this writ shall issue for the king, &c. *Old Nat. Brev.* 162. The difference between the *grand cape* and *petit cape* is, that the *grand cape* is awarded upon the tenant's not appearing or demanding the view in such real actions, where the original writ does not mention the particulars demanded; and the *petit cape* is after appearance or view granted: and whereas the *grand cape* summons tenant to answer for the default, and likewise over to the demandant: *petit cape* summons the tenant to answer the default only; and therefore it is called *petit cape;* though some say it hath its name, not because it is of small force, but by reason it consists of few words. *Reg. Jud. fol.* 2. *Fleta, lib.* 2. *c.* 44. *Termes de la ley.*

CAPE AD VALENTIAM. This is a species of *cape magnum*, and is where I am impleaded of lands, and vouch to warrant another, against whom the *summons ad warrantizandum* hath been awarded, and he comes not at the day given; then if the demandant recover against me, I shall have this writ against the vouchee, and recover so much *in value* of the lands of the vouchee, if he hath so much; if not, I shall have execution of such lands and tenements as shall after descend to him in fee; or if he purchases afterwards, I shall have against him a resummons, &c. And this, with his before appearance. *Old Nat. Brev.* 616. See further *Fine* and *Recovery*.

CAPELLA, before the word chapel, was restrained to an oratory or depending place of divine worship: it was used also for any sort of chest, cabinet, or other repository of precious things, especially of religious reliques. *Kennet's Paroc. Antiq. p.* 580.

CAPELLUS. A cap, bonnet, or other covering for the head. *Tenures, p.* 32. *Capellus ferreus*, an helmet or iron head-piece. *Hoveden, p.* 61. *Capellus Militis* is likewise an helmet or military head-piece. *Consuetud. Domûs de Farendon, MS. fol.* 21.

CAPIAS. A writ or process of two sorts; one whereof in the court of C. P. is called *capias ad respondendum*, before judgment, where an original is sued out, &c. to take the defendant and make him answer the plaintiff: and the other a writ of execution, after judgment, being of divers kinds, as *capias ad satisfaciendum*, *capias utlagatum*, &c.

The CAPIAS AD RESPONDENDUM in C. B. is drawn from the *præcipe*, which serves both for the *original* and *capias*, and the return of the original is the test of the *capias*. If a *capias* be special, in case, covenant, &c. the cause of action must be recited at large, and the substance of the intended declaration set forth, as also in the original.

This *capias* is a writ commanding the sheriff to *take* the body of the defendant, if he may be found in his bailiwick or county, and him safely to keep, so that he may have him in court, on the day of the return to answer to the plaintiff of a plea of debt, trespass, &c. as the case may be.

In cases of injury accompanied with force, the law, to

punish the breach of the peace, and prevent its disturbance, provided a process against the defendant's *person*, in case he neglected to appear on the process of attachment against his goods, or had no substance whereby to be attached; (see titles *Attachiamenta bonorum* and *Process*;) subjecting his body to imprisonment by this writ of *Capias ad respondendum*. 3 *Rep.* 12. But the immunity of the defendant's person, in case of *peaceable*, though fraudulent injuries, producing a great contempt of the law in indigent wrong-doers, a *capias* was also allowed to arrest the persons in actions of *account*, though no breach of the peace be suggested by *stat. Marlb.* 52 *H.* 3. *c.* 23. *Westm.* 2. 13 *E.* 1. *c.* 11.—In actions of *debt* and *detinue* by *stat.* 25 *E.* 3. *c.* 17.—And in all actions *on the case* by *stat.* 19 *H.* 7. *c.* 9.

Before this last statute, a practice had been introduced of commencing the suit, by bringing an original writ of trespass *quare clausum fregit*, for breaking the plaintiff's close *vi et armis*; which by the old common law, subjected the defendant's person to be arrested by writ of *capias*: and then afterwards by connivance of the court, the plaintiff might proceed to prosecute for any other less forcible injury. This practice, (through custom rather than necessity, and for saving some trouble and expence, in suing out a special original adapted to the particular injury) still continues in almost all cases, except in actions of debt; though now by virtue of the above and other statutes, a *capias* might be had upon almost every species of complaint. See titles *Common Pleas*, *Ac etiam*, *Process*.

It is now also usual in practice to sue out the *capias* in the first instance, on a supposed return of the sheriff, (that the defendant being summoned or attached, made default; or that he had no substance whereby to be attached); and afterwards a fictitious original is drawn up, if the party is called upon so to do, with a proper return thereupon, in order to give the proceedings a colour of regularity. When this *capias* is delivered to the sheriff, he, by his under-sheriff, grants a warrant to his bailiffs to execute it.

If the sheriff of the county in which the injury is supposed to be committed and the action is laid, cannot find the defendant in his jurisdiction, he returns *non est inventus*; whereupon another writ issues, called a *testatum capias*, directed to the sheriff of the county where the defendant is supposed to reside, reciting the former writ, and that it is testified, *testatum est*, that the defendant lurks or wanders in *his* bailiwick, wherefore *he* is commanded to take him, as in the former *capias*. Here also, when the action is brought in one county, and the defendant lives in another, it is usual for saving trouble, time, and expence, to make out a *testatum capias* at the first; supposing not only an original, but also a former *capias* to have been granted. And this fiction, being beneficial to all parties, is readily acquiesced in, and is now become the settled practice.

But where the defendant absconds, and the plaintiff would proceed to an outlawry against him, an original writ must then be sued out regularly, and after that a *capias*. And if the sheriff cannot find the defendant upon the first writ of *capias*, and returns a *non est inventus*, there issues out an *aliàs* writ, and after that a *pluries*, to the same effect as the former; only after these words, *We command you*, this clause is inserted, *as we have formerly (aliàs) or often (pluries)* commanded you. See further title *Outlawry*.—On the subject also of process in *C. P.* see this Dict. title *Common Pleas*; and 3 *Comm.* 282. *&c.*

A Capias is also in use in *criminal cases*.—The proper process on an indictment for any petty misdemeanor, or on a penal statute, is a writ of *venire facias*, which is in the nature of a summons to cause the party to appear. And if by the return to such *venire*, it appears that the party hath lands in the county whereby he may be distrained, then a *distress infinite* shall be issued from time to time till he appears. But if the sheriff returns that he hath no lands in his bailiwick, then upon his non-appearance a writ of *capias* shall issue, which commands the sheriff to take his body, and have him at the next assises; and if he cannot be taken upon the first *capias*, an *aliàs* and a *pluries* shall issue. But on indictments for treason or felony, a *capias* is the first process; and for treason or homicide, only one shall be allowed to issue, or two in the case of other felonies, by *stat.* 25 *E. c.* 14; though the usage is to issue only one in any felony; the provisions of this statute being in most cases found impracticable. 2 *H. P. C.* 195. And so in the case of misdemeanors, it is now the usual practice for any judge of the court of K. B. upon certificate of an indictment found, to award a writ of *capias* immediately, in order to bring in the defendant. But in this as in civil cases, if he absconds, and it is thought proper to pursue him to an outlawry, a greater exactness is necessary. 4 *Comm.* 318. See titles *Arrest*, *Outlawry*.

Capias ad Satisfaciendum, (shortly termed a Ca. Sa.) A judicial writ of execution which issues out on the record of a judgment, where there is a recovery in the courts at Westminster, of debt, damages, &c. And by this writ the sheriff is commanded to take the body of the defendant in execution, and him safely to keep, so that he have his body in court at the return of the writ, to satisfy the plaintiff his debt and damages. *Vide* 1 *Lill. Abr.* 219. And if he does not then make satisfaction he must remain in custody till he does. When the body is taken upon a *ca. sa.* and the writ is returned and filed, it is an absolute and perfect execution of the highest nature against the defendant, and no other execution can be afterwards had against his lands or goods; except where a person dies in execution, then his lands and goods are liable to satisfy the judgment, by *stat.* 21 *Jac.* 1. *c.* 24. See *Rol. Abr.* 904.

Properly speaking this writ cannot be sued out against any but such as were liable to be taken upon the *capias* mentioned in the preceding article. 3 *Rep.* 12. *Mo.* 767. The intent of it is to imprison the body of the debtor, till satisfaction be made for the debt, costs, and damages: this writ therefore doth not lie against any privileged persons, peers, or members of parliament; nor against executors or administrators; (except on a *devastavit* returned by the sheriff. 1 *Lill.* 250.) nor against such other persons as could not be originally held to bail.

This writ may be sued out (as may all other executory process) for costs, against a plaintiff as well as a defendant, where judgment is had against him.

In case two persons are bound jointly and severally, and prosecuted in two courts, whereupon the plaintiff had judgment, and execution by *ca. sa.* against one of them; if he after have an *elegit* against the other, and his lands and goods are delivered upon it, then he that is in prison shall have *audita querela*. *Hob.* 2. 57. Where one taken on a *ca. sa.* escapes from the sheriff, and no return is made of the writ, nor any record of the award of the *capias*; the plaintiff may bring a *scire fac.* against him, and on that what execution he will. *Rol.* 904. And if the defendant rescue himself, the plaintiff shall have a new *capias*, the first writ not being returned. *Ibid.* 901.

If a defendant cannot be taken upon a *ca. sa.* in the county where the action is laid, there may issue a *testatum ca. sa.* into another county; and so of the other writs. See ante title *Capias*.

For further matter, see titles *Execution*, *Fieri facias*.

Capias Utlagatum is a writ that lies against a person who is outlawed in any action, by which the sheriff is commanded to apprehend the body of the party outlawed, for not appearing upon the *exigent*, and keep him in safe custody till the day of return, and then present him to the Court, there to be dealt with for his contempt; who, in the Common Pleas, was in former times to be committed to the Fleet,

there to remain till he had sued out the king's pardon, and appeared to the action. And by a special *capias utlagatum* (against the body, lands, and goods in the same writ) the sheriff is commanded to seize all the defendant's lands, goods, and chattels, for the contempt to the king; and the plaintiff (after an inquisition taken thereon, and returned into the Exchequer) may have the lands extended, and a grant of the goods, &c. whereby to compel the defendant to appear; which when he doth, if the reverse be outlawry, the same shall be restored to him. *Old Nat. Br.* 154. When a person is taken upon a *capias utlagatum*, the sheriff is to take an attorney's engagement to appear for him, where special bail is not required; and his bond with sureties to appear, where it is required. *Stat.* 4 *&* 5 *W. & M. c.* 18. See *Outlawry*.

CAPIAS PRO FINE. Anciently, when judgment was given in favour of the plaintiff, in any action in the king's courts, it was considered that the plaintiff be arrested for his wilful delay of justice, or *capiatur* be taken till he paid a *fine* to the king, considering it as a public misdemeanor coupled with the private injury—But now in cases of *trespass*, *ejectment*, *assault*, and *false imprisonment*, it is provided by *stat.* 5 *&* 6 *W. & M. c.* 12. that no writ of *capias* shall issue *for the fine*, nor any fine be paid: but the plaintiff shall pay 6*s.* 8*d.* to the proper officer, and be allowed it against the defendant among his other costs. See title *Judgment*. See also title *Fines for Offences*.

CAPIAS IN WITHERNAM. A writ lying (where a distress taken is driven out of the county, so that the sheriff cannot make deliverance in replevin) commanding the sheriff to take as many beasts of the distrainer, &c. *Reg. Orig.* 82. 83. See titles *Distress*, *Replevin*, *Withernam*.

CAPIATUR. See title *Capias pro Fine*.

CAPITA, *Distribution per.*] *i. e.* to every man an equal share of *personal* estate, when all the claimants claim in their own rights, as in equal degree of kindred, and not *jure representationis*. See title *Executor*, V. 8.

CAPITA, *Succession per.*] Where the claimants are next in degree to the ancestor, in their own right, and not by right of representation. See title *Descent*.

CAPITALE. A thing which is stolen, or the value of it. *Leg. H.* 1. *cap.* 59.

CAPITALE VIVENS. Live cattle. *Leg. Athelstan.*

CAPITE, from *caput*, *i. e. Rex*, *unde tenere in* capite, *est tenere de rege*, *omnium terrarum* capite.] TENURE IN CAPITE was an ancient tenure, whereby a man held lands of the king immediately as of the crown, whether by knight's service, or in socage. This tenure was likewise called, tenure holding of the person of the king: and a person might hold of the king, and not in *capite*; that is, not immediately of the crown, but by means of some honour, castle, or manor belonging to it. According to Kitchen, one might hold land of the king by *knight's service*, and not in *capite*; because it might be held of some honour in the king's hands descended to him from his ancestors, and not immediately of the king, as of his crown. *Kitch.* 129. *Dyer* 44. *F. N. B.* 5.

The very ancient tenure in *capite*, was of two sorts; the one *principal* and *general*, and the other *special* or *subaltern*; the *principal* and *general* was of the king as *caput regni*, *et caput generalissimum omnium feodorum*, the fountain whence all feuds and tenures have their main original: the *special* was of a particular subject, as *caput feudi*, *seu terræ illius*, so called from his being the first that granted the land in such manner of tenure; from whence he was stiled *capitalis dominus*, &c. But tenure in *capite* is now abolished; and by *stat.* 12 *Car.* 2. *c.* 24. *all tenures* are turned into *free* and *common socage*: so that tenures hereafter to be created by the king are to be in common socage only; and not by *capite*, knight's service, &c. *Blount.* See title *Tenures*.

CAPITILITIUM. Poll-money. *Dict.*

CAPITITIUM. A covering for the head. It is mentioned in the *stat.* 1 *Hen.* 4. and other old statutes, which prescribe what *dresses* shall be worn by all degrees of persons.

CAPITULI AGRI. The head-lands, lands that lie at the head or upper end of the lands or furrows. *Kennet's Paroch. Antiq. p.* 137.

CAPITULA RURALIA. Assemblies, or chapters held by rural deans and parochial clergy within the precinct of every distinct deanery; which at first were every three weeks, afterwards once a month, and more solemnly once a quarter. *Cowel.*

CAPTAIN, *capitaneus.*] One that leadeth or hath the command of a company of *soldiers*: and is either general, as he that hath the governance of the whole army, or special, as he that leads but one band.—There is also another sort of *captains*, *qui urbium præfecti sunt*, *&c. Blount.*

CAPTION, *captio.*] That part of a legal instrument, as a *commission*, *indictment*, &c. which shows where, when, and by what authority it is *taken*, *found*, or *executed*. Thus when a commission is executed, the commissioners subscribe their names to a certificate, declaring when and where the commission was executed.—These kinds of *captions* relate chiefly to business of three kinds, *i. e.* to commissions to take fines of lands, to take answers in chancery, and depositions of witnesses: on the taking of a fine it is thus:—*Taken and acknowledged the —— day of*, *&c. at &c.*—The word *caption* is also used (rather vulgarly) for an *arrest*. See title *Indictment*.

CAPTIVES. An act was made for relief of *captives*, taken by Turkish, Moorish, and other pirates, and to prevent taking of others in time to come. *Stat.* 16 *&* 17 *Car.* 2. *c.* 24. See titles *Negro*, *Slavery*.

CAPTURE, *captura.*] The taking of a prey, an arrest, or seizure: and it particularly relates to *prizes* taken by privateers, in time of war. See titles *Admiral*, *Insurance*, *Navy*, *Privateer*.

CAPUTAGIUM. Some think this word signifies head or poll money, or the payment of it: but it seems rather what we otherwise call *chevagium*.

CAPUT ANNI. New year's day, upon which of old was observed the *festum stultorum*.

CAPUT BARONIÆ. Is the castle or chief seat of a nobleman; which descends to the eldest daughter, if there be no son, and must not be divided amongst the daughters, like unto lands, &c. See title *Coparceners*, *Dower*.

CAPUT JEJUNII. In our records is used for Ash-Wednesday, being the head, or first day of the beginning of the Lent-Fast. *Paroch. Antiq. p.* 132.

CAPUT LOCI. The head or upper end of any place; *ad caput villæ*, at the end of the town.

CAPUT LUPINUM. Anciently an outlawed felon was said to have *caput lupinum*, and might be knocked on the head like a wolf.—*Now* the wilful killing of such a one would be murder. 1 *Hal. P. C.* 497. Vide *Bracton*, *fo.* 125.—See title *Outlawry*.

CAR AND CHAR. The names of places beginning with *car* and *char* signify a city, from the Brit. *caer*, *civitas*; as Carlisle, &c.

CARAVANNA. A *caravan*, or joint company of travellers in the Eastern countries, for mutual conduct and defence. *Gaufrid. Vinesau Richardi Regis*, *Iter. Hierosol. lib.* 5. *cap.* 52.

CARCAN. Is sometimes expounded for a pillory: as is *carcannum* for a prison. *LL. Canuti Regis.*

CARCATUS. Loading; a ship freighted. *Pat.* 10 *R.* 2.

CARDS AND DICE. Duties, under the control of the Stamp Commissioners, are imposed in Great Britain, on cards 2*s.* 6*d.* per pack, and dice 1*l.* per pair, by 44 *Geo.* 3. *c.* 98.—In Ireland, cards 2*s.* and dice 15*s.* under the Excise. 45 *Geo.* 3 *c.* 19. but now tranferred to the stamps there. See 55 *Geo.* 3. *c.* 101. § 30—56. and 56 *Geo.* 3. *c.* 56. *Sched.* IV.

By *stat.* 10. *Ann. c.* 19. no playing cards or dice shall be imported.—Selling second-hand cards incurs a penalty of 20*l. stat.* 29 *Geo.* 2. *c.* 13. § 10. and of 5*l. per* pack by *stat.* 16 *Geo.* 3. *c.* 34.—Several other regulations are made by statute to prevent frauds in manufacturing the above articles.—If cards or dice unstamped are *used* in any public gaming houses, a penalty of 5*l.* attaches on the *seller.* 10 *Ann. c.* 19. § 162.—See also *stat.* 5 *Geo.* 3 *c.* 46. § 9—17. 41 *Geo.* 3. *c.* 86. § 5. 8. 10. &c.

CARECTA AND CARECTATA. A cart and cart-load. *Mon. Angl. tom.* 2. *f.* 340.

CARETARIUS, OR CARECTARIUS. A carter. *Blount.* See *Carreta.*

CARISTIA. Dearth, scarcity, dearness. *Pat.* 8 *Ed.* 1.

CARITAS. *Ad* caritatem, *poculum* caritatis.] A grace-cup; or an extraordinary allowance of the best wine, or other liquor, wherein the religious at festivals drank in commemoration of their founders and benefactors. *Cartular. Abat. Glaston. A. S. f.* 29. See *Cowel.*—It is sometimes written *Karite.*

CARK. A quantity of wool, whereof thirty make a sarpler. *Stat.* 27 *H.* 6. *c.* 2.

CARLE. See *Karle.*

CARNARIUM. A charnel house, or repository for the bones of the dead.

CARNO. This word hath been used for an immunity or privilege, as appears in *Cromp. Jurisd. fol.* 191.

CARPEMEALS. Cloth made in the northern parts of England, of a coarse kind; mentioned in 7 *Jac.* 1. *cap.* 16.

CARR. Is a kind of cart with wheels. Vide *Caruca.*

CARRAT. A weight of four grains in diamonds, &c. And this word it is said was formerly used for any weight or burden.

CARRETA. A carriage, cart, or wain load; as *Careta fœni* is used in an old charter for a load of hay. *Kennet's Gloss.*

CARRELS. Closets, or apartments for privacy and retirement.—Three pews or carrels, where every one of the old monks, after they had dined, did resort, and there study. *Davies Mon. of Durham*, p. 31.

CARRICK, OR CARRACK, *carrucha.*] A ship of great burden, so called of the Italian word *carico* or *carco*, which signifies a burden or charge: it is mentioned in the statute 2 *R.* 2. *c.* 4. They were not only used in trade, but also in war. See *Walsingh in Hen.* 5. *fol.* 394.

CARRIER. A person that carries goods for others for his hire.

I. *Who are to be considered as Carriers; and generally how chargeable.*

II. *For what Defaults answerable; and the Exceptions in their favour.*

III. *What Circumstances must concur to charge them.*

I. All persons carrying goods for hire, as masters and owners of ships, lightermen, stage-coachmen (but not hackney coachmen in London), and the like, come under the denomtnation of common carriers; and are chargeable on the general custom of the realm for their faults or miscarriages. See 1 *Com. Rep.* 25. *Bull. N. P.* 70.—And as to the duty and engagement of a carrier, see title *Bailment* 5. and V.

*In an action on the case* upon the custom of the realm againt the defendant, master of a *stage coach*, the plaintiff set forth, that he took a place in the coach for such a town, and that in the journey the defendant, by negligence, lost the plaintiff's trunk; upon Not-guilty pleaded, the evidence was, that the plaintiff gave the trunk to the man who drove the coach, who promised to take care of it, but lost it; and the question was, whether the *master* was chargeable; and adjudged that he was not, unless the *master* takes a *price* for the *carriage of the goods* as well as for the *carriage of the person*, and then he is within the custom as a carrier; that a *master* is not chargeable for the acts of his *servant*, but when they are done in execution of the authority given by the master, then the act of the servant is the act of the master, 1 *Salk.* 282.—But by the custom and usage of stages, every passenger pays for the carriage of goods above a certain weight; and there the coachman shall be charged for the loss of goods beyond such weight. 1 *Com. Rep.* 25.

If a common carrier loses goods he is intrusted to carry, a special action on the case lies against him; on the custom of the realm; and so of a common carrier by boat. 1 *Rol. Abr.* 6. An action will lie against aporter, carrier, or bargeman, upon his bare receipt of the goods, if they are lost by negligence. 1 *Sid.* 36. Also a lighterman spoiling goods he is to carry, by letting water come to them, action on the case lies against him on the common custom. *Palm.* 528.

If one be not a common carrier, and takes hire, he may be charged on a special *assumpsit;* for where hire is taken, a promise is implied. *Cro. Jac.* 262. So if a man who is not a common carrier, and who is not to receive a premium, undertakes to carry goods safely, he is answerable for any damages they may sustain through his neglect or default.—This was the express point determined in *Coggs* v. *Bernard*, 1 *Com. Rep.* 133. &c. See title *Bailment.*

Where a carrier entrusted with goods opens the pack, and takes away and disposes of part of the goods, this, showing an intent of stealing them, will make him guilty of felony. *H. P. C.* 61. And it is the same if the carrier receives goods to carry them to a certain place, and carrieth them to some other place, and not to the place agreed. 3 *Inst.* 367. That is, if he do it, with intent to defraud the owner of them. If a carrier, after he hath brought goods to the place appointed, take them away privately, he is guilty of felony; for the possession which he received from the owner being determined, his second taking is in all respects the same as if he were a mere stranger. 1 *Hawk. P. C. c.* 33. § 5. See *Larceny*, &c.

If a common carrier, who is offered his hire, and who has convenience, refuse to carry goods, he is liable to an action in the same manner as an inn-keeper who refuses to entertain a guest, or a smith who refuses to shoe a horse. 2 *Show. Rep.* 327.—But a carrier may refuse to admit goods into his warehouse at an unseasonable time, or before he is ready to take his journey. *Ld. Raym.* 652.

A common carrier may have action of trover or trespass for goods taken out of his possession by a stranger; he having a special property in the goods, and being liable to make satisfaction for them to the owner; and where goods are stolen from a carrier, he may bring an indictment against the felon as for his own goods, though he has only the possessory, and not the absolute property; and the owner may likewise prefer an indictment against the felon. *Kel.* 39.

By *stat.* 3 *Car.* 1. *c.* 1. carriers are not to travel on the Lord's Day.

By the *stat.* 3 *W. & M. c.* 12. the justices are annually to assess the price of land-carriage of goods to be brought into any place within their jurisdiction, by any common carrier, who is not to take more, under the penalty of 5*l.* And by the *stat.* 21 *Geo.* 2. *c.* 28. § 3. a carrier is not to take more, for carrying goods from any place to London, than is settled by the justices for the carrying goods from London to such a place, under the same penalty.

By *stat.* 24 *Geo.* 2. *c.* 8. *sect.* 9. Commissioners for regulating the navigation of the river Thames are to rate the price of water carriage.

By *stat.* 30 *Geo.* 3. *c.* 22. *sect.* 3. Justices of the city of London are to assess the rates of carrying goods between London and Westminster.

Carriers and waggoners are to write or paint on their waggons or carts their names and places of abode. See titles *Carts, Highways.*

II. At common law a carrier is liable by the custom of the realm to make good *all losses* of goods entrusted to him to carry, except such losses as arise (1.) from the act of God, or inevitable accident; or (2.) from the act of the king's enemies —to which may be added (3.) the default of the party sending them. 1 *Inst.* 89. *Coggs* v. *Bernard*, 2 *Ld. Raym.* 909. *Esp. N. P.* 619. 5 *T. Rep.* 389.

1. Where the defendant's hoy in coming through London bridge, was by a *sudden gust of wind* driven against the arch and sunk, the owner of the hoy was held not to be liable, the damage having been occasioned by the act of God, which no care of the defendant could provide against or foresee.—But in this case it was held that if the hoy-man had gone out voluntarily in bad weather, so that there was a probability of his being lost, he would have been liable. *Amies* v. *Stephens*, 1 *Stra.* 128.

Upon this ground of its being the act of God, if a bargeman in a tempest, for the safety of the lives of his passengers, throws over-board any trunks or packages of value, he is not liable for the loss. 1 *Rol. Rep.* 79. and see *Bulst.* 280. and 1 *Vent.* 190. 1 *Wils.* 281.

The defendant having lodged his waggon in an inn, an accidental fire broke out, which consumed it—he was adjudged liable; and it was held that negligence does not enter into the grounds of this action, for though *the carrier uses all proper care*, yet in case of a loss he is liable. *Forward* v. *Pittard*, 1 *Term Rep.* 27.

But where a common carrier, between two places (Stourport and Manchester), employed to carry goods from one place to the other, to be forwarded from thence to a third place (Stockport); carried them to Stourport, there put them in his warehouse, in which they were destroyed by an accidental fire, before he had an opportunity of forwarding them; in this case the carrier was held not to be liable, the keeping them in the warehouse in this case being not for the convenience of the carrier, but of the owner. 4 *Term Rep. K. B.* 581.

The owners of vessels on the navigation between A. and C. having given public notice that they would not be answerable for losses in any case, except the loss were occasioned by the want of care in the master, nor even in such case beyond 10 per cent. unless extra freight were paid: the master of one of the ships took on board the plaintiff's goods to be carried from A. to B. (an intermediate place between A. and C.) and to be delivered at B. The vessel passed by B. without delivering the plaintiff's goods there, and sunk before her arrival at C. without any want of care in the master: held that the owner of the vessel was responsible for the whole loss in an action on the contract. *Ellis* v. *Turner*, 8 *T. Rep.* 531.

A carrier who undertakes for hire to carry goods is bound to deliver them at all events, except damaged or destroyed by act of God, or of the king's enemies; even though it be expressly found that the goods were destroyed without any actual negligence of the carrier. 1 *Term Rep.* 27.

2. If a carrier is *robbed*, he shall be liable for the loss; not on the ground that he may charge the hundred under the statute of Winchester, but because if it were otherwise he might, by collusion with robbers, defraud the owner of the goods; and so in other cases, where the grounds are the same. 4 *Rol. Ab.* 333. 1 *Salk.* 143.

But if a carrier be robbed of goods, either he or the owner may bring an action against the hundred, to make it good. 2 *Saund.* 380.

Where in the case of a master of a ship it appeared there was a sufficient crew for the ship, but that at night eleven persons boarded the ship as pirates under the pretence of pressing, and plundered her of the goods, it was adjudged the master (the ship being *infra corpus comitatûs*) was liable, for superior force shall not excuse him. *Morse* v. *Slue*, 1 *Vent.* 109. 2 *Lev.* 69. 1 *Mod.* 85. *Barclay* v. *Higgins*, *E.* 24 *Geo.* 3. cited 1 *Term Rep.* 33.

3. In an action against a carrier, for negligently carrying a pipe of wine, which by that means burst, and the wine was spilt, it was good evidence for the defendant that the loss happened while he was driving gently, and arose from the wine being in a ferment; so that the loss was occasioned by its being sent in that state. *Bull. N. P.* 74.—So if a carrier's waggon is full, and yet a person forces goods on him, and they are lost, the carrier is not liable. *Lovert* v. *Hobbs*, 2 *Show.* 127.

4. But the following exemptions by statute have been found necessary for the security of *owners* of ships.

By *stat.* 7 *Geo.* 2. *c.* 15. no owners of any ship shall be liable to answer any loss by reason of *embezzlement* by the master *or* mariners, of any gold, silver, or other *goods* shipped on board, or for *any act* done by the master *or* mariners, without the owner's privity; beyond the value of the ship and freight.

By *stat.* 26 *Geo.* 3. *c.* 86. no owners of any ship shall be subject to make good any loss by reason of any *robbery*, embezzlement, secreting, or making away with any *gold*, silver, jewels, diamonds, precious stones or *other goods* from on board; or for *any act* or forfeiture done or occasioned without the knowledge of such owner, beyond the value of the ship and freight, *although* the master or mariners shall *not be* concerned in, or privy to, such robbery, &c.

These acts do not impeach any remedy for fraudulent embezzlement, and if several proprietors or freighters sustain such loss, and the value of the ship and freight is not sufficient to make full compensation, the loss shall be averaged amongst them.

No *owner* shall be subject to answer for loss happening by fire on board ship. *Stat.* 26 *Geo.* 3. *c.* 86. § 2.

No *master* or *owners* shall be subject to answer for *any loss* of gold, silver, diamonds, &c. by reason of any robbery, &c. unless the shipper of such goods insert the *true nature*, *quality*, and *value* of the gold, &c. in his bills of lading. *Stat.* 26 *Geo.* 3. *c.* 86.

Previous to this last statute it was determined, that the owner of a ship was not liable beyond the value of the ship and freight, under *stat.* 7 *Geo.* 2. *c.* 15. in the case of a *robbery* (of dollars) in which one of the mariners was concerned, by giving intelligence, and afterwards sharing the spoil; *Sutton* v. *Mitchell*, 1 *Term Rep.* 18. where it was said, the statute was made to protect the owners against *all treachery* in the master or mariners.

A carrier by water contracting to carry goods for hire *impliedly* promises that the vessel shall be tight and fit for the purpose, and is answerable for damage arising from leakage. And this, though he had given notice "that he would not be answerable for *any* damage *unless* occasioned by want of ordinary care in the master or crew of the vessel, in which case he would pay 10 *per cent.* upon such damage, so as the whole did not exceed the value of the vessel and freight." For a loss happening by the *personal* default of the carrier himself (such as the not providing a sufficient vessel) is not within the scope of such notice, which was meant to exempt the carrier from losses by accident or chance, &c.; even if it were competent to a common carrier to exempt himself by a special exceptance from the responsibility cast upon him by the common law for a reasonable reward to make good all losses not arising from the act of God, or the king's enemies. *Lyon* v. *Mells*, 5 *East*, 428.

Where no lien exists at common law, it can only arise by contract with the particular party, either express or implied;

it may be implied either from previous dealings between the same parties upon the footing of such a lien, or even from a usage of the trade so general as that the jury must reasonably presume that the parties knew of and adopted it in their dealing. But whereas in the case of a common carrier claiming a lien for his general balance, such a lien is against the policy of the common law and custom of the realm, which only gives him a lien for the carriage price of the particular goods, there ought to be very strong evidence of a general usage for such a lien to induce a jury to infer the knowledge and adoption of it by the particular parties in their contract; and the jury having negatived such a general usage, though proved to have been frequently exercised by the defendant and various other common carriers throughout the north for 10 or 12 years before, and in one instance, so far back as 30 years, and not opposed by other evidence, the court refused to grant a new trial. *Rushforth* v. *Handfield*, 7 *East*, 224.

A parcel containing bank notes, stamps, and a letter, was sent by a common carrier from one stamp distributor to another. By 42 *Geo.* 3. *c.* 81. § 6. it is provided that the prohibition to send letters otherwise than by the post shall not extend to letters sent by any common carrier with the goods which the letter concerns. In an action against the carrier, the court of King's Bench held that the circumstance of the letter accompanying the stamps was evidence that it related to them; and that the defendant, not having proved the letter to relate to any other subject, was liable for the value of the parcel. *Bennet* v. *Clough, & al. E.* 58 *Geo.* 3. *Rep. K. B.* 461.

III. In order to *charge the carrier*, these circumstances are to be observed.

1. The goods must be lost while in the possession of the carrier himself, or in his sole care.—Therefore where the plaintiffs, the East India Company, sent their servants with the goods in question on board the vessel, who took charge of them, and they were lost, defendant was held not to be liable. 1 *Stra.* 690.

2. The carrier is liable only so far as he is *paid*, for he is chargeable by reason of his reward.

One brought a box to a carrier, in which there was a large sum of money, and the carrier demanded of the owner what was in it; he answered it was filled with silks, and such like goods; upon which the carrier took it and was robbed: and adjudged, that the carrier was liable to make it good: but a special acceptance, as *provided there is no charge of money*, would have excused the carrier. 1 *Vent.* 238. 4 *Rep.* 83.

A person delivered to a carrier's book-keeper two bags of money sealed up, to be carried from London to Exeter, and told him that it was 200*l.* and took his receipt for the same, with promise of *delivery* for 10*s. per cent.* carriage and risk: though it be proved that there was 400*l.* in the bags, if the carrier be robbed he shall answer only for 200*l.* because there was a particular undertaking for the carriage of that sum and no more, and his reward, which makes him answerable, extends no farther. *Carth.* 486.

A. sends goods to B. who says, he will warrant they shall go safe; he is liable for any damage sustained by them, notwithstanding A. sends one of his own servants in B.'s cart to look after them. 2 *B. & P.* 416.

3. Under a special or unqualified acceptance the carrier is bound no further than he undertakes.

For where the owner of a stage-coach puts out an advertisement "That he would not be answerable for money, plate, or jewels above the value of 5*l.* unless he had notice, and was paid accordingly;" all goods received by that coach are under that special acceptance; and if money or plate be sent by it without notice, and being paid for it, if lost, the coach owner is not liable: *Gibbon* v. *Paynton*, 4 *Burr.* 2298. *Izett* v. *Mountain*, 4 *East*, 371. *Nicholson* v. *Willan*, 5 *East*, 507. Not even to the extent of the 5*l.* or the sum paid for booking, *Clay* v. *Willan*, *H. Black. Rep.* 298.—In these cases a personal communication is not necessary to constitute a special acceptance.—Advertisements, notices in the warehouse, and hand-bills, which it is probable the plaintiff saw, or which he might have seen, are sufficient.

From these cases and the opinion of Lord *Mansfield*, it seems safest, that in all instances of sending things of value by a carrier, the carrier should have notice and be paid accordingly. See ante II. 4.

4. A delivery to the carrier's servant is a delivery to himself, and shall charge him; but they must be goods, such as it is his custom to carry, not out of his line of business. *Salk.* 282.

5. Where goods are lost which have been put on board a ship, the action may be brought, either against the master or against the owners. 2 *Salk.* 440.—If one owner only is sued, he must plead it in abatement, that there are other partners; for he shall not be allowed to give it in evidence, and nonsuit the plaintiff. 5 *Burr.* 2611. See ante II. 4.

6. It is not necessary in order to charge the carrier that the goods are lost *in transitu*, while immediately under his care; for he is *bound to deliver them* to the consignee, or send notice to him according to the direction, and though they are carried safely to the inn, yet if left there till they are spoiled, and no notice given to the consignee, the carrier is liable. 3 *Wils.* 429. 2 *Bl. Rep.* 916.

As to the *proof* necessary in an action against a carrier, see title *Bailment* 5.—That a carrier may retain goods for his hire, see 1 *Ld. Raym.* 166. 752.

CART-BOTE. See title *Bote*.

CARTS. By the *stat.* 2 *W. & M. stat.* 2. *c.* 8. *sect.* 19. 20. & 18 *Geo.* 2. *c.* 33. the wheels of every cart or dray for the carriage of any thing from and to any place where the streets are paved, within the bills of mortality, &c. shall contain six inches in the felly, not to be shod with iron, nor be drawn with above two horses, under the penalty of 40*s.*—By the *stat.* 18 *Geo.* 2. *c.* 33, they may be drawn with three horses and not more, and the wheels being of six inches breadth, when worn, may be shod with iron, if the iron be of the full breadth of six inches, made flat, and not set on with rose-headed nails: and no person shall drive any cart, &c. within the limits aforesaid, unless the name of the owner, and number of such cart, &c. be placed in some conspicuous place of the cart, &c. and his name be entered with the commissioners of hackney-coaches, under the penalty of 40*s.* and every person may seize and detain such cart till the penalty be paid.—By the *stats.* 1 *Geo.* 1. *st.* 2. *c.* 57. 24 *Geo.* 2. *c.* 43. the driver of any such cart, &c. riding upon such cart, &c. not having a person on foot to guide the same, shall forfeit 10*s.* and by *stats.* 24 *Geo.* 2. *c.* 43. the *owner* so guilty shall forfeit 20*s.* and any person may apprehend the offender.

On changing property new owners' names to be affixed, 30 *Geo.* 2. *c.* 22. *sect.* 2. and to be entered with the commissioners of hackney-coaches. And see *stat.* 24 *Geo.* 3. *st.* 2. *c.* 27. to compel the entry of all carts *driven*, within five miles of Temple Bar.

CARVAGE. See post *Carucate*.

CARUCA, Fr. *charrue*.] A plough; from the old Gallic *carr*, which is the present Irish word for any sort of wheeled carriage; hence *charl* and *car*, a ploughman or rustick. Vide *Karle*.

CARUCAGE, *carucagium*.] A tribute imposed on every plough, for the public service: and as *hidage* was a taxation by hides, so *carucage* was by carucates of land. *Mon. Angl. tom.* 1. *f.* 294.

CARUCATE, OR CARVE OF LAND, *carucata terræ*.] A plough-land; which in a deed of *Thomas de Arden*, 19 *E.* 2. is declared to be one hundred acres, by which the subjects have sometimes been taxed; whereupon the tribute so levied

was called *carvagium*, or *carucagium*. *Bract. lib.* 2. *cap.* 26. But *Skene* says, it is as great a portion of land as may be tilled in a year and a day by one plough; which also is called *hilda*, or *hida terræ*, a word used in the old British laws. And now by statute 7 & 8 *W.* 3. *c.* 29. a plough-land, which may contain houses, mills, pasture, meadow, wood, &c. is 50*l. per annum*.

*Littleton*, in his chapter of tenure in socage, saith, that soca *idem est quod* carucata, a soke or plough-land are all one. *Stow* says King Hen. III. took *carvage*, that is, two marks of silver of every knight's fee, towards the marriage of his sister Isabella to the Emperor. *Stow's Annals*, *p.* 271.

*Rastal*, in his exposition of words, says *carvage* is to be quit, if the king shall tax all the lands by *carves*; that is, a privilege whereby a man is exempted from *carvage*. The word *carve* is mentioned in the *stat.* 28. *Ed.* 1. of wards and reliefs, and in *Magna Charta*, *c.* 5. And A. D. 1200, on peace made between England and France, King John *lent* the King of France thirty thousand marks, for which *carvage* was collected in England, viz. iiis. for each plow. *Spelm.* v. *Carua. Kennet's Gloss.* 2 *Inst.* 69. and *n.*

CARUCATARIUS. He that held lands in *carvage*, or plough-tenure. *Paroch. Antiq. p.* 354.

CASE. Action on. See title *Action.*

CASES OR REPORTS. See *Law-books, Libel.*

CASSATUM, CASSATA. By the Saxons called *hide;* by *Bede*, *familia*, is a house with lands sufficient to maintain one family; *Rex. Ang. Ethelred*, de 310 Cassatis, *unum trierem*, &c. *Hoveden* anno 1008. And *Hen. Huntingdon*, mentioning the same thing, instead of *cassata* writes *hilda.*

CASHLITE, Saxon. A mulct or fine. *Blount.*

CASSIDILE. A little sack, purse, or pocket. *Mat. Westm.*

CASK. An uncertain quantity of goods; and of sugar contains from eight to eleven hundred weight. There are also *casks* for liquors, of divers contents; and by *stat.* 25 *Eliz. c.* 11. none were to transport any wine *casks*, &c. except for victualling ships, under a certain penalty.

CASSOCK, OR CASSULA. A garment belonging to the priest, *quasi minor cassa.* See *Tassale.*

CASTEL, OR CASTLE, *castellum.*] A fortress in a town; a principal mansion of a nobleman. In the time of Hen. 2. there were in England 1115 castles; and every castle contained a manor; but during the civil wars in this kingdom these castles were demolished, so that generally there are only the ruins or remains of them at this day. 2 *Inst.* 31.

CASTELLAIN, *castellanus.*] The lord, owner, or captain of a castle, and sometimes the constable of a fortified house. *Bract. lib.* 5. *tract.* 2. *cap.* 16. 3 *Ed.* 1. *cap.* 7. It hath likewise been taken for him that hath the custody of one of the king's mansion houses, called by the Lombards *curtes*, in English courts; though they are not castles or places of defence. 2 *Inst.* 31. And *Manwood*, in his *Forest Laws*, says, there is an officer of the forest called *castellanus.*

CASTELARIUM, CASTELLARII. The precinct or jurisdiction of a castle.—*Et unum toftum juxta* castellarium. *Mon. Angl. tom.* 2. *f.* 402.

CASTELLORUM OPERATIO. Castle-work, or service and labour done by inferior tenants, for the building and upholding of castles of defence; towards which some gave their personal assistance, and others paid their contribution. This was one of the three necessary charges, to which all lands among our Saxon ancestors were expressly subject. And after the conquest an immunity from this burthen was sometimes granted. As King Hen. II. granted to the tenants within the honour of Wallingford.—*Ut sunt quieti de* operationibus castellorum. *Paroch. Antiq. page* 114. It was unlawful to build any castle without leave of the king, which was called *castellatio.* *Du Fresne.*

CASTIGATORY for *scolds.* A woman indicted for being a common scold, if convicted, shall be sentenced to be placed on a certain engine of correction, called the tre bucket, *tumbrel*, *tymborella*, *castigatory*, or *cucking stool*, which in the Saxon language signifies the scolding stool; though now it is frequently corrupted into *ducking stool*, because the residue of the judgment is, that when she is so placed therein, she shall be plunged in the water for her punishment. 3 *Inst.* 219. 4 *Comm.* 169.—It is also termed *goginstole* and *cokestole*, and by some is thought corrupted from *choaking stool.* Though this punishment is now disused, a former editor of *Jacob's Dict.* (Mr. Morgan) mentions that he remembers to have seen the remains of one, on the estate of a relation of his in Warwickshire, consisting of a long beam, or rafter moving on a fulcrum, and extending to the centre of a large pond, on which end the stool used to be placed.

At Banbury in Oxfordshire, this punishment has been used towards common whores, within the memory of persons now (1793) living; and the pool for the purpose yet retains the name of *the cucking pool*, but the engine was not long since removed. See *Lamb. Eiren. lib.* 1. *c.* 12.

In Domesday-book it is called *Cathedra Stercoralis*, and was used by the Saxons for the same purpose, and by them salled *scealfing stole.* It was anciently also a punishment inflicted on brewers and bakers transgressing the laws, who were ducked in *stercore*, in stinking water.

CASTING VOTE. See *Parliament*, VII.

CASTLE-WARD. *Castlegardum, vel wardum castri.*] An imposition laid upon such persons as dwelled within a certain compass of any castle, towards the maintenance of such as watch and ward the castle. *Magna Charta*, *cap.* 15. 20. 32 *Hen.* 8. *cap.* 48. It is sometimes used for the circuit itself, which is inhabited by those that are subject to this service. *Castle guard rents* were paid by persons dwelling within the liberty of any castle for the maintaining of watch and ward within the same. By *stat.* 22 & 23 *Car.* 2. *c.* 24. *sect.* 2. these and other rents in the Duchy of Lancaster, payable to the king, were vested in trustees to be sold.

CASTER, AND CHESTER. The names of places ending in these words are derived from the Lat. *Castrum;* for this termination at the end was given by the Romans to those places where they built castles.

CASTRATION. See title *Maihem.*

CASUAL EJECTOR. In ejectment, a nominal defendant, and who continues such until appearance by or for the tenant in possession. See title *Ejectment.*

CASUALTY OF WARDS. Are the mails and duties, due to the superiors in Ward-holdings. *Scotch Dict.*

CASU CONSIMILI. Is a *writ* of *entry* granted where *tenant* by the *courtesy*, or *tenant* for *life*, *aliens in fee* or *in tail*, or *for another's life;* and is brought by him *in reversion* against the *party to whom* such tenant so aliens to his prejudice, and in the tenant's life time. It takes its name from this, that the clerks of the Chancery did, by their common assent, frame it to the *likeness* of the writ called *in casu proviso*, according to the authority given them by the *stat. Westm.* 2. (13 *E.* 1.) *cap.* 24. which statute, as often as there happens a new case in Chancery something like a former, yet not specially fitted by any writ, authorises them to frame a new form answerable to the new case, and as *like* the former as they may. 7 *Rep.* 4. See *Fitz. Nat. Br. fo.* 206. *Termes de la ley.* See 3 *Comm.* 51.

CASU PROVISO. A *writ* of *entry*, given by the statute of *Gloucester*, *cap.* 7. where a *tenant in dower* aliens in *fee* or *for life*, &c. and it lies for him in *reversion* against the *alienee. Fitz. N. B.* 205. This writ, and the writ of *casu consimili*, supposes the tenant to have aliened in fee, though it be for life only: and a *casu proviso* may be without making any title in it, where a lease is made by the demandant himself to the tenant that doth alien; but if an ancestor lease for life, and the tenant

alien in fee, &c. the heir in reversion must have this with the title included therein. *F. N. B.* 206. 207.

CASUS OMISSUS. Is where any particular thing is omitted out of, and not provided against by a statute, &c.

CATALS, *Catalla*. Goods and chattels. See *Chattels*.

CATALLIS CAPTIS NOMINE DISTRICTIONIS.—Anciently a writ that lay where a house was within a borough, for rent going out of the same; and which warranted the taking of doors, windows, &c. by way of distress for rent. *Old. Nat. Br.* 66. This writ is now obsolete.

CATALLIS REDDENDIS. An ancient writ which lay where goods being delivered to any man to keep till a certain day, are not, upon demand, delivered at the day. It may be otherwise called a *writ of detinue:* and is answerable to *actio depositi* in the Civil Law. See *Reg. Orig.* 139. and *Old Nat. Br.* 63.

CATAPULTA. A warlike engine to shoot darts: or rather a cross bow.

CATASCOPUS. An Archdeacon. *Du Cange.*

CATCHLAND. In Norfolk there are some grounds which it is not known to what parish they certainly belong, so that the minister who first seizes the tithes does by that right of pre-occupation enjoy them for that year: and the land of this dubious nature is there called *catchland*, from this custom of seizing the tithes. *Cowel.*

CATCHPOLE. See *Cachepollus*. Sheriff's officers are commonly so called.

CATHEDRAL, *ecclesia cathedralis.*] The church of the bishop, and head of the diocese: wherein the service of the church is performed with great ceremony. See title *Church*.

CATHEDRATICK, *cathedraticum.*] A sum of 2*s.* paid to the bishop by the inferior clergy, *in argumentum subjectionis et ob honorem* cathedræ. *Hist. procurat. et Synodals, p.* 82.

CATZURUS. A hunting horse. *Tenures, page* 68. Vide *Chacurus*.

CATTLE. Several ancient laws were made to regulate the number of sheep to be kept by any farmer. See title *Sheep*.

As to the *importation of cattle*.—By *stat. 5 Geo.* 3. *c.* 43. bestials may be freely imported from the Isle of Man.—By the 6th article of the Union, 5 *Ann c.* 8. no Scotch cattle carried into England shall be liable to any other duties than the cattle of England are. By *stat. 5 Geo.* 3. *c.* 10. which was of temporary continuance, but made perpetual by *stat.* 16 *G.* 3. *c.* 8. all sorts of cattle may be imported from Ireland duty free. And this notwithstanding the *stats.* 18 *C.* 2. *c.* 2. 20 *C.* 2. *c.* 7, and 32 *C.* 2. *c.* 2.

As to *buying and selling* cattle, &c.—No person shall buy any ox, cow, calf, &c. and sell the same again alive in the same market or fair, on pain of forfeiting double the value. *Stats.* 3 *&* 4 *E.* 6. *c.* 19. 3 *C.* 1. *c.* 49. § 8.—And the said act 3 *&* 4 *E.* 6. *c.* 19. is not repealed by *stat.* 12 *Geo.* 3. *c.* 71. which repeals the general forestalling act of 5 *&* 6 *E.* 6. *c.* 14, and other subsequent acts enforcing the same, but hath no reference to any preceding act.—By *stat.* 31 *Geo.* 2. *c.* 40. no salesman, broker, or factor employed in buying cattle for others, shall buy and sell for himself, in London, or within the bills of mortality, on penalty of double the value of the cattle bought or sold.

By several statutes made from time to time, the king has been empowered to make regulations to prevent the spreading of distempers among horned cattle: And by *stat.* 9 *Geo.* 3. *c.* 39. he may prohibit the importation of hides, skins, horns, &c.

By *stat.* 3 *Car.* 1. *cap.* 1. no *drovers* are to travel with cattle on *Sundays*, on penalty of 20*s.*

By *stat.* 21 *Geo.* 3. *c.* 67. several wholesome regulations are made, to prevent the cruelties of *drovers* and others, in driving cattle in London, Westminster, and the bills of mortality, by which a fine from 20*s.* to 5*s.* is imposed on them for misbehaviour; or one month's imprisonment; and power is given to the lord mayor and aldermen of London, to make regulations to further the purposes of the act, and which was accordingly done.

As to *killing, maiming*, and *stealing* cattle. By *stat.* 37 *H.* 8. *c.* 6. whoever shall cut out the tongue of any tame beast the property of another person, the beast being alive, shall pay treble damages, and forfeit 10*l.*

By *stat.* 22 *&* 23 *Car.* 2. *c.* 7. maliciously, unlawfully, and willingly to kill any horses, sheep or other cattle in the night-time is felony; but the felon may make his election to be transported for seven years.

And if any shall maliciously *maim, wound* or *hurt* such cattle in the night-time, he shall forfeit treble damages, by action of trespass, or on the case, to be tried before three justices of peace and a jury.

By *stat.* 14 *Geo.* 2. *c.* 6. and 15 *Geo.* 2. *c.* 34. feloniously driving away or stealing any oxen, bulls, cows, sheep, &c. or killing them with intent to steal the carcase, or any part of it, is made felony without benefit of clergy; and any person prosecuting an offender to conviction shall have a reward of 10*l.*

By the *Black Act* (see that title) 9 *Geo.* 3. *c.* 22. unlawfully and maliciously to maim or wound any cattle is felony without clergy, and the hundred shall be answerable as far as 200*l.* and persons convicting offenders shall receive 50*l.* reward. See 4 *Comm.* 246. *n.* 1.

To prevent the stealing of horses and other cattle for the purpose of selling them, merely for their skin, the *stat.* 26 *G.* 3. *c.* 71. provides that every person keeping a slaughter-house for cattle, not killed for butchers' meat, shall take out licences and be subject to an inspector; and shall not slaughter, but at certain times, &c. &c. See title *Horses*.

CAVALRY (provisional). See *Defence of the Realm*.

CAUDA TERRÆ. A land's end, or the bottom of a ridge in arable land. *Catul. Abbat. Glaston. fol.* 117.

CAVEAT. A process in the *spiritual court* to stop the institution of a clerk to a benefice, or probate of a will, &c. When a caveat is entered against an institution, if the bishop afterwards institutes a clerk, it is void; the *caveat* being a *supersedeas:* but a caveat has been adjudged void when entered in the life time of the incumbent. Though if it is entered "dead or dying" it will last good one month; and if the incumbent dies, till six months after his death. So a caveat entered against a will stands in force for three months; and this is or the caution of the ordinary, that he do no wrong: though it is said the temporal courts do not regard these sorts of caveats. 1 *Rol. Rep.* 191. 1 *Nels. Abr.* 416. 417.

CAVERS. Offenders relating to the mines in Derbyshire, who are punishable in the *bergmote*, or miners' court.

CAULCEIS. See *stat.* 6 *H.* 6. *c.* 5. respecting sewers. Ways pitched with flint, or other stones. See *Calcetum*.

CAURCINES, *Caursini.*] Italians that came into England about the year 1235, terming themselves the *Pope's merchants*, but driving no other trade than letting out money; and having great banks in England, they differed little from Jews, save (as history says) that they were rather more merciless to their debtors; Cowel says they have their name from Caorsium, Caorsi, a town in Lombardy, where they first practised their arts of usury and extortion: from whence spreading themselves, they carried their cursed trade through most parts of Europe, and were a common plague to every nation where they came. The then bishop of London excommunicated them: and King Hen. 3. banished them from this kingdom in the year 1240. But being the pope's solicitors and money-changers, they were permitted to return in the year 1250; though in a very short time after, they were driven out of the kingdom again for their intolerable exactions. *Mat. Paris*, 403.

CAUSA MATRIMONII PRÆLOCUTI. Is a writ which lies where a woman gives land to a man in fee simple, &c. to

the intent he should marry her, and he refuseth to do it in any reasonable time, being thereunto required. *Reg. Orig.* 66. If a woman makes a feoffment to a stranger of land in fee, to the intent to infeoff her, and one who shall be her husband; if the marriage shall not take effect, she shall have the writ of *causa matrimonii prelocuti*, against the stranger, notwithstanding the deed of feoffment be absolute. *New Nat. Br.* 456. A woman infeoffed a man upon condition that he should take her to wife, and he had a wife at the time of the feoffment; and afterwards the woman for not performing the condition, entered again into the land, and her entry was adjudged lawful, though upon a second feoffee. *Lib. Ass. anno* 40 *Ed.* 3. The husband and wife may sue the writ *causa matrimonii prælocuti* against another who ought to have married her; but if a man give lands to a woman to the intent to marry him, although the woman will not marry him, &c. he shall not have his remedy by writ *causa matrimonii prelocutis*. *New Nat. Br.* 455.

CAUSAM NOBIS SIGNIFICES QUARE. A writ directed to a mayor of a town, &c. who was by the king's writ commanded to give seisin of lands to the king's grantee, on his delaying to do it, requiring him to *shew cause why* he so delays the performance of his duty.

CAUTIONE ADMITTENDA. A writ that lies against a bishop, who holds an excommunicated person in prison for contempt, notwithstanding he offers sufficient *caution* or security to obey the orders and commandment of the church for the future. *Reg. Orig.* 66. And if a man be excommunicated, and taken by a writ of *significavit*, and after offers caution to the bishop to obey the church, and the bishop refuseth it; the party may sue out this writ to the sheriff to go against the bishop and to warn him to take caution, &c. but if he stands in doubt whether the sheriff will deliver him by that writ, the bishop may purchase another writ directed to the sheriff reciting the case and the end thereof; *Tibi præcipimus, quod ipsum A. B. à prisona prædict. nisi in præsenti tua cautionem pignorat ad minus eidem episc. de satisfaciend. obtulerit nullatenus deliberas absque mandato nostro seu ipsius episcopi in hac parte speciali*, &c. When the bishop hath taken caution, he is to certify the same in the Chancery, and thereupon the party shall have a writ unto the sheriff to deliver him. *New Nat. Br.* 142.

CEAPGILDE, From Sax. *ceap, pecus*, cattle; and *gild*, i. e. *solutio*;] Hence it is *solutio pecudis*: from this Saxon word *gild*, it is very probable we have our English word *yield*; as yield or pay. *Cowel.*

CELER LECTI. The top, head, or tester of a bed. *Hist. Elien. apud Whartoni, Angl. Sax. par.* 1. *p.* 673.

CELLERARIUS. The butler in a monastery: in the Universities they are sometimes called *manciple*, and sometimes *caterer*, and steward.

CENDULÆ. Small pieces of wood laid in form of tiles, to cover the roof of a house. *Pat.* 4 *Hen.* 3. *p.* 1. *m.* 10.

CENEGILD. An expiatory mulct, paid by one who killed another, to the kindred of the deceased. *Spelm.*

CENELLÆ. Acorns from the oak. In our old writings, *persona cenellarum* is put for the pannage of hogs or running of swine, to feed on acorns.

CENNINGA. Notice given by the buyer to the seller, that the things sold was claimed by another, that he might appear and justify the sale: it is mentioned in the laws of *Athelstan, apud Brompton, cap.* 4.

CENSARIA. A farm, or hous eand land, let *ad censum* at standing rent; it comes from the Fr. *cense*, which signifies a farm.

CENSARII. Farmers. *Blount.*

CENSUALES. A species or class of the *oblati*, or voluntary slaves of churches or monasteries, *i. e.* those who, to procure the protection of the church, bound themselves to pay an annual tax or quit rent out of their estates to a church or monastery. Besides this, they sometimes engage to perform certain services. *Robert. Hist. Emp. C.* V. 1. *V.* 271. 272. *Potgiesserus de Statu Servorum, lib.* 1. *cap.* 1. *sect.* 6, 7.

CENSURE, from Lat. *census.*] A custom called by this name, observed in divers manors in Cornwall and Devon, where all persons residing therein above the age of sixteen are cited to swear fealty to the lord, and to pay 1*d. per* poll, and 1*d. per ann.* ever after; and these thus sworn are called *censers. Survey of the Dutchy of Cornwall.*

CENTENARII. Petty judges, under-sheriffs of counties, that had rule of an *hundred*, and judged smaller matters among them. 1 *Vent.* 211.

There were anciently inferior judges so called in France: who were set over every hundred freemen, and were themselves subject to the count or *comes*. 1 *Comm.* 115.

CEOLA. A large ship. *Malmsbury, lib.* 1. *c.* 1.

CEPI CORPUS. A return made by the sheriff, upon a *capias*, or other process to the like purpose, that he *hath taken the body* of the party. *F. N. B.* 26.

CEPPAGIUM. The stumps or roots of trees which remain in the ground after the trees are felled. *Fleta. lib.* 2. *cap.* 41.

CERAGIUM. Cerage, a payment to find candles in the church. *Mat. Paris.* See *Waxscot.*

CERTAINTY. Is a plain, clear, and distinct setting down of things so that they may be understood. 5 *Rep.* 121. A convenient certainty is required in writs, declarations, pleadings, &c. But if a writ abate for want of it, the plaintiff may have another writ: 'tis otherwise if a deed become void, by incertainty, the party may not have a new deed at his pleasure. 11 *Rep.* 25. 121. *Dyer* 84. That has certainty enough, that may be made certain; but not like what is certain of itself. 4 *Rep.* 97. See generally title *Pleading*—and particularly titles *Deed; Fine; Will.*

CERTIFICANDO DE RECOGNITIONE STAPULÆ. A writ commanding the mayor of the staple to certify to the Lord Chancellor a statute staple taken before him, where the party himself detains it, and refuseth to bring in the same. *Reg. Orig.* 152. There is the like writ to certify a statute merchant; and in divers other cases. *Ibid.* 148. 151. &c.

CERTIFICATE. A writing made in any court to give notice to another court of any thing done therein; which is usually by way of transcript, &c. And sometimes it is made by an officer of the same court, where matters are referred to him, or a rule of court is obtained for it; containing the tenor and effect of what is done. The clerks of the crown, assize and peace, are to make certificates into B. R. of the tenor of indictments, convictions, &c. under penalties by the *stat.* 34 *&* 35 *Hen.* 8. *c.* 14. 3 *W. & M. c.* 9. See tit. *Clergy, benefit of.*

If a question of *mere law* arises in the course of a cause in Chancery (as whether by the words of a will, an estate for life or in tail is created, or whether a future interest devised by a testator, shall operate as a remainder, or an executory devise), it is the practice of that court, to refer it to the opinion of the judges of the court of K. B. or C. P. upon a case stated for the purpose; wherein all the material facts are admitted, and the point of law is submitted to their decision, who thereupon hear it solemnly argued by counsel on both sides, and certify their opinion to the chancellor. And upon such *certificate*, the decree is usually founded. 3 *Comm.* 453.

The Trial by Certificate, is allowed in such cases, where the evidence of the person certifying is the only proper criterion of the point in dispute. Thus, 1. The question whether one were absent with the king in his army out of the realm, in time of war, might be tried by the certificate of the marshal of the king's host under seal. *Litt.* § 102.—2. If in order to avoid an outlawry it be alleged the defendant was in prison, &c. at Bourdeaux or Calais, this, when those places

belonged to the crown of England was allowed to be tried by the certificate of the mayor. 9 *Rep.* 31. 2 *Ro. Ab.* 583. And therefore by parity of reason, it should now hold that in similar cases arising at Jamaica, &c. the trial should be by certificate from the governor. 3 *Comm.* 334.

3. For matters within the realm; the *Customs* of the city of London shall be tried by the certificate of the mayor and aldermen, certified by the mouth of the recorder, upon a surmise from the party alleging it, that it should be so tried; else it must be tried by the country, as it must also if the corporation of London be a party, or interested in the suit. 1 *Inst.* 74. 4 *Burr.* 218. *Bro. Ab.* 1. *Trial, pl.* 96. *Hob.* 85. But see 1 *Term Rep.* 423. If the recorder has once certified a custom, the court are in future bound to take notice of it. *Doug.* 380.

4. In some cases the *sheriff of London's* certificate shall be the final trial; as if the issue be whether the defendant be a citizen of London, or a foreigner, in case of privilege pleaded to be sued only in the city courts. 1 *Inst.* 74. Of a nature somewhat similar to which is the trial of the privilege of either University *when the chancellor claims* cognizance of the cause; in which case the charters confirmed by parliament, allow the question to be determined by the certificate of the chancellor under seal. But in case of an issue between two parties themselves, the trial shall be by jury. 2 *Ro. Ab.* 583.—3 *Comm.* 335.

5. In matters of ecclesiastical jurisdiction, as *marriage, general bastardy, excommunication*, and *orders*, these and other like matters, shall be tried by the bishop's certificate. See titles *Bastardy*, &c. Ability of a clerk presented, admission, institution and deprivation of a clerk, shall also be tried by certificate from the ordinary or metropolitan. 2 *Inst.* 632. *Show. P. C.* 88. 2 *Ro. Ab.* 583. &c. But *induction* shall be tried by a jury; being the corporal investiture of the temporal profits. *Dy.* 229. Resignation of a benefice may be tried either way, but seems most properly to fall within the bishop's cognizance. 2 *Ro. Ab.* 583. 3 *Comm.* 336.

6. The trial of all customs and practices of the courts shall be by certificate from the proper officer of those courts respectively; and what return was made on a writ by a sheriff or under-sheriff, shall be only tried by his own certificate. 9 *Rep.* 31. 3 *Comm.* 336.

As to certificates in cases of *Costs*, of *Bankrupts*, or relative to the settlement of the *Poor*, see those titles in this Dict.

CERTIFICATION, *i. e.* Assurance. *Scotch Dict.*

CERTIFICATION. Is when the judge doth ascertain the party called, and not compearing what he will do in that case. *Scotch Dict.*

CERTIFICATE OR CERTIFICATION OF ASSISE, *certificatio assisæ novæ disseisinæ*, &c.] A writ anciently granted for the re-examining or re-trial of a matter passed by assise before justices: used where a man appearing by his bailiff to an assise, brought by another, lost the day; and having something more to plead for himself, which the bailiff did not, or might not plead for him, desired a farther examination of the cause, either before the same justices or others, and obtained letters-patent to them to that effect; whereupon he brought a writ to the sheriff to call both the party for whom the assise passed, and the jury that was impannelled on the same, before the said justices at a certain day and place to be re-examined. It was called a certificate, because therein mention is made to the sheriff, that upon the party's complaint of the defective examination, as to the assise passed, the king hath directed his letters-patent to the justices for the better *certifying* of themselves, whether all points of the said assise were duly examined. *Reg. Orig.* 200. *F. N. B.* 181. *Bracton, lib.* 4. *c.* 13. *Horn's Mirr. lib.* 3.—This writ is now entirely superseded by the remedy afforded by means of *new trials*. See 3 *Comm.* 389.



## CERTIORARI.

This is an Original Writ, issuing out of the court of Chancery or K. B. directed in the king's name to the judges or officers of the inferior courts, commanding them *to certify*, or to return the records of a cause depending before them; to the end the party may have the more sure and speedy justice before the king, or such justices as he shall assign to determine the cause. See *F. N. B.* 145. 242.

This writ is either returnable in the King's Bench, and then hath these words, "send to us;" or in the *Common Bench*, and then has "to our justices of the bench;" or in the Chancery, and then hath "*in our Chancery*," &c.

On this subject we may briefly consider, 1. In what cases this writ is grantable, or not.—2. In what manner.—3. The effect of it when granted: and,—4. Of the return, with the form of that and the writ.

1. A writ of *certiorari* may be had at any time before trial, to certify and remove *indictments*, with all the proceedings thereon from any inferior court of criminal jurisdiction, into the court of K. B. the sovereign ordinary court of justice in causes criminal. And this is frequently done for one of four purposes: 1. To consider and determine the validity of appeals and indictments, and the proceedings thereon; and to quash or confirm them accordingly.—2. To have the prisoner or defendant tried at the bar of the courts, or before justices of *Nisi Prius* where it is surmised that a partial or insufficient trial will probably be had in the inferior court.—3. To plead the king's pardon in the court of K. B.—4. To issue process of outlawry against the offender, in those counties or places where the process of inferior judges will not reach him. 2 *H. P. C.* 210. 4 *Comm.* 430.

Such *certiorari* is granted of course on the application of the crown; but the defendant must lay some ground for it. *R.* v. *Eaton.* 2 *Term Rep.* 89.

A *certiorari* lies in all judicial proceedings, in which a writ of error does not lie; and it is a consequence of all inferior jurisdictions, erected by act of parliament to have their proceedings returnable in K. B. *Ld. Raym.* 469. 580.

But without laying a special ground before the court, it cannot be sued out to remove proceedings in an action from the courts of the counties palatine. *Doug.* 749.—It does not lie to judges of oyer and terminer to remove a recognizance of appearance *Lucas* 278.—Nor to remove a poor's rate. *Sira.* 932. 975. See *Leach's Hawk. P. C.* ii. *c.* 27. § 23. *in n.*

A *certiorari* lies to justices of the peace and others, even in such cases, which they are empowered by statute *finally* to hear and determine; and the superintendancy of the court of K. B. is not taken away without express words. 2 *Hawk. P. C. c.* 27. § 22. 23.

If an order of removal be confirmed at the sessions, and both orders be removed into B. R. by *certiorari* on a case reserved, and that court disapprove of the orders, for want of jurisdiction of the removing magistrates; appearing on the face of the original order; the court will quash both orders, without remitting back to the sessions to quash the original order, for the purpose of enabling them to give maintenance according to *stat.* 9 *Geo.* 1. *c.* 7. § 9. and at any rate they will not admit an application for amending their judgment for quashing both orders made in the term subsequent to the judgment so pronounced. *Rex* v. *Moor-Critchell Parish*, 2 *East.* 222.

The court refused to grant a *certiorari* to a defendant pending an appeal to the sessions by him. 2 *Term Rep.* 196. *n.*

That a *certiorari* does not lie to remove any other than judicial acts. See *Cald.* 309. *Say.* 6.

Where a *certiorari* is by law grantable for an indictment at the suit of the king, the court is bound to award it, for it

is the king's prerogative to sue in what court he pleases; but it is at the discretion of the court to grant or not, in case of private prosecutions, and at the prayer of the defendant: and the court will not grant it for the removal of an indictment before justices of gaol-delivery, without some special cause; or where there is so much difficulty in the case, that the judge desires it may be determined in B. R. &c. *Burr*, 2456. Also on indictments of perjury, forgery, or for heinous misdemeanors, the court will not generally grant a *certiorari* to remove at the instance of the defendant. 2 *Hawk. P. C. c.* 27. § 27. 28. But see 2 *Ld. Raym.* 1452.

But in particular cases, the court will use their discretion to grant a *certiorari;* as if the defendant be of good character, or if the prosecution be malicious or attended with oppressive circumstances. *Leach's Hawk. P. C.* ii. *c.* 27. § 28. *n.*

Where issue is joined in the court below, it is a good objection against granting a *certiorari:* and if a person doth not make use of this writ till the jury are sworn, he loses the benefit of it. *Mod. Ca.* 16. *Stat.* 43 *Eliz. c.* 5. After conviction, a *certiorari* may not be had to remove an indictment, &c. unless there be special cause; as if the judge below is doubtful what judgment is proper to be given, when it may. See *Stra.* 1227. *Burr.* 749. And after conviction, &c. it lies in such cases where writ of error will not lie. 1 *Salk.* 149. The court, on motion in an extraordinary case, will grant a *certiorari* to remove a judgment given in an inferior court; but this is done where the ordinary way of taking out execution is hindered in the inferior court. 1 *Lill. Abr.* 253.

In common cases a *certiorari* will not lie to remove a cause out of an inferior court, after verdict. It is never sued out after a writ of error, but where diminution is alledged: and when the thing in demand does not exceed 5*l.* a *certiorari* shall not be had, but a writ of error or attaint. *Stat.* 21 *Jac.* 1. *cap.* 23. See *stat.* 12 *Geo.* 1. *c.* 29. A *certiorari* is to be granted on matter of law only; and in many cases there must be a judge's hand for it. 1 *Lill.* 252. *Certioraris* to remove indictments, &c. are to be signed by a judge; and to remove orders, the *fiat* for making out the writ must be signed by some judge. 1 *Salk.* 150.

*Certiorari* lies to the courts of Wales; and the cinque ports, counties palatine, &c. 2 *Hawk. P. C. c.* 27. § 24. 25.

Things may not be removed from before justices of peace, which cannot be proceeded in by the court where removed; as in case of refusing to take the oaths, &c. which is to be certified and inquired into, according to the statute. 1 *Salk.* 145. And where the court which awards the *certiorari* cannot hold plea on the record, there but a tenor of the record shall be certified; for otherwise, if the record was removed into B. R. as it cannot be sent back, there would be a failure of right afterwards. 1 *Danv. Abr.* 792. But a record sent by *certiorari* into B. R. may be sent after by *mittimus* into C. B. *Ibid.* 789. And a record into B. R. may be certified into Chancery, and from thence be sent by *mittimus* into an inferior court, where an action of debt is brought in an inferior court, and the defendant pleads that the plaintiff hath recovered in B. R. and the plaintiff replies *Nul tiel record*, &c. 1 *Saund.* 97. 99.

The court of B. R. will grant a new *certiorari* to affirm a judgment, &c. though generally one person can have but one *certiorari.* *Cro. Jac.* 369.

A *certiorari* may not be had to a court superior, or that has equal jurisdiction, in which case day is given to bring in the record, &c.

Besides the statutes hereafter mentioned, there are several which restrain, and many which absolutely prohibit a *certiorari;* in order to avoid frivolous and unfounded delays in justice. For a complete list of these, if needed, the student should consult the statutes.—The following seem to have deserved a short mention in this place.

By *stats.* 12 *Car.* 2. *cc.* 23. 24. no *certiorari* shall be allowed in certain cases of transgression of the *Excise Laws.*

*Certiorari* granted to remove an indictment *against* an excise officer from the sessions, on the motion of the attorney-general, without any affidavit. 4 *T. R.* 161.

By *stat.* 13 *Geo.* 3. *c.* 78. (which see at large title *Highways*) no presentment, &c. of any highway shall be removed from the sessions, until it be traversed, except the right to repair be the question.—Or by *stat.* 5 & 6 *W. & M. c.* 11. may come in question—but this means on the part of the defendant only, for on the part of the prosecution it lies before.—No other proceedings under the highway act may be removed by *certiorari.*—But if the sessions manifestly exceed their authority in making orders, they may be removed into K. B. by *certiorari* and quashed. *Leach's Hawk. P. C.* ii. *c.* 27. § 37. and *n.*

By *stat.* 16 *Geo.* 3. *c.* 30. against *deer-stealers*, no *certiorari* shall issue, unless the party convicted shall become bound to the prosecutor in 100*l.* to pay full costs and damages within thirty days, and to the justice in 60*l.* to prosecute the *certiorari* with effect. But in appeal to the sessions, he may sue out a *certiorari* on six days' notice to prosecute. And the like in effect is enacted by *stats.* 4 & 5 *W. & M. c.* 23. and 5 *An. sess.* 2. *c.* 14. concerning game. 2 *Hawk. P. C. c.* 27. § 60. 61.

Also by *stat.* 1 *An. c.* 18. concerning the repair of *bridges*, *no certiorari* shall be allowed: but it may, at the instance of the *prosecutor*, notwithstanding the general words. 6 *T. R.* 194.—Nor by *stat.* 8 *Geo.* 2. *c.* 20. for punishing destroyers of *turnpikes.*—Nor by *stat.* 12 *Geo.* 2. *c.* 29. for assessing *county rates.*—Nor on *stat.* 19 *Geo.* 2. *c.* 21. against *cursing* and *swearing.*—Nor on *stat.* 23 *Geo.* 2. *c.* 13. against *seducing artificers.*—Nor on *stat.* 25 *Geo.* 2. *c.* 36. against *bawdy-houses;* but this does not restrain the crown from removing the indictment by *certiorari.* 5 *T. R.* 626.—Nor on 29 *Geo.* 2. *c.* 40. against *stealing lead*, *iron*, &c.—Nor on 30 *Geo.* 2. *c.* 21. for preserving *fish* in the Thames.—Nor on 30 *Geo.* 2. *c.* 24. for restraining *gaming* in public-houses.—Nor on 31 *Geo.* 2. *c.* 29. for regulating *bread.*—Nor on 2 *Geo.* 3. *c.* 30. for preventing thefts in bumb-boats.—Nor on 10 *Geo.* 3. *c.* 18. against *dog-stealers.*

For a long detail of further matter on the subject of *certiorari* see 2 *Hawk. P. C. c.* 27.

2. By *stat.* 1 & 2 *P. & M. c.* 13. no [*habeas corpus* or] *certiorari* shall be granted to remove any *recognizance*, unless signed by the Chief Justice, or in his absence by one of the other judges.

By *stats.* 5 & 6 *W. & M. c.* 11. and 8 & 9 *W.* 3. *c.* 33. a *certiorari* may be granted in vacation-time by any of the judges of *B. R.* and security is to be found before it is allowed. No *certiorari* is to be granted out of B. R. to remove an *indictment*, or presentment, before justices of peace at the sessions before trial, unless motion be made in open court, and the party indicted find security by two persons in 20*l.* each to plead to the indictment in B. R. &c. And if the defendant prosecuting the *certiorari* be *convicted*, the court of *B. R.* shall order costs to the prosecutor of the indictment. In case of *certiorari* granted in vacation, the name of the judge and party applying to be indorsed on the writ. See title *Habeas Corpus.*

*Convicted* in the foregoing acts means convicted by *judgment*, and therefore, if after a verdict of guilty the judgment be arrested, no costs can be allowed the prosecutor. 15 *E. R.* 570.

If on a *certiorari* to remove an indictment the party do not find manucaptors in the sum of 20*l.* to plead to the indictment and try it, according to the statute, it is no *supersedeas. Mod. Ca.* 33. And a *procedendo* may be granted where bail is not put in before a judge, on a *certiorari.* As to costs, see 1 *Wils.* 139. 1 *Burr.* 54. 2 *Term Rep.* 47.

No judgment or order to be removed by *certiorari*, without sureties found to the amount of 50*l*. *Stat.* 5 *Geo.* 2. *c.* 19.

The 12th section of the *stat.* 38 *Geo.* 3. *c.* 52. providing that no indictment shall be removed into the next adjoining county, *except the person applying for such removal* shall enter into a recognizance in 40*l*. for the extra costs, and does not relate to indictments sent by B. R. to be tried in the next adjoining county, after a removal thither by *certiorari*. *Rex* v. *Nottingham*, 4 *East*. 208.

*Certiorari*, to remove convictions, orders, or proceedings of justices, to be applied for within six calendar months, and upon six days' notice to the justices. *Stat.* 13 *Geo.* 2. *c.* 18. See *Stra.* 991. 4 *T. R.* 211. 8 *T. R.* 219. And the six days' notice must be given *before* making the motion for a rule to show cause why such *certiorari* should not be granted. 5 *T. R.* 279. See further 1 *Maul. & Selw. Rep.* 631. 734. The provisions of this statute do not apply to indictments at the sessions, but only to proceedings of a lower denomination; therefore a *certiorari* to remove an indictment from the sessions may be sued out without giving the six days' previous notice. 1 *E. R.* 298. See also this Dict. tit. *Sessions*.

The *certiorari* to remove a conviction of a glass-maker, by *stat.* 13 *Geo.* 2. *c.* 18. § 5. is not taken away from the crown, though it is from the defendant; the act being levelled against *vexatious* delays. 15 *E. R.* 339.

It is said, a *certiorari* to remove an indictment is good, although it bear date before the taking thereof: but on a *certiorari* the very record must be returned, and not a transcript of it; for if so, then the record will still remain in the inferior court. 2 *Lill.* 253. In B. R. the very record itself of indictments is removed by *certiorari*; but usually in Chancery, if a *certiorari* be returnable there, it removes only the tenour of the record; and therefore, if it be sent from thence into the King's Bench, they cannot proceed either to judgment or execution, because they have but such tenour of the record before them. 2 *Hale's Hist. P. C.* 215. In London a return of the tenour only is warranted by the city charters. 2 *Hawk. P. C. c.* 27. § 26. 76.

On a *certiorari* to remove a record out of an inferior court, the style of their court, and power to hold plea, and before whom, ought to be shown on their certificate. *Jenk. Cent.* 114. 232.

A *certiorari* to remove an order of bastardy should be applied for in six months. *Rex* v. *Howlett*, 1 *Wils.* 35.

If a *certiorari* be prayed to remove an indictment out of London or Middlesex, three days' notice must be given the other side, or the *certiorari* shall not be granted. *Raym.* 74.

3. After a *certiorari* is allowed by the inferior court, it makes all the *subsequent* proceedings, on the record that is removed by it, erroneous. 2 *Hawk. P. C. c.* 27. § 62. 64. But if a *certiorari* for the removal of an indictment before justices of peace be not delivered before the jury be sworn for the trial of it, the justices may proceed. 2 *Hawk. P. C. c.* 27. § 64.—And the justices may set a fine to complete their judgment after a *certiorari* delivered. *Ld. Raym.* 1515. See *ante* 1.

A *certiorari* removes all things done between the teste and return. *Ld. Raym.* 835. 1805.—And as it removes the record itself out of the inferior court, therefore, if it remove the record against the principal, the accessary cannot be tried there. 2 *Hawk. P. C. c.* 29. § 54.—And if the defendant be convicted of a capital crime, the *person* of the defendant must be removed by *habeas corpus*, in order to be present in court, if he will move in arrest of judgment.—And herein the case of a conviction differs from that of a special verdict. *Burr.* 930.

Although on a *habeas corpus* to remove a person, the court may bail or discharge the prisoner, they can give no judgment upon the record of the indictment againt him, without a *certiorari* to remove it; but the same stands in force as it did, and new process may issue upon it. 2 *H. H. P. C.* 211. If an indictment be one, but the offences several, where four persons are indicted together, a *certiorari* to remove this indictment against two of them, removes it not as to the others; but as to them the record remains below. 2 *Hale's Hist.* 214.

If a cause be removed from an inferior court by *certiorari*, the pledges in the court below are not discharged; because a defendant may bring a *certiorari*, and thereby the plaintiff may lose his pledges. *Skin. Rep.* 244. 246. A *certiorari* from K. B. is a *supersedeas* to restitution in a forcible entry. 1 *Hawk. P. C. c.* 64. § 62.

4. The return of a *certiorari* is to be under seal: and the person to whom a *certiorari* is directed may make what return he pleases, and the court will not stop the filing of it, on *affidavit* of its falsity, except where the public good requires it: the remedy for a false return is action on the case, at the suit of the party injured; and information, &c. at the suit of the king. 2 *Hawk. P. C. c.* 27. § 70.

The court refused a criminal information against a magistrate for returning to a writ of *certiorari*, a conviction of a party *in another and more formal shape*, than that in which it was first drawn up, and of which a copy had been delivered to the party convicted; the conviction returned being warranted by the facts. 1 *E. R.* 186.

If the person to whom the *certiorari* is directed, do not make a return, then an *alias*, then a *pluries*, *vel causam nobis significes quare*, shall be awarded, and then an attachment. *Cromp.* 116.

### Form of a Certiorari, To certify the Record of a Judgment.

*GEORGE the Third, &c. To the Mayor and Sheriffs of our city of E. and to every of them, in our court at the Guildhall there greeting: Whereas A. B. hath lately in our said court in the said city, according to the custom of the same court, impleaded C. D. late of, &c. in an action of debt upon demand of thirty pounds; and thereupon, in our said court before you, obtained judgment against the said C. for the recovery of the said debt: and we, being desirous for certain reasons, that the said record should by you* be certified *to us, Do command you, that you send under your seals the record of the said recovery, with all things touching the same, into our court before us at Westminster, on the day, &c. plainly and distinctly, and in as full and ample manner as it now remains before you, together with this writ, so that we on the part of the said A. may be able to proceed to the execution of the said judgment, and do what shall appear to us of right ought to be done. Witness, &c.*

The return of *certiorari* may be thus—First, on the back of the writ indorse these or similar words "*The execution of this writ appears in a schedule to the same writ annexed.*" Which schedule may be in the following form, on a piece of *parchment* (not paper, 1 *Barn. K. B.* 113.), by itself, and filed to the writ.

*Middlesex.—I A. B. one of the keepers of the peace and justices of our lord the king, assigned to keep the peace within the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the same county committed by virtue of this writ to me delivered, do under my seal certify unto his Majesty in his court of King's Bench, the indictment, of which mention is made in the same writ, together with all matters touching the said indictment. In witness whereof I the said A. B. have to these presents set my seal. Given at —— in the said county, the —day of——, in the——year of the reign of——.*

Then take the record of the indictment, and close it within the above schedule, and seal up, and send them both together with the *certiorari*.

CERT-MONEY, *quasi* certain *money*.] *Head-money* paid yearly by the resiants of several manors to the lords thereof, for the *certain* keeping of the leet; and sometimes to the hundred: as the manor of Hook, in Dorsetshire, pays *cert-money* to the hundred of Egerdon. In ancient records this is called *certum letæ*. See *Common Fine*.

CERVISARII. The Saxons had a duty called *drinclean*, that is *retributio potûs*, payable by their tenants; and such tenants were in *Domesday* called *cervisarii*, from *cervisia*, ale, their chief drink: though *cervisarius* vulgarly signifies a beer or ale brewer.

CERURA. A mound, fence, or inclosure. *Cart. priorat. de Thelesford MS.*

CESSAT EXECUTIO. In trespass against two persons if it be tried and found against one, and the plaintiff takes his execution against him, the writ will abate as to the other; for there ought to be a *cessat executio* till it is tried against the other defendant. 10 *Ed.* 4. 1. See titles *Execution*, &c.

CESSAVIT. A writ which lies (by the *stats.* of *Gloucester*, 6 *E.* 1. *c.* 4. and *Westm.* 2. 13 *E.* 1. *c.* 21. 41.) when a man who holds lands by rent or other services, neglects or *ceases* to perform his services for two years together; or where a religious house hath lands given it, on condition of performing some certain spiritual service, as reading prayers, or giving alms, and neglects it; in either of which cases if the *cesser* or neglect shall have continued for two years, the lord or donor and his heirs shall have a writ of *cessavit* to recover the land itself. *F. N. B.* 208.—In some instances relating to religious houses, called *Cessavit de Cantariâ*.

By the *stat. of Gloucester*, the *cessavit* does not lie for lands let upon fee-farm rents, unless they have lain fresh and uncultivated for two years, and there be not sufficient distress upon the premises, or unless the tenant hath so inclosed the land, that the lord cannot come upon it to distrain. *F. N. B.* 209. 2 *Inst.* 298. For the law prefers the simple and ordinary remedies, by distress, &c. to this extraordinary one of forfeiture; and therefore the same statute has provided farther, that on tender of arrears, and damages before judgment, and giving security for the future performance of the services (that he will *no more cease*), the process shall be at an end, and the tenant shall retain his land, to which the *stat. of Westm.* 2. conforms so far as may stand with convenience and reason of law. 2 *Inst.* 401. 460.

The *stats.* 4 *Geo.* 2. *c.* 28. and 11 *Geo.* 2. *c.* 19. seem evidently borrowed from the above ancient writ of *cessavit*.—The former of these statutes permits landlords who have a right of re-entry for non-payment of rent, to serve an ejectment on their tenants when half a year's rent is due, and no sufficient distress on the premises. See title *Ejectment*. And the same remedy is in substance adopted by the *stat.* 11 *Geo.* 2. *c.* 16. which enacts, that where any tenant at rack rent shall be one year's rent in arrear, and shall desert the demised premises, leaving the same uncultivated or unoccupied, so that no sufficient distress can be had, two justices of the peace (after notice affixed on the premises for fourteen days) may give the landlord possession thereof; and the lease shall be void. See titles *Distress*, *Lease*, *Rent*.

By *stat. Westm.* 2. § 2. the heir of the demandant may maintain a *cessavit* against the heir or assignee of the tenant. But in other cases, the heir may not bring this writ for *cessure* in the time of his ancestor: and it lies not but for *annual service*, *rent*, and *such like*; *not* for *homage* or *fealty*. *Termes de la ley*: *New Nat. Br.* 463. 464.

The lord shall have a writ of *cessavit* against tenant for life, where the remainder is over in fee to another: but the donor of an estate-tail shall not have a *cessavit* against the tenant in tail: though if a man make a gift in tail, the remainder over in fee to another, or to the heirs of the tenant in tail, there the lord of whom the lands are held *immediate*, shall have a *cessavit* against the tenant in tail, because that he is tenant to him, &c. *Ibid.* If the lord distrains pending the writ of *cessavit* against his tenant, the writ shall abate. The *writ cessavit* is directed to the sheriff, *To command A. B. that &c. he render to C. D. one messuage, which he holds by certain services, and which ought to come to the said C. by force of the statute, &c. because the said A. in doing those services* had ceased *two years, &c.* Dict.

CESSE. An *assessment* or tax. *Stat.* 22 *Hen.* 8. *cap.* 3. In Ireland, it was anciently applied to an exaction of victuals, at a certain rate, for soldiers in garrison. *Antiq. Hiberniæ.*

CESSIO BONORUM. A process in the law of Scotland, similar in effect to that under the statutes relating to *Bankruptcy* in England.—See *Bankrupt.*

CESSION, *Cessio.*] A ceasing, yielding up, or giving over. When an ecclesiastical person is created bishop, or a parson of a parsonage takes another benefice, without dispensation or being otherwise not qualified, &c. in both cases their first benefices are become void, and are in the law said to be void by *cession*: and to those benefices that the person had who was created bishop, the king shall present for that time, whoever is patron of them; and in the other case, the patron may present. *Cowel.*

But cession in the case of bishops does not take place till consecration. *Dyer* 223. See title *Commendam*, *Advowson* II.

No person is entitled to dispensation, but *chaplains* of the king and others mentioned in the *stat.* 21 *H.* 8. *c.* 13.; the brethren, and the sons of lords and knights (not of baronets), and doctors and bachelors of divinity and law in the Universities of this realm. 1 *Comm.* 392. See title *Chaplain*.

Both the livings must have cure of souls; and the statute expressly excepts deaneries, archdeaconries, chancellorships, treasurerships, chanterships, prebends and sinecure rectories. See title *Chaplain*, *Parson*.

In case of a cession under the statute, the church is so far void upon institution to the second living, that the patron *may* take notice of it, and present if he pleases; but it seems that a lapse will not incur from the time of *institution* against the patron, unless notice be given him; but it will from the time of *induction*. 2 *Wils.* 200. 3 *Burr.* 1504. See title *Advowson*, II.

CESSOR, *Lat.*] He who *ceaseth*, or neglects so long to perform a duty, that he thereby incurs the danger of the law. *Old Nat. Br.* 136.—See title *Cessavit*.

CESSURE, OR CESSOR. *Ceasing*, giving over; or departing from. *Stat. Westm.* 2. *c.* 1. See title *Cessavit*.

CESTUI QUE TRUST, or, *cestui à que trust.*] Is he in trust for whom, or to whose use or benefit, another man is enfeoffed or seized of lands or tenements. By *stat.* 29 *Car.* 2. *c.* 3. lands of *cestui que trust* may be delivered in execution. See titles *Trusts*, *Uses*.

CESTUI QUE USE, more accurately as in old law tracts, cestui *à* que use, Fr. *cestui à l'use de qui.*] He to whose *use* any other man is enfeoffed of lands or tenements. 1 *Rep.* 133. Feoffees to uses were formerly deemed owners of the lands; but now the possession is adjudged in *cestui que use*, and without any entry he may bring assise, &c. *Stat.* 27 *Hen.* 8. *c.* 10. *Cro. Eliz.* 46. See tit. *Use*.

CESTUI [à] QUE VIE. He for whose life any lands or tenements are granted. *Perk.* 97. See tit. *Occupant*.

CHACEA. A station of game more extended than a park, and less than a forest; and is sometimes taken for the liberty of chasing or hunting within such a district. And according to *Blount* it hath another signification, *i. e.* the way through which cattle are drove to pasture, commonly called in some places a *drove way*. *Bracton*, *lib.* 4. *c.* 44. See tit. *Chase*.

CHACEARE *ad lepores*, *vel vulpes*. To hunt hare or fox. *Cartular. Abbat. Glaston. MS.* 87.

CHACURUS, from the Fr. *chasseur.*] A horse for the chase; or rather a hound or dog, a courser. *Rot.* 7 *Johan.*

CHAFE. From the Fr. *chaufer* to heat, whence our *chafing* dish.

CHAFEWAX. An officer in Chancery, that fitteth the wax for sealing of the writs, commissions and such other instruments as are there made to be issued out.

CHAFFERS. Seem to signify wares or merchandise; and *chaffering* is yet used for buying and selling, or rather a kind of bartering of one thing for another. The word is mentioned in the *stat.* 3 *Ed.* 4. *c.* 4.

CHAINS. *Hanging* in. See title *Murder*.

CHAIRS. See *Coaches*.

CHALDRON OR CHALDER of coals. See title *Coals*.

CHALKING. The merchants of the staple require to be eased of divers new impositions, as *chalking*, ironage, wharfage, &c. *Rot. Parl.* 50 *Ed.* 3.

CHALLENGE. *Calumnia*, from the Fr. *chalenger*.] An exception taken either against persons or things. *Persons* as to jurors, or any one or more of them: or in case of felony, by the prisoner at the bar against *things*, as a declaration, &c. *Termes de la ley*, 109. The former is the most frequent signification in which this term is used, and which shall here be shortly mentioned; referring for further matter to titles *Jury*, *Trial*, in this Dictionary.

There are two kinds of challenge; either to the *array*, by which is meant the whole jury as it stands *arrayed* in the *panel*, or little square *pane* of parchment, on which the jurors' names are written; or to the *polls;* by which are meant the several particular persons or *heads* in the array. 1 *Inst.* 156. 8.

*Challenge* to jurors is also divided into *challenge principal* or *peremptory;* and *challenge pur cause*, *i. e.* upon cause or reason alledged: *challenge* principal or peremptory, is that which the law allows without cause alledged, or further examination; as a prisoner at the bar, arrainged for felony, may *challenge* peremptorily the number allowed him by law, one after another, alledging no cause, but his own dislike, and they shall be put off, and new taken in their places: but yet there is a difference between *challenge* principal, and *challenge* peremptory; the latter being used only in matters criminal, and barely without cause alledged; whereas the former is in civil actions for the most part, and by assigning some such cause of exception, as being found true the law allows. *Staundf. P. C.* 124. 157. *Lamb. Eiren. lib.* 4. *cap.* 14.

*Challenge* to the favour, which is a species of challenge for cause, is where the plaintiff or defendant is tenant to the sheriff, or if the sheriff's son hath married the daughter of the party, &c. and is also when either party cannot take any principal *challenge*, but showeth cause of favour; and causes of favour are infinite. If one of the parties is of affinity to a juror, the juror hath married the plaintiff's daughter, &c. If a juror hath given a verdict before in the cause, matter, or title; if one labours a juror to give his verdict; if after he is returned, a juror eats and drinks at the charge of either party; if the plaintiff, &c. be his master, or the juror hath any interest in the thing demanded, &c. these are *challenges* to the favour. 2 *Rol. Abr.* 636. *Hob.* 294.

CHALLENGE TO FIGHT.—It is a very high offence to challenge another, either by word or letter, to fight a duel, or to be the messenger of such a challenge, or even barely to endeavour to provoke another to send a challenge, or to fight; as by dispersing letters to that purpose, full of reflections, and insinuating a desire to fight, &c. 1 *Hawk. P. C. c.* 63. § 3.

By *stat.* 9 *An. c.* 14. § 8. (see title *Gaming;*) "whoever shall [assault and beat,] or challenge, or provoke to fight, any other person or persons whatsoever, upon account of any money won by gaming, playing, or betting at any of the games mentioned in that act, shall, on conviction by indictment or information, forfeit all their goods, chattels, and personal estate, and suffer imprisonment without bail, in the county prison for two years."

It is now every day's practice for the court of King's Bench to grant informations against persons sending challenges to *justices of the peace*, and in other heinous cases.

For further matter, see title *Murder*.

CHAMBERDEKINS, or *Chamber deacons*, were certain poor Irish scholars, clothed in mean habit, and living under no rule; or rather beggars banished England by *stat.* 1 *H.* 5. *cap.* 7. 8.

CHAMBERLAIN, *Camerarius.*] Is variously used in our laws, statutes, and chronicles: as first there is *Lord Great Chamberlain of England*, to whose office belongs the government of the palace at Westminster; and upon all solemn occasions the keys of Westminster-Hall and the court of Requests are delivered to him; he disposes of the sword of state to be carried before the king when he comes to the parliament, and goes on the right hand of the sword next to the king's person: he has the care of providing all things in the House of Lords in the time of parliament; to him belongs livery and lodgings in the king's court, &c. And the gentleman usher of the black rod, yeoman usher, &c. are under his authority.

The office of *Lord Great Chamberlain of England* is hereditary; and where a person dies seized in fee of this office, leaving two sisters, the office belongs to both sisters, and they may execute it by deputy: but such deputy must be approved of by the king, and must not be of a degree inferior to a knight. 2 *Bro. P. C.* 146. 8*vo ed.*

*The Lord Chamberlain of the Household* has the oversight and government of all officers belonging to the king's chamber (except the bed-chamber, which is under the groom of the stole), and also of the wardrobe; of artificers retained in the king's service, messengers, comedians, revels, musick, &c. The serjeants at arms are likewise under his inspection; and the king's chaplains, physicians, apothecaries, surgeons, barbers, &c. And he hath under him a vice-chamberlain, both being always privy councillors.

There were formerly chamberlains of the king's courts. 7 *Ed.* 6. *cap.* 1. And there are chamberlains of the Exchequer, who keep a controlment of the pells, of receipts and *exitus*, and have in their custody the leagues and treaties with foreign princes, many ancient records, the two famous books of antiquity called *Domesday*, and the *Black book of the Exchequer;* and the standards of money, and weights, and measures are kept by them. There are also under-chamberlains of the Exchequer, who make searches for all records in the treasury; and are concerned in making out the tallies, &c. The office of chamberlain of the Exchequer is mentioned in the *stat.* 34 & 35 *H.* 8. *cap.* 16. Besides these, we read of a chamberlain of North Wales. *Stowe*, *p.* 611.

A chamberlain of Chester, to whom it belongs to receive the rents and revenues of that city; and when there is no Prince of Wales, and Earl of Chester, he hath the receiving and returning of all writs coming thither out of any of the king's courts. See title *Counties-Palatine.*

The chamberlain of London, who is commonly the receiver of the city rents payable into the chamber; and hath great authority in making and determining the rights of freemen; as also concerning apprentices, orphans, &c. See title *London.*

CHAMBERS OF THE KING, *Regiæ cameræ.*] The havens or ports of the kingdom are so called in our ancient records. *Mare Claus. fol.* 242.

CHAMBRE DEPEINTE. Anciently *St. Edward's chamber*, now called the *painted chamber.* See title *Parliament.*

CHAMPARTY, OR CHAMPERTY, *campi partitio*, because the parties in *champerty* agree to divide the land, &c. in question.] A bargain with the plaintiff or defendant in any suit, to have part of the land, debt, or other thing sued for, if the party that undertakes it prevails therein. Whereupon the Champertor is to carry on the party's suit at his

own expence. See 4 *Comm.* 135: 1 *Inst.* 368. It is a species of *maintenance*, and punished in the same manner. This seems to have been an ancient grievance in our nation; for notwithstanding the several statutes of *Westm.* 1. 3 *Ed.* 1. *cap.* 25. *Westm.* 2. 13 *Ed.* 1. *cap.* 49. 28 *Ed.* 1. *st.* 3. *c.* 11. and 33 *Ed.* 1. *stat.* 3. &c. and a form of a writ framed to them; yet *stats.* 4 *Ed.* 3. *c.* 11. and 32 *Hen.* 8. *cap.* 9. enacted, that whereas former statutes provided redress for this evil in the King's Bench only, from henceforth it should be lawful for justices of the Common Pleas, justices of assize, and justices of peace in their quarter sessions, to inquire, hear and determine this and such like cases, as well at the suit of the king, as of the party: and this offence is punishable by common law and statute; the *stat.* 33 *Ed.* 1. *stat.* 3. makes the offenders liable to three years' imprisonment, and a fine at the king's pleasure. By the *stat.* 28 *Ed.* 1. *c.* 11. it is ordained, that no officer, nor any other, shall take upon him any business in suit, to have part of the thing in plea; nor none upon any covenant, shall give up his right to another; and if any do, and be convicted thereof, the taker shall forfeit to the king so much of his lands and goods as amounts to the value of the part purchased.

In the construction of these statutes, it hath been adjudged that under the word *covenant*, all kinds of promises and contracts are included, whether by writing, or parol: that rent granted out of land in variance, is within the statute of *champerty:* and grants of part of the thing in suit made merely in consideration of the maintenance, or champerty, are within the meaning of this statute; but not such as are made in consideration of a precedent honest debt, which is agreed to be satisfied with the thing in demand when recovered. *F. N. B.* 172. 2 *Inst.* 209. 2 *Rol. Abr.* 113.

It is said not to be material, whether he who brings a writ of *champerty*, did in truth suffer any damage by it; or whether the plea wherein it is alledged be determined or not. 1 *Hawk. P. C. c.* 84. A conveyance executed pending a plea, in pursuance of a bargain made before, is not within the statutes against *champerty;* and if a man purchase land of a party, pending the writ, if it be *bonâ fide*, and not to maintain, it is not *champerty*, *F. N. P.* 272.; 2 *Rol. Abr.* 113. But it hath been held, that the purchase of land while a suit of equity concerning it is depending, is within the purview of the statute 28 *E.* 1. *stat.* 3. *c.* 11. *Moor* 665. A lease for life, or years, or a voluntary gift of land, is within the statutes of *champerty;* but not a surrender made by a lessee to his lessor; or a conveyance relating to lands in suit, made by a father to his son, &c. 1 *Hawk. P. C. c.* 84.

The giving part of the lands in suit, after the end of it, to a counsellor for his reward, is not *champerty*, if there be no precedent bargain relating to such gift; but if it had been agreed between the counsellor and his client before the action brought, that he should have part of his reward, then it would be *champerty*. *Bro. Champert.* 3. And it is dangerous to meddle with any such gift, since it carries with it a strong presumption of *champerty*. 2 *Inst.* 564. If any attorney follow a cause to be paid in gross, when the thing in suit is recovered, it hath been adjudged, that this is *champerty*, *Hob.* 117. Every *champerty* implies maintenance; but every maintenance is not *champerty*. *Crom. Jur.* 39. 2 *Inst.* 108.

To this head may be referred the provision of the *stat.* 32 *H.* 8. *c.* 9. that no one shall sell or purchase any pretended right or title to land, unless the vendor hath received the profits thereof for one whole year before such grant; *or* hath been in actual possession of the land, or of the reversion or remainder; on pain that both purchaser and vendor, shall each forfeit the value of such land to the king and the prosecutor. See title *Maintenance.*

CHAMPERTORS. Are defined by statute to be those who move pleas or suits, or cause them to be moved, either by their own procurement, or by others, and sue them at their proper costs, to have part of the land in variance, or part of the gain. 33 *Ed.* 1. *stat.* 2. See the preceding article.

CHAMPION, *campio.*] Is taken in the law not only for him that fights a combat in his own cause, but also for him that doth it in the place or quarrel of another. *Bract. lib.* 3. *tract.* 2. *cap.* 21. And in Sir *Edward Bishe's* notes on *Upton*, *fol.* 36. it appears that *Henry de Ferneberg*, for thirty marks fee, did by charter covenant to be *champion* to *Roger* abbot of *Glastenbury*, *An.* 42 *Hen.* 3. These *champions*, mentioned in our law books and histories, were usually hired; and any one might hire them except parricides, and those who were accused of the highest offences: before they came into the field, they shaved their heads, and made oath that they believed the persons who hired them were in the right, and that they would defend their cause to the utmost of their power; which was always done on foot, and with no other weapon than a stick or club, and a shield; and before they engaged, they always make an offering to the church, that God might assist them in the battle. When the battle was over, the punishment of a *champion* overcome, and likewise of the person for whom he fought, was various: if it was the *champion* of a woman for a capital offence, she was burnt, and the *champion* hanged; if it was of a man, and not for a capital crime, he not only made satisfaction, but had his right hand cut off; and the man was to be close confined in prison, till the battle was over. *Bract. lib.* 2. *c.* 35. See titles *Battel*, *Appeal of Death.*

Victory in the trial by battle is obtained, if either champion proves *recreant;* that is, yields and pronounces the horrible word of *craven;* a word of disgrace and obloquy, rather than of any determinate meaning. But a horrible word it indeed is to the vanquished champion: since as a punishment to him for forfeiting the land of his principal, by pronouncing that shameful word, he is condemned as a recreant to become infamous, and not to be accounted *liber et legalis homo;* being supposed by the event to be proved forsworn, and therefore never to be put upon a jury, or admitted as a witness in any cause. 3 *Comm.* 340.

CHAMPION OF THE KING, *campio regis.*] An ancient officer, whose office it is at the coronation of our kings, when the king is at dinner, to ride armed *cap-à-piè* into Westminster Hall, and by the proclamation of a herald make a challenge, *That if any man shall deny the king's title to the crown, he is there ready to defend it in single combat, &c.* Which being done, the king drinks to him and sends him a gilt cup with a cover full of wine, which the *champion* drinks, and hath the cup for his fee. This office, ever since the coronation of King Richard II. when Baldwin Freville exhibited his petition for it, was adjudged from him to Sir John Dymocke his competitor (both claiming from Marmion), and hath continued ever since in the family of the Dymockes; who hold the manor of Scrivelsby (Scrivelbay, or Scrivelsbury) in Lincolnshire, hereditary from the Marmions, by grand serjeanty, *viz.* That the lord thereof shall be the king's *champion*, as abovesaid. Accordingly Sir Edward Dymocke performed this office at the coronation of King Charles II. And a person of the name of Dymocke performed it at the coronation of his present Majesty George the Third.

CHANCE. Where a man commits an unlawful act, by *misfortune*, or chance, and not by design, it is a deficiency of the will; as here it observes a total neutrality, and doth not co-operate with the deed; which therefore wants one main ingredient of a crime. Of this, as it affects the life of another, see title *Murder.*—It is to be observed however generally, that if any *accidental* mischief happens to follow from the performance of a *lawful* act, the party stands excused from all guilt; but if a man be doing any thing *unlawful*, and a consequence ensues which he did not foresee *or intend*, as the death of a man or the like, his want of foresight, shall be

no excuse; for being guilty of one offence, in doing antecedently what is in itself unlawful, he is criminally guilty of whatever consequence may follow the first misbehaviour. 1 *Hal. P. C.* 39. See title *Chance medley.*

CHANCELLOR, *Cancellarius.*] Was at first only a chief notary or scribe under the emperor, and was called *cancellarius*, because he sate *intra cancellos*, to avoid the crowd of the people. This word is by some derived from *cancello*, and by others from *cancellis*, an inclosed or separated place, or chancel, encompassed with bars, to defend the judges, and other officers from the press of the public. And *cancellarius* originally, as *Lupanus* thinks, signified only the register in court; *Grapharios, scil, qui conscribendis et excipiendis judicum actis dant operam*: but this name and officer is of late times greatly advanced, not only in this, but in other kingdoms; for he is the chief administrator of justice, next to the Sovereign, who anciently heard equitable causes himself.

All other Justices in this kingdom are tied to the strict rules of the law, in their judgments; but the Chancellor hath power to moderate the written law, governing his judgment by the law of nature and conscience, and ordering all things *juxtà æquum et bonum*: and having the king's power in these matters, he hath been called the keeper of the king's conscience. It has been suggested, that the Chancellor originally presided over a political college of secretaries, for the writing of treaties, grants, and other public business; and that the court of equity under the old constitution was held before the king and his council in the palace, where one supreme court for business of every kind was kept: and at first the Chancellor became a judge to hear and determine petitions to the king, which were referred to him; and in the end, as business increased, the people intitled their suits to the chancellor, and not the king; and thus the chancellor's equitable power had by degrees commencement by prescription. *Hist. Cham. p.* 3. 10. 44. &c.

*Staundford* says, the Chancellor hath two powers; one absolute, the other ordinary; meaning, that although by his ordinary power, in some cases, he must observe the form of proceeding as other inferior judges; in his absolute power he is not limited by the law, but by conscience and equity, according to the circumstances of things. See post tit. *Chancery.*

And though *Polydore Virgil*, in his *History of England*, makes Willam the First, called the Conqueror, the founder of our chancellors, yet *Dugdale* has shewn that there were many chancellors of England long before that time, which are mentioned in his *Origines Juridicales*, and catalogues of chancellors; and *Sir Edward Coke* in his fourth *Institute* saith, it is certain, that both the British and Saxon kings had their chancellors, whose great authority under their kings were in all probability drawn from the reasonable custom of neighbouring nations and the civil law.

He that bears this chief magistracy, is styled the *Lord High Chancellor of Great Britain*, which is the highest honour of the long robe. There is also a *Lord High Chancellor of Ireland.* But the Lord Chancellor of Great Britain is to certain purposes keeper of the great seal of the *United Kingdom*. See *stat.* 53 *G.* 3. *c.* 24. for appointing the Vice-Chancellor of England.

A chancellor may be made so at will, by patent, but it is said not for life; for being an ancient office, it ought to be granted as hath been accustomed. 2 *Inst.* 87. But Sir Edward Hide, afterwards Earl of Clarendon, had a patent to be lord chancellor for life, though he was dismissed from that office, and the patent declared void. 1 *Sid.* 338.

By the English *stat.* 5 *Eliz. cap.* 18. (not extended to Ireland) the Lord Chancellor and Keeper have one and the same power; and therefore since that statute, there cannot be a Lord Chancellor and Lord Keeper at the same time; before there might, and had been. 4 *Inst.* 78. King Hen. V. had a great seal of gold, which he delivered to the Bishop of Durham, and made him Lord Chancellor, and also another of silver, which he delivered to the Bishop of London to keep. But the Lord Bridgman was Lord Keeper, and Lord Chief Justice of the Common Pleas, at the same time; which offices were held not to be inconsistent. *Ibid.*

By *stat.* 1 *W. & M. c.* 21. commissioners appointed to execute the office of Lord Chancellor, may exercise all the authority, jurisdiction, and execution of laws, which the Lord Chancellor or Lord Keeper, of right ought to use and execute, &c. since which statute this high office hath been several times in commission. Although this *stat.* 1 *W. & M. c.* 21. is not expressly extended to Ireland, yet see *stat.* 42 *G.* 3. *c.* 105. which increases the salary of the Lord Chancellor of Ireland to 10,000*l.* a year, by which it is provided that when the great seal there is in commission the salary may be *apportioned.*

With respect to the Lord Chancellor or Lord Keeper (with reference to Great Britain, except where special mention is made of Ireland), the office is now created by the mere delivery of the King's great seal into his custody; whereby he becomes, without writ or patent, an officer of the greatest weight and power of any now subsisting in the kingdom, and superior in point of precedency to every temporal lord.—And the act of taking away this seal by the king, or of its being resigned or given up by the Chancellor, determines his office. (See 1 *Sid.* 338.) He is a privy councillor by his office; and according to Lord Chancellor Ellesmere, prolocutor of the House of Lords by prescription.—To him belongs the appointment of all Justices of peace throughout the kingdom.—Being formerly usually an Ecclesiastic (for none else were then capable of an office so conversant in writings) and presiding over the Royal Chapel, he became keeper of the King's conscience; visitor in right of the king of all hospitals and colleges of the king's foundation, and patron of all the king's livings under the value of *twenty marks* a year in the king's books. (38 *Ed.* 3. *c.* 3. *F. N. B.* 35. though *Hob.* 214. extends this value to *twenty pounds.*)—He is the general guardian of all infants, ideots, and lunatics; and has the general superintendence of all charitable uses in the kingdom. And all this over and above the vast and extensive jurisdiction, which he exercises in his judicial capacity in the Court of Chancery. 3 *Comm.* 47.

The *stat.* 25 *E.* 3. *c.* 2. declares it to be *treason* to slay the *Chancellor* (and certain other judges) being in their places doing their offices; and it seems that the Lord Keeper and Commissioners of the great seal are within this *statute* by virtue of *stats.* 5 *Eliz. c.* 18. and 1 *W. & M. c.* 21. already mentioned. See title *Treason.*

*The Lord Chancellor*, when there is no Lord High Steward, is accounted the first officer of the kingdom; and he not only keeps the king's great seal, but all patents, commissions, warrants, &c. from the king, are perused and examined by him before signed; and Lord Coke says the Lord Chancellor is so termed *à cancellando*, from *cancelling the king's letters patent*, when granted contrary to law; which is the highest point of his jurisdiction. 4 *Inst.* 88. He by his oath swears well and truly to serve the king, and to do right to all manner of people, &c. In his judicial capacity, he hath divers assistants and officers, *viz.* the Vice-Chancellor of England, the Master of the Rolls, the Masters in Chancery, &c. in England and Ireland. In matters of difficulty, the Chancellor frequently calls one or more of the chief justices and judges to assist him in making his decrees; though in such cases they only give their advice and opinion, and have no share whatever of the judicial authority. See *stat.* 1 *Geo. c.* 1. § 6. whereby His Majesty is empowered to grant 5000*l.* a year out of the Post-office revenue to the Lord Chancellor.

*The Master of the Rolls* in England has judicial power, and is an assistant to the Lord Chancellor when present, and his deputy when absent; but he has certain causes assigned him

to hear and decree, which he usually doth on certain days appointed at the chapel of the Rolls, being assisted by one or more Masters in chancery: he is, by virtue of his office, chief of the masters of chancery, and chief clerk of the petty-bag office. See 3 *G.* 2. *c.* 30. tit. *Decree.*

The power of the Master of the Rolls in Ireland is assimilated to that of the like officer in England, and his salary, &c. ascertained by *stats.* 41 *G.* 3. *c.* 25. 55 *G.* 3. *c.* 114.

The power of the *Vice-Chancellor* was introduced and established by *stat.* 53 *Geo.* 3. *c.* 24. by which the Crown is empowered to appoint by letters patent, some barrister of fifteen years standing to be an additional Judge and Assistant to the Lord Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal of the United Kingdom, in the discharge of their respective offices, to be called *Vice-Chancellor of England*, to hold such office during his good behaviour.

Such Vice-Chancellor is empowered to hear and determine all causes depending in the court of chancery in England, either as a court of law or equity, or incident to any ministerial office of the said court, or submitted to such court or to the Lord Chancellor, &c. by any act of parliament, as the chancellor, &c. shall direct; and all decrees, orders, &c. made by the vice-chancellor shall be valid, as acts of the court, but subject to be reversed or altered by the lord chancellor, &c. and no such decree, &c. shall be enrolled till signed by the chancellor, &c. It is expressly provided that the vice-chancellor shall not have power to reverse or alter any decree, &c. made by the chancellor, &c. unless authorised by the chancellor, &c. so to do; nor to reverse any decree or order of the Master of the Rolls.

Vice-Chancellor shall sit for the chancellor, &c. when required, and while the chancellor is also sitting, and have a separate court, and shall rank next to the Master of the Rolls, and have a secretary, train-bearer, usher, &c. He may be removed by address of both houses. His salary 5000*l.* per ann. to be paid out of the interest of unclaimed suitors' money.

*The Twelve Masters in Chancery* sit some of them in court, and take notice of such references as are made to them, to be reported to the court, relating to matters of practice, the state of the proceedings, accounts, &c. and they also take affidavits, acknowledge deeds and recognizances, &c. See title *Master in Chancery.*

*The Six Clerks* in chancery transact and file all proceedings by bill and answer; and also issue out some patents that pass the great seal: which business is done by their under clerks, each of whom has a seat there, and whereof every six clerk has a certain number in his office, usually about ten; the whole body being called the *sixty clerks.*

By 55 *G.* 3. *c.* 114. § 3—6. the Six Clerks in Ireland are allowed to sell their offices with the consent of the master of the rolls, &c.

*The Cursitors* of the court, four and twenty in number, make out all original writs in chancery, which are returnable in C. B. &c. and among these the business of the several counties is severally distributed.

*The Register* is a place of great importance in this court, and he hath several deputies under him, to take cognisance of all orders and decrees, and enter and draw them up, &c.

*The Master of the Subpœna Office* issues out all writs of *subpœna.*

*The Examiners* are officers in this court, who take the depositions of witnesses, and are to examine them and make out copies of the depositions.

*The Clerk of the Affidavits* files all affidavits used in court, without which they will not be admitted.

*The Clerk of the Rolls* sits constantly in the rolls to make searches for deeds, offices, &c. and to make out copies.

*The Clerks of the Petty-Bag Office*, in number three, have great variety of business that goes through their hands, in making out writs of summons to parliament, *congé d'elires* for bishops, patents for customers; *liberates* upon extent of statute-staple, and recovery of recognisances forfeited, &c. And also relating to suits for and against privileged persons, &c. And the clerks of this office have several clerks under them.

*The Usher of the Chancery* had formerly the receiving and custody of all money ordered to be deposited in court, and paid it back again by order: but this business was afterwards assumed by the masters in chancery; till by *stat.* 12 *Geo.* 1. *c.* 32. a new officer was appointed, called *The Accountant General*, to receive the money lodged in court, and convey the same to the Bank, to be there kept for the suitors of the court. See title *Accountant General.*

There is also a *Serjeant at Arms*, to whom persons standing in contempt are brought up by his substitute as prisoners.

*A Warden of the Fleet*, who receives such prisoners as stand committed by the court, &c.

Besides these offices, there is a clerk of the crown in Chancery; clerk and controller of the hanaper; clerk for inrolling letters patent, &c. not employed in proceedings of equity, but concerned in making out commissions, patents, pardons, &c. under the great seal, and collecting the fees thereof. A clerk of the faculties, for dispensations, licences, &c.; clerk of the presentations, for benefices of the crown in the chancellor's gift; clerk of appeals, on appeals from the courts of the archbishop to the court of chancery: and divers other officers, who are constituted by the chancellor's commission.—See further, titles *Chancery, Judges.*

Chancellor of a Diocese; or, of a Bishop. A person appointed to hold the bishop's courts, and to assist him in matters of ecclesiastical law. This officer, as well as all other ecclesiastical ones, if lay or married, must be a doctor of the civil law, so created in some university. *Stat.* 37 *H.* 8. *c.* 17.

Chancellor of the Dutchy of Lancaster. An officer before whom, or his deputy, the court of the *Dutchy Chamber of Lancaster* is held. This is a special jurisdiction concerning all manner of equity relating to lands holden of the king in right of the *Dutchy of Lancaster*, *Hob.* 77. 2 *Lev.* 24. This is a thing very distinct from the county palatine, which hath also its separate chancery for sealing of writs and the like. 1 *Ventr.* 257. This Dutchy comprises much territory which lies at a vast distance from the county, as particularly a very large district surrounded by the city of Westminster. The proceedings in this court are the same as on the equity side of the courts of *Exchequer* and *Chancery.* 4 *Inst.* 206. So that it seems not to be a court of record: and it has been holden that those courts have a concurrent jurisdiction with the Dutchy Court, and may take cognisance of the same causes. 1 *C. R.* 55. *Toth.* 145. *Hard.* 171. See title *Equity.*

This court is held in Westminster-hall, and was formerly much used. Under the chancellor of the Dutchy are an attorney of the court, one chief clerk or register, and several auditors, &c. See further title *Counties Palatine.*

Chancellor of the Exchequer. Is likewise a great officer, who, it is thought by many, was originally appointed for the qualifying extremities in the Exchequer: he sometimes sits in court, and in the Exchequer Chamber; and, with the judges of the court, orders things to the king's best benefit. He is mentioned in *stat.* 25 *H.* 8. *c.* 16. and hath by the *stat.* 33 *H.* 8. *c.* 39. power with others, to compound for the forfeitures upon penal statutes, bonds and recognizances entered into to the king: he hath also great authority in the management of the royal revenue, &c. which seems of late to be his chief business, being commonly the first commissioner of the treasury. And though the court of equity in the exchequer-chamber was intended to be holden before the treasurer, chancellor, and barons, it is usually before the barons only. When

there is a lord-treasurer, the chancellor of the exchequer is under treasurer.

As to the *Chancellor of the Order of the Garter*, see Stow's Annals, page 706.—*Chancellor of the Universities*, see title *Courts of the Universities*.—The office of *Chancellor in Cathedral Churches* is thus described in the *Monasticon*. *Lectiones legendas in ecclesia per se vel per suum vicarium auscultare, male legentes emendare, scholas conferre, sigilla ad causas conferre literas capituli facere et consignare, libros servare, quoticscunque voluerit prædicare, prædicationes in ecclesia vel extra ecclesiam predicare, et cui voluerit prædicationis officium assignare.* See Mon. Angl. tom. 3. p. 24. 339.

CHANCE-MEDLEY. From the Fr. *chance*, lapsus, and *mêler*, miscere.] Such killing of a man as happens either [in self defence] on a sudden quarrel; or in the commission of an unlawful act, without any deliberate intention of doing any mischief at all. 1 *Hawk. P. C. c.* 30. § 1.

The self-defence here meant is that whereby a man may protect himself from an assault or the like in the course of a sudden brawl or quarrel, by killing him who assaults him. And this is what the law expresses by this word *chance-medley*, or as some rather choose to write it, *chaud-medley*; the former of which, in its etymology, signifies a *casual* affray, the latter an affray in the heat of blood or passion; both of them of pretty much the same import; but the former is in common speech too often *erroneously* applied to any manner of homicide by *misadventure*; whereas it appears by *stat.* 24 *H.* 8. *c.* 5. and in ancient law books, that it is properly applied to such killing as happens to self-defence, in a sudden rencounter. 4 *Comm.* 183. cites *Stamf. P. C.* 16. 3 *Inst.* 55. 7. *Foster* 275. 6. This being in fact a species of excuseable homicide, comes more properly under the division of *murder*, and is therefore treated of in that place. See title *Homicide*.—In *chance-medley* the offender forfeits his goods, but hath a pardon of course. See *stat.* 6 *Ed.* 1. *c.* 9.

## CHANCERY.

Cancellaria.] The highest court of judicature in this kingdom next to the parliament, and of very ancient institution. The jurisdiction of this court is of two kinds; *ordinary* and *extraordinary*. The *ordinary* jurisdiction is that wherein the Lord Chancellor, Lord Keeper, &c. in his proceedings and judgments, is bound to observe the order and method of the common law; and the *extraordinary* jurisdiction is that which this court exercises in cases of *equity*.

The *Ordinary Court* holds plea of recognisances acknowledged in the Chancery, writs of *scire facias* for repeal of letters patent, writs of partition, &c. and also of all personal actions, by or against any officer of the court; and by acts of parliament of several offences and causes. All original writs, commissions of bankrupt, of charitable uses, and other commissions, as ideots, lunacy, &c. issue out of this court, for which it is always open; and sometimes a *supersedeas*, or writ of privilege, hath been here granted to discharge a person out of prison. An *habeas corpus*, prohibition, &c. may be had from this in the vacation; and here a *subpœna* may be had to force witnesses to appear in other courts, when they have no power to call them. 4 *Inst.* 79. 1 *Danv. Abr*, 776.

The *Extraordinary Court*, or Court of Equity, proceeds by the rules of equity and conscience, and moderates the rigour of the common law, considering the *intention* rather than the words of the law. Equity being the correction of that wherein the law, by reason of its universality, is deficient. On this ground, therefore, to maintain a suit in chancery, it is always alleged that the plaintiff is incapable of obtaining relief at common law; and this must be without any fault of his own, as by having lost his bond, &c. chancery never acting *against*, but in assistance of the common law, supplying its deficiencies, not contradicting its rules. A judgment at law not being reversable by a decree in chancery. *Cro. Eliz.* 220. But a bill in chancery may be brought to compel the discovery of the contents of a letter which would discharge the plaintiff of an action at law, before verdict obtained. 3 *C. Rep.* 17.

A modern writer (Mr. Mitford, afterwards Lord Chancellor of Ireland, with the title of Lord Redesdale) remarks, that it is not a very easy task accurately to describe the jurisdiction of our courts of equity. They who have attempted it have generally failed.

Early in the history of our jurisprudence, the administration of justice by the ordinary courts appears to have been incomplete. To supply the defect, the courts of equity have gained an establishment; assuming the power of enforcing the principles, upon which the ordinary courts also decide when the powers of those courts or their modes of proceeding are insufficient for the purpose;—of preventing those principles, when enforced by the ordinary courts, from becoming, contrary to the purpose of their original establishment, instruments of injustice;—and of deciding on principles of universal justice, where the interference of a court of judicature is necessary to prevent a wrong, and the positive law is silent. The courts of equity also administer to the ends of justice, by removing impediments to the fair decision of a question in the other courts; by providing for the safety of property in dispute, pending a litigation; by restraining the assertion of doubtful rights, in a manner productive of irreparable damage; by preventing injury to a third person from the doubtful title of others; and by putting a bound to vexatious and oppressive litigations and preventing unnecessary multiplicity of suits; and, without pronouncing any judgment on the subject, by compelling a discovery which may enable other courts to give their judgment; and by preserving testimony, when in danger of being lost, before the matter to which it relates can be made the subject of judicial investigation. This establishment has obtained throughout the whole system of our judicial policy; most of the inferior branches of that system having their peculiar courts of equity: [*e. g.* the court of exchequer, courts of Wales, the counties palatine, cinque ports, &c.] and the court of chancery assuming a general jurisdiction in cases which are not within the bounds, or which are beyond the powers, of other jurisdictions. *Mitford's Treatise on the Pleadings in Chancery*, 8vo. 1787. 2d edition. See further as to the origin and jurisdiction of *Courts of Equity* in general, this Dictionary, title *Equity*.

It is not therefore to be expected that all the cases within the jurisdiction of this court can be enumerated with any degree of accuracy in such a work as this.—What confusedly follows may serve to show the leading principles of its decision. They who desire further and more precise information will consult *Viner's* and the other Abridgment and Digests, which enter so much more fully into the subject; and the titles in this Dictionary of the several subjects to which such jurisdiction relates. See *Bankrupts*, *Charities*, *Frauds*, *Infants*, *Lunatics*, *Trusts*, *&c. &c.*

This court gives relief for and against infants, notwithstanding their minority: and for and against married women, notwithstanding their coverture: in some cases a woman may sue her husband for maintenance; she may sue him when he is beyond sea, &c. and be compelled to answer without her husband. All frauds and deceits, for which there is no remedy at common law may here be redressed; as also unreasonable and deceitful engagements and agreements entered into without consideration, 1 *Vern.* 205. See title *Fraud*. All breaches of trust and confidence; and accidents; as to relieve obligors mortgagors, &c. against penalties and forfeitures, where the intent was only to pay the debt; titles to lands, where the deeds are lost, or suppressed, may by this court be confirmed, conveyances rendered defective by mistake, may be made perfect, &c.

In this court executors may be called upon to give security and pay interest for money that is to lie long in their hands. Here executors may sue one another, or one executor alone be sued by the legatees or others without the rest: order may be made for performance of a will: it may be decreed who shall have the tuition of a child, and other matters are regulated as to the disposal of the goods of testators and intestates. See 3 *Comm.* 437.—Under this head it may be observed that money articled to be laid out in land shall be taken as land in equity, and descend to the heir. 1 *Salk.* 154. Personal estate in the hands of executors, shall be applied in discharge of the heir, where there are sufficient assets to pay the debts and legacies. 1 *Danv.* 770. There shall be no bill in equity against an executor, to discover assets before a suit commenced at law. *Hard.* 115. *Sed qu.* Legal assets shall be applied in a course of administration; but equitable assets amongst all the creditors proportionably, on a bill brought, &c. 2 *Vern.* 62. See titles *Assets, Executor.*

Mortgages are not relievable in equity after twenty years, where no demand has been made, or interest paid, or where other particular circumstances do not interfere, &c. 2 *Vent.* 340. See title *Mortgage.*

Copyhold tenants may be relieved against the lords of manors—inclosures of common lands may be decreed—assignments of choses in action for a good consideration, though not valid in law, may be carried into effect—accounts are compelled to be rendered—the limitation of actions by statute may be relieved against.

A deed appearing to be cancelled has been decreed to be a good deed, on special circumstances. 1 *Ch. Cas.* 219. Articles of agreement upon marriage reduced into writing, though not signed by either party, being proved to be agreed to, were decreed to be performed. 2 *Vern.* 200. Also an agreement in writing made since the statute of frauds, has been decreed to be discharged by parol. 1 *Vern.* 240.

A release shall be avoided for fraud, where there is *suppressio veri*, or *suggestio falsi*; and a release may be set aside in chancery by reason of the misapprehension of the party that gave it. 1 *Vern.* 20. 32. A will concerning lands may be avoided in a court of equity when obtained by fraud, &c. 2 *Ch. Rep.* 97. Heirs may be relieved in equity against unconscionable contracts made during their fathers' lives to pay large sums of money on their outliving their fathers, and the securities are frequently decreed to be delivered up, on payment of the sum actually advanced. 2 *Chan. Rep.* 397. 1 *Vern.* 467.

A purchaser of land, without notice of an incumbrance, shall not be hurt thereby in equity; and in pleading a purchase the defendant ought to deny notice of incumbrances, &c. Indentures of apprenticeship have been decreed to be delivered up, and the money given with the apprentice to be paid back by the master, on ill usage of the apprentice, &c. *Finch Rep.* 125. Charity lands being let at a great undervalue, as was found by inquisition, on a commission of charitable uses, the lease was avoided in equity, and the lessee decreed to pay the arrears in rent according to the first value, and to yield up the possession. 2 *Vern.* 415. Other cases of relief with respect to public charities and charitable corporations, come also under the immediate direction of the Court of Chancery.

It is common to give relief in chancery notwithstanding there is an agreement between the parties that there shall be no relief in law or equity. 1 *Mod.* 141. 305. In cases which tend to restrain freedom, or introduce corruption into marriage contracts, the court are always most ready to afford relief. If a portion be given to a woman, provided she marries not without the consent of a certain person, although she marries without such consent, she shall be relieved in chancery, and have her portion: unless the portion, on such marriage, had been limited over to another, in which case it is otherwise. 1 *Danv.* 752. 1 *Mod.* 300. If a father on the marriage of his son, take a bond of the son, that he shall pay him so much, &c. this is void in equity, being adjudged by coercion, while he is under the awe of his father. 1 *Salk.* 158. Also where a son, without privity of the father, treating the match, gives bond, to return any part of the portion, in equity it is void. *Ibid.* 156. But a man is not bound to discover the consideration of a bond generally given, which in itself implies a consideration. *Hard.* 200. See titles *Fraud, Marriage, &c.*

If a factor to a merchant hath money in his hands, it shall be accounted his own; for equity cannot follow money; but it may goods, to make them the merchant's which may be known, though money cannot. 1 *Salk.* 260.

Where trustees convert money raised out of land for payment of debts, to their own use, the heir shall have the land discharged, which hath borne its burden, and the trustees are liable to the debts in equity. 1 *Salk.* 153. If lessee for years without impeachment of waste, about the end of his term, cuts down timber trees, the court of chancery may stop him by injunction. 1 *Rol. Abr.* 380. And tenant after possibility of issue extinct, or for life, dispunishable of waste, may be stopped in equity from pulling down houses, &c. 1 *Danv.* 761.

The following is a general and comprehensive view of the nature and reason of the pleadings in chancery, extracted and abridged from *Mr. Milford's Treatise.* See also 3 *Comm.* 446. &c.

Previous to entering on the subject it should be remembered, that chancery will not retain a suit for any thing under 10*l.* value, except in cases of charity, nor for lands under 40*s.* *per annum.*

A suit to the extraordinary jurisdiction of the court of chancery, on behalf of a subject merely, is commenced by preferring *a bill* (signed by counsel) in the nature of a petition to the lord chancellor, lord keeper, or lords commissioners of the great seal; or to the king himself, in his court of chancery, in case the person holding the seal is a party, or the seal is in the king's hand. But if the suit is instituted on behalf of the crown, or of those who partake of its prerogative, or whose rights are under its particular protection, as the objects of a public charity, the matter of complaint is offered by way of *information*, given by the proper officer [usually the attorney-general.] Except in some few instances, bills and informations have been always in the English language; and a suit thus preferred is therefore commonly termed a suit by *English* bill, by way of distinction from the proceedings in suits within the ordinary jurisdiction of the court, which till the statute of 4 *G.* 2. *c.* 26. were entered and enrolled more anciently in the French or Roman tongue, and afterwards in the Latin; in the same manner as the pleadings in the other courts of common law.

Every *bill* must have for its object one or more of the grounds upon which the jurisdiction of the court is founded; and as that jurisdiction sometimes extends to decide on the subject, and in some cases is only ancillary to the decision of another court, or a future suit, the bill may, 1, either complain of some injury which the person exhibiting it suffers, and pray relief, according to the injury; or, 2, without praying relief, may seek a discovery of matter necessary to support or defend another suit; or, 3, although no actual injury is suffered, it may complain of a *threatened* wrong; and, stating a probable ground of possible injury, may pray the assistance of the court to enable the plaintiff, or person exhibiting the bill, to defend himself against the injury whenever it shall be attempted to be committed.

As the court of Chancery has general jurisdiction in matters of equity which are not within the bounds, or which are beyond the powers, of inferior judrisdictions, it assumes a controul over those jurisdictions, by removing from them suits which they are incompetent to determine. To effect this it requires the party injured to institute a suit in the court of chancery, the sole object of which is, the removal of the for-

mer suit, by means of the writ of *certiorari*; and the prayer of the bill used for this purpose is confined to that object.

The *bill*, except it merely prays the writ of *certiorari* [in which case it does not require any defence, nor can there be any pleading beyond the bill], requires the answer of the defendant or party complained of, upon oath; unless the party is entitled to privilege of peerage, or as a lord of parliament, or unless a corporation aggregate is made a party. In the first case the answer is required upon the *honour* of the defendant, and in the latter under the corporation seal.

[In the case of exhibiting a bill against a peer, the Lord Chancellor writes a letter to him, called a *letter missive*, and if he does not put in his answer, a *subpœna* issues, and then an order to shew cause why a *sequestration* should not issue, and if he still stands out, then a *sequestration* is granted; for there can be no process of contempt against the person of a peer: the process is the same against a member of the house of commons, except the *letter missive*.] See title *Privilege, III.*

An answer is thus required in the case of a bill, seeking the *decree* of the court on the subject of the complaint, with a view—1. To obtain an admission of the case made by the bill either in aid of proof; or—2. to supply the want of it—3. To obtain a discovery of the points in the plaintiff's case, controverted by the defendant, and—4. of the grounds on which they are controverted—5. To gain a discovery of the case on which the defendant relies; and—6. of the manner in which he means to support it.

If the bill seeks only the assistance of the court to protect the plaintiff against a future injury, the answer of the defendant, upon oath, may be required to obtain an *admission* of the plaintiff's title, and a *discovery* of the claims of the defendant, and the grounds on which those claims are intended to be supported.

When the sole object of the bill is a *discovery* of matter necessary to support or defend another suit, the oath of the defendant is required to compel that discovery; which oath, however, the plaintiff may, if he thinks proper, dispense with, by consenting to, or obtaining an order of court for the purpose; and this is frequently done for the convenience of parties.

To the bill thus preferred (unless it is merely for a *certiorari*) it is necessary for the person or persons complained of to *make defence*, or to disclaim all rights to the matters in question.

As the bill calls upon the defendant to answer the several charges it contains, he must do so, unless he can dispute the right of the plaintiff to compel such answer; either, 1. From some impropriety in requiring the discovery sought; or, 2. From some objection to the proceeding to which the discovery is proposed to be assistant; or, 3. Unless by disclaiming all right to the matters in question, he shews a further answer from him to be unnecessary.

The *grounds* on which *defence* may be made to a bill, either by answer, or by disputing the right of the plaintiff to compel such answer, are various. 1. The subject of the suit may not be within the jurisdiction of a court of equity; 2. Some other court of equity may have the proper jurisdiction. 3. The plaintiff may not be entitled to sue, by reason of some personal disability. 4. The plaintiff may not be the person he pretends to be. 5. He may have no interest in the subject; or 6. Though he has such interest he may have no right to call upon the defendant concerning it. 7. The defendant may not be the person he is alledged to be by the bill; or 8. He may not have that interest in the subject to make him liable to the claims of the plaintiff.—And notwithstanding all these requisites concur. 9. Still the plaintiff may not be entitled in the whole, or in part, to the relief or assistance he prays; or 10. Even if he is so entitled, the defendant may *also* have rights in the subject which may require the attention of the court, and call for its interference to adjust the rights of all parties.—The effecting *complete* justice, and *finally* determining, as far as possible, all questions concerning the subject being the constant aim of courts of equity.

Some of these grounds may extend only to entitle the defendant to dispute the plaintiff's claim to the relief prayed by the bill; and may not be sufficient to protect him from making the discovery sought by it: and where there is no ground for disputing the plaintiff's right to relief, or if no relief is prayed, the *impropriety* or *immateriality* of the discovery may protect the defendant from making it.

The *form* of making *defence* varies according to the foundation on which it is made, and the extent in which it submits to the judgment of the court.—If it rests on the bill, and, on the foundation of the matter there apparent, demand the judgment of the court, whether the suit shall proceed at all, it is termed *A Demurrer*. If on the foundation of new matter offered, it demands judgment whether the defendant shall be compelled to answer further, it assumes a different form, and is termed *A Plea*. If it submits to answer generally the charges in the bill, demanding the judgment of the court on the whole case made on both sides, it is offered in a shape still different, and is simply called *An Answer*. If the defendant disclaims all interest in the matters in question, his answer to the complaint made is different from all the others, and is termed *A Disclaimer*. And these several forms, or any of them, may be used together, if applied to separate and distinct parts of the bill.

*A Demurrer*, being founded on the bill itself, necessarily admits the truth of the facts contained in the bill, or in that part of it to which the demurrer extends; and therefore, as no *fact* can be in question between the parties, the court may immediately proceed to pronounce its definitive judgment on the demurrer; which, if favourable to the defendant, puts an end to so much of the suit as the demurrer extends to. A demurrer thus allowed consequently prevents any further proceeding.

*A Plea* is also intended to prevent further proceeding at large, by resting on some point founded on matter stated in the plea; and it therefore admits, for the purposes of the plea, the truth of the facts contained in the bill, so far as they are not controverted by facts stated in the plea. Upon the sufficiency of this defence the court will also give immediate judgment, supposing the facts stated in it to be true: but the judgment, if favourable to the defendant, is not definitive; for the truth of the plea may be denied by *A Replication*, and the parties may then proceed to examine witnesses, the one to prove and the other to disprove the facts stated in the plea. The replication in this case concludes the pleadings, though if the truth of the plea is not supported, further proceedings may be had, which will be noticed presently.

*An Answer* generally controverts the facts stated in the bill, or some of them; and states other facts to shew the rights of the defendant, in the subject of the suit; but sometimes it admits the truth of the case made by the bill, and either with or without stating additional facts, submits the questions arising upon the case, thus made, to the judgment of the court. If an answer admits the facts stated in the bill, or such of them as are material to the plaintiff's case; and states no new facts, or such only as the plaintiff is willing to admit, no further pleading is necessary; the court will decide on the answer, considering it as true. So if the sole object of the suit is to obtain *a discovery*, there can be no proceeding beyond an answer by which the discovery is obtained. But if necessary to maintain the plaintiff's case, the truth of the answer, or of any part of it, may be denied, and the sufficiency of the bill may be asserted by *a replication*, which in this case also concludes the pleadings according to the present practice of the court.

If *a Demurrer* or *Plea* is *over-ruled* upon argument, the defendant must make a new defence. This he cannot do by a second demurrer of the same extent with that over-ruled; for although, by a standing order of the court, a cause of de-

murrer must be set forth in the pleading, yet if that is over-ruled, any other cause appearing on the bill may be offered on argument of the demurrer, and, if valid, will be allowed, the rule of court affecting only the costs. But after a demurrer has been over-ruled, new defence may be made by a demurrer less extended, or by plea or answer.—And after a plea has been over-ruled, defence may be made by demurrer, by a new plea, or by an answer, and the proceedings upon the new defence will be the same as if it had been originally made.

*A Disclaimer* neither asserting any fact, nor denying any right sought by the bill, admits of no further pleading.

*Suits* thus instituted are sometimes *imperfect* in their frame, or become so by accident before their end has been obtained; and the interests in the property in litigation may be changed, pending the suit, in various ways.—To supply the defects arising from any such circumstances, new suits may become necessary, to add to, or continue, or obtain the benefit of, the original suit. A litigation commenced by one party, sometimes renders necessary a litigation by another party, to operate as a defence, or to obtain a full decision on the rights of all parties. [And bills filed for this purpose are termed *cross bills.*]—Where the court has given judgment on a suit, it will in some cases permit that judgment to be controverted, suspended, or avoided by a second suit; and sometimes a second suit becomes necessary to carry into execution a judgment of the court. Suits instituted for any of these purposes are also commenced by bill; and hence arises a variety of distinctions of the kinds of bills necessary to answer the several purposes; as bills of *review* (which among other causes may be brought, where new matter is discovered, in time, after the decree made), bills of *revivor*, &c. [See 3 *Comm.* 448. &c. and titles *Review, Revivor;*] and on all the different kinds of bills there may be the same pleadings as on a bill used for instituting an original suit.

It frequently happens, that pending a suit, the parties discover some error or defect in some of the pleadings; and if this can be rectified by amendment of the pleadings, the court will in many cases permit it. This indulgence is most extensive in the case of bills: which being often framed upon an inaccurate state of the case, it was formerly the practice to supply their deficiences, and avoid the consequences of errors by *special replications*: but this tending to long and intricate pleading, the special replication, requiring a *rejoinder* in which the defendant might in like manner supply defects in his answer, and to which the plaintiff might *sur-rejoin*, the special replication is now disused for this purpose: and the court will in general permit a plaintiff to rectify any error or supply any defect in his bill, either by amendment or by *a supplemental bill*, and will also permit, in some cases, a defendant in like manner to complete his answer, either by amendment or by a further answer.

If the plaintiff conceives a defendant's answer to be insufficient to the charges contained in the bill, he may take exceptions against it, on which it is referred to a Master to report, whether it be sufficient or not; to which report exceptions may be also made. The *answer, replication,* and *rejoinder,* &c. being settled, and the parties come to issue, witnesses are examined upon *interrogatories,* either in court, or by commission in the country, wherein the parties usually join; and when the plaintiff and defendant have examined their witnesses, *publication* is made of the *depositions,* and the cause is set down for hearing, after which follows the *decree.*

If however in the process of the cause the parties come to an issue of fact, which by the common law is triable by a jury, the Lord Chancellor, in this case, delivers the record into the King's Bench to be tried there; and after trial had, the record is remanded into Chancery, and judgment given there. Trials and issues at law are frequently directed by the court, which in that case makes an *interlocutory decree or order,* that after trial the parties shall resort to the court on the equity reserved.

Interlocutory orders and decrees are also made on other occasions; as for *injunctions* till a hearing, where the injury sustained by the plaintiff requires such immediate interference. See title *Injunction.*

If the plaintiff dismisses his own bill, or the defendant obtains the dismissal of it for want of prosecution, or if the decree is in behalf of the defendant, the bill is dismissed with costs to be taxed by a Master. *Stat. 4 & 5. An. c.* 16. If the defendant does not appear, on being served with the process of *subpœna,* in order to answer, upon affidavit of the service of the writ, an *attachment* issues out against him; and if a *non est inventus* is returned, an attachment with proclamation goes forth against him; and if he stands further out in contempt, then a *commission of rebellion* may be issued, for apprehending him, and bringing him to the Fleet prison; in the execution whereof the persons to whom directed may justify breaking open doors. If the defendant stands further in contempt, a serjeant at arms is to be sent out to take him; and if he cannot be taken, a *sequestration* of his land may be obtained till he appears. And if a decree, when made, is not obeyed, being served upon the party under the seal of the court, all the aforementioned processes of contempt may issue out against him, for his imprisonment till he yields obedience to it.—The court of Chancery, notwithstanding its very extensive power, binding the person only, and not the estate or effects of the defendant. And in this sense, we presume, it is said that it is no court of record. 1 *Danv. Ab.* 749. and *Chan. Rep.* 193. *Howard* v. *Suffolk.* See Treatise of Equity —and title *Costs.*

Where there is any *error* in a *decree* in matter of law; there may be a *bill of review,* which is in nature of a writ of error; or an appeal to the House of Lords. Old authorities have been quoted, that a writ of error lies returnable in B. R.—and that a judgment of Chancery may be referred to the twelve judges. 4 *Inst.* 80. 3 *Bulst.* 116. But it is now usual to *appeal to the House of Lords;* which appeals are to be signed by two counsel of eminence, and exhibited by way of petition; the petition of appeal is lodged with the clerk of the House of Lords, and read in the house, whereon the appellee is ordered to put in his answer, and a day fixed for hearing the cause; and after counsel heard, and evidence given on both sides, the Lords affirm or reverse the decree of the Chancery, and finally determine the cause by a majority of votes, &c. Though it is to be observed on an *appeal* to the Lords from a decree in Chancery, no proofs will be permitted to be read as evidence, which were not made use of in the Chancery. *Preced. Canc.* 212.

For further matter as to the jurisdiction of the court, its modes of proceeding, and the various cases wherein it relieves, &c. vide *Comm. Dig.* (2 v.) tit. *Chancery,* and Mr. *Mitford's* treatise before quoted.

There are several statutes relating to the court of Chancery. By *stat.* 28 *Ed.* 1. *c.* 5. the court of Chancery is to follow the king. By *stat.* 18 *Ed.* 3. *stat.* 5. the oaths of the clerks in Chancery are appointed. The chancellor and treasurer may correct errors in the Exchequer. Whosoever shall find himself grieved with any statute, shall have his remedy in Chancery. 36 *Ed.* 3. *c.* 9. 31 *Ed.* 3. *stat.* 1. *c.* 12. And see 15 *R.* 2. *c.* 12. 17 *R.* 2. *c.* 6. & 4 *H.* 8. *c.* 9.

No *subpœna,* or other process of appearance, shall issue out of Chancery, &c. till after a bill is filed (except bills for injunctions to stay waste, or to stay suits at law commenced), and a certificate thereof brought to the *subpœna* office. *Stat.* 4 & 5 *An. c.* 16. Persons in remainder, or reversion of any estate, after the death of another, on making affidavit in the court of Chancery, that they have cause to believe such other person

dead, and his death concealed by the guardian, trustees, or others, may move the lord chancellor to order such guardian, trustees, &c. to produce the person suspected to be concealed; and if he be not produced, he shall be taken to be dead, and those in reversion, &c. may enter upon the estate: and if such person be abroad, a commission may be issued for his being viewed by commissioners. *Stat.* 6 *An. c.* 18.

Infants under the age of twenty-one years, seised of estates in trust, or by way of mortgage, are enabled by statute to make conveyances thereof; or they may be compelled thereto, by order of the court of chancery, &c. upon petition and hearing of the parties concerned. 7 *An. c.* 9. And see statutes 4 *Geo.* 2. *c.* 10. 43 *Geo.* 3. *c.* 75. whereby ideots and lunatics seised of estates, may make conveyances by order of the Chancery, &c. See titles *Infant, Lunatic.*

By 12 *Geo.* 1. *c.* 32. *and* 33. the power of the Masters in Chancery in England was abridged, with respect to the suitors' money, which is now to be paid into the Bank of England: and an additional stamp duty, on writs, processes, &c. is granted for relief of the suitors, and as a common stock of the court of Chancery.

All orders and decrees made and signed by the Master of the Rolls, shall be deemed and taken to be good and valid orders and decrees of the court of Chancery; but not to be inrolled till signed by the Lord Chancellor, and subject to reversal, &c. by him. *Stat.* 3 *Geo.* 2. *c.* 30.

Where a defendant does not appear after *subpœna* issued, but keeps out of the way to avoid being served with the process; on affidavit that he is not to be found, and suspected to be gone beyond sea, or to abscond, &c. the court of Chancery will make an order for his appearance at a certain day; a copy of which order is to be published in the London Gazette, &c. and then, if he do not appear, the plaintiff's bill shall be taken *pro confesso*, and the defendant's estate sequestered, &c. But persons out of the kingdom, returning in seven years, may have a rehearing in six months, and be admitted to answer; otherwise to be barred by final decree. 5 *Geo.* 2. *c.* 25. See *pro confesso.*

By 12 *Geo.* 2. *c.* 24. part of the suitor's cash is to be placed out at interest, for defraying the charge of the Accountant General's office, in England. And see 23 *Geo.* 2. *c.* 25. for making good deficiencies to the clerk of the Hanaper, and for augmenting the income of the Master of the Rolls.

By 1 *Geo.* 3. *c.* 1. § 6. the king is empowered to grant a sum not exceeding 5000*l.* per annum to the Chancellor.

By 4 *Geo.* 3. *c.* 32. part of the suitors' cash unclaimed to be placed at interest, to be applied to the Accountant-General's third clerk, and other purposes.

By 5 *Geo.* 3. *c.* 28. 80,000*l.* of the suitors' cash was placed at interest; and 200*l.* per annum paid thereout half-yearly, to each of the eleven masters of the court, and 400*l.* per annum additional, under 46 *Geo.* 3. *c.* 128.

By 9 *Geo.* 3. *c.* 19. 20,000*l.* more of the suitors' money was placed at interest: out of which 460*l.* per annum is paid in salaries, viz. 250*l.* to the Accountant-General; 50*l.* to his first clerk; 40*l.* to his second clerk; and 120*l.* to his fourth clerk, in lieu of all fees. The residue being brought to account. By 46 *Geo.* 3. *c.* 129. further claims and allowances are given out of the same fund, viz. to the first and second clerk, 100*l.*; third clerk, 200*l.*; fourth clerk, 250*l.*; fifth and sixth clerks, 180*l.*; seventh clerk, 200*l.*; and also 180*l.* per annum each to four additional clerks; and 200*l.* per annum to the Accountant-General for furniture, books, and stationery.

By 14 *Geo.* 3. *c.* 43. 50,000*l.* more was in like manner placed out; and out of the interest thereof, and the surplus interest under 12 *Geo.* 2. *c.* 24.; 5 *Geo.* 3. c. 28.; and 9 *Geo.* 3. *c.* 19. the Chancellor is by his order to direct the rebuilding of the Six Clerks' Office, and apply 10,000*l.* (and by 20 *Geo.* 3. *c.* 33. 3000*l.* more) for building the Registrar's and Accountant-General's offices; to be vested in the Accountant-General and his successors.

By 15 Geo. 3. *c.* 22. part of Lincoln's Inn garden was vested in the Accountant-General, in trust, for the purposes in the last act, as to the Registrar's and Accountant-General's office.

By 15 *Geo.* 3. *c.* 56. the Lord Chancellor may apply certain sums to be raised, as mentioned in 14 *Geo.* 3. for the purposes of this and that act; the Six Clerks' Office to be built on part of Lincoln's-Inn garden, and the same vested in the Six Clerks.

The *stat.* 17 *Geo.* 3. *c.* 59. regulates the leases to be made from time to time, by the Master of the Rolls for the time being.

By *stat.* 32 *Geo.* 3. *c.* 42. 300,000*l.* further is to be employed in building offices for the Masters in Chancery, &c.

By 46 *Geo.* 3. *c.* 128. § 2. the Lord Chancellor, in Great Britain, is empowered to order an annuity of 1500*l.* to be paid (out of the suitors' money unapplied) to Masters in Chancery on their resigning after 20 years' standing: or in case of permanent infirmity. See 36 *Geo.* 3. *c.* 90.; 52 *Geo.* 3. *cc.* 32. 158. as to transfer and application of funds of infants and other incapacitated persons, &c. under the authority of Courts of Equity.

For other parts of this subject, see titles *Equity, Injunction, Interrogatories, Lunatics,* &c. &c.

CHANGER. An officer belonging to the king's *mint*, whose office consists chiefly in exchanging coin for bullion, brought in by merchants or others: it is written after the old way, *chaunger.* *Stat.* 2 *Hen.* 6. *c.* 12.

CHANTER, *cantator.*] A *singer* in the choir of a cathedral church: and is usually applied to the chief of the singers. This word is mentioned in 13 *Eliz. c.* 10. At St. David's cathedral in Wales, the chanter is next to the bishop; for there is no dean. *Cam. Britan.*

CHANTRY, OR CHAUNTRY, *cantaria.*] A little church, chapel, or particular altar, in some cathedral church, &c. endowed with lands, or other revenues, for the maintenance of one or more priests, daily to *sing mass*, and officiate Divine service for the souls of the donors, and such others as they appointed. See *stat.* 1 *Ed.* 6. *c.* 14. which in effect put an end to these chantries, by declaring it not to be lawful for any person to enter for non-performance of the conditions on which they were founded.

Of these chantries, mention is made of forty-seven belonging to St. Paul's church in London, by *Dugdale*, in his history of that church.

CHAPEL, *capella*, Fr. *chapelle.*] Is either adjoining to a church, for performing Divine service; or separate from the mother-church, where the parish is wide, which is commonly called a *chapel of ease.* And chapels of ease are built for the ease of those parishioners who dwell far from the parochial church, in *prayer* and *preaching* only; for the *sacraments*, [*marriages,*] and *burials*, ought to be performed in the parochial church. 2 *Rol. Abr.* 340.

These chapels are served by inferior curates, provided at the charge of the rector, &c. And the curates are therefore removeable at the pleasure of the rector or vicar; but chapels of *ease* may be parochial, and have a right to sacraments and burials, and to a distinct minister, by custom; (though subject in some respects to the mother-church:) and *parochial chapels* differ only in name from parish churches, but they are small, and the inhabitants within the district are few. In some places chapels of ease are endowed with lands or tithes, and in other places by voluntary contributions: and in some few districts there are chapels which baptize and administer the sacraments, and have chapel-wardens; but these chapels are not exempted from the visitation of the ordinary, nor the

parishioners who resort thither from contributing to the repairs of the mother-church, especially if they bury there; for the *chapel* generally *belongs to*, and is, as it were, a *part of* the mother-church; and the parishioners are obliged to go to the mother-church, but not to the chapel. 2 *Rol. Abr.* 289. And hence it is said, that the offerings made to any chapel are to be rendered to the mother-church; unless there be a custom that the chaplain shall have them.

Public chapels annexed to parish churches shall be repaired by the parishioners, as the church is; if any other persons be not bound to do it. 2 *Inst.* 489. Besides the 'forementioned chapels, there are *free* chapels, perpetually maintained and provided with a minister, without charge to the rector or parish; or that are free and exempt from all ordinary jurisdiction; and these are where some lands or rents are charitably bestowed on them. *Stat.* 37 *Hen.* 8. *cap.* 4.: 1 *Ed.* 6. *c.* 14. There are also *private chapels*, built by noblemen, and others, for private worship, in or near their own houses, maintained at the charge of those noble persons to whom they belong, and provided with chaplains and stipends by them; which may be erected without leave of the bishop, and need not be consecrated, though they anciently were so, nor are they subject to the jurisdiction of the ordinary.

There are likewise *chapels in the Universities*, belonging to particular colleges, which, though they are consecrated, and sacraments are administered there, yet they are not liable to the visitation of the *bishop*, but of the *founder*. 2 *Inst.* 363. —See titles *Churches*, *Marriage*.

CHAPELRY, *capellania*.] Is the same thing to a chapel, as a parish to a church; being the precinct and limits thereof.

CHAPERON, *Fr.*] A hood or bonnet, anciently worn by the knights of the garter, as part of the habit of that noble order: but in *heraldry* it is a little escutcheon fixed in the forehead of the horses that draw a hearse at a funeral.

CHAPITRES, Lat. *capitula*, Fr. *Chapitres*, *i. e.* chapters of a book.] Signify in our common law a summary of such matters as are to be enquired of, or presented before justices in eyre, justices of assize, or of peace, in their sessions. *Britton*, *cap.* 3. useth the word in this signification: and chapiters are now most commonly called *articles*, and delivered by the mouth of the justice in his charge to the inquest; whereas, in ancient times (as appears by *Bracton* and *Britton*), they were, after an exhortation given by the justices for the good observation of the laws and the king's peace, first read in open court, and then delivered in writing to the grand inquest, for their better observance; and the grand jury were to answer upon their oaths to all the articles thus delivered them, and not put the judges to long and learned charges to little or no purpose, for want of remembering the same, as they do now, when they think their duty well enough performed, if they only present those few of many misdemeanors which are brought before them by way of indictment.

It is to be wished that this order of delivering written articles to grand juries were still observed, whereby crimes would be more effectually punished: in some inferior courts, as the court leet, &c. in several parts of England, it is usual at this day for stewards of those courts to deliver their charges in writing to the juries sworn to inquire of offences. *Horne*, in his Mirror of Justices, expresses what those articles were wont to contain. *Lib.* 3. *cap. des Articles in Eyre.* And an example of articles of this kind, may be found in the book of assizes, *F.* 138.

CHAPLAIN, *capellanus*.] Is most commonly taken for one that is depending upon the king, or other noble person, to instruct him and his family, and say Divine service in his house, where there is usually a private chapel for that purpose. The King, Queen, Prince, Princess, &c. may retain as many chaplains as they please; and the king's chaplains may hold such number of benefices of the king's gift, as the king shall think fit to bestow upon them.

An Archbishop may retain eight chaplains; a Duke, or a Bishop, six; Marquis or Earl, five; Viscount, four; Baron, Knight of the Garter, or Lord Chancellor, three; a Duchess, Marchioness, Countess, Baroness (being widows), the Treasurer, and Controller of the King's house, the King's Secretary, Dean of the Chapel, Almoner, and Master of the Rolls, each of them two; the Chief Justice of the King's Bench, and Warden of the Cinque Ports, one; all which chaplains may purchase a licence or dispensation, and take two benefices with cure of souls. *Stat.* 21 *Hen.* 8. *cap.* 13.

But both the livings must have cure of souls; and the statute expressly excepts deaneries, archdeaconries, chancellorships, treasurerships, chantership, prebends, and sinecure rectories, A dispensation in this case can only be granted to hold one benefice more, except to clerks who are of the privy council, who may hold three by dispensation. By the canon law, no person can hold a second incompatible benefice, without a dispensation: and in that case, if the first is under 8*l.* per annum [in the king's book], it is so far void, that the patron may present another clerk, or the bishop may deprive; but till deprivation, no advantage can be taken by lapse. See title *Advowson*.—But independent of the statute, a clergyman by dispensations may hold any number of benefices, if they are all under 8*l.* per annum, except the last, and then by a dispensation under the statute, he may hold one more. 1 *Comm.* 392 *in n.* See *Plurality*.

By the 41st canon of 1603, the two benefices must not be further distant from each other than thirty miles; and the person obtaining the dispensation, must at least be a Master of Arts in one of the Universities. But the provisions of this canon are not enforced or regarded in the temporal courts. 2 *Bl. Rep.* 278. See *ante* title *Canon Law*.

Also every Judge of the King's Bench and Common Pleas; and Chancellor and Chief Baron of the Exchequer, and the King's Attorney and Solicitor-General, may each of them have one chaplain, attendant on his person, having one benefice with cure, who may be *non-resident* on the same by *stat.* 25 *Hen.* 8. *cap.* 16.

And the Groom of the Stole, Treasurer of the King's Chamber, and Chancellor of the Duchy of Lancaster, may retain each one chaplain. *Stat.* 33 *Hen.* 8. *cap.* 28. But the chaplains under these two last statutes, are not entitled to *dispensations* under *stat.* 21 *Hen.* 8. If a nobleman hath his full number of chaplains allowed by law, and retains one more, who has dispensation to hold plurality of livings, it is not good. *Cro. Eliz.* 723.

If one person has two or more of the titles or characters mentioned in *stat.* 21 *Hen.* 8. *c.* 13. united in himself, he can only retain the number of chaplains limited to his highest degree. 4 *Co.* 90. The king may present his own chaplains, *i. e.* waiting chaplains in ordinary, to any number of livings in the gift of the crown, and even in addition to what they hold upon the presentation of a subject without dispensation; but a king's chaplain, being beneficed by the king, cannot *afterwards* take a living from a subject, but by a dispensation according to the *stat.* § 29. 1 *Salk.* 161.

A person retaining a chaplain, must not only be capable thereof at the time of granting the instrument of retainer, but he must continue capable of qualifying till his chaplain is advanced; and therefore if a duke, earl, &c. retain a chaplain, and die; or if such a noble person be attainted of treason; or if an officer, qualified to retain a chaplain, is removed from his office, the retainer is determined: but where a chaplain hath taken a second benefice before his lord dieth, or is attainted, &c. the retainer is in force to qualify him to enjoy the benefices.

And if a *woman* that is *noble* by *marriage*, afterwards mar-

ries one under the degree of nobility, her power to retain chaplains will be determined; though it is otherwise where a *woman* is *noble* by *descent*, if she marry under degree of nobility, for in such case her retainer before or after marriage is good. A *Baroness*, &c. during the coverture, may not retain chaplains; if she doth, the lord, her husband, may discharge them, as likewise her former chaplains, before their advancement. 4 *Rep.* 118.

A chaplain must be retained by letters testimonial under hand and seal, or he is not a chaplain within the statute; so that it is not enough for a spiritual person to be retained by word only to be a chaplain, by such person as may qualify by the statutes to hold livings, &c. although he abide and serve as chaplain in the family. And where a nobleman hath retained and thus qualified his number of chaplains, if he dismisses them from their attendance upon any displeasure, after they are preferred, yet they are his chaplains at large, and may hold their livings during their lives; and such nobleman, though he may retain other chaplains in his family, merely as chaplains, he cannot qualify any others to hold pluralities while the first are living: for if a nobleman could discharge his chaplain when advanced, to qualify another in his place, and qualify other chaplains, during the lives of chaplains discharged, by these means he might advance as many chaplains as he would, whereby the statutes would be evaded. 4 *Rep.* 90.—See further titles *Advowson*, *Parson*, 3 *Comm.* 392. *n.*

CHAPTER, *capitulum.*] A congregation of clergymen *under* the *dean* in a cathedral church: *congregatio clericorum in ecclesia cathedrali, conventuali, regulari, vel collegiata.* This collegiate company is metaphorically termed *capitulum*, signifying a little head, it being a kind of head, not only to govern the diocese in the vacation of the bishoprick, but also in many things to advise and assist the bishop when the see is full, for which, with the dean, they form a council. *Co. Lit.* 103. The chapter consists of *prebendaries* or *canons*, which are some of the chief men of the church, and therefore are called *capita ecclesiæ*: they are a *spiritual corporation aggregate*, which they cannot surrender without leave of the bishop, because he hath an interest in them; they with the dean, have power to confirm the bishop's grants: during the vacancy of an archbishoprick, they are guardians of the spiritualists, and as such have authority, by the *stat.* 25 *Hen.* 8. *cap.* 21. to grant dispensations; likewise as a corporation they have power to make leases, &c.

When the dean and chapter confirm grants of the bishop, the dean joins with the chapter, and there must be the consent of the major part; which consent is to be expressed by their fixing of their seal to the deed, in one place, and at one time, either in the chapter house, or some other place; and this consent is the will of many joined together. *Dyer*, 233. They had also a check on the bishop at common law; for till *stat.* 32 *H.* 8. *c.* 28. his grant or lease would not have bound his successors, unless confirmed by the *dean and chapter.* 1 *Inst.* 103.

A chapter is not capable to take by purchase or gift, without the *dean*, who is the *head* of the *body*; but there may be a chapter without a dean, as a chapter of the collegiate church of Southwell; and grants by, or to them, are as effectual as other grants by dean and chapter. Yet where there are chapters without deans, they are not properly chapters; and the chapter in a collegiate church, where there is no episcopal see, as at Westminster and Windsor, is more properly called a college.

Chapters are said to have their beginning before deans; and formerly the bishop had the rule and ordering of things without a dean and chapter, which were constituted afterwards: and all the ministers within his diocese were as his chapter, to assist him in spiritual matters. 2 *Rol. Rep.* 454. 3 *Co.* 75. The bishop hath the power of visiting the dean and chapter; but the dean and chapter have nothing to do with what the bishop transacts as ordinary. 3 *Rep.* 75. Though the *bishop* and *chapter* are but one body, yet their *possessions* are for the most part divided; as the *bishop* hath his part in right of his *bishoprick*; the *dean* hath a part in right of his *deanery*; and each *prebendary* hath a certain part in right of his *prebend*; and each too is incorporated by himself.

Deans and chapters have some of them ecclesiastical jurisdiction in several parishes (besides that authority they have within their own body), executed by their officials; also temporal jurisdiction in several manors belonging to them, in the same manner as bishops, where their stewards keep courts, &c. 2 *Rol. Abr.* 229. It has been observed, that though the chapter have distinct parcels of the bishop's estate assigned for their maintenance, the bishop hath little more than a power over them in his visitations, and is scarce allowed to nominate half of those to their prebends, who were originally of his family: but of common right it is said he is their patron. *Rol. Ibid.*—They are now sometimes appointed by the king, sometimes by the bishop, and sometimes elected by each other. 1 *Comm.* 383. See further titles *Dean*, *Prebend.*

CHARACTER, false. See *Servants.*

CHARGE of Justices in Sessions, &c. See title *Chapiters.*

CHARGE AND DISCHARGE. A charge is said to be a thing done that bindeth him that doth it, or that which is his, to the performance thereof; and discharge is the removal, or taking away of that charge. *Termes de Ley.* Land may be charged divers ways; as by grant of rent out of it, by statutes, judgments, conditions, warrants, &c. Lands in fee-simple may be charged in fee: and where a man may dispose of the land itself, he may charge it by a rent, or statute, one way or other. *Lit. sect.* 648. *Moor Ca.* 129. *Dyer*, 10. If one charge land in tail, and land in fee-simple, and die; the land in fee only shall be chargeable. *Bro. Cha.* 9.

Lands intailed may be charged in fee, if the estate-tail be cut off by recovery: if tenant in tail charge the land, and after levy a fine or suffer a recovery of the lands, to his own use; this confirms the charge, and it shall continue. 1 *Rep.* 61. A tenant for life charges the land, and then makes a feoffment to a stranger, or doth waste, &c. whereby it is forfeited, he in reversion shall hold it charged during his (the tenant's) life: and if one have a lease for life or years of land, and grant a rent out of it; if after he surrenders his estate, yet the charge shall continue so long as the estate had endured, in case it had not been surrendered. 1 *Rep.* 67. 145. *Dyer*, 10.

If one *jointenant* charge land, and after release to his companion and die, the survivor shall hold it charged: but if it had come to him by survivorship, it would be otherwise. 6 *Rep.* 76. 1 *Shep. Abr.* 325. He that hath a *remainder* or *reversion* of land may charge it; because of the *possibility* that the land will come into *possession*, and then the *possession* shall be charged. But where one leases land for life, and grants the reversion or remainder over to A. B. who charges the land, and dies, and the tenant for life is heir to the fee; in this case he shall hold it discharged, for he had the *possession* by *purchase*, though he had the *fee* by *descent.* *Bro.* 11. 15. 1 *Rep.* 62.

If a rent be issuing out of a house, &c. and it falls down, the charge shall remain upon the soil. 9 *E.* 4. 20. But when the estate is gone upon which the charge was grounded, there, generally, the charge is determined. *Co. Lit.* 349. And in all cases where any *executory* thing is created by *deed*, there by *consent* of *all* the parties it may be *by deed* defeated and discharged. 10 *Rep.* 49. See titles *Estate*, *Limitations*, *Mortgage*, &c.

CHARITABLE CORPORATION. A society of persons in the late reign obtained a statute to lend money to *in-*

*dustrious poor*, at 5*l.* per cent. interest on pawns and pledges, to prevent their falling into the hands of the pawn-brokers, and therefore they were called the *Charitable Corporation*: but they likewise took 5*l.* per cent. for the charge of officers, warehouses, &c. And in the fifth year of King *Geo.* 2. the chief officers of this corporation, by connivance of the principal directors, absconded and broke, and defrauded the public proprietors of great sums; for relief of the sufferers wherein, as to part of their losses, several statutes were made and enacted. See *stats.* 5 *Geo.* 2. *cc.* 31. 32. 7 *Geo.* 2. *c.* 11.

CHARITABLE USES. The laws against devises in *mortmain* (see that title) do not extend to any thing but *superstitious* uses; it is therefore held, that a man may give lands for the maintenance of a school, an hospital, or any other *charitable* uses. But as it was apprehended, from recent experience, that persons on their death beds might make large and improvident dispositions, even for these good purposes, and defeat the political end of the statutes of mortmain, it is therefore enacted by *stat.* 9 *Geo.* 2. *c.* 36. that no lands or tenements, or money to be laid out thereon, shall be given for, or charged with, any *charitable* uses whatsoever, unless *by deed indented*, executed in the presence of two witnesses, *twelve* calendar *months* before the death of the donor; and enrolled in the court of Chancery within six months after its execution (except Stock in the public funds, and which must be transferred at least six calendar months previous to the donor's death); and unless such gift be made to take effect immediately and be without power of revocation; and that all other gifts shall be void. *The two Universities*, their colleges, and the scholars on the foundation of the colleges of Eton, Winchester, and Westminster, are exempted out of this act; but with the proviso, that no college shall be at liberty to purchase more advowsons than are equal in number to one moiety of the fellows or students on their foundations.

Corporations are excepted out of the statutes of Wills (32 *H.* 8. *c.* 1. 34 *H.* 8. *c.* 5. See titles *Devise*, *Wills*,) to prevent the extension of gifts in *mortmain*; but now by construction of *stat.* 43 *Eliz. c.* 4. (see the next paragraph) it is held that a devise to a corporation for a charitable use is valid, as operating in the nature of an *appointment*, rather than of a *bequest*. And indeed the piety of judges hath formerly carried them great lengths in supporting such charitable uses (*Pre. Ch.* 272.); it being held that the *stat.* of *Eliz.* which favours appointments to charities, supersedes and repeals all former statutes: (*Gilb. Rep.* 45. 1 *P. Wms.* 248.) and supplies all defects of assurances. (*Duke*, 84.) And therefore not only a devise to a corporation, but a devise by a copyhold tenant, without surrender, to the use of his will, and a devise, nay even a settlement by tenant in tail, without either fine or recovery, if made to a charitable use, is good by way of appointment. *Moor*, 890. 2 *Vern.* 453. *Pre. Ch.* 16. 2 *Comm.* 375.

The king as *parens patriæ* has the general superintendance of all charities, which he exercises by the Lord Chancellor. And therefore whenever it is necessary, the Attorney General, at the relation of some informant, who is usually called the *relator*, files *ex officio*, an information in the court of Chancery, to have the charity properly established. Also by *stat.* 43 *Eliz. c.* 4. authority is given to the Lord Chancellor or Lord Keeper, and to the Chancellor of the Dutchy of Lancaster, respectively, to grant commissions under their several seals, to enquire into any abuses of charitable donations, and rectify the same by decree; which may be reviewed in the respective courts of the several chancellors, upon exceptions taken thereto. But, though this is done in the Petty Bag Office in the court of Chancery, because the commission is there returned, it is not a proceeding at common law, but treated as an original cause in the court of Equity. The evidence below is not taken down in writing, and the respondent in his answer to the exceptions may alledge what new matter he pleases; upon which they go to proof, and examine witnesses in writing upon all the matters in issue: and the court may decree the respondent to pay all the costs, though no such authority is given by the statute. An appeal lies from the Chancellor's decree to the House of Peers, notwithstanding any loose opinion to the contrary. 3 *Comm.* 427.

Lands given to alms and aliened, may be recovered by the donor. 13 *Ed.* 1. *c.* 41.

Lands, &c. may be given for the maintenance of houses of correction, or of the poor, *stat.* 35 *Eliz. c.* 7. § 27. Commissioners to inquire of money given to poor prisoners, *stats.* 22 & 23 *Car.* 2. *c.* 20. § 11. 32 *Geo.* 2. *c.* 28. § 9. 10. See tit. *Prisoners*.

Money given to put out apprentices, either by parishes or publick charities, to pay no duty, 8 *Ann. c.* 9. § 40. See title *Apprentices*.

See this subject treated at length under title *Mortmain*.

The *statute* 52 *Geo.* 3. *c.* 101. provides that in all cases of breach, or supposed breach, of any trust created for charitable purposes, or whenever the order of a court of equity may be necessary for the administration of any such trust, any two persons may present a petition to the Lord Chancellor, Lord Keeper, &c. Master of the Rolls or Court of Exchequer, praying relief, and which shall be heard in a summary way upon affidavits, &c.; and the order made thereupon shall be conclusive, unless appeal be made within two years to the House of Lords. Every petition shall be signed by the party, and attested by the solicitor, and allowed by the Attorney or Solicitor General.

The *stat.* 52 *Geo.* 3. *c.* 102. for registering and securing of charitable donations, directs a memorial or statement of all real and personal estates, and of the annual income, investment, and general and particular objects of all charities, and charitable donations for the benefit of poor persons in England and Wales, which shall have been or may hereafter be founded, with the names of the founders or benefactors, and of the person in whose custody the deeds relating thereto may be, and the trustees, feoffees, and possessors of the estates, shall be registered by such trustees, &c. in the office of the clerk of the peace, within which such poor persons shall be.

By 58 *Geo.* 3. *c.* 91. His Majesty is empowered to appoint commissioners to enquire into the nature and management of charities in England and Wales, connected with education, and to report thereon half yearly to his Majesty and Parliament. The two Universities and the Colleges therein, the Colleges of Eton, Westminster, and Winchester, the Charter-House, Harrow, and Rugby Schools, all cathedrals, colleges, and free schools, having special visitors, and all Jewish, Quaker, or Roman Catholic places of education, are exempted from the operation of the act.

CHARKS. Are pit coal when *charred* or *charked*; so called in Worcestershire; as sea-coal thus prepared at Newcastle is called *coke*.

CHARRE OF LEAD. A quantity of lead consisting of thirty *pigs*, each pig containing six *stone* wanting two pounds, and every stone being twelve pounds. *Assisa de ponderibus. Rob.* 3. *R. Scot, cap.* 22.

CHARTA. A word made use of not only for a *charter*, for the holding an estate; but also a statute. See *Magna Charta*.

CHARTE. A cart, chart, or plan which mariners use at sea, mentioned in *stat.* 14 *Car.* 2. *cap.* 33.

CHARTEL, Fr. *cartel.*] A letter of defiance, or challenge to a single combat: in use heretofore to decide difficult controversies at law, which could not otherwise be determined. *Blount.*—A *cartel* is now used for the instrument or writing for settling the exchange of prisoners of war: and a *cartel ship*, for the ship used on such occasion, which is privileged from capture.

CHARTER, Lat. *charta*, Fr. *chartres*, i. e. *instrumenta*.] Is taken in our law for written evidence of things done between man and man; whereof *Bracton*, *lib.* 2. *cap.* 26. says thus, *Fiunt aliquando donationes in scriptis, sicut in* chartis, *ad perpetuam rei memoriam, propter brevem hominum vitam, &c.* And *Britton*, in his 39th chapter, divides *charters* into those of the king, and those of private persons. *Charters of the king* are those whereby the king passeth any grant to any person or body politick; as a *charter* of exemption, of privilege, &c.—See tit. *King*.

*Charter of pardon*, whereby a man is forgiven a felony, or other offence committed against the king's crown and dignity; and of these there are several sorts. See title *Pardon*.

*Charter of the forest*, wherein the laws of the forest are comprised, such as the *charter of Canutus, &c. Kitch.* 314: *Fleta*, *lib.* 3. *c.* 14.

*Charters of private persons* are deeds and instruments for the conveyance of lands, &c. And the purchaser of lands shall have all the *charters*, deeds and evidences as incident to the same, and for the maintenance of his title. *Co. Lit.* 6. *Charters* belong to a feoffee, although they be not sold to him, where the feoffer is not bound to a general warranty of the land; for there they shall belong to the feoffer, if they be sealed deeds or wills in writing; but other *charters* go to the tertenant. *Moor. Ca.* 687. The *charters*, belonging to the feoffer in case of warranty the heir shall have, though he hath no land by descent, for the possibility of descent after. 1 *Rep.* 1. See tit. *Magna Charta*.

CHARTERER. In Cheshire, a freeholder is called by this name. *Sir P. Ley's Antiq. fol.* 356.

CHARTER GOVERNMENTS IN AMERICA. See title *Plantations*.

CHARTER LAND, *terra per chartam*.] See title *Bockland*.

CHARTER-PARTY, Lat. *charta partita*, Fr. *chartre parti*, *i. e.* a deed or writing divided.] Is what among merchants and sea-faring men is commonly called a *pair of indentures*, containing the covenants and agreements made between them, touching their merchandize and maritime affairs. 2 *Inst.* 673. *Charter parties* of affreightment settle agreements, as to the cargo of ships, and bind the master to deliver the goods in good condition at the place of discharge, according to agreement; and the master sometimes obliges himself, ship, tackle and furniture, for performance.

The common law construes *charter parties*, as near as may be, according to the intention of them, and not according to the literal sense of traders, or those that merchandize by sea; but they must be regularly pleaded. In covenant by *charter-party*, that the ship should return to the river of Thames, by a certain time, *dangers of the sea excepted*, and after, in the voyage, and within the time of the return, the ship was taken upon the sea by pirates, so that the master could not return at the time mentioned in the agreement; it was adjudged that this impediment was with the exception of the *charter party*, which extends as well to any danger upon the sea by pirates and men of war, as dangers of the sea by shipwreck, tempest, &c. *Stile*, 132. 2 *Rol. Abr.* 248. So where a *charter party* of affreightment, provided that in case of the "inability of the ship to execute or proceed on the service," certain persons should be at liberty to make such *abatement* out of the freight as they should think reasonable: held, that an inability of the ship to proceed to sea for want of men to navigate her, was within the proviso; although such want of men proceeded from the ravages of the small-pox amongst the original crew, the death of some, and the desertion of others from fear of the distemper, and an impossibility of procuring others on the spot in their room. *Beatson*, v. *Shank.* 3 *East*, 233.

A ship is freighted at so much per month that she shall be out, covenanted to be paid after her arrival at the port of London; the ship is cast away coming up from the Downs, but the lading is all preserved, the freight shall in this case be paid; for the money becomes due monthly by the contract, and the place mentioned is only to ascertain where the money is to be paid, and the ship is intitled to wages, like a mariner that serves by the month, who if he dies in the voyage, his executors are to be answered *pro rata*. *Molloy de Jur. Maritim.* 260. If a part owner of a ship refuse to join with the other owners in setting out of the ship, he shall not be entitled to his share of the freight; but by the course of the Admiralty, the other owners ought to give security if the ship perish in the voyage, to make good to the owner standing out, his share of the ship. *Sir L. Jenkins*, in a case of this nature, certified that by the Law Marine and course of the Admiralty, the plaintiff was to have no share of the freight; and that it was so in all places, for otherwise there would be no navigation. *Lex Mercat.* See titles *Admiralty*, *Freight*, *Insurance*.

CHARTIS REDDENDIS. An ancient writ which lay against one that had charters of feoffment entrusted to his keeping, and refused to deliver them. *Reg. Orig.* 159.

CHASE, Fr. *chasse*.] In its general signification is a great quantity of woody ground lying open, and privileged for wild beast and wild fowl: and the beasts of *chase* properly extend to the buck, doe, fox, martin and roe; and in common and legal sense to all the beasts of the forest. *Co. Lit.* 233.

A *chase* differs from a park in that it is not inclosed; and also in that a man may have a *chase* in another man's ground, as well as in his own: being indeed the liberty of keeping beasts of chase or royal game therein, protected even from the owner of the land, with a power of hunting them thereon. 2 *Comm.* 38.

But if one have a chase within a forest, and he kill or hunt any stag or red deer, or other beast of the forest, he is fineable. 1 *Jones's Rep.* 278.

A *chase* is of a middle nature between a forest and a park, being commonly less than a forest, and not endowed with so many liberties, as the courts of attachment, swainmote, and justice-seat; though of a larger compass, and stored with greater diversity both of keepers, and wild beast or game, than a park.

A *chase* differs from a *forest* in this, because it may be in the hands of a subject, which a forest in its proper and true nature cannot; and from a *park*, in that it is not enclosed, and hath a greater compass, and more variety of game, and officers likewise. *Crompt.* in his *Jurisd. fol.* 148. says a forest cannot be in the hands of a subject, but it forthwith loseth its name, and becomes a *chase*: but *fol.* 197. he says, a subject may be lord and owner of a forest, which though it seems a contradiction, yet both sayings are in some sort true; for the king may give or alienate a forest to a subject, so as when it is once in the subject, it loseth the true property of a forest, because the courts called the justice-seat, swainmote, &c. do forthwith vanish, none being able to make a Lord Chief Justice in Eyre of the forest, but the king; yet it may be granted in so large a manner, as there may be attachment, swainmote, and a court equivalent to a justice seat. *Manwood*, *part* 2. *c.* 3. 4.

A forest and a *chase* may have different officers and laws: every forest is a *chase*, *& quiddam amplius*; but any *chase* is not a forest. A *chase* is *ad communem legem*, and not to be guided by the forest laws; and it is the same of parks. 4 *Inst.* 314. A man may have a free *chase* as belonging to his manor in his own woods, as well as a warren and a park in his own grounds; for a *chase*, warren and park are collateral inheritances, and not issuing out of the soil; and therefore if a person hath a *chase* in other men's grounds, and after purchaseth the grounds, the *chase* remaineth. *Ibid.* 318. If a man have freehold in a free *chase*, he may cut his timber and wood growing upon it, without view or licence of any; though it is

not so of a forest; but if he cut so much that there is not sufficient for covert, and to maintain the game, he shall be punished at the suit of the king; and so if a common person hath a *chase* in another's soil, the owner of the soil cannot destroy all the covert, but ought to leave sufficient thereof, and also browsewood, as hath been accustomed. 11 *Rep.* 22. And it has been adjudged, that within such *chase*, the owner of the soil by prescription may have common for his sheep, and warren for his coneys, but he cannot surcharge with more than has been usual, nor make coney-burrows in other places than hath been used. *Ibid.* If a free *chase* be inclosed, it is said to be a good cause of seizure into the king's hands.

It is not lawful to make a *chase*, park or warren, without licence from the king under the broad seal. See titles *Forest, Game, Park.*

CHASOR. An hunting horse.—*Dederunt mihi unum* chasorem, &c. *Leg. Will.* 1. *cap.* 22. And in another chapter it is written *cacorem.*

CHASTELLAINE. A noble woman: *quasi castelli domina.*

CHASTITY. The Roman law (*Ff.* 48. 8. 1.) justifies homicide in defence of the chastity either of one's self or relations; and so also, according to *Selden* (*de Legib. Hebræor. l.* 4. *c.* 3.) stood the law in the Jewish republick. The English law likewise justifies a woman, killing one who attempts to ravish her. (*Bac. Elem.* 34. 1 *Hawk. P. C.* 71.) So the husband or father may justify killing a man, who attempts a rape upon his wife or daughter; but not if he takes them in adultery by consent, for the one is forcible and felonious, but not the other. 1 *Hal. P. C.* 485. 6.

And without doubt the forcibly attempting a crime, of a *still more detestable nature*, may be equally resisted by the death of the *unnatural aggressor.* For the one uniform principle, that runs through our own and all other laws, seems to be this; that where a crime, in itself capital, is endeavoured to be committed by *force*, it is *lawful* to *repel* that *force* by the *death* of the party attempting. 4. *Comm.* 181.—See titles *Murder, Adultery.*

CHATHAM CHEST. See *Greenwich chest.*

CHATTELS, OR CATALS, *catalla.*] All goods moveable and immoveable, except such as are in nature of freehold, or parcel of it. The Normans call moveable goods only, *chattels;* but this word by the common law extends to all moveable and immoveable goods: and the Civilians denominate not only what we call *chattels*, but also land, *bona.* But no estate of inheritance or freehold, can be termed in our law goods and chattels; though a lease for years may pass as goods.

*Chattels* are either *personal* or *real: personal*, as gold, silver, plate, jewels, household stuff, goods and wares in a shop, corn sown on the ground, carts, ploughs, coaches, saddles, &c. Cattle, &c. as horses, oxen, kine, bullocks, sheep, pigs, and all tame fowls and birds, swans, turkeys, geese, poultry, &c.; and these are called personal in two respects, one because they belong immediately to the person of a man; and the other, for that being any way injuriously with-held from us we have no means to recover them but by personal action.

*Chattels real*, saith *Coke* (1 *Inst.* 118.), are such as concern or savour of the reality; as terms for years of land, the next presentation to a church, estates by *a statute merchant, statute staple, elegit*, or the like. And these are called real chattels, as being interests issuing out of, or annexed to real estates; of which they have one quality, *viz. immobility*, which denominates them *real;* but want the other, *viz.* a sufficient, legal, indeterminate duration; and this want it is that constitutes them *chattels.* The utmost period for which they can last, is fixed and determinate, either for such a space of time certain, or till such a particular sum of money be raised out of such a particular income; so that they are not equal in the eye of the law to the lowest estate of freehold, a lease for another's life. 2 *Comm.* 386.

But deeds relating to a freehold, obligations, &c. which are things in action, are not reckoned under goods and *chattels;* though if writings are pawned, they may be *chattels;* and money hath been accounted not to be goods or *chattels;* nor are hawks or hounds, such being *feræ naturæ.* 8 *Rep.* 33. *Termes de Ley*, 103. *Kitch.* 32.

A collar of SS. garter of gold, buttons, &c. belonging to the dress of a knight of the garter, are not jewels to pass by that name in personal estate, but ensigns of honour. *Dyer*, 59. As to devises of chattels with remainder over. See tit. *Devise.*

*Chattels personal* are, immediately upon the death of the testator, in the *actual possession* of the *executor*, as the law will adjudge, though they are at never so great a distance from him; *chattels real*, as leases for years of houses, lands, &c. are *not* in the *possession* of the *executor* till he makes an *entry*, or hath *recovered* the same; except in case of a lease for years of tithes, where no entry can be made. 1 *Nels. Abr.* 437.

Leases for years, though for a thousand years, leases at will, estate of tenants by *elegit*, &c. are *chattels*, and shall go to the executor, all obligations, bills, statutes, recognisances and judgments, shall be as a *chattel* in the executors, &c. *Bro. Obl.* 18. *F. N. B.* 120.

But if one be seized of land in fee on which trees and grass grow, the heir shall have these, and not the executor; for they are not *chattels* till they are cut and severed, but parcel of the inheritance. 4 *Rep.* 63. *Dyer*, 273. The game of a park, with the park, fish in the pond, and doves in the house with the house, go to the heir, &c. and are not *chattels:* though if pigeons, or deer, or tame, or kept alive in a room; or if fish be in a tank, &c. they go to the executors as *chattels.* *Noy.* 124. 11 *Rep.* 50. *Keilw.* 88. See titles *Heir, Executor.*

An owner of *chattels* is said to be possessed of them: as of freehold, the term is, that a person is *seised* of the same.

CHAUD-MEDLEY. See title *Chance-Medley.*

CHAUMPERT. A kind of tenure mentioned *Pat.* 35. *Ed.* 3. To the hospital of Bowes, in the isle of Guernsey. *Blount.*

CHAUNTER. A singer in a cathedral. See *Chanter.*

CHAUNTRY-RENTS. Are rents paid to the crown by the servants or purchasers of *chauntry-lands.* See *stat.* 22. *Car.* 2. *c.* 6.

CHEATS. Are deceitful practices in defrauding or endeavouring to defraud another of his known right, by means of some artful device, contrary to the plain rules of common honesty; as by playing with false dice; or by causing an illiterate person to execute a deed to his prejudice, by reading it over to him in words different from those in which it was written; or by persuading a woman to execute writings to another as her trustee, upon an intended marriage, which in truth contained no such thing, but only a warrant of attorney to confess a judgment; or by suppressing a will; and such like. 1 *Hawk. P. C. c.* 71.

Changing corn by a miller, and returning bad corn in the stead, is punishable by indictment, being an offence against the publick. 1 *Sess. Ca.* 217.—So to run a foot race fraudulently, and by a previous understanding with the seeming competitor to win money. 6 *Mod.* 42.—So if an indented apprentice enters for a soldier, and having received the bounty, is discharged on his master's demanding him, he may be indicted. 1 *Hawk. P. C. c.* 71. § 3. *n.*—But selling beer short of the just and due measure, is not indictable as a cheat. 1 *Wils.* 301. *Say.* 146. 1 *Black. Rep.* 274.—Nor selling gum of one denomination for that of another. *Sayer*, 205.—Nor selling wrought gold, as and for gold of the true standard; the offender not being a goldsmith. *Cowp.* 323.

The distinction laid down as proper to be attended to in all cases of the kind is this. That in such impositions or deceits where common prudence may guard persons against their suffering from them, the offence is not indictable; but the

party is left to his civil remedy for redress of the injury done him; but where false weights and measures are used, or false tokens produced, or such methods taken to cheat and deceive as people cannot by any ordinary care or prudence be guarded against, there it is an offence indictable. *Burr.* 1125.

By *stat.* 33 *H.* 8. *cap.* 1. *sect.* 2. if any person falsely and deceitfully get into his hands or possession any money or other things of any other persons by colour of any *false token*, &c. being convicted he shall have such punishment by imprisonment, setting upon the pillory, or by any corporal pain (except pains of death) as shall be adjudged by the persons before whom he shall be convict.

Lord Coke observes hereupon, that for this offence the offender cannot be *fined*, but corporal pain only inflicted. 3 *Inst.* 133.—But in 1 *Hawk. P. C. c.* 71. § 6. it is said that a person has been fined 500*l.* for this offence.

In indictments on this *stat.* the false token made use of must be set forth. *Stra.* 1127.—A counterfeit pass has been held such. *Dalt.* 91.—Or a pretended power to discharge soldiers. 1 *Latch.* 202.

By *stat.* 30 *Geo.* 2. *c.* 24. persons convicted of obtaining money or goods by *false pretences*, or of sending threatening letters in order to extort money or goods, may be punished by fine and imprisonment, or by pillory, whipping or *transportation*. In indictment on this stat. it must appear what the *false pretences* were. 2 *Term. Rep.* 581.

By 52 *G.* 3. *c.* 64. the penalties of the act 30 *G.* 2. *c.* 24. are extended to persons obtaining bonds, bills, notes, or other securities for money, or warrants or orders for payment of money or transfer of goods, either from persons or corporations, by false pretences, &c.

As there are frauds which may be relieved civilly, and not punished criminally (with the complaints whereof the courts of equity do generally abound), so there are other frauds, which in a special case may not be helped civilly, and yet shall be punished criminally. Thus, if a minor goes about the town, and *pretending to be of age*, defrauds many persons, by taking credit for a considerable quantity of goods, and then insisting on his nonage; the persons injured cannot recover the value of their goods, but they may indict and punish him for a common cheat. *Barl.* 100. 1 *Hawk. P. C. c.* 71. § 6. *n.*

CHECK-ROLL. A *roll* or book containing the names of such as are attendants on, and in pay to the king or other great personages, as their household servants. *Stat.* 19 *Car.* 2. *c.* 1. It is otherwise called the *chequer-roll*, and seems to take its etymology from the *Exchequer*. *Stat.* 14 *Hen.* 8. *c.* 13.

CHELINDRA. A sort of ship. *Mat. Paris. anno* 1238.

CHELSEA HOSPITAL. See title *Soldiers*.

CHELSEA WATER-WORKS. See *stat.* 7. *Jac.* 1. *c.* 9.

CHEST OF CHATHAM. See *Greenwich Chest*.

CHEMISTRY. See *Multiplication of gold and silver*.

CHESTER. See general title *County-Palatine*.—Where felony, &c. is committed by any inhabitant of the Palatine of Chester, in another county, process shall be made to the *exigent* where the offence was done, and if the offender then fly into the county of Chester the outlawry shall be certified to the officers there. 1 *H.* 4. *c.* 18. The session for the county palatine of Chester is to be kept twice in the year, at Michaelmas and Easter; and justices of peace, &c. in Chester shall be nominated by the Lord Chancellor. *Stats.* 32 *H.* 8. *c.* 43. 33 *H.* 8. *c.* 13. Recognisances of statutes-merchant may be acknowledged, and fines levied before the mayor of Chester, &c. for lands lying there. 2 & 3 *Ed.* 6. *c.* 31. But no writ of protection shall be granted in the county palatine.

CHEVAGE, *chevagium*, from the Fr. *chef, caput.*] A tribute or sum of money formerly paid by such as held lands in villenage to their lords in acknowledgement, and was a kind of head or poll money. Of which *Bracton, lib.* 1. *c.* 10. says thus: *Chevagium dicitur recognitio in signum subjectionis et domini de capite suo.* Lambard writes this word *chivage*; but it is more properly *chiefage*: and anciently the Jews, whilst they were admitted to live in England, paid *chevage* or poll money to the king, as appears by *Pat.* 8 *Ed.* 1. *par.* 1. It seems also to be used for a sum of money yearly given to a man of power for his protection, as a chief head or leader: but Lord Coke says, that in this signification, it is a great misprision for a subject to take sums of money, or other gifts yearly of any, in name of *chevage*, because they take upon them to be their chief heads or leaders. *Co. Lit.* 140. *Spelman* in v. *Chevagium* says, it is a duty paid in Wales, *pro filiabus maritandis*.

CHEVANTIA. A loan or advance of money upon credit; Fr. *chavarice*. Goods, stock. *Mon. Ang. tom.* 1. *pag.* 629.

CHEVERILL, *cheverillus.*] A young cock, or cockling. *Pat.* 15. *H.* 3.

CHEVISANCE, from the Fr. *chevir*, i. e. *Venir à chef de quelque chose*, to come to the head or end of a business.] An agreement or composition made; an end or order set down between a creditor or debtor; or sometimes an indirect gain in point of usury, &c. In some ancient statutes it is often mentioned, and seems commonly used for *an unlawful bargain* or *contract*. In the *stat.* 13 *Eliz. c.* 7. (see title *Bankrupts*) it is used simply, in the sense explained by Dufresne, for *making contracts*.

CHEVITIÆ, AND CHEVISCÆ. Heads of ploughed lands. *Mon. Angl. tom.* 2. *f.* 116.

CHIEF-RENTS. The rents of freeholders of manors often so called, *i. e. reditus capitales*.—They are also denominated *quit-rents, quieti reditus*; because thereby the tenant goes quit and free of all other services. 2 *Comm.* 42. See title *Rents*.

CHIEF PLEDGE. See title *Headborough*.

CHIEF (TENANTS IN). Tenants in *capite*, holding immediately under the king, in right of his crown and dignity. See titles *Capite, Tenure*.

CHILDREN. As to devises to, see title *Devise*. See also titles *Descent, Heir, Limitation, Poor, Posthumous Child*, &c.

CHILD-STEALING. For punishing this offence, it is by *stat.* 54. *G.* 3. *c.* 101. enacted, that every person who shall maliciously, either by force or fraud, lead, take, or carry away, or decoy or entice away, any child under the age of ten years, with intent to deprive its parent, or other person having the lawful care of such child, of the possession, by concealing or detaining such child from such person or other person, or with intent to steal any article of apparel, or ornament, or other thing of value, on, or upon or about the person of such child: or who shall receive and harbour (with any such intent as aforesaid) any such child, knowing the same to have been so by force or fraud led, taken, carried away, or decoyed or enticed away, shall, together with their counsellors, procurers, aiders and abettors, be deemed guilty and punishable as in cases of grand larceny. The act contains a proviso in favour of the father or person claiming right to the possession of any illegitimate child.—It does not extend to Scotland.

CHILDWIT, *Sax.*] A fine or penalty of a bond-woman unlawfully begotten with child. *Cowel* says it signifieth a power to take a fine of your bond-woman gotten with child without your consent: and within the manor of Writtle in Com. Essex, every reputed father of a base child pays to the lord for a fine 3*s.* 4*d.* where it seems to extend as well to free as bond-women; and the custom is there called *childwit* to this day. See title *Bastard*.

CHIMIN, Fr. *chemin; via.*] In law phrase is a way; which is of two sorts; the king's highway, and a private way.

The *king's highway* (*chiminus regius*) is that in which the king's subjects and all others under his protection, have free liberty to pass, though the property of the soil where the way lies, belongs to some private person.

A *private way* is that in which one man or more have liberty to pass, through the ground of another, by prescription or charter; and this is divided into *chimin in gross* and *chimin appendant*.

*Chimin in gross* is where a person holds a way principally and solely in itself.

*Chimin appendant* is that way which a man hath as appurtenant to some other thing: as if he rent a close or pasture, with covenant for ingress and egress through some other ground in which otherwise he might not pass. *Kitch.* 117. *Co. Lit.* 56. See titles *Highway*, *Trespass*, *Way*.

CHIMINAGE, *chiminagium*. Toll due by custom for having a *way* through a forest; and in ancient records it is sometimes called *pedagium*. *Cromp. Jurisd.* 189. *Co. Lit.* 56. See *Chart. Forest. cap.* 14.

CHIMNEY-MONEY. Otherwise called *hearth-money*. A duty to the crown imposed by *stat.* 14 *Car.* 2. *cap.* 2. of 2*s.* for every hearth in a house. Now long since repealed.

CHIMNEY-SWEEPERS. By *stat.* 28 *Geo.* 3. *c.* 48. churchwardens and overseers with the consent of two justices may bind boys of eight years old or upwards; and who, themselves or their parents are chargeable to the parish, or who shall beg; or with the consent of their parents; to be apprentices to chimney-sweepers until they are sixteen years old. § 1.

The form of the indenture is settled by a schedule annexed to the statute.—In that the master covenants to find the boy with decent clothing—to permit him to attend public worship; and to observe the statute in the several particulars mentioned. All other indentures and agreements are declared void; and any chimney sweeper keeping an apprentice under eight years of age is to forfeit not more than 10*l.* nor less than 5*l.* for each. § 4.

One justice is authorised to settle all complaints of ill usage by the masters, or ill behaviour in the boys. § 6.

No Chimney sweeper shall keep more than six apprentices at once; the master's name and place of abode are to be inscribed on a brass plate in the front of a leathern cap to be provided by the master for each apprentice, to be worn by the boy when on duty. For every apprentice above six, and for neglecting to provide their caps the master is to forfeit not exceeding 10*l.* nor less than 5*l.* § 7.

If the master shall mis-use or evil treat his apprentice, or be guilty of the breach of any of the covenants in his indenture, he shall forfeit, not more than 10*l.* nor less than 5*l.* § 8.

The statute containing the foregoing and other humane regulations was obtained by the exertions of the benevolent Mr. Jonas Hanway; to whom the public and the poor are indebted for many laudable charities.

CHIPP, CHEAP, CHIPPING. Signify the place to be a market town, as Chippenham, &c. *Blount.*

CHIPPINGAVEL, OR CHEAPINGAVEL. Toll for buying and selling.

CHIRCHGEMOT, CHIRGEMOT, KIRK-MOTE. *Ciregemot* (Sax.) *forum ecclesiasticum.—Leg. Hen.* 1. *c.* 8. 4 *Inst.* 321.—A synod.—It is used for a meeting in a church or vestry. *Blount.*

CHIROGRAPH, *chirographum*, or *scriptum chirographatum.*] Any public instrument or gift of conveyance, attested by the subscription and crosses of witnesses, was in the time of the Saxons called *chirographum*; which being somewhat changed in form and manner by the Normans, was by them stiled *charta*: in following times, to prevent frauds and concealments, they made their deeds of mutual covenant in a *script* and *rescript*, or in a part and counter-part, and in the middle, between the two copies, they drew the capital *letters of the alphabet*, and then tallied or cut asunder in an indented manner, the sheet or skin of parchment; which being delivered to the two parties concerned, were proved authentic by matching with and answering to one another: and when this prudent custom had for some time prevailed, then the word *chirographum* was appropriated to such bipartite writings or indentures.

Anciently when they made a *chirograph* or deed, which required a counter-part, they ingrossed it twice upon one piece of parchment contrariwise, leaving a space between, in which they wrote in great letters the word CHIROGRAPH; and then cut the parchment in two, sometimes even and sometimes with indenture, through the midst of the word: this was afterwards called *dividenda*, because the parchment was so divided or cut; and it is said the first use of these *chirographs* was in Henry the Third's time.

*Chirograph* was of old used for a fine; the manner of ingrossing whereof, and cutting the parchment in two pieces, is still observed in the *chirographer's Office*: but as to deeds, that was formerly called a *Chirograph*, which was subscribed by the proper hand-writing of the vendor or debtor, and delivered to the vendee or creditor; and it differed from *syngraphus*, which was in this manner, viz. Both parties, as well the creditor as debtor, wrote their names and the sum of money borrowed, on paper, &c. and the word SYNGRAPHUS in capital letters in the middle thereof, which letters were cut in the middle, and one part given to each party, that upon comparing them (if any dispute should arise) they might put an end to the difference. The *chirographs* of deeds have sometimes concluded thus:—*Et in hujus rei testimonium huic scripto, in modum* chirographi *confecto, vicissim sigilla nostra apposuimus.* The *chirographs* were called *chartæ divisæ, scripta per* chirographos *divisa, chartæ per alphabetum divisæ*; as the *chirographs* of all fines are at this time. *Kennet's Antiq.* 177. *Mon. Ang. tom.* 2. *p.* 94.

CHIROGRAPHER OF FINES, *chirographus finium et concordiarum*, of the Greek Χειρόγραφον, a compound of Χεὶρ, *manus* a hand, and *γράφω scribo*, I write; a writing of a man's hand.] That officer in the Common Pleas who ingrosseth fines, acknowledged in that court into a perpetual record, after they are examined and passed in the other offices, and that writes and delivers the indentures of them to the party: and this officer makes out two indentures, one for the buyer, another for the seller; and also makes one other indented piece, containing the effect of the fine, which he delivers to the *custos brevium*, which is called the *foot of the fine*. The *chirographer* likewise, or his deputy, proclaims all the fines in the court every term, according to the statute, and endorses the proclamations upon the backside of the foot thereof; and always keeps the writ of covenant, and note of the fine: the *chirographer* shall take but 4*s.* fee for a fine, on pain to forfeit his office, &c. *Stats.* 2 *H.* 4. *c.* 8. 23 *Eliz. c.* 3. 2 *Inst.* 468.

CHIRURGEON. See *Surgeon.*

CHIVALRY, *servitium militare*, from the Fr. *chevalier.*] A tenure of lands by knight's service; whereby the tenant was bound to perform service in war unto the king, or the mesne lord of whom he held by that tenure.—See title *Tenures.*

*Chivalry* was of two kinds, either *regal*, held only of the king, or *common*, held of a common person; that which might be held only of the king was called *servitium*, or *serjeantia*, and was again divided into *grand* and *petit serjeanty*; the *grand serjeanty* was where one held lands of the king by service, which he ought to do in his own person, as to bear the king's banner or spear, to lead his host, or to find a man at arms to fight, &c. *Petit serjeanty* was when a man held lands of the king to yield him annually some small thing towards his wars, as a sword, dagger, bow, &c.—See title *Serjeanty.*

Of the *Court of Chivalry*, its power and jurisdiction, see post title *Court of Chivalry.*

CHOCOLATE. See *Coffee.*

CHOP-CHURCH, *ecclesiarum permutatio.*] Is a word mentioned in a statute of King *Hen.* 6. by the sense of which,

it was in those days a kind of trade, and by the judges declared to be lawful: but *Brooke* in his Abridgment says, it was only *permissable* by law: it was without a doubt a nickname given to those that used to change benefices; as to *chop* and *change* is a common expression. 9 *Hen.* 6. *cap.* 65. Vide *Litera missa omnibus episcopis*, &c. *contra* Choppe-Churches, *anno* 1391. *Spelm. de Con. vol.* 2. *p.* 642.

CHORAL, *choralis.*] Signifies any person that by virtue of any of the orders of the clergy, was in ancient time admitted to sit and serve God in the *choire; Dugdale* in his History of St. Paul's Church says, that there were formerly six *Vicars Choral* belonging to that church.

CHOREPISCOPI. See *Suffragan.*

CHOSE, Fr. A thing.] Used in the common law with divers epithets; as *chose local*, *chose transitory*, and *chose in action. Chose local* is such a thing as is annexed to a place, as a mill, and the like: and *chose transitory* is that thing which is moveable, and may be taken away, or carried from place to place; *chose in action* is a thing incorporeal, and only a *right;* as an annuity, obligation for debt, &c. And generally all causes of suit for any debt, duty, or wrong, are to be accounted *choses in action:* and it seems *chose in action* may be also called *chose in suspense*, because it hath no real existence or being, nor can properly be said to be in our possession. *Bro.* title *Chose in Action:* 1 *Lil. Abr.* 264.

A person disseises me of land, or takes away my goods; my right or title of entry into the lands, or action or suit for it, and so for the goods, is a *chose in action:* so a debt on an obligation, and power and right of action to sue for the same. 1 *Brownl.* 33. And a condition and power of re-entry into land upon a feoffment, gift, or grant, before the performance of the condition, is of the nature of a *chose in action. Co. Lit.* 214. 6 *Rep.* 50. *Dyer*, 244. If one have an advowson, when the church becomes void, the presentation is but as a *chose in action*, and not grantable, but it is otherwise before the church is void. *Dyer*, 296. Where a man hath a judgment against another for money, or a statute, these are *choses in action.* An annuity in fee to a man and his heirs, is grantable over: but it has been held, that an annuity is a *chose in action*, and not grantable: 5 *Rep.* 89. *Fitz. Grant*, 45. A *chose in action* cannot be transferred over; nor is it devisable: nor can a *chose in action* be a satisfaction, as one bond cannot be pleaded to be given in satisfaction for another: but in equity *choses in action* may be assignable; and the king's grant of a *chose in action* is good. *Cro. Jac.* 170. 371. *Chanc. Rep.* 169.

Charters, where the owner of the land hath them in possession, are grantable: a possibility of an interest, or estate in a term for years, is near to a *chose in action*, and therefore may not be granted; but a possibility, joined with an interest, may be a grantable chattel. *Co. Lit.* 265. 4 *Rep.* 66. *Mod. Ca.* 1128. And this the law doth provide, to avoid multiplicity of suits, and the subversion of justice, which would follow if these things were grantable from one man to another. *Dyer*, 30. *Plowd.* 185.

But by release *choses in action* may be released and discharged for ever; but then it must be to parties and privies in the estate, &c. for no stranger may take advantage of *things in action;* save only in some special cases: *Co. Lit.* 214. *Yelv.* 9. 85.—See title *Assignment.*

CHRISM. A confection of oil and balsam consecrated by the bishop, and used in the Popish ceremonies of baptism, confirmation, and sometimes ordination.

CHRISMALE, *chrismal*, *chrisom.* The face-cloth, or piece of linen laid over the child's head at baptism, which in ancient times was a perquisite due to the parish priest. *Stat. Egid. Epis. Salisbr. An.* 1256.

CHRISMATIS DENARII, *Chrisom pence.* Money paid to the diocesan, or his suffragan, by the parochia clergy, for the *chrisom* consecrated by them about Easter for the holy uses of the year ensuing. This customary payment being made in Lent near Easter, was in some places called *Quadragesimals*, and in others *Paschals* and *Easter pence.* The bishop's exaction of it was condemned by Pope Pius XI. for simony and extortion; and thereupon the custom was released by some of our English bishops.—See *Cartular. Mon. de Bernedy, MS. Cotton.*

CHRISTIANITATIS CURIA. The court christian, or ecclesiastical judicature. See *Court Christian.*

CHRISTIANITY. Of the punishment of offences against, see titles *Blasphemy*, *Heresy*, and also title *Religion.*

## CHURCH.

ECCLESIA.—A temple or building consecrated to the honour of God and religion, and anciently dedicated to some Saint, whose name it assumed; or it is an *assembly of persons united by the profession of the same Christian faith, met together for religious worship.* A Church to be adjudged such in law must have administration of the sacraments and sepulture annexed to it. If the king founds a *church*, he may exempt it from the ordinary's jurisdiction; but it is otherwise in case of a subject.

The manner of founding *churches* in ancient times was, after the founders had made their applications to the bishop of the diocese, and had his licence, the bishop or his commissioners set up a cross, and set forth the *church yard* where the *church* was to be built; and then the founders might proceed in the building of the *church*, and when the *church* was finished, the bishop was to consecrate it; and then, and not before, the sacraments were to be administered in it. *Stillingfleet's Ecclesiast. Cases.* But by the common law and custom of this realm, any person who is a good Christian may build a *church* without licence from the bishop, so as it be not prejudicial to any ancient *churches;* though the law takes no notice of it as a *church*, till consecrated by the bishop, which is the reason why *church* and no *church*, &c. is to be tried and certified by the bishop. And in some cases, though a *church* has been consecrated, it must be consecrated again; as in case any murder, adultery, or fornication be committed in it, whereby it is defiled; or if the *church* be destroyed by fire, &c.

The ancient ceremonies in consecrating the ground on which the *church* was intended to be built, and of the *church* itself after it was built, were thus: when the materials were provided for building, the bishop came in his robes to the place, &c. and having prayed, he then perfumed the ground with incense, and the people sung a collect in praise of that saint to whom the *church* was dedicated; then the corner stone was brought to the bishop, which he crossed, and laid for the foundation: and a great feast was made on that day, or on the saint's day to which it was dedicated; but the form of consecration was left to the discretion of the bishop, as it is at this day.

A *church* in general consists of three principal parts, that is, the belfrey or steeple, the body of the *church* with the isles, and the chancel: and not only the freehold of the whole *church*, but of the *church yard*, are in the parson or rector; and the parson may have an action of trespass against any one that shall commit any trespass in the *church* or *church-yard;* as in the breaking of seats annexed to the *church*, or the windows, taking away the leads, or any of the materials of the *church*, cutting the trees in the *church-yard*, &c. But *church-wardens* may, by custom, have a fee for burying in the church; the church-yard is a common place of burial for all the parishioners. *Vent.* 274. *Keb.* 504. 523.—But see *Cro. Jac.* 367. *Gibs.* 453. and post *Church-wardens*, III. 2.

And it seems that actions for taking away the *seats* must be brought in the name of the church-wardens, the parishioners being at the expense of them. *Raym.* 246. 12 *Co.* 105. 3 *Com. Dig.* title *Esglise* (F. 3.)

If a man erect a pew in a *church*, or hang up a bell, &c. therein, they thereby become *church* goods, though not expressly given to the *church*; and he may not afterwards remove them. *Shaw. P. L.* 79. The parson only is to give *licence* to bury in the *church*; but for defacing a monument in a *church*, &c. the builder, or heir of the deceased, may have an action. *Cro. Jac.* 367. And a man may be indicted for digging up the graves of persons buried, and taking away their burial dresses, &c. The property whereof remains in the party who was the owner when used, and it is said an offender was found guilty of felony in this case, but had his clergy. *Co. Lit.* 113.

Though the parson hath the freehold of the *church* and *church-yard*, he hath not the fee-simple, which is always in abeyance; but in some respects the parson hath a fee-simple qualified. *Lit.* 644. 645. The chancel of the *church* is to be repaired by the parson, unless there be a custom to the contrary; and for these repairs, the parson may cut down trees in the *church-yard*, but not otherwise. See *stat.* 35 *Ed.* 1. *stat.* 2. *Ne Rector prosternat*, &c. The church-wardens are to see that the body of the *church* and steeple are in repair; but not any aisle, &c. which any person claims by prescription to him or his house: concerning which repairs the canons require every person who hath authority to hold ecclesiastical visitation to view their *churches* within their jurisdictions once in three years, either in person, or cause it to be done; and they are to certify the defects to the ordinary, and the names of those who ought to repair them; and these repairs must be done by the church-wardens, at the charge of the parishioners. *Can.* 86. 1 *Mod.* 236. See post title *Church-wardens*, III. 2.

A grant of part of the chancel of a *church*, by a lay-impropriator, to A. his heirs and assigns, is not valid in law; and therefore such grantee, or those claiming under him, cannot maintain trespass for pulling down pews there erected. *Clifford v. Wicks. E.* 58 *G.* 3. *Term. Rep. K. B.*

By the common law, parishioners of every parish are bound to repair the *church*: but by the canon law, the parson is obliged to do it; and so it is in foreign countries. 1 *Salk.* 164. In London the parishioners repair both the *church* and the chancel. The Spiritual Court may compel the parishioners to repair the *church*, and excommunicate every one of them till it be repaired; but those that are willing to contribute shall be absolved till the greater part agree to a tax, when the excommunication is to be taken off; but the Spiritual Court cannot assess them towards it. 1 *Mod.* 194. 1 *Vent.* 367. For though this Court hath power to oblige the parishioners to repair by ecclesiastical censures; yet they cannot appoint in what sum, or set a rate, for that must be settled by the church-wardens, &c. 2 *Mod.* 8.

If a *church* be down, and the parish is increased, the greater part of the parish may raise a tax for the necessary enlarging it, as well as the repairing thereof, &c. 1 *Mod.* 237. But in some of our books it is said, that if a *church* falls down, the parishioners are not obliged to rebuild it; though they ought to keep it in due repair. 1 *Ventr.* 35.—On rebuilding of churches, it is now usual to apply for, and obtain *briefs*, on the petition of the parishioners, to collect the charitable contributions of well-disposed Christians, to assist them in the expence. See post title *Church-wardens*, III. 2.

For *church* ornaments, utensils, &c. the charge is upon the *personal estates* of the *parishioners*; and for this reason persons must be charged for these, where they live: but though generally lands ought not to be taxed for ornaments, yet by special custom, both lands and houses may be liable to it. 2 *Inst.* 489. *Cro. Eliz.* 843. *Hetley*, 131. It has been resolved that no man shall be charged for his land to contribute to the *church* reckonings, if he doth not reside in the same parish. *Moor*, 554.

By *stat.* 37 *H.* 8. *c.* 21, *churches* not above six pounds a year, in the King's books, by assent of the ordinary, patron and incumbent, may be united: and by *stat.* 17 *Car.* 2. *c.* 3. in cities and corporations, &c. *churches* may be united by the bishop, patrons, and chief magistrates, unless the income exceeds 100*l.* per ann. and then the parishioners are to consent, &c. See tit. *Union.*

For completing of St. Paul's Church, and repairing Westminster Abbey, a duty of 2*s.* per chaldron on coals was granted; and the *church-yard* is to be inclosed, and no persons build thereon, except for the use of the *church.* 1 *Ann. st.* 2. *c.* 12.

Fifty new *churches* are to be built in or near London and Westminster, for the building whereof a like duty is granted upon coals, and commissioners appointed to purchase lands, ascertain bounds, &c. The rectors of which churches were to be appointed by the crown, and the first church-wardens and vestrymen, &c. to be elected by the commissioners. *Stat.* 9 *Ann. cap.* 22. and see *stat.* 10 *Ann. c.* 11. A duty is also granted on coals imported into London, to be appropriated for maintaining of ministers for the fifty new *churches.* *Stat.* 1 *Geo.* 1. *cap.* 23.

By 43 *G.* 3. *c.* 108, "to promote the building, repairing, "and providing of churches and chapels, and of houses for "the residence of ministers, and church-yards and glebes," persons possessed of estates in their own right, may by deed enrolled (in England, under *stat.* 27 *Hen.* 8. *c.* 16. and in Ireland under 10 *Car.* 1. *stat.* 2. *c.* 1. § 17.) or by will executed three months before their decease, give lands not exceeding five acres, or goods and chattels not exceeding 500*l.* for the purposes of the act. This act does not extend to infants, femes covert, or incapacitated persons.—Only one such gift shall be made by one person, and where the gift exceeds the legal amount, the chancellor may reduce it, § 12.—Plots of land not exceeding one acre, held in mortmain may be granted by exchange or benefaction, for being annexed to a church, &c. § 4.

In all parochial churches and chapels to be hereafter erected, accommodation shall be provided for the poor, § 5.

By 51 *Geo.* 3. *c.* 115. the king is empowered to vest lands in any person for building any church, chapel, parsonage house, &c. and by the same act, any person seized in fee simple of any manor, &c. may grant five acres of the waste to any parochial church or chapel. By 54 *Geo.* 3. *c.* 117. rectors, &c. in Ireland, with consent of bishop, may grant one acre of glebe land for site of a new church, or church-yard. By 56 *Geo.* 3. *c.* 141. ecclesiastical corporate bodies are enabled to alienate lands for enlarging church-yards. See further title *Clergy.*

As to the building and repairing of churches, chapels, &c. in Ireland, see *stats.* 43 *Geo.* 3. *c.* 106. 108. 48 *Geo.* 3. *c.* 65. 49 *Geo.* 3. *c.* 103. 53 *Geo.* 3. *c.* 66. 54 *Geo.* 3. *c.* 117. extending the Irish Act 33 *Geo.* 2. *c.* 11.

By *stat.* 58 *G.* 3. *c.* 45. for promoting the building of *additional churches*, in populous parishes, in England and Wales, the Crown is empowered to authorise the Treasury to issue Exchequer Bills to the amount of One Million, on which the Bank may advance money for the purposes of the act. Commissioners to be appointed by the Crown, are required to examine into the state of parishes and extra-parochial places, and to ascertain in what places additional churches or chapels are most required for the exercise of the established religion of the Church. These commissioners are authorised to grant and lend sums out of the said million, for building such churches or chapels; or assisting in building them, when a proportion of the expense is raised by the subscriptions of, or rates on the inhabitants of any parish or place.

On the representation of the commissioners, parishes may be divided into separate smaller parishes, or into ecclesiastical

districts. All laws, as to the publication of Banns, and the performance of Marriages, Christenings, Churchings, and Burials, are extended to such New Churches and Chapels. The commissioners are empowered to accept lands for the site of churches and church-yards; which corporations, tenants for life, &c. are empowered to give.—Bishops are authorised to direct the performance of a third service and sermon on Sundays, &c.—Two Churchwardens are to be chosen for each New Church and Chapel, one by the incumbent, and one by the inhabitants. Free seats are to be provided in all the new churches and chapels—pews therein may be let—no graves are to be made in the churches—existing churches may be enlarged by parishioners, who may borrow money of the commissioners for that purpose, securing the repayment on the parish rates.

No man shall cover his head in the *church* in time of divine service, except he have some infirmity, and then with a cap; and all persons are to kneel and stand, &c. as directed by the Common Prayer during service. *Can.* 18.

No fairs or markets shall be kept in *church-yards*. *Stat.* 13 *E.* 1. *st.* 2. *c.* 6.

Any person may be indicted for indecent or irreverent behaviour in the *church*; and those that offend against the acts of uniformity are punishable either by indictment upon the statute, or by the ordinary, &c. See further titles *Churchwardens*, *Parsons*. And as to offences in not coming to church, see titles *Dissenters*, *Religion*.

If any person shall, by words only, quarrel, chide, or brawl, in any church or church-yard; the ordinary of the place is empowered, on proof by two witnesses, to suspend the offender, if a layman, from the entrance of the church, and if a clerk, from the ministration of his office; so long as the said ordinary shall think meet, according to the fault. *Stat.* 5 & 6 *Edw.* 6. *c.* 4. § 1.

This offence was cognizable in the ecclesiastical court before this statute, *ratione loci*; and the statute, though it provides a penalty, doth not alter the jurisdiction. *Ld. Raym.* 850.

If any person shall smite or lay any violent hands upon another, the offender shall *ipso facto* be deemed excommunicate, 5 & 6 *Edw.* 6. *c.* 4. § 2. But previous to excommunication, there must be either a conviction at law, or a declaratory sentence, in the ecclesiastical court. See 1 *Hawk. P. C. c.* 63. 1 *Burr.* 240. *Burn, Eccl. Law*, tit. *Church*, x.

If one be assaulted in the church, or in a church-yard, he may not beat the other or draw a weapon there, although the other assaulted him, and it be therefore in his own defence: for it is a sanctified place, and he may be punished for that by the foregoing statute. And it is the same in any of the king's courts, or within view of the courts of justice; because a force in that case is not justifiable, though in a man's own defence. *Cro. Jac.* 367. 1 *Hawk. c.* 63. § 4.

If any person shall maliciously strike any person with any weapon, in any church or church-yard; or shall draw any weapon in any church or church-yard, to the intent to strike another therewith, he shall, on conviction, or verdict, or confession, or by two witnesses, at the assizes or sessions, be adjudged to have one of his ears cut off; and *if he have no ears*, he shall be burned in the cheek with a hot iron, having the letter F, whereby he may be known and taken for a *fray-maker* and *fighter*, and besides, he shall be and stand *ipso facto*, excommunicated as is aforesaid, 5 & 6 *Edw.* 6. *c.* 4. § 3.

By *stat.* 27 *Geo.* 3. *c.* 44. no suit shall be brought in any ecclesiastical court for striking or brawling in any church or church-yard, after the expiration of eight calendar months, from the time when such offence shall have been committed.

CHURCHGEMOT. Vide *Chirchgemot*.

## CHURCH-WARDENS.

Anciently styled *Church-Reeves* or *Ecclesiæ Guardiani*.] Officers instituted to protect the edifice of the church; to superintend the ceremonies of public worship; to promote the observance of religious duties; to form and execute parochial regulations; and to become, as occasion may require, the *legal representatives* of the *body of the parish*.

The office was originally confined to such matters only as concerned *the Church*, considered *materially* as an edifice, building, or place of public worship; and the duty of suppressing profaneness and immorality was intrusted to two persons annually chosen by the parishioners, as assistants to the church-wardens, who from their power of *inquiring* into offences, detrimental to the interests of religion, and of *presenting* the offenders to the next provincial council, or *episcopal synod*, were called *quest-men* or *synods-men*, which last appellation has been converted into the name of *sides-men*. But great part of the duty of these *testes synodales*, or ancillary officers, is now devolved upon the church-wardens; the sphere of whose duty has, since the establishment of the *Overseers of the Poor*, been considerably enlarged; and is also diverted into various channels by many modern acts of parliament. See *Paroch. Antiq.* 649. for a more particular account of the origin and progress of these *Sides-men*.

Under this head it will be proper to consider,

I. 1. *Of the Election of Church-wardens; 2. Of Exemptions from being elected.*
II. *Of their Interest in the Things belonging to the Church.*
III. 1. *Of their Power; and 2. Duty.*
IV. *Of their Accounts.* And see *Poor*.

I. They are generally chosen by the joint consent of the parishioners and minister; but by *custom* (on which the right of choosing these officers entirely depends, 2 *Atk.* 650. 2 *Stra.* 1246.) the minister may choose one, and the parishioners another; or the parishioners alone may elect both. 1 *Vent.* 267. But where the custom of a parish does not take place, the election shall be according to the directions of the canons of the church: *Can.* 89. 90. which direct that all church-wardens or quest-men in every parish, shall be chosen by the joint consent of the minister and the parishioners, if it may be; but if they cannot agree upon such a choice, then the minister shall choose one, and the parishioners another: and without such a joint or several choice, none shall take upon them to be church-wardens. *Gibs. Cod.* 241. 2. 1 *Stra.* 145.

If the parson or vicar, who has, by custom, a right to chuse *one* church-warden, be under sentence of *deprivation*, the right of choosing *both* results to the parishioners. *Carth.* 118.

The parson cannot intermeddle in the choice of that church-warden which it is the right of the parishioners by custom to elect. 2 *Stra.* 1045.—Under the word Parson a *Curate* is included. 2 *Stra.* 1246.

In most of the parishes in London, the parishioners choose both church-wardens by custom; but in all parishes erected under *stat.* 9 *An. c.* 22. the canon shall take place (unless the act, in virtue of which any church was erected, shall have specially provided that the parishioners shall choose both); inasmuch as no *custom* can be pleaded in such new parishes. *Gibs.* 215. *Co. Lit.* 113. 1 *Ro. Abr.* 339. *Cro. Jac.* 532. 1 *Comm.* 77.

By *stat.* 58 *G.* 3. *c.* 45. two church-wardens of each church built under that act are to be chosen, one by the incumbent, and one by the parishioners.

In the election of church-wardens by the parishioners, the majority of those who *meet at the vestry*, upon a written no-

tice given for that purpose, shall bind the rest of the parish. *Lane*, 21.

By custom also, the choice of church-wardens may be in *a select vestry*, or a particular number of the parishioners, and not in the body of the parishioners at large. *Hard.* 378. 1 *Mod.* 181. See this Dict. title *Vestry*.

In some cases the lord of the manor prescribeth for the appointment of church-wardens: and this shall not be tried in the Ecclesiastical Court, although it be a prescription of what appertains to a spiritual thing. *God.* 153. 2 *Inst.* 653.

Where a parish contained within itself a borough not co-extensive with it, and the mayor of the borough, on a return to a *mandamus* for allowing a poor rate made by the church-wardens and overseers of the whole parish, stated a custom which had existed since 43 *Eliz.* of appointing separate church-wardens and overseers, and of making separate rates for the borough and those parts of the parish, which lay without the borough; it was holden that such custom was invalid, and the return was quashed. *R.* v. *Gordon*, *E.* 58 *G.* 3. *Term Rep. K. B.*

The validity of the custom of choosing church-wardens is to be decided, like all other customs of the realm, by the courts of *common law*, and not by the *spiritual* court. *Cro. Car.* 552. 6 *Mod.* 89. 2 *Ld. Raym.* 1008. 3 *Salk.* 88. 1 *Bac. Ab.* 371.—So also the legality of the votes given on the election is to be determined by the Common Law. *Burr.* 1420.—But the Spiritual Court may become the means of trying the validity of the election by a return of 'not elected'—'not duly elected,' or any other return that answers the writ, and affords an opportunity of trying the right in an action for a false return. 1 *Ld. Raym.* 138. *Stra.* 610. 2 *Ld. Raym.* 1379. 1405. 2 *Salk.* 433. 5 *Mod.* 325. *Cowp.* 413.

The parishioners are also sole judges of what description of persons they think proper to choose as church-wardens; the Spiritual Court therefore cannot in any case control or examine into the propriety of the election. 1 *Salk.* 166. See also the authorities immediately preceding.—And the parishioners may, for misbehaviour, remove them. 13 *Co.* 70. *Com. Dig.* 3. title *Esglise* (F. 1.)—An indictment also lies against them for corruption and extortion in their office. 1 *Sid.* 307.

The court of King's Bench will not grant a *mandamus* to the church-wardens, to call a vestry to elect their successors. *Stra.* 686. Sed vid. *Stra.* 52.—Nor will the Court grant a *quo warranto* to try the validity of an election to the office. 4 *Term Rep.* 382.

They are sworn into their offices by the Archdeacon or Ordinary of the Diocese, and if he refuse, a *mandamus* shall issue to compel him. *Cro. Car.* 551. 5 *Com. Dig.* tit. *Mandamus* (A.) and the authorities there cited, and without *fee*. 1 *Salk.* 330. But the oath must be general, 'to execute their duty truly and faithfully.'—*Hard.* 364. and under *stats.* 4 *Jac.* 1. *c.* 5. 1 *Jac.* 1. *c.* 9. & 21 *Jac.* 1. *c.* 7. to execute the laws against drunkenness. See *post* III. 2.

If a church-warden, properly appointed, refuse to take the oath, he may be excommunicated. *Gibs. Cod.* 961. 1 *Mod.* 194. And he must not execute the office till he is sworn. *Gibs.* 243. *Shaw. P. L.* 70.

2. All *peers* of the realm, by reason of their dignity, are exempted from the office. *Gibs.* 215. So are all *clergymen*, by reason of their order. 6 *Mod.* 140. 2 *Stra.* 1107. 1 *Ld. Raym.* 265.—*Members of Parliament* by reason of their privilege. *Gibs. Cod.* 215.—*Practising Barristers*—and such only, as it seems,—*Attorneys. Com. Dig.* tit. *Attorney* (B. 16.) *Clerks in Court.* 1 *Ro. Rep.* 368. but see *Mar.* 30.—*Physicians, Surgeons, Apothecaries, Aldermen, Dissenting Teachers, Prosecutors of Felons, Militia-men.*—See title *Constable*, II. 2.

No person *living out of the parish*, although he occupies lands within the parish, may be chosen church-warden; because he cannot take notice of absences from church nor disorders in it, for the due presenting of them. *Gibs.* 215.

II. *Church-wardens* are a corporation by custom, to sue and be sued for the goods of the church; and they may purchase *goods*, but not *lands*, except it be in London, by custom. *Jones* 439. *Cro. Car.* 532, 552. 4 *Vin.* 525. *n.* 1 *Ld. Raym.* 337. *Co. Lit.* 3.

In the city of London, by special custom, the *church-wardens*, with the minister, make a corporation for *lands* as well as *goods*; and may as such, hold, purchase, and take *lands* for the use of the church, &c. And there is also a custom in London, that the minister is there excused from repairing the chancel of the church. 2 *Cro.* 325. *Co. Lit.* 3. 1 *Rol. Abr.* 330. Church-wardens may have appeal of robbery for stealing the goods of the church. 1 *Rol. Abr.* 393. *Cro. Eliz.* 179.—And they may also purchase goods for the use of the parish. *Mar.* 22. 67: *Cro. Car.* 552: 3 *Bulst.* 264: *Yelv.* 173.—They may also take money or things (by legacy, gift, &c.) for the benefit of the church. 2 *P. Wms.* 125. And they may dispose of the goods of the church, *with the consent of the parishioners.* 1 *Ro. Ab.* 393. 1 *Vent.* 89. *Cro. Jac.* 234. 4 *Vin.* 526.

But the *church-wardens* (except in London) have no right to, or interest in the freehold and inheritance of the church, which alone belongs to the parson or incumbent. *Comp. Incumb.* 381. 1 *Bac. Ab.* 372. 1 *Vent.* 127. 4 *Vin.* 527.

A custom pleaded for the churchwardens of a parish to set up monuments, &c. in a church, without the consent of either rector or ordinary, determined to be illegal. *Beckwith* v. *Harding*, *E.* 58 *Geo.* 3. *Term. Rep. K. B.*

They may bring an appeal of robbery for goods of the church feloniously stolen—*Y. B.* vol. 11. p. 27.—and *ejectment* for land leased to them for years. *Runnington's Ejectments*, 59. 3 *Com. Dig. Esglise* (F. 3.)

If they waste the goods of the church, the new *church-wardens* may have actions against them, or call them to account; though the parishioners cannot have an action against them for wasting the church goods; for they must make new *church-wardens*, who must prosecute the former, &c. 1 *Danv. Abr.* 788. 2 *Cro.* 845. *Bro. Account*, 1.

They have a certain *special* property in the organs, bells, parish books, bible, chalice, surplice, &c. belonging to the church; of which they have the *custody* on behalf of the parish, whose property they really are; for the taking away, or for any damage done any of these, the church-wardens may bring an action at law, and therefore the parson cannot sue for them in the Spiritual Court. 1 *Bac. Abr.* 372. 1 *Ro. Rep.* 255.—See *Cro. Eliz.* 179. 1 *Vent.* 89. 7 *Mod.* 116.

But they have not, *virtute officii*, the custody of the title deeds of the advowson though they are kept in a chest in the church. 4 *Term Rep.* 351.

III. 1. Church-wardens have power and authority throughout the parish, though it extends into different hundreds and counties; being, though temporal officers, employed in ecclesiastical affairs, and must therefore follow the ecclesiastical division of the kingdom. *Shaw. P. L.* 86.

They have, with the consent of the minister, the placing the parishioners in the seats of the body of the church, appointing gallery keepers, &c. reserving to the ordinary a power to correct the same: and in London, the *church-wardens* have this authority in themselves.

Particular persons may *prescribe* to have a *seat*, as belonging to them by reason of their estates, as being an ancient messuage, &c. and the seats having been constantly repaired by them: also one may *prescribe* to any *isle* in the church, to *sit*, and to *bury* there, *always repairing the same.* 3 *Inst.* 202. *Cro. Jac.* 366. If the ordinary displaces a person claiming

a seat in a church by prescription, a prohibition shall be granted, &c. 12 *Rep.* 106. The parson impropriate has a right to the chief seat in the chancel; but by prescription another parishioner may have it. *Noy's Rep.*

Besides their ordinary power, the *church-wardens* have the care of the benefice during its vacancy: and as soon as there is an avoidance, they are to apply to the Chancellor of the diocese for a sequestration; which being granted, they are to manage all the profits and expences of the benefice for him that succeeds, plough and sow his glebes, gather in tithes, thrash out and sell corn, repair houses, &c. and they must see that the church be duly served by a curate approved by the bishop, whom they are to pay out of the profits of the benefice. 2 *Inst.* 489. *Shaw. P. L.* 99. *Stat.* 13 & 14 *Car.* 2. *c.* 12.

The *church-wardens* have not originally power to make any rate themselves, exclusive of the parishioners, their duty being only to summon the parishioners to a *vestry*, who are to meet for that purpose; and, when they are assembled, a rate made by the majority present shall bind the whole parish, although the *church-wardens* voted against it. *Comp. Incumb.* 389. 1 *Vent.* 367. 1 *Bac. Abr.* 373. 3 *Term. Rep.* 592.

But if the *church-wardens* give the parishioners due notice, that they intend to meet for the purpose of making a rate to repair the church, and the parishioners refuse to come, or being assembled, refuse to make any rate, they may make one without their concurrence; for they are liable to be punished in the ecclesiastical courts for not repairing the church. *Degge*, 172. 1 *Vent.* 367. 1 *Mod.* 79. 194. 237.—See further on this subject, title *Vestry*.

A taxation by a pound-rate is the most equitable way, which if refused to be paid, should be proceeded for in the Ecclesiastical Court; and *Quakers* are subject to such church rate, recoverable as their tithes, *Wood's Inst. b.* 1. *c.* 7. *Gibs.* 219. *Degge* 171.

2. Their duty is extensive and various; the heads of it are therefore here ranged alphabetically.

*Apprentices.*—See this Dict. titles *Apprentices*, *Chimney Sweepers*.

*Bastards.*—The church-wardens are bound to provide for such for whose sustenance the parish have made no provision; and this without an order of justices. *Hays* v. *Bryant*, *Trin.* 29 *Geo.* 3. in *C. P.*

*Belfry.*—Church-wardens ought to keep the keys of, and take care the bells are not rung without proper cause. *Can.* 88.

*Briefs.*—Church-wardens are by *stat.* 4 *An. c.* 14. to collect the charity-money upon *briefs*; which are letters-patent issuing out of Chancery, to re-build churches, restore loss by fire, &c. which are to be read in churches; and the sums collected, &c. to be indorsed on the briefs in words at length, and signed by the minister and *church-wardens*; after which they shall be delivered, with the money collected to the persons undertaking them, in a certain time, under the penalty of 20*l.* A register is to be kept of all money collected, &c. Also the undertakers in two months after the receipts of the money, and notice to sufferers, are to account before a Master in Chancery, appointed by the Lord Chancellor.

*Burial.*—The consent of the church-wardens must be had for burying a person in a different parish from that in which he dies.—It is their duty not to suffer suicides, or excommunicated persons, to be buried in the church or church-yard, without licence from the bishop.—By *stat.* 30 *Car.* 2. *c.* 3. they are to apply to the magistrates to convict offenders for not burying in woollen.—See also *post*, *Register*.

*Butter and Cheese.*—The penalties under *stat.* 13 & 14 *Car.* 2. *c.* 26. for reforming abuses in, are payable to the church-wardens of the parish where the offence is committed.

*Chimney-Sweepers.* See that title in this Dict.

*Church.*—Church-wardens or quest-men are to take care it be well aired, the windows glazed, the floors well paved, &c. If church-wardens erect or add a new gallery, &c. they must have the consent of the parishioners, and a licence of the ordinary, but not for occasional repairs. 2 *Inst.* 439. 1 *Mod.* 273. See *ante* III. 1. They must also take care to have in the church a large bible, a book of common prayer, a book of homilies, a font of stone, a decent communion table; with bread and wine for the communion, a table-cloth, carpet, and flagon, plate, and bowl of silver, gold or pewter. *Can.* 20. *Y. B.* 8 *H.* 5. *p.* 4. *Doct. & Stud.* 118. *Deg.* 151.—Church-wardens also are to sign certificates of persons taking the sacrament, to qualify for offices. They are to see that the ten commandments are set up at the East end of the church, and other chosen sentences upon the walls, with a reading desk and a pulpit, and a chest for alms, all at the charge of the parish. It is also the duty of church-wardens to prevent any irreverence or indecency from being committed in the church; and therefore they may pull off a person's hat in the church, or even turn him out if he attempts to disturb the congregation. The church being under the care of the church-wardens, they may refuse to open it at the instance of any person, except *the parson*, or any one acting under him. 1 *Sand.* 13. 1 *Lev.* 196. 1 *Sid.* 301. 3 *Salk.* 37. 12 *Mod.* 433. *Can.* 85.—They are not to suffer any stranger to preach, unless he appears qualified, by producing a licence—and such preacher is to register his name, and the day when he preached, in a book. *Can.* 50. 52. The pulpit is exclusively the right of the parson of the parish, and the church-wardens are punishable if they shut the door against him; and his consent is necessary to a stranger's preaching. 3 *Salk.* 87. 12 *Mod.* 433. See further this Dictionary, title *Church*.

*Church-yards.*—By the canons of the church it is ordained that the church-wardens, or quest-men, shall take care that the church-yards be well and sufficiently repaired, found, and maintained with walls, rails, or pales, as have been in each place accustomed, at their charges, unto whom the same, by law, appertaineth; they are also to see that the church be well kept and repaired; and by a constitution of Archbishop Winchelsea, this charge is to be at the expence of the parishioners. 2 *Inst.* 489. (But one who has land adjoining to the church-yard may by custom be bound to keep the fences in repair.)—*Church-wardens* shall suffer no plays, feasts, banquets, suppers, church-ales, drinkings, temporal courts or leets, lay juries, musters, or any profane usage to be kept in the church or church-yard.—Nor shall they suffer any idle persons to abide either in the church-yard or the church-porch during the time of divine service or preaching, but shall cause them to come in or to depart. So also, by the common law, church-wardens may justify the removal of tumultuous persons from the church-yard to prevent them from disturbing the congregation whilst the minister is performing the rites of burial. 1 *Mod.* 168. And by the canon law may prevent an *excommunicated person* from even entering into the church-yard at any time or on any pretence.

*Conventicles.*—*Church-wardens* are to levy the penalties by warrant of a justice, under *stat* 22 *Car.* 2. *c.* 1.

*Corn.*—See *stat.* 22 *Car.* 2. *c.* 8.

*County Rate.*—See *stat.* 12 *Geo.* 2. *c.* 29.

*Drunkenness.*—*Church-wardens* are to receive the penalties under *stat.* 4 *Geo.* 1. *c.* 5. 21 *Geo.* 2. *c.* 7. and 1 *Jac.* 1. *c.* 9. See this Dict. title *Constable*.

*Fast Days.*—See *stat.* 5 *Eliz. c.* 5.

*Fire.*—See this Dict. title *Fire*.

*Game.*—Church-wardens are to receive the penalties under *stat.* 1 *Jac.* 1. *c.* 27.

*Greenwich Hospital.*—Church-wardens are to sign certificates of out-pensioners under *stat.* 3 *Geo.* 3. *c.* 16.

*Hawkers and Pedlars.*—*Church-wardens* are to apprehend, and receive the penalties under *stat.* 9 & 10 *W.* 3 *c.* 27. and 9 *Geo.* 2. *c.* 23.

*Militia.*—See the *Militia Act* 26 *Geo.* 3. *c.* 107.

*Non-conformists.*—Church-wardens to levy the penalty of 12*d.* on persons not coming to church each Sunday, under *stat.* 1 *Eliz. c.* 2.

*Parson.*—Church-wardens are to observe whether he reads the thirty-nine articles twice a year, and the canons once in the year, preaches every Sunday good doctrine, reads the Common Prayer, celebrates the sacraments, preaches in his gown, visits the sick, catechises children, marries according to law, &c.

*Parishioners.*—Church-wardens to see if they come to church, and duly attend the worship of God; if baptism be neglected; women not churched; persons marrying in prohibited degrees, or without banns or licence; alms-houses or schools abused; legacies given to pious uses; &c. *Can.* 117. *Cro. Car.* 291. 1 *Vent.* 114.

*Poor.*—Church-wardens are to act in conjunction with the *overseers;* every church-warden being an overseer, but not *è contrà.*—See this Dict. titles *Overseer, Poor.*

*Presentments.*—Church-wardens, by their *oath*, are to present, or certify to the bishop or his officers, all things presentable by the *ecclesiastical law*, which relate to the *church*, to the *minister*, and to the *parishioners.* The articles which are delivered to church-wardens for their guidance in this respect, are, for the most part, founded on the *book of canons*, and on *rubricks* of the common prayer. They are also bound by the 4 *Jac.* 1. *c.* 5. to present tippling or drunkenness, and by 3 *Jac.* 1. *c.* 4. recusants. They need not take a fresh oath upon each presentment they make, nor are they obliged to make presentments oftener than once a year; but they may do it as often as they please, except there is a custom in the parish to the contrary; and, upon default or neglect in the church-wardens, the minister may present; but such presentment ought to be upon oath. *Can.* 117. *Cro. Car.* 285. 291. 1 *Vent.* 86. 114. and see 1 *Vent.* 127. 1 *Saund.* 13. 1 *Sid.* 463.

*Rates.*—See *ante* III. 1.

*Recusants.*—See *Presentments, Non-conformists.*

*Registers.*—Church-wardens shall provide a box wherein to keep *the parish register*, with three locks and three keys; two of the keys to be kept by them, and one by the minister: and every Sunday they shall see that the minister enter therein all the christenings, weddings, and burials that have happened the week before; and at the bottom of every page, they shall, with the minister, subscribe their names: and they shall, within a month after the 25th day of March, yearly, transmit to *the bishop* a copy thereof for the year before, subscribed as above. By *stat.* 23 *Geo.* 3. *c.* 67. upon the entry of any burial, marriage, birth, or christening in *the register* of any parish, precinct, or place, a stamp duty of 3*d.* shall be paid; and therefore the church-wardens and overseers, or one of them, are directed to provide a book for this purpose, with proper stamps for each entry, and to pay for the same, and for the stamps contained therein, out of the rates under their management; and to receive back the moneys which shall be so paid from the persons authorised to demand and receive the said duties.

*Sunday.*—Church-wardens to levy penalties for profaning: under *stats.* 1 *Car.* 1 *c.* 1. and 29 *Car.* 2. *c.* 7.

IV. At the end of the year the *church-wardens* are to yield just accounts to the minister and parishioners, and deliver what remains in their hands to the parishioners or to new *church-wardens:* in case they refuse, they may be presented at the next visitation, or the new officers may by process call them to account before the ordinary, or sue them by writ of account at Common Law. *Shaw. P. L.* 76. 12 *Mod.* 9. 1 *Bac. Abr.* 375. *Bro. Account.* 71. But in laying out their money, they are punishable for fraud only, not indiscretion. *Gibs.* 196, 1 *Burn's Just.* 349. *Shaw. P. L.* 76. If their receipts fall short of their disbursements, the succeeding *church-wardens* may pay them the balance, and place it to their account. 1 *Rol. Abr.* 121. *Can.* 89. 109. &c. And the Court of Chancery on application will make an order for the purpose: 2 *Eq. Ab.* 203. *Pre. Ch.* 43. but see 4 *Vin.* (8vo.) 529.

*Church-wardens, de facto* may maintain an action against a former church-warden for money received by him for the use of the parish; though the validity of the election of the plaintiffs to their office be doubtful, and though they be not the immediate successors of the defendant. 2 *H. Blackst.* 559.

By the *stat.* 3 & 4 *W. & M. cap.* 11. in all actions to be brought in the courts of Westminster, or at the assises, for money mis-spent by *church-wardens*, the evidence of the parishioners, other than such as receive alms, shall be taken and admitted.

*Church-wardens* are comprehended within the purview of the *stats.* 7 *Jac.* 1. *cap.* 5. and 21 *Jac.* 1. *cap.* 12. as to pleading the general issue to actions brought against them, and as to double costs when they have judgment.

But in an action on the case against a *church-warden* for a false and malicious presentment, though there be judgment for him, yet he shall not have double costs; for the statute does not extend to spiritual affairs. *Cro. Car.* 285. 467; 1 *Sid.* 463. 1 *Vent.* 86. 2 *Hawk. P. C.* 61. *Hardw.* 125.

The Spiritual Court can only order the *church-wardens'* accounts to be audited, but cannot make a rate to re-imburse them, because they are not obliged to lay out money before they receive it. *Hardw.* 381. 2 *Stra.* 974. *Cro. Car.* 285. 286.

But a custom that the church-wardens shall, before the end of their year, give notice to the parishioners to audit their accounts, and that a general rate shall be made, for the purpose of re-imbursing them all money advanced, is good 2 *Andr.* 32.

If there be a select committee or vestry elected by custom, and the church-wardens exhibit their accounts to such committee, who allow the same, this shall discharge them from being proceeded against in the Spiritual Court. 2 *Lutw.* 1027. So of allowance at a vestry in general. *Bunb.* 247. 289. 1 *Vent.* 367. 1 *Sid.* 281. *Raym.* 418. 2 *Barn. K. B.* 421. *Andr.* 11. And if the Spiritual Court take any step whatever after the accounts are delivered in, it is an excess of jurisdiction for which a prohibition will be granted, even after sentence. 3 *Term Rep.* 3.

CHURCHESSET, or *churchset, ciricseat.*] A Saxon word used in *Domesday*, which is interpreted *quasi semen ecclesiæ*, corn paid to the church. Fleta says, it signifies a certain measure of wheat, which in times past every man on St. Martin's day gave to holy church, as well in the times of the Britons as of the English; yet many great persons, after coming of the Romans, gave that contribution according to the ancient law of Moses, in the name of *first fruits;* as in the writ of King Canutus sent to the Pope is particularly contained, in which they call it *churchsed. Selden's Hist. Tithes, p.* 216.

CHURCH-SCOT. Customary oblations paid to the parish-priest; from which duties the religious sometimes purchased an exemption for themselves and their tenants.

CHURLE, *ceorle, carl.* Was in the Saxon times a tenant at will, of free condition, who held some land of the Thanes, on condition of rents and services: which *ceorles* were of two sorts; one that hired the lord's tenementary estate, like our farmers; the other that tilled and manured the *demesnes* (yielding work and not rent), and were thereupon called his *sockmen* or *ploughmen. Spelm.*

CINQUE PORTS, *quinque portus.*] Those havens that lie towards France, and therefore have been thought by our kings to be such as ought to be vigilantly guarded and preserved against invasion: in which respect they have an especial governor, called *Lord Warden of the Cinque Ports*, and divers privileges granted them, as a peculiar jurisdiction;

their warden having not only the authority of an admiral amongst them, but sending out writs in his own name, &c. 4 *Inst.* 222.

*Cambden* says, that Kent is accounted the key of England; and that William, called the Conqueror, was the first that made a constable of Dover Castle, and warden of the *Cinque Ports*, which he did to bring that country under a stricter submission to his government; but King John was the first who granted the privileges to those ports, which they still enjoy: however, it was upon condition that they should provide a certain number of ships at their own charge for forty days, as often as the king should have occasion for them in the wars, he being then under a necessity of having a navy for passing into Normandy, to recover that dukedom which he had lost. And this service the *Barons of the Cinque Ports* acknowledged and performed, upon the king's summons, attending with their ships the time limited at their proper costs, and staying as long after as the king pleased at his own charge. *Somner of Roman Ports in Kent.* See this Dict. tit. *Navy.*

The *Cinque Ports*, as we now account them, are, Dover, Sandwich, Romney, Winchelsea, and Rye; and to these we may add Hythe and Hastings, which are reckoned as part or members of the *Cinque Ports;* though by the first institution it is said that Winchelsea and Rye were added as members, and that the others were the *Cinque Ports:* there are also several other towns adjoining that have the privileges of the ports. These *Cinque Ports* have certain franchises to hold pleas, &c. and the king's writs do not run there; but on a judgment in any of the king's courts, if the defendant hath no goods, &c. except in the ports, the plaintiff may get the records certified into Chancery, and from thence sent by *mittimus* to the Lord Warden to make execution, 4 *Inst.* 223. 3 *Leon.* 3.

The constable of Dover Castle is Lord Warden of the *Cinque Ports.* And there are several courts within the *Cinque Ports;* one before the constable, others within the *ports* themselves, before the mayors and jurats; another, which is called *curia quinque portuum apud Shepway:* there is likewise a court of *Chancery*, in the *Cinque Ports*, to decide matters of equity; but no original writs issue thence. 1 *Danv. Abr.* 793. the jurisdiction of the *Cinque Ports* is general, extending to personal, real, and mix'd actions; and if any erroneous judgment is given in the *Cinque Ports* before any of the mayors and jurats, error lies according to the custom, by bill in nature of error, before the Lord Warden of the *Cinque Ports*, in his court of *Shepway.* And in these cases the mayor and jurats may be fined, and the mayor removed, &c. 4 *Inst.* 334. *Cromp. Jurisd.* 138.—And error lies from the court of *Shepway* to the court of *K. B. Jenk.* 71. 1 *Sid.* 356.

It has been observed that the *Cinque Ports* are not *jura regalia*, like counties palatine, but are parcel of the county of *Kent:* so that if a writ be brought against one for land within the *Cinque Ports*, and he appears and pleads to it and judgment is given against him in the Common Pleas, this judgment shall bind him; for the land is not exempted out of the county, and the tenant may waive the benefit of his privilege. *Wood's Inst.* 519.

The *Cinque Ports* cannot award process of outlawry. *Cro. Eliz.* 910. And a *quo minus* lies to the *Cinque Ports. Ibid.* 911. If a man is imprisoned at Dover by the Lord Warden, an *habeas corpus* may be issued; for the privilege that the king's writ lies not there is intended between *party* and *party*, and there can be no such privilege against the *king;* and an *habeas corpus* is a *prerogative writ*, by which the king demands an account of the *liberty* of the *subject.* *Cro. Jac.* 543. 1 *Nels. Abr.* 447.

*Certiorari* lies to the *Cinque Ports*, to remove indictments; and the jurisdiction that *brev. dom. regis non currit* is only in *civil causes* between party and party. 2 *Hawk. P. C. c.* 27. § 24.

CIRCA. A watch; from which *circuitor.*

CIRCADA. A tribute anciently paid to the bishop or archdeacon for visiting the churches. *Du Fresne.*

CIRCGEMOT. Vide *Chirchgemot.*

CIRCUITY OF ACTION, *circuitus actionis.*] A longer course of proceeding to recover a thing sued for than is needful: as if a person grant a rent-charge of 10*l.* per annum out of his manor of B. and after, the grantee disseiseth the grantor of the same manor, who brings an assise and recovers the land, and 20*l.* damages, which being paid, the grantee brings his action for 10*l.* of his rent due during the time of the disseisin, which he must have had if no disseisin had been: this is called *circuity of action*, because as the grantor was to receive 20*l.* damages, and pay 10*l.* rent, he might have received but 10*l.* only for damages, and the grantee might have kept the other 10*l.* in his hands by way of retainer for his rent, and so saved his action, which appears to be needless. *Termes de Ley.* See title *Action.*

CIRCUITS. Certain divisions of the kingdom appointed for the judges to go twice a year, for administering of justice, in the several counties. These circuits are made in the respective vacations, after Hilary and Trinity terms. See titles *Assise*, *Nisi Prius.*

The several counties of England are divided into six circuits, viz. 1. MIDLAND; containing the counties of Northampton, Rutland, Lincoln, Nottingham, Derby, Leicester, Warwick—2. NORFOLK; Bucks, Bedford, Huntingdon, Cambridge, Norfolk, Suffolk—3. HOME; Hertford, Essex, Kent, Sussex, Surrey—4. OXFORD; Berks, Oxford, Hereford, Salop, Gloucester, Monmouth, Stafford, Worcester—5. WESTERN; Southampton, Wilts, Dorset, Cornwall, Devon, Somerset—6. NORTHERN; York, Durham, Northumberland, Cumberland, Westmorland, Lancashire.

CIRCUMSPECTE AGATIS. Is the title of a statute made *anno* 13 *Ed.* 1. *stat.* 4. relating to *prohibitions*, prescribing certain cases to the judges, wherein the king's prohibition lies not. 2 *Inst.* 187. See title *Prohibition.*

CIRCUMSTANTIAL EVIDENCE. See title *Evidence.*

CIRCUMSTANTIBUS. By-standers; a word of art, signifying the supplying or making up the number of *jurors*, if any impanelled appear not, or appearing are challenged by either party, by adding to them so many of such as are present, or *standing-by* (*tales de circumstantibus*) who are qualified as will serve the turn. See *stat.* 35 *H.* 8. *cap.* 6. and *stat.* 5 *Eliz. c.* 25. for Wales. See also title *Jury.*

CIRCUMVENTION. Is any act of fraud, whereby a person is reduced to a deed by decreet. *Scotch Dict.*

CITATION, *citatio.*] A summons to appear, applied particularly to process in the Spiritual Court. The ecclesiastical courts proceed according to the course of the civil and canon laws, by *citation*, *libel*, &c. A person is not generally to be cited to appear out of the diocese, or peculiar jurisdiction where he lives; unless it be by the archbishop, in default of the ordinary; where the ordinary is party to the suit, in cases of appeal, &c. and by law a defendant may be sued where he lives, though it is for subtracting tithes in another diocese, &c. 1 *Nels.* 449. By the *stat.* 23 *Hen.* 8. *cap.* 9. every archbishop may cite any person dwelling in any bishop's diocese within his province for heresy, &c. if the bishop or other ordinary consents; or if the bishop or ordinary, or judge do not do his duty in punishing the offence. Where persons are cited out of their diocese, and live out of the jurisdiction of the bishop, a *prohibition* or *consultation* may be granted: but where persons live in the diocese, if when they are cited they do not appear, they are to be excommunicated, &c. The above statute was made to maintain the jurisdiction of inferior dioceses; and if any person is cited out of the diocese, &c. where the civil or canon law doth not allow it, the party grieved shall have double damages. If one defame

another within the peculiar of the archbishop, he may be punished there; although he dwell in any remote place out of the archbishop's peculiar. *Godb.* 190. See title *Courts Ecclesiastical.*

CITIZENS OF LONDON. See title *London.*

CITY, *civitas.*] According to *Cowel* is a town corporate, which hath a bishop and cathedral church, which is called *civitas*, *oppidum*, and *urbs*; *civitas*, in regard it is governed by justice and order of magistracy; *oppidum*, for that it contains a great number of inhabitants; and *urbs*, because it is in due form begirt about with walls. But *Crompton*, in his *Jurisdictions*, where he reckons up the cities, leaveth out Ely, although it hath a bishop and cathedral church; and puts in Westminster, though it hath not at present a bishop: and Sir *Edward Coke* makes Cambridge a city; yet there is no mention that it was ever an episcopal see. Indeed it appears by the *stat.* 35 *H.* 8. *cap.* 10. that there was a bishop of Westminster; see title *Bishops;* since which in *stat.* 17 *Eliz. cap.* 5. it is termed a *city* or borough: and notwithstanding what *Coke* observes of Cambridge, in the *stat.* 11 *H.* 7. *c.* 4. Cambridge is called only a town.

Kingdoms have been said to contain as many cities as they have sees of archbishops and bishops: but according to *Blount*, *city* is a word which hath obtained since the Conquest; for in the time of the Saxons there were no *cities*, but all great towns were called *burghs*, and even London was then styled *London-Bourg;* as the capital of Scotland is now called *Edinburgh.* And long after the conquest the word *city* is used promiscuously with the word *burgh*, as in the charter of Leicester it is called both *civitas* and *burgus;* which shows that those writers were mistaken, that tell us every *city* was or is a bishop's see. And though the word *city* signifies with us such a town corporate as hath usually a bishop and cathedral church; yet it is not always so.

A city, says *Blackstone*, is a town incorporated, which is or hath been the see of a bishop; and though the bishoprick be dissolved, as at Westminster, yet still it remaineth a city. 1 *Comm.* 114.

It appears, however, that Westminster retained the name of city, not because it had been a bishop's see, but because it was expressly created such, in the letters-patent by King Hen. VIII. erecting it into a bishoprick.—See *Burnet's Reform. Appx.* There was a similar clause in favour of the other five new created cities, Chester, Peterborough, Oxford, Glouceste r, and Bristol: the charter for Chester is in *Gib. Cod.* 1449; and that for Oxford in 14 *Rym. Fœd.* 854. Lord *Coke* seems anxious to rank Cambridge among the cities. Mr. *Wooddeson*, late Vinerian professor (see his Lectures, i. 302.) has produced a decisive authority that cities and bishops' sees had not originally any necessary connexion with each other. It is that of *Ingulphus*, who relates that at the great council assembled in 1072, to settle the claim of precedence between the two archbishops, it was decreed that bishops' sees should be transferred from towns to cities.

The accidental coincidence of the same number of bishops and cities would naturally produce the supposition that they were connected together as a necessary cause and effect; it is certainly a strong confirmation of the above authority that the same distinction is not paid to bishops' sees in Ireland.

Mr. *Hargrave*, in his notes to 1 *Inst.* 110. proves that although Westminster is a city, and has sent citizens to parliament from the time of Ed. VI. *it never was incorporated;* and this is a striking instance in contradiction of the learned opinions there referred to, viz. that the king could not grant within time of memory to any place the right of sending members to parliament without first creating that place a corporation. 1 *Comm. edit.* 1793. in *n.* See also titles *Parliament*, *Bishops*, *Borough*, &c.

CIVIL LAW. Is defined to be that *law* which every particular nation, commonwealth, or city, has established peculiarly for itself: *jus civile est, quod quisque populus sibi constituit. Just. Inst.* Now more properly distinguished by the name of *municipal law:* the term Civil Law being chiefly applied to that which the old Romans used, compiled from the Laws of Nature and of Nations. The Roman law was founded first, upon the regal constitutions of their ancient kings; next upon the twelve tables of the *Decemviri*; then upon the laws or statutes enacted by the Senate or People; the edicts of the *Prætor* and the *Responsa Prudentum*, or opinions of learned lawyers; and lastly, upon the imperial decrees or constitutions of successive emperors.—These had by degrees grown to an enormous bulk; but the inconvenience arising therefrom was in part remedied, by the collections of three private lawyers, Gregorius, Hermogenes, and Papsnius; and afterwards by the Emperor Theodosius the younger, by whose orders a *Code* was compiled, *A. D.* 438, being a methodical collection of all the imperial constitutions then in force: which *Theodosian Code* was the only book of civil law received as authentic in the western part of Europe, till many centuries after.—For Justinian commanded only in the eastern remains of the empire; and it was under his auspices that the present body of Civil Laws was compiled and finished by Trebonian, about the year 533.

This consists of,—1. The *Institutes;* which contain the elements or first principles of the Roman law, in four books. —2. The *Digests* or *Pandects*, in fifty books; containing the opinions and writings of eminent lawyers, digested in a systematical method.—3. A *New Code* or collection of imperial constitutions, in twelve books; the lapse of a century having rendered the former code of Theodosius imperfect.—4. The *Novels* or new constitutions posterior in time to the other books, and amounting to a supplement to the code containing new decrees of successive emperors, as new questions happened to arise.—These form the body of the Roman law, or *Corpus Juris Civilis*, as published about the time of Justinian; which however soon fell into neglect and oblivion till about the year 1130, when a copy of the *Digests* was found at Amalfi in Italy; which accident, concurring with the policy of the Roman ecclesiastics, suddenly gave a new vogue and authority to the Civil Law, and introduced it into several nations. 1 *Comm.* 80. 81.

The *Digest* or *Pandects*, was collected from the works and commentaries of the ancient lawyers, some whereof lived before the coming of our Saviour: The whole Digest is divided into seven parts: the first part contains the elements of the *law*, as what is justice, right, &c. The second part treats of judges and judgments. The third part of personal action, &c. The fourth part of contracts, pawns, and pledges. The fifth part of wills, testaments, &c. The sixth part of the possession of goods. The seventh part of obligations, crimes, punishments, &c. The *Institutes* contain a system of the whole body of *law*, and are an epitome of the Digest divided into four books; but sometimes they correct the Digest: they are called Institutes, because they are for instruction, and show an easy way to the obtaining a knowledge of the *Civil Law:* but they are not so distinct and comprehensive as they might be, nor so useful at this time as they were at first. The *Novels*, or *Authentics*, were published at several times, without any method; they are termed *Novels* as they are *new laws*, and *Authentics*, being authentically translated from the Greek into the Latin tongue; and the whole volume is divided into nine Collations, Constitutions, or Sections; and they again into 168 Novels, which also are distributed into certain chapters. The first collation relates to heirs, executors, &c.; the second, the state of the church; the third is against bawds; the fourth concerns marriages, &c.; the fifth forbids the alienation of the possessions of the church; the sixth shows

the legitimacy of children, &c.; the seventh determines who shall be witnesses; the eighth ordains wills to be good, though imperfect, &c.; and the ninth contains matter of succession in goods, &c. *Dict.*

To those tomes of the *Civil Law* we may add the *Book of Feuds*, which contains the customs and services that the subject or vassal oweth to his prince or lord, for such lands or fees as he holdeth of him. *The Constitutions of the Emperor* were either by a *rescript*, which was the letter of the Emperor in answer to particular persons who inquired the law of him; or by *edict*, which the Emperor established of his own accord, that it might be generally observed by every subject; or by *decree*, which the Emperor pronounced between plaintiff and defendant, upon hearing a particular cause. The power of issuing forth rescripts, edicts, and decrees, was given to the prince by the *lex regia*, wherein the people of Rome wholly submitted themselves to the government of one person, viz. Julius Cæsar, after the defeat of Pompey, &c. And by this submission the prince could not only *make laws*, but was esteemed above all coercive power of them. *Dict.*

How far the Civil Law is adopted and of force in this kingdom, see title *Canon Law.*

Before the Reformation, decrees were as frequent in the *Canon Law* as in the *Civil Law.*—Many were graduates *in utroque jure* or *utriusque juris.* J. U. D. or *juris utriusque doctor*, is still common in foreign universities. But Hen. 8. in the twenty-seventh year of his reign, when he had renounced the authority of the Pope, issued a mandate to the University of Cambridge, to prohibit *lectures* and the granting *degrees* in Canon Law in that University. *Stat. Acad. p.* 137.—It is probable that at the same time Oxford received a similar prohibition, and that degrees in canon law have ever since been discontinued in England. 1 *Comm.* 392. in *n.*

CIVIL LIST. See title *King.*

TO CLACK WOOL. Is to cut off the sheep's mark, which makes it weigh lighter; as to *force wool*, signifies to clip off the upper and hairy part thereof; and to *bard* it, is to cut the head and neck from the rest of the fleece. *Stat.* 8 *Hen.* 6. *cap.* 22.

CLADES. *Clida, cleta, cleia*, from the Brit. *clie*, and the Irish *clia.*] A wattle or hurdle; and a hurdle for penning or folding of sheep is still in some counties of England called a *cley*. *Paroch. Antiq. p.* 575.

CLARENDON, *Constitutions of.* Certain *Constitutions* made in the reign of Hen. 2. *A. D.* 1164, in a great council held at Clarendon, whereby the King checked the power of the Pope, and his clergy, and greatly narrowed the total exemption they claimed from the secular jurisdiction. 4 *Com.* 422.

CLARETUM. A liquor made of wine and honey, clarified or made clear by decoction, &c. which the Germans, French, and English, called *hippocras*: and it was from this, the red wines of France were called *claret.*—*Girald. Camb. apud Wharton. Ang. Sax. Par.* 2. *p.* 480.

CLAIM, *clameum.*] A challenge of interest in any thing that is in the possession of another, or at least out of a man's own possession; as *claim* by charter, by descent, &c.

In *Plow. Comm.* 359. (*a*), *Dyer*, C. J. is said to have defined *claim* to be, *a challenge of the ownership or property* that one hath not in possession, but which is detained from him by wrong.

CLAIM is either verbal, where one doth by words *claim* and challenge the thing that is so out of his possession; or it is by an action brought, &c.; and sometimes it relates to lands, and sometimes to goods and chattels. *Lit. Sect.* 420. Where any thing is wrongfully detained from a person, this *claim* is to be made; and the party making it may thereby avoid descents of lands, disseisins, &c. and preserve his title, which otherwise would be in danger of being lost. *Co. Lit.*



250. A man who hath present right or title to enter, must make a *claim*; and in case of reversions, &c. one may make a *claim* where he hath right, but cannot enter on the lands: when a person dares not make an entry on land, for fear of being beaten or other injury, he may approach as near as he can to the land, and *claim* the same; and that shall be sufficient to vest the seisin in him. 1 *Inst.* 250. See title *Entry.*

If nothing doth hinder a man, having a right to land, from entering or making his *claim*; there he must do so, before he shall be said to be in possession of it, or can grant it over to another; but where the party who hath right, is in possession already, and where an entry or *claim* cannot be made, it is otherwise, 1 *Rep.* 157. A *claim* will divest an estate out of another, when the party must enter into some part of the land; but if it be only to bring him into possession, he may do it in view. By *claim* of lands in most cases is intended a *claim* with an entry into part of the lands, or by a near approach to it. *Co. Lit.* 252. 254. *Poph.* 67. One in reversion after an estate for years, or after a statute-merchant, staple, or *elegit*, may enter and make a *claim* to prevent a descent or avoid a collateral warrantry. And *claim* of a remainder by force of a condition must be upon the land, or it will not be sufficient. *Co. Lit.* 202.

If a man seised of lands in right of his wife make a feoffment in fee on condition, and the husband dieth, and then the condition is broken, and the heir enters; in this case the wife need not *claim* to get possession of her estate, for the law doth vest it in her without any *claim*. *Co. Lit.* 202. 8 *Rep.* 43.

The *claim* of the particular tenant shall be good for him in reversion or remainder; and of him in reversion, &c. for particular tenant: so *claim* of a copyholder will be good for the lord, &c. But if tenant for years, in a court of record, *claim* the fee of his land, it is a forfeiture of his estate. *Plowd.* 359. *Co. Lit.* 251. A *claim* may be made by the party himself; and sometimes by his servants or deputy: and a guardian in soccage, &c. may claim, or enter, in the name of the infant that hath right, without any commandment. *Co. Lit.* 245.

*Claim* or entry should be made as soon as may be; and by the Common Law it is to be within a year and a day after the disseisin, &c. and if the party who hath unjustly gained the estate do afterwards occupy the land, in some cases an assise, trespass, or forcible entry, may be had against him. *Lit. Sect.* 426. 430.

If a fine is levied of lands, strangers to it are to enter and make a *claim* within five years, or be barred: infants after their age, *feme coverts* after the death of their husbands, &c. have the like time, by *stat.* 1. *R.* 3. *c.* 7. See title *Fines.*

CONTINUAL CLAIM, is where a man hath right and title to enter into any lands or tenements, whereof another is seised in fee, or in fee tail; if he who hath title to enter makes *continual claim* to the lands or tenements before the dying seised of him who holdeth the tenements then, though such tenant die thereof seised, and the lands or tenements descend to his heir, yet may he who hath made such continual claim, or his heir, enter into the lands or tenements so descended, by reason of the continual claim made, notwithstanding the descent. So (*Si come*), in case a man be disseised, and the disseisee makes continual claim to the tenements in the life of the disseisor, although the disseisor dieth disseised in fee, and the land descend to his heir, yet may the disseisee enter upon the possession of the heir, notwithstanding the descent. *Litt.* § 414.

But such claim must always be made within the year and the day before the death of the person holding the land; for if such tenant do not die seised within a year and a day after such claim made, and yet he that hath right dares not enter, he must make another claim, within the year and the day after the first claim, and so *toties quoties*, that he may be sure his

claim shall always have been made within a year and a day before the death of the tenant; and hence it seems it is called *Continual Claim.* See further title *Entry;* as also *Descent.*

By *stat.* 32 *H.* 8. *c.* 43. five years must elapse without entry or continual claim, in order that a descent on the disseisor's death should take away the entry of the disseisee, or his heir; but after the five years, the disseisee must make continual claim, as before the statute. And by *stat.* 4 *An. c.* 16. § 16. no claim (or entry) shall be of effect to avoid a fine, unless an action shall be commenced thereon within a year, and prosecuted with effect. See titles *Fine, Entry, Disseisin,* &c.—And for further particulars, see 1 *Inst.* 150. and *n.*

CLAIM OF LIBERTY. A suit or petition to the king in the court of Exchequer, to have liberties and franchises confirmed there by the king's attorney general. *Co. Ent.* 93.

CLAMEA ADMITTENDA IN ITINERE PER ATTORNATUM. An ancient writ by which the king commanded the justices in eyre to admit a person's claim by attorney who was employed in the king's service, and could not come in his own person. *Reg. Orig.* 19.

CLAP-BOARD. Board cleft or cut in order to make casks or vessels. By *stat.* 35 *Eliz. c.* 11. all exporters of beer or fish were required to import a certain proportion of clap-boards for new casks.

CLARIGARIUS ARMORUM. An herald at arms. *Blount.*

CLARIO. A trumpet. *Knighton, anno* 1346.

CLASSIARIUS. A seaman, or soldier serving at sea. *Chart. Carol. 5 Imperator. Thomæ Comit. Surr. dat. in urbe Londiniensi,* 8 *Junii* 1522.

CLAUD, *Brit.*] A ditch: *claudere,* to enclose, or turn open fields into enclosures. *Paroch. Antiq.* 236.

CLAVES INSULÆ. A term used in the Isle of Man, where all ambiguous and weighty cases are referred to twelve persons, whom they call *claves insulæ, i. e.* the keys of the island.

CLAVIA. In the inquisition of Serjeanties in the 12th and 13th years of King John, within the counties of Essex and Hertford; *Boydin Aylet tenet quatuor lib. terræ in Bradwell, per manum Willielmi de dono per serjeantiam* clavie, *viz.* By the serjeanty of the club or mace. *Brady's Append. Introduct. to Eng. Hist.* 22.

CLAVIGERATUS. A treasurer of a church. *Mon. Angl. tom.* 1. *p.* 184.

*Clause irritant,* is any provision which makes a penalty be incurred, and the obligation to be null for the future; or upon any other account, makes the right to vacate or resolve. *Scotch Dict.*

*Cause resolutive,* is a provision, whereby the contract to which it is affixed, is for not performance declared to have been null from the beginning. *Scotch Dict.*

CLAUSE ROLLS, *rotuli clausi.*] Contain all such matters of record as were committed to close writs; these rolls are preserved in the Tower.

CLAUSTURA. Brushwood for hedges and fences. *Paroch. Antiq.* 247.

CLAUSUM FREGIT. See titles *Capias, Common Pleas.*

CLAUSUM PASCHIÆ. *Stat. Westm.* 1. *In crastino* clausi Paschæ, or *In crastino octabis Paschæ,* which is all one, that is, the morrow of the *utas* (or eight days) of Easter. 2 *Inst.* 157. Clausum Paschæ, i. e. *Dominica in albis; sic dictum, quod* Pascha claudat. *Blount.*—The end of Easter—the Sunday after Easter-Day.

CLAUSURA HEYÆ. The enclosure of a hedge. *Rot. Plac. in itinere apud Cestriam, ann.* 14 *H.* 7.

CLAWA. A close, or small measure of land. *Mon. Ang. tom.* 2. *pag.* 250.

CLEPTOR. A rogue or thief. *Hoveden, anno* 946.

## CLERGY.

*Clerus.*] Signifies the assembly or body of clerks or ecclesiastics, being taken for the whole number of those who are *de clero Domini,* of our Lord's lot or share, as the tribe of Levi was in Judea; and are separate from the noise and bustle of the world, that they may have leisure to spend their time in the duties of the Christian religion.

The *Clergy* in general were heretofore divided into *regular* and *secular;* those being *regular* which lived under certain rules, being of some religious order, and were called men of religion, or, *The Religious:* such as all Abbots, Priors, Monks, &c. The *secular* were those that lived not under any certain rules of the religious orders, as Bishops, Deans, Parsons, &c.—Now, the word *Clergy* comprehends all persons in *holy orders,* and in ecclesiastical offices, *viz. Archbishops, Bishops, Deans and Chapters, Archdeacons, Rural Deans, Parsons* (who are either *Rectors* or *Vicars*), and *Curates,*—to which may be added *Parish Clerks,* who formerly frequently were, and yet sometimes are, in orders.—As to the law more peculiarly respecting each of these, see the several titles, particularly title *Parson.*

This venerable body of men have several privileges allowed them by our municipal laws, and had formerly much greater, which were abridged at the time of the reformation, on account of the ill use which the Popish clergy had endeavoured to make of them: for the laws having exempted them from almost every personal duty, they attempted a total exemption from every secular tie. The personal exemptions however for the most part continue; a clergyman cannot be compelled to serve on a *jury,* nor to appear at a *Court Leet,* or view of frank-pledge, which almost every other person is obliged to do. 2 *Inst.* 4. (See title *Court Leet.*) But if a layman is summoned on a jury, and before the trial takes orders, he shall, notwithstanding, appear and be sworn. 4 *Leon.* 190. A clergyman cannot be chosen to any temporal office, as bailiff, reeve, constable, or the like, in regard of his own continual attendance on the sacred function. *Finch. L.* 88. During his attendance on divine service he is privileged from *arrests* in civil suits; for a reasonable time, *eundo, redeundo, & morando,* to perform service. *Stats.* 50 *E.* 3. *c.* 5. 1 *R.* 2. *c.* 16. 12 *Co.* 100.—In cases of felony he shall have benefit of his clergy, without being branded; and may likewise have it more than once. See *post, Clergy, benefit of.*—Clergymen also have certain disabilities; they are not capable of sitting as members of the House of Commons. *Stat.* 41 *Geo.* 3. *c.* 63. See title *Parliament.*—By *stat.* 21 *H.* 8. *c.* 13. the Clergy were not (in general) allowed to take any lands or tenements to farm, on pain of 10*l. per* month, and total avoidance of the lease; unless where they had not sufficient glebe, and the land is taken for the necessary expenses of their household, § 8.—Nor, on like penalty, to keep any tan-house, or brewhouse.—Nor to engage in any trade, or sell merchandize, on forfeiture of treble value.

See now 43 *Geo.* 3. *cc.* 84. 89. 54 *Geo.* 3. *c.* 175. as to England, and 48 *Geo.* 3. *c.* 66. as to Ireland, regulating the residence, &c. of the Clergy, and this *Dict.* tit. *Residence.*

As to increasing of small livings in England, by what is usually termed Queen Anne's bounty, see *st.* 2, 3 *Ann. c.* 11. 1 *Geo.* 1. *c.* 10. 43 *Geo.* 3. *c.* 107. 45 *Geo.* 3. *c.* 84. 55 *Geo.* 3. *c.* 147. In Ireland, by Archbishop Boulter's charity; See *Irish Act,* 29 *Geo.* 2. *c.* 18. as amended by 46 *Geo.* 3. *c.* 60.

As to augmenting and modifying the stipends of the Clergy of Scotland, see 48 *Geo.* 3. *c.* 138. 50 *Geo.* 3. *c.* 84.

As to Stipendiary Curates in England, see *st.* 53 *Geo.* 3. *c.* 149. 54 *Geo.* 3. *c.* 175.

See further, titles *Church, Curate, First-fruits, Ordination, Parson, Residence.*

By the statute called *Articuli Cleri,* 9 *E.* 2. *st.* 1. *c.* 3. if any

person lay violent hands on a clerk, the amends for the peace broken shall be before the king (that is, by indictment), and the assailant may *also* be sued before the bishop, that excommunication or bodily penance may be imposed; which, if the offender will redeem by money, it may be sued for before the bishop. See 4 *Comm.* 217.

Although the *Clergy* claimed an exemption from all secular jurisdiction, yet *Mat. Paris* tells us, that soon after William the First had conquered Harold, he subjected the bishoprics and abbeys who held *per baroniam*, that they should be no longer free from military service; and for that purpose he in an arbitrary manner registered how many soldiers every bishopric and abbey should provide, and send to him and his successors in time of war; and having placed these registers of ecclesiastical servitude in his treasury, those who were aggrieved departed out of the realm: but the *clergy* were not till then exempted from all secular service; because, by the laws of king Edgar, they were bound to obey the secular magistrate in three cases, viz. upon any *expedition to the wars*, and to contribute to the building and repairing of *bridges*, and of *castles* for the defence of the kingdom. It is probable, that by expedition to the wars it was not at that time intended they should personally serve, but contribute towards the charge: one they must do, as appears by the petition to the king, *anno* 1267, viz. *Ut omnes* clerici *tenentes per baroniam vel feudum laicum, personaliter armati procederent contra regis adversarios, vel tantum servitium in expeditione regis invenirent, quantum pertineret ad tantam terram vel tenementum.* But their answer was, that they ought not to fight with the military but with the spiritual sword, that is, with prayers and tears; that they were to maintain peace and not war; and that their baronies were founded on charity; for which reason they ought not to perform any military service. *Blount.*

That the *Clergy* had greater privileges and exemptions at common law than the *laity* is certain; for they are confirmed to them by *Magna Charta*, and other ancient statutes; but these privileges are in a great measure lost, the *clergy* being included under general words in later statutes; so that *clergymen* are liable to all public charges imposed by act of parliament, where they are not particularly excepted as above stated. Their bodies are not to be taken upon statute-merchant or staple, &c. for the writ to take the body of the conusor is *si laicus sit;* and if the sheriff or any other officer arrest a *clergyman* upon any such process, it is said an action of false imprisonment lies against him that does it, or the *clergyman* arrested may have a *supersedeas* out of *Chancery.* 2 *Inst.* 4.

In action of trespass, account, &c. against a person in holy orders, wherein process of *capias* lies, if the sheriff return that the defendant is *clericus beneficiatus nullum habens laicum feodum ubi summoneri potest;* in this case the plaintiff cannot have a *capias* to arrest his body; but the writ ought to issue to the bishop, to compel him to appear, &c. But on *execution* had against such *clergyman*, a sequestration shall be had of the profits of his benefice. 2. *Inst.* 4. *Degge* 157.

The foregoing are all the privileges remaining on civil accounts: though by the common law, they were to be free from the payment of tolls, in all fairs and markets, as well for all the goods gotten upon their church livings, as for all goods and merchandises by them bought to be spent upon their rectories; and they had several other exemptions, &c.

## Clergy, Benefit of.

This being, as *Blackstone* observes, a title of no small curiosity as well as use; the learned commentator's chapter on that subject (4 *Comm.* 305.) is here abridged; with such additions thereto as seemed requisite; in which enquiry is made,

I. *Into its original; and various Changes.*
II. *To whom it is now to be allowed.*
III. *In what cases.*
IV. *The consequences of allowing it.*

I. Clergy, the *privilegium clericale*, or in common speech *The Benefit of Clergy*, had its original from the pious regard paid by Christian princes to the church in its infant state; and the ill use the Popish ecclesiastics soon made of that pious regard. The exemptions which they granted to the Church were principally of two kinds: 1. Exemption of *places*, consecrated to religious duties, from criminal arrests, which was the foundation of sanctuaries: 2. Exemption of the *persons* of clergymen from criminal process before the secular judge in a few particular cases; which was the true original and meaning of the *privilegium clericale.*

In England, however, a total exemption of the clergy from secular jurisdiction could never be thoroughly effected, though often endeavoured by the clergy. *Keilw.* 180. See *stat. Westm.* 1. 3 *E.* 1. *c.* 2.: and therefore, though the ancient *privilegium clericale* was, in *some* capital cases, yet it was not *universally* allowed. And in those particular cases, the use was for the Bishop or Ordinary to demand his clerks to be remitted out of the king's courts as soon as they were indicted: concerning the allowance of which demand there was for many years a great uncertainty; (2 *Hal. P. C.* 377.) till at length it was finally settled, in the reign of Henry IV. that the prisoner should first be arraigned; and might either *then* claim his benefit of clergy, by way of declinatory plea; or, after *conviction*, by way of aresting judgment. This latter way is most usually practised, as it is more to the satisfaction of the court to have the crime previously ascertained by confession, or the verdict of a jury; and also it is more advantageous to the prisoner himself, who may possibly be acquitted, and so need not the benefit of his clergy at all.

Originally the law was held, that no man should be admitted to the privilege of clergy, but such as had the *habitum et tonsuram clericalem.* 2 *Hal. P. C.* 372. *M. Paris, A. D.* 1259. But in process of time, a much wider and more comprehensive criterion was established; every one that could read (a mark of great learning in those days of ignorance and superstition) being accounted a clerk, or *clericus*, and allowed the benefit of clerkship, though neither initiated in holy orders, nor trimmed with the clerical tonsure. But when learning, by means of the invention of printing, and other concurrent causes, began to be more generally disseminated than formerly; and reading was no longer a competent proof of clerkship, or being in holy orders; it was found that as many laymen as divines were admitted to the *privilegium clericale*; and therefore by *stat.* 4 *Hen.* 7. *c.* 13. a distinction was once more drawn between mere lay scholars, and clerks that were really in orders. And, though it was thought reasonable still to mitigate the severity of the law with regard to the former, yet they were not put upon the same footing with actual clergy; being subjected to a slight degree of punishment, and not allowed to claim the clerical privilege more than once. Accordingly the *stat.* directs, that no person, once admitted to the benefit of clergy, shall be admitted thereto a second time, unless he produces his orders; and in order to distinguish their persons, all laymen who are allowed this privilege shall be burnt with a hot iron in the brawn of the left thumb. This distinction between learned laymen, and real clerks in orders, was abolished for a time by the *stats.* 28 *Hen.* 8. *c.* 1. and 32 *Hen.* 8. *cap.* 3. but it is held (*Hob.* 294. 2 *Hal. P. C.* 375.) to have been virtually restored by *stat.* 1 *Edw.* 6. *c.* 12. which statute also enacts that lords of parliament, and peers of the realm, having place and voice in parliament, may have the benefit of their peerage, equivalent to that of clergy, for the first offence, (although they cannot read, and without

being burnt in the hand), for all offences then clergyable to commoners; and also for the crimes of house-breaking, highway-robbery, horse-stealing, and robbing of churches.

After this burning, the laity, and before it, the real clergy, were discharged from the sentence of the law in the king's court, and delivered over to the Ordinary, to be dealt with according to the ecclesiastical canons. Whereupon the Ordinary proceeded to make a purgation of the offender by a new canonical trial, by the oath of the offender and that of twelve compurgators, although he had been previously convicted by his country, or perhaps by his own confession. *Staunf. P. C.* 138. *b.* See also 3 *P. Wms.* 447. *Hob.* 289. 291.

But this purgation opening a door to a scandalous prostitution of oaths, and other abuses, it was enacted by *stat.* 18 *Eliz. c.* 7. that for the avoiding of such perjuries and abuses, after the offender has been allowed his clergy, he shall not be delivered to the Ordinary as formerly; but upon such allowance, and burning in the hand, he shall forthwith be enlarged and delivered out of prison; with proviso that the judge may, if he thinks fit, continue the offender in gaol for any time not exceeding a year. And thus the law continued for above a century, unaltered; except only that the *stat.* 21 *Jac.* 1. *c.* 6. allowed, that *women* convicted of *simple larcenies* under the value of 10*s.* should (not properly have the benefit of clergy, for they were not called upon to read; but) be burned in the hand, whipped, put in the stocks, or imprisoned for any time not exceeding a year. And a similar indulgence by *stats.* 3 & 4 *W. & M. c.* 9. 4 & 5 *W. & M. c.* 24. was extended to women guilty of *any clergyable felony* whatsoever; who were allowed to claim the benefit of the statute once, in like manner as men might claim the benefit of clergy, and to be discharged upon being burned in the hand, and imprisoned for any time not exceeding a year. The punishment of burning in the hand was changed by *stat.* 10 & 11 *W.* 3. *c.* 23. into burning in the left cheek, near the nose: but this provision was repealed by *stat.* 5 *Ann. c.* 6.; and till that period, all women, all peers of parliament, and peeresses, and all male commoners who could read, were discharged in all clergyable felonies; the males absolutely, if clerks in orders; and other commoners, both male and female, upon branding; and peers and peeresses without branding; for the first offence; yet all liable (except peers and peeresses) at the discretion of the judge, to imprisonment not exceeding a year. And those men who could not read, if under the degree of peerage, were hanged.

But by the said *stat.* 5 *Ann. c.* 6. it was enacted that the benefit of clergy should be granted to all those who were entitled to ask it, without requiring them to read. And it was further enacted by the same statute, that when any person is convicted of *any theft or larceny*, and burnt in the hand for the same, according to the ancient law, he shall also at the discretion of the judge, be committed to the house of correction, or public work-house, to be there kept to hard labour for any time not less than six months, and not exceeding two years; with a power of inflicting a double confinement in case of the party's escape from the first. And by *stats.* 4 *Geo.* 1. *c.* 11. 6 *Geo.* 1. *c.* 23. when any person shall be convicted of any *larceny*, either *grand* or *petit*, or any felonious stealing, or of taking of money or goods, either from the person, or the house of another, or in any other manner, and who by the law shall be entitled to the benefit of clergy, and liable only to burning in the hand, or whipping, the court may instead thereof direct such offenders to be transported; and by the *stat.* 19 *Geo.* 3. *c.* 74. offenders liable to transportation, may in lieu thereof be employed, if males (except in the case of petty larceny) in hard labour, for the benefit of some public navigation, and in all cases might be confined to hard labour in certain penitentiary houses, then in contemplation to be erected; but this latter plan of the penitentiary houses was never carried into execution. See further titles *Felons*, *Transportation*. 2 *Hawk. P. C. c.* 58. § 10.

By the same *stat.* 19 *Geo.* 3. *c.* 74. instead of burning in the hand, the court in all clergyable felonies may impose a pecuniary fine, or (except in the case of man-slaughter) may order the offender to be once or oftener, but not more than thrice, either publicly or privately whipped; and in the latter case, certain provisions are added to prevent collusion or abuse. The offender so fined or whipped, to be equally liable to subsequent detainer or imprisonment, this part of the act is made perpetual, by 39 *Geo.* 3. *c.* 45.

II. 1. All *Clerks in orders*, are without any branding, and of course without any transportation, fine, or whipping (for those are only substituted in lieu of the other), to be admitted to this privilege, or benefit of clergy, and immediately discharged; and this as often as they offend. 2 *Hal. P. C.* 375.

2. All *Lords of Parliament* and peers of the realm, having place and voice in parliament, by *stat.* 1 *E.* 6. *c.* 12. (which is likewise held to extend to peeresses; *Duchess of Kingston's* case, 11 *State Tr.* 198) shall be discharged in all clergyable, and other felonies, provided for by the act, without any burning in the hand, or imprisonment, or other punishment substituted in its stead, in the same manner as real clerks convict; but this only for the first offence.

3. All the *Commons* of the realm, not in orders, whether male or female, shall *for the first offence* be discharged of the capital punishment of felonies, within the benefit of clergy, upon being burnt in the hand, whipped or fined, or suffering the discretionary imprisonment before stated; or in case of larceny, upon being transported for seven years, if the court shall think proper.

It is a privilege peculiar only to the *Clergy*, that sentence of death can never be passed upon them for any number of *manslaughters*, *bigamies*, *simple larcenies*, or other *clergyable* offences; but a layman, even a peer, may be ousted of clergy, and will be subject to the judgment of death, upon a second conviction of a clergyable offence. Thus if a layman has once been convicted of manslaughter, upon production of the conviction he may afterwards suffer death for bigamy or *any other* clergyable felony; which would not therefore be a capital crime to another person not so circumstanced. See *post* as to the *Counter-plea*.

It has been said that Jews and other infidels and heretics, were not capable of the benefit of clergy, till after the *stat.* 5 *An. c.* 6. as being under a legal incapacity for orders. 2 *Hal. P. C.* 373. 2 *Hawk. P. C. c.* 33. § 5. *Fost.* 306. But it does not seem that this was ever ruled for law, since the reintroduction of the Jews into England, in the time of the usurpation by Cromwell. For if that were the case, the Jews are still in the same predicament; which every day's experience contradicts; the *stat. of An.* having made no alteration in this respect, it only dispensing with the necessity of reading. 4 *Comm.* 373.

But a person having once had benefit of clergy, shall not be ousted of his clergy, by the bare mark in his hand, or by a parol averment, without the record testifying it, or a transcript thereof, according to the following statutes. 2 *H. H.* 373.

By *stat.* 34 & 35 *H.* 8. *c.* 14. the clerk of the crown, or of the peace, or of assize, shall certify a transcript briefly of the tenor of the indictment, outlawry, or conviction, and attainder, into the King's Bench in forty days; and the clerk of the crown, when the judges of assize, or justices of the peace, write to him for the names of such persons, shall certify the same, with the causes of the conviction or attainder.

Another method is given by the *stat.* 3 *W. & M. c.* 9. *sect.* 7. which enacts, that the clerk of the crown, clerk of the peace, or clerk of assize, where a person admitted to clergy under

that act shall be convicted, shall, at the request of the prosecutor, or any other in the king's behalf, certify a transcript briefly and in few words, containing the effect and tenor of the indictment and conviction, of his having the benefit of *clergy*, and the addition of the party, and the certainty of the felony and conviction, to the judges where such person shall be indicted for any subsequent offence.

Also it seems, that if the party deny that he is the same person, issue must be joined upon it, and it must be found upon trial that he is the same person, before he can be ousted of *clergy*. 2. *H. H.* 373.

Against the defendant's prayer of clergy, the prosecutor may file a COUNTER-PLEA; alledging some fact, which in law deprives the defendant of the privilege he claims.

It is a good *counter-plea* to the prayer of the clergy, that the offender is not entitled to the benefit of the statute, because he was before convicted of an offence, and thereupon prayed the benefit of the statute, which was allowed to him; alledging the truth of the fact and praying the judgment of the court, that he may die according to law: which fact is to be tried by the record in pursuance of the *stat.* 34 & 35 *H.* 8. *c.* 14. above stated. *Staunf.* 135.—Divers other *counter-pleas* also, by which an offender may be deprived of clergy, may be framed from a consideration of *the persons* to whom it is allowed or denied by the common law; and of the *circumstances* under which that allowance or denial of it has been placed by divers statutes. *Ib.* 138.

The use of this *counter-plea* however had long become obsolete, and out of practice; no traces of it appearing in any of the books since Staundforde's time; who was Chief Justice of K. B. *temp. Eliz.* But the daring practices of some money-coiners occasioned its revival; and in the case of R. v. Marston Rothwell, and Mary Child, convicted for coining, at the Old Bailey, in September sessions, 1783, before Ashhurst J. a *counter-plea* of record was filed on the part of the prosecution; alledging that the convicts had been before allowed the benefit of the statute, &c. And they were thereby ousted of their clergy. *Leach's Hawk. P. C.* ii. *c.* 33. § 19. *n.* And see *Leach's Crown Law*, 312.

III. Privilege of *Clergy* was not indulged at common law, either in high treason, or in petit larceny, nor in any mere misdemeanors; and therefore it may be laid down for a rule, that it was only allowable in petit treasons, and capital felonies: which for the most part became legally entitled to this indulgence by the *stat. de Clero*, 25 *E.* 3. *st.* 3. *c.* 4. which provides, "that clerks convict for treasons or felonies, touching other persons than the king himself, shall have the privilege of Holy Church." But yet it was not allowable in all felonies whatsoever: for in some it was denied even by the common law, *viz. insidiatio viarum*, or lying in wait for one on the highway; *depopulatio agrorum*, or destroying and ravaging a country; (2 *Hal. P. C.* 333. but in these two cases it was expressly remedied by *stat.* 4 *H.* 4. *c.* 2. as to *clerks* only;) and *combustio domorum*, or *arson*, the burning of houses: 1 *Hal. P. C.* 346. all which are a kind of hostile acts, and in some degree border on treason. And further, all these identical crimes, together with petit treason, and very many other acts of felony, are ousted of clergy by particular acts of parliament.

All the statutes for excluding clergy, are in fact nothing else but the restoring of the law to the same rigor of capital punishment in the first offence, that was exerted before the *privilegium clericale* was at all indulged; and so tender is the law of inflicting capital punishment, in the first instance, for any inferior felony, that notwithstanding, by the *marine law*, as declared in *stat.* 28 *H.* 8. *c.* 15. benefit of clergy is not allowed in any case whatever; yet when offences are committed within the Admiralty jurisdiction, which would be clergyable if committed by land, the constant course is to acquit and discharge the prisoner. *Moor*, 756. *Fost.* 288.

As there is no necessity that the Ordinary should demand the *benefit of the clergy* for a clerk; so neither is there any that the prisoner himself should demand it, where it sufficiently appears to the court that he hath a right to it, in respect to his being in orders, &c. In which case, if the prisoner does not demand it, it is left to the discretion of the judge, either to allow, or not allow it him. 2 *Hawk. P. C. c.* 33. § 112.

*Clergy* may be demanded after judgment given against a person, whether of death, &c. and even under the gallows, if there be a proper judge there, who has power to allow it. 2 *Hawk. P. C. c.* 33. § 111.

To conclude this head of inquiry, it may be observed.—1. That in all felonies, whether new created or by common law, clergy is now allowable, unless taken away by express words of an act of parliament. 2 *Hal. P. C.* 330.—2. That where clergy is taken away from the principal, it is not of course taken away from the accessory; unless he be also particularly included in the words of the statute. 2 *Hawk. P. C. c.* 33. § 26. And where *clergy* is taken away expressly by any statute, the offence must be laid in the indictment to be against that very statute, and the words of it, or the offender shall have his *clergy*. *Kel.* 104. *H. P. C.* 231.—3. That when the benefit of clergy is taken away from the *offence* (as in case of murder, robbery, rape, &c.) a principal in the second degree, being present aiding and abetting the crime, is excluded from his clergy equally with him that is principal in the first degree: but—4. That where it is only taken away from the *person committing* the offence (as in the case of stabbing, or larceny in a dwelling house, or privately stealing from the person), his aiders and abettors are not excluded: as such statutes are to be taken literally. 1 *Hal. P. C.* 529. *Foster*, 356. 7.

Clergy in cases of outlawry. 4 *Comm.* 320. *n.* 41.

IV. The *consequences* are such as affect the present interest and future credit and capacity of the party, as having been once a felon, but now purged from that guilt by the privilege of clergy, which operates as a kind of statute pardon.

1. By this conviction, the offender forfeits all his goods to the king; which being once vested in the crown, shall not afterwards be restored to the offender. 2 *Hal. P. C.* 388.—2. After conviction, and till he receives the judgment of the law by branding, or some of its substitutes, or else is pardoned by the king, he is to all intents and purposes a felon, and subject to all the disabilities and other incidents of a felon. 3 *P. Wms.* 487.—3. After burning, or its substitute, or pardon, he is discharged for ever of that, and all other *clergyable* felonies before committed; but not of felonies, from which benefit of clergy is excluded; and this by *stats.* 8 *Eliz. c.* 4. and 18 *Eliz. c.* 7.—4. By the burning, or its substitute, or the pardon of it, he is restored to all capacities and credits, and the possession of his lands, as if he had never been convicted. 2 *Hal. P. C.* 389. 5 *Rep.* 110.—5. What is said with regard to the advantages of commoners and laymen, subsequent to the burning in the hand, is equally applicable to all peers and clergymen, although never branded at all, or subjected to other punishment in its stead. 2 *Hal. P. C.* 389. 390.

It is holden, that after a man is admitted to his *clergy* it is actionable to call him felon; because his offence being pardoned by the statute, all the infamy and other consequences of it are discharged. 2 *Hawk P. C. c.* 33. § 132.

As to what felonies are *within*, and what *without* clergy. See this Dict. title *Felons*, and more particularly the Index to 1 *Hawk. P. C.* As to the time of pleading clergy, see titles *Pleading Judgment.*

CLERICO ADMITTENDO. See *Admittendo Clerico.*

CLERICO INFRA SACROS ORDINES CONSTITUTO, NON ELIGENDO IN OFFICIUM. A writ directed to those who have thrust a bailiwick, or other office upon one in holy orders, charging them to release him. *Reg. Orig.* 143.

CLERICO CAPTO PER STATUTUM MERCATORUM, &c. A writ for the delivery of a *clerk* out of prison, who is taken and imprisoned upon the breach of a statute merchant. *Reg. Orig.* 147. See *ante* title *Clergy*.

CLERICO CONVICTO COMMISSO GAOLÆ IN DEFECTU ORDINARII DELIBERANDO. An ancient writ that lay for the *delivery* of a *clerk* to his *ordinary*, that was formerly *convicted* of felony, by reason his *ordinary did* not challenge him according to the privileges of *clerks*. *Reg. Orig.* 69. See *ante* title *Clergy*.

CLERK, *clericus.*] The law term for a clergyman, and by which all of them who have not taken a degree are designated in deeds, &c. In the most general signification, is one that belongs to the holy ministry of the church; under which, where the Canon Law hath full power, are not only comprehended *sacerdotes* and *diaconi*, but also *subdiaconi*, *lectores*, *acolyti*, *exorcistæ* and *ostiarii:* but the word has been anciently used for a *secular priest;* in opposition to a *religious* or *regular*. *Paroch. Antiq.* 171. And is said to be properly a minister or priest, one who is more particularly called *in sortem Domini*. *Blount*.

CLERK. In another sense denotes a person who practises his pen in any court, or otherwise; of which *clerks* there are various kinds, in several offices, &c.—The Clergy, in the early ages, as they engrossed almost every other branch of learning, so were they peculiarly remarkable for their proficiency in the study of the law. *Nullus clericus nisi causidicus* is the character given of them soon after the Conquest by William of Malmsbury. The judges therefore were usually created out of the sacred order; and all the inferior offices were supplied by the lower clergy, which has occasioned their successors to be denominated *clerks* to this day. 1 *Comm.* 17.

CLERK OF THE ACTS. An officer in the Navy Office, whose business it is to record all orders, contracts, bills, warrants, &c. transacted by the Lord High Admiral, or Lords Commissioners of the Admiralty, and Commissioners of the Navy. See *stat.* 22 & 23 *Car.* 2. *c.* 11.

CLERK OF AFFIDAVITS. In the court of Chancery, is an officer that files all *affidavits* made use of in court.

CLERK OF THE ASSISE. Is he that writes all things judicially done by the justices of *assises* in their circuits. *Cromp. Jurisd.* 227. This officer is associated to the judge in commissions of *assise*, to take *assises*, &c.—Clerk of the assise shall not be counsel with any person on the circuit. *Stat.* 33 *Hen.* 8. *c.* 24. § 5.—To certify the names of felons convict. See title *Clergy, benefit of*, II.—How punished for concealing, &c. any indictment, recognizance, fine or forfeiture. *Stat.* 22 & 23 *C.* 2. *c.* 22. § 9. 3 *Geo.* 1. *c.* 15. § 12.—See title *Estreat, Sheriff.*—To take but 2*s.* for drawing an indictment, and nothing if defective. 10 & 11 *W.* 3. *c.* 23. §§ 7. 8.—Fineable for falsely recording appearances of persons returned on a jury. 3 *Geo.* 2. *c.* 25. § 3. See title *Jury*.

CLERK OF THE BAILS. An officer belonging to the court of King's Bench. He files the bail pieces taken in that court, and attends for that purpose.

CLERK OF THE CHEQUE. An officer in the King's court, so called because he hath the *check* and controlment of the yeomen of the guard, and all other ordinary yeomen belonging either to the King, Queen or Prince; giving leave, or allowing their absence in attendance, or diminishing their wages for the same: he also by himself or deputy takes the view of those that are to watch in the court, and hath the setting of the watch. See *stat.* 33 *H.* 8. *c.* 12. Also there is an officer of the same name in the King's dock yards at Plymouth, Deptford, Woolwich, Chatham, &c.

CLERK CONTROLLER OF THE KING'S HOUSE. Whereof there are two: An officer in the *King's* court, that hath authority to allow or disallow charges and demands of Pursuivants, Messengers of the Green Cloth, &c. He hath likewise the oversight of all defects and miscarriages of any of the inferior officers: and hath a right to sit in the counting-house, with the superior officers, *viz.* the Lord Steward, Treasurer, *Controller*, and Cofferer of the Household, for correcting any disorders. See *stat.* 33 *H.* 8. *c.* 12.

CLERK OF THE CROWN, *clericus coronæ.*] An officer in the King's Bench, whose function is to frame, read and record all indictments against offenders there arraigned or indicted of any public crime. And when divers persons are jointly indicted, the *Clerk of the crown* shall take but one fee, *viz.* 2*s.* for them all: *stat.* 2 *H.* 4. *c.* 10. He is otherwise termed Clerk of the Crown Office, and exhibits informations, by order of the court, for divers offences. See title *Information*.

CLERK OF THE CROWN IN CHANCERY. An officer in that court who continually attends the Lord Chancellor in person or by deputy: he writes and prepares for the Great Seal, special matters of State by commission, or the like, either immediately from his Majesty's orders, or by order of his council, as well ordinary as extraordinary *viz.* commissions of lieutenancy, of justices of assise, *oyer* and *terminer*, gaol delivery, and of the peace, with their writs of association, &c. Also all general pardons, at the King's coronation; or in parliament, where he sits in the Lords' house in parliament time; and into his office the writs of parliament, with the names of knights and burgesses elected thereupon, are to be returned and filed. He hath likewise the making out of all special pardons: and writs of execution upon bonds of statute-staple forfeited; which was annexed to this office in the reign of Queen Mary, in consideration of his chargeable attendance.

CLERK OF THE DECLARATIONS. An officer of the court of King's Bench, that files all declarations in causes there depending, after they are ingrossed, &c.

CLERK OF THE DELIVERIES. An officer in the Tower of London, who exercises his office in taking of indentures for all stores, ammunition, &c. issued from thence.

CLERK OF THE ERRORS, *clericus errorum.*] In the court of *Common Pleas*, transcribes and certifies into the *King's Bench* the tenor of the records of the cause or action upon which the writ of *error*, made by the cursitor, is brought there to be heard and determined. The *Clerk of the Errors*, in the *King's Bench*, likewise transcribes and certifies the records of causes, in that court, into the *Exchequer*, if the cause of action were by bill: if by original, the Lord Chief Justice certifies the record into the House of Peers in Parliament, by taking the transcript from the *Clerk of the Errors*, and delivering it to the Lord Chancellor, there to be determined, according to the *stats.* 27 *Eliz. c.* 8. and 31 *Eliz.* c. 1. The *Clerk of the Errors in the Exchequer* also transcribes the records, certified thither out of the King's Bench, and prepares them for judgment in the court of Exchequer Chamber, to be given by the justices of C. B. and Barons there. *Stats.* 16 *Car.* 2. *c.* 2. 20 *Car.* 2. *c.* 4. See title *Error*.

CLERK OF THE ESSOINS. An officer belonging to the Court of Common Pleas, who keeps the *essoin rolls;* and the *essoin roll* is a record of that court; he has the providing of parchment, and cutting it out into *rolls*, marking the numbers thereon; and the delivery out of all the rolls to every officer of the court; the receiving of them again when they are written, and the binding and making up the whole bundles of every term; which he doth as servant of the Chief Justice. The Chief Justice of C. B. is at the charge of the parchment of all the rolls, for which he is allowed; as is also the Chief Justice of B. R. besides the penny for the seal of every writ

of privilege and outlawry, the seventh penny taken for the seal of every writ in court under the green wax, or petit seal; the said Lord Chief Justices having annexed to their offices or places, the custody of the said seals belonging to each court.

Clerk of the Estreats, *clericus extractorum.*] A clerk or officer belonging to the Exchequer, who every Term receives the *estreats* out of the Lord Treasurer's Remembrancer's Office, and writes them out to be levied for the King: and he makes schedules of such sums *estreated* as are to be discharged. See title *Estreat.*

Clerk of the Hanaper, or Hamper. An officer in Chancery, whose office is to receive all the money due to the King, for the seals of charters, patents, commissions, and writs; as also fees due to the officers for enrolling and examining the same. He is obliged to attendance on the Lord Chancellor daily in the term time, and at all times of sealing, having with him leather bags, wherein are put all charters, &c. After they are sealed, those bags, being sealed up with the Lord Chancellor's private seal, are delivered to the *Controller of the Hanaper*, who, upon receipt of them, enters the effect of them in a book, &c. This *hanaper* represents what the Romans termed *fiscum*, which contained the Emperor's treasure; and the Exchequer was anciently so called, because *in eo reconderentur* hanapi *et scutræ cæteraque vasa quæ in censum et tributum persolvi solebant;* or it may be for that the yearly tribute which princes received was in hampers or large vessels full of money. There being an arrear of 10,590*l.* 12*s.* 11*d.* of several ancient fees and salaries, &c. payable out of this office; and there being a remainder of 13,698*l.* 1*s.* 11*d.* of the six-penny stamp duty on writs granted for relief of the suitors of the court of Chancery; it was enacted by the *stat.* 23 *Geo.* 2. *c.* 25. that thereout the 10,590*l.* 12*s.* 11*d.* should be paid to the creditors of this office. That the said duty should be made perpetual; and thereout 3000*l. per annum* should be paid to the *Clerk of the Hanaper*, that the residue of the 13,698*l.* 1*s.* 11*d.* should be laid out in government securities, and the interest paid to the *Clerk of the Hanaper*, who should pay 1,200*l.* to the Master of the Rolls. And that in case the revenue of this office so augmented, should be more than sufficient to pay all fees, salaries, &c. the clerk should account for the surplus.

Clerk of the Inrollments. An officer of the Common Pleas, that inrolls and exemplifies all fines and recoveries, and returns writs of entry, summons, and seisin, &c.

Clerk of the Juries, *clericus juratorum.*] An officer belonging to the court of Common Pleas, who makes out the writs of *habeas corpora* and *distringas*, for the appearance of *juries;* either in that court, or at the assises, after the jury or panel is returned upon the *venire facias:* he also enters into the rolls the awarding of these writs; and makes all the continuances, from the going out of the *habeas corpora* until the verdict is given.

Clerk of the Market, *clericus mercati hospitii regis.*] Is an officer of the king's house, to whom it belongs to take charge of the king's measures, and keep the standards of them, which are examples of all measures throughout the land; as of ells, yards, quarts, gallons, &c. and of weights, bushels, &c. And to see that all weights and measures in every place be answerable to the said standard: as to which office see *Fleta, lib.* 2. *cap.* 8. 9. 10. &c. Touching this officer's duty, there are also divers statutes, as 13 *R.* 2. *cap.* 4. and 16 *R.* 2. *c.* 3. by which every clerk of the market is to have weights and measures with him when he makes essay of weights, &c. marked according to the standard; and to seal weights and measures, under penalties.

The *stat.* 16 *Car* 1. *c.* 19. enacts, that clerks of the market of the King's or Prince's household, shall only execute their offices within the verge; and head officers are to act in corporations, &c. The clerks of markets have generally power to hold a court, to which end they may issue out process to sheriffs and bailiffs to bring a jury before them; and give a charge, take presentments of such as keep or use false weights and measures; and may set a fine upon the offenders, &c. 4 *Inst.* 274. But if they take another fee or reward than what is allowed by statute, &c. or impose any fines without legal trial; or otherwise misdemean themselves, they shall forfeit 5*l.* for the first offence, 10*l.* for the second, and 20*l.* for the third offence, on conviction before a justice of peace, &c. The court of the *Clerk of the Market* is incident to every fair and market in the kingdom, to punish misdemeanors therein; as a court of *Pie Powdre* is to determine all disputes relating to private or civil property. It is the most inferior court of criminal jurisdiction in the kingdom. 4 *Comm.* 275. See also *stats.* 22 *C.* 2. *c.* 8. 23 *C.* 2. *c.* 12. and title *Weights and Measures.*

Clerk Marshal of the King's House. An officer that attends the *Marshal* in his court, and records all his proceedings.

Clerk of the Nichils, or Nihils, *clericus nihilorum.*] An officer of the court of Exchequer, who makes a roll of all such sums as are *nihiled* by the sheriffs upon their estreats of green wax; and delivers the same into the Remembrancer's Office, to have execution done upon it for the king. See *stat.* 5 *R.* 2. *c.* 13.—*Nihils* are issues by way of fine or amercement.

Clerk of the Ordnance. An officer in the Tower who registers all orders touching the king's *ordnance.*

Clerk of the Outlawries, *clericus utlagariorum.*] An officer belonging to the court of Common Pleas, being the servant or deputy to the King's Attorney-General, for making out writs of *capias utlagatum*, after *outlawry;* the King's Attorney's name being to every one of those writs.

Clerk of the Paper Office. A officer in the court of King's Bench, that makes up the paper-books of special pleadings and demurers in that court.

Clerk of the Papers. An officer in the Common Pleas, who hath the custody of the *papers* of the warden of the Fleet, enters commitments and discharges of prisoners, delivers out day-rules, &c.

Clerk of a Parish. See title *Parish Clerk.*

Clerk of the Parliament Rolls, *clericus rotulorum parliamenti.*] An officer who records all things done in the high court of *parliament*, and ingrosseth them in parchment *rolls*, for their better preservation to posterity; of these officers there are two, one in the Lords' House, and another in the House of Commons.

Clerk of the Patents. Or of the letters patent under the Great Seal of England. An office erected 18 *Jac.* 1.

Clerk of the Peace, *clericus pacis.*] An officer belonging to the sessions of the peace: his duty is to read indictments, inrol the proceedings, and draw the process; he keeps the counter-part of the indenture of armour; records the proclamation of rates for servants' wages; has the custody of the register-book of licences given to badgers of corn; of persons licensed to kill game, &c. And he registers the estates of papists and others not taking the oaths. Also he certifies into the King's Bench transcripts of indictments, outlawries, attainders, and convictions, had before the justices of peace, within the time limited. See title *Clergy, benefit of.*—And as to his duty respecting estreats, see title *Estreats.*

The *Custos Rotulorum* of the county hath the appointment of the clerk of the peace, who may execute his office by deputy, to be approved of by the *Custos Rotulorum* to hold the office during good behaviour. See *stats.* 37 *H.* 8. *c.* 1. 1 *W. & M. c.* 21.

The following is the form of the oath prescribed by *stat.* 1 *W. & M. c.* 21. to be taken by the clerk of the peace in open sessions before he enters on his office.

*I, C. P. do swear, that I have not* [*paid*] *nor will pay any sum or sums of money, or other reward whatsoever, nor given any bond or other assurance to pay any money, fee, or profit, directly or indirectly, to any person or persons whomsoever, for* [*my*] *nomination and appointment.*

*So help me God.*

He is also to take the oaths of allegiance, supremacy, and abjuration, and perform such requisites as other persons who qualify for offices.

By *stat.* 22 *Geo.* 2. *c.* 46. § 14. no clerk of the peace, or his deputy, shall act as solicitor, attorney, or agent at the sessions where he acts as clerk or deputy, on penalty of 50*l.* with treble costs.

*Burn*, in his *Justice*, title *Clerk of the Peace*, hints how necessary it is that all hir fees should be regulated.

If a clerk of the peace misdemeans himself, the justices of peace in quarter sessions have power to discharge him; and the *Custos Rotulorum* is to chuse another, resident in the county, or on his default the sessions may appoint one: the place is not to be sold, on pain of forfeiting double the value of the sum given by each party, and disability to enjoy their respective offices, &c. *Stat.* 1 *W. & M. sess.* 1. *c.* 21.

Clerk of the Pells, *clericus pellis.*] A clerk belonging to the Exchequer, whose office is to enter every teller's bill into a parchment roll or skin, called *pellis receptorum*, and also to make another roll of payments, which is termed *pellis exituum*; wherein he sets down by what warrant the money was paid; mentioned in the *stat.* 22 & 33 *Car.* 2. *c.* 22.

The sessions are not authorised to order the payments, by the Bridgemaster to the Clerk of the Peace, of a per centage on all money raised for the repair of bridges in a particular district, in lieu of all his fees for indictments, presentments, &c. for bridges within such district: although such per centage was claimed as an ancient fee, and had been paid without dispute for a long period. *R.* v. *Houldgrave, Kil.* 58 *Geo.* 3. *Term Report, K. B.*

Clerk of the Petty Bag, *clericus parvæ bagæ.*] An officer of the court of Chancery. There are three of these officers, of whom the Master of the Rolls is the chief. Their office is to record the return of all inquisitions out of every shire; to make out patents of customers, gaugers, controllers, &c. all *congé d' elires* for bishops, the summons of the nobility, and burgesses to parliament, commissions directed to knights and others of every shire, for assessing subsidies and taxes: all offices found *post mortem* are brought to the clerks of the petty bag to be filed: and by them are entered all *pleadings* of the Chancery concerning the validity of patents or other things which pass the Great Seal; they also make forth *liberates* upon *extents* of statutes staple, and recovery of recognizances forfeited, and all *elegits* upon them; and all suits for or against any privileged person are prosecuted in their office, &c.

Clerk of the Pipe, *clericus pipæ.*] An officer in the Exchequer, who having the accounts of debts due to the king, delivered and drawn out of the Remembrancer's Offices, charges them down in the great roll, and is called *Clerk of the pipe* from the shape of that roll, which is put together like a *pipe*: he also writes out warrants to the sheriffs to levy the said debts upon the goods and chattels of the debtors; and if they have no goods, then he draws them down to the Lord Treasurer's Remembrancer, to write estreats against their lands. The ancient revenue of the crown stands in charge to him, and he sees the same answered by the farmers and sheriffs: he makes a charge to all sheriffs of their summons of the *pipe*, and green wax, and takes care it be answered on their accounts. And he hath the drawing and ingrossing of all leases of the king's lands: having a *secondary* and several clerks under him. In the reign of King Hen. VI. this officer was called *Ingrossator magni rotuli.* See *stat.* 33 *Hen.* 8. *c.* 22.

Clerk of the Pleas, *clericus placitorum.*] An officer in the court of Exchequer, in whose office all the officers of the court, upon special privilege belonging unto them, ought to sue or be sued in any action, &c. The *clerk of the pleas* has under him a great many clerks, who are attorneys in all suits commenced or depending in the court of Exchequer.

Clerks of the Privy Seal, *clericus privati sigilli.*] These are four of the officers which attend the Lord *Privy Seal:* or if there be no Lord *Privy Seal*, the principal Secretary of State; writing and making out all things that are sent by warrant from the Signet to the *Privy Seal*, and which are to be passed to the Great Seal: also they make out *privy seals*, upon a special occasion of his Majesty's affairs, as for loan of money, and the like. He that is now called *Lord Privy Seal*, seems to have been in ancient times called *Clerk of the Privy Seal;* but notwithstanding to have been reckoned in the number of the great officers of the realm. *Stats.* 12 *R.* 2. *c.* 11. 27 *H.* 8. *c.* 11.

Clerk of the Remembrance. An officer in the Exchequer, who is to sit against the clerk of the Pipe, to see the discharges made in the pipe, &c. *Stat.* 37 *Ed.* 3. *c.* 4. The Clerk of the Pipe and Remembrancer, shall be sworn to make a schedule of persons discharged in their offices. *Stat.* 5 *R.* 2. *stat.* 1. *c.* 15.

Clerk of the Rolls. An officer of the Chancery, that makes search for, and copies deeds, offices, &c.

Clerk of the Rules. In the court of King's Bench, is he who draws up and enters all the *rules* and orders made in court; and gives rules of course on divers writs: this officer is mentioned in *stat.* 22 & 23 *Car.* 2. *c.* 22.

Clerk of the Sewers. An officer belonging to the commissioners of *sewers*, who writes and records their proceedings, which they transact by virtue of their commissions, and the authority given them by by *stat.* 13 *Eliz. c.* 9. See title *Sewers.*

Clerk of the Signet, *clericus signeti.*] An officer continually attendant on his Majesty's Principal Secretary, who hath the custody of the *privy signet*, as well for sealing his Majesty's private letters, as such grants as pass the king's hand by bill signed: and of these clerks or officers there are four that attend in their course, and have their diet at the Secretary's table. The fees of the *clerk of the signet*, and privy seal, are limited particularly by statute, with a penalty annexed for taking any thing more. See 27 *Hen.* 8. *c.* 11.

Clerk of the King's Silver, *clericus argenti regis.*] An officer belonging to the court of Common Pleas, to whom every fine is brought after it hath passed the office of the *custos brevium*, and by whom the effect of the writ of covenant is entered into a paper-book; according to which all the fines of that term are recorded in the rolls of the court. After the King's silver is entered, it is accounted a fine in law, and not before. See title *Fine.*

Clerk of the Supersedeases. An officer belonging to the court of Common Pleas, who makes out writs of *supersedeas*, upon a defendant's appearing to the *exigent* on an outlawry, whereby the sheriff is forbidden to return the *exigent.* See title *Outlawry.*

Clerk of the Treasury, *clericus thesaurarii.*] An officer of the Common Pleas, who hath the charge of keeping the records of the court, and makes out all the records of *Nisi Prius;* also he makes all exemplifications of records being in the *Treasury;* and he hath the fees due for all searches. He is the servant of the Chief Justice, and removeable at pleasure; whereas all other officers of the court are for life: there is a *Secondary*, or *Under Clerk of the Trea-*

*sury*, for assistance, who hath some fees and allowances: and likewise an *under keeper*, that always keeps one key of the *Treasury* door, and the chief *clerk* of the secondary, another; so that the one cannot come in without the other.

CLERK OF THE KING'S GREAT WARDROBE. An officer of the king's household, that keeps an account or inventory of all things belonging to the royal *wardrobe*. *Stat.* 1 *Ed.* 4. *cap.* 1.

CLERK OF THE WARRANTS, *clericus warrantorum.*] An officer belonging to the Common Pleas' court, who enters all warrants of attorney for plaintiffs and defendants in suits; and inrolls deeds of indentures of bargain and sale, which are acknowledged in the court or before any judges out of the court. And it is his office to estreat into the Exchequer all issues, fines, and amerciaments, which grow due to the king in that court, for which he hath a standing fee or allowance.

CLERONIMUS. An heir. *Mon. Angl. tom.* 3. *p.* 129.

CLIPPING *the Coin*. See titles *Coin*, *Money*, *Treason*.

CLITONES. The eldest, and all the sons of kings. See the charter of King Æthelred: *Mat. Paris. pag.* 158. *Selden's notes upon Eadmerus.*

CLIVE, CLIFF. The names of places beginning or ending with these words, signify a rock, from the old Saxon.

CLOCKS AND WATCHES. Dial-plates and cases not to be exported without the movement. *Stat.* 9 & 10 *W.* 3. *c.* 28. § 2.—Makers shall engrave their names on clocks and watches, *st.* 9 & 10 *W.* 3. *c.* 23. § 2.—Penalties on workmen, &c. imbezzling materials of clocks and watches, *st.* 27 *Geo.* 2. *c.* 7. See title *Manufacturers*. By *stat.* 37 *Geo.* 3. *c.* 108. a duty on clocks and watches was imposed, payable by the proprietors; but this was repealed by 38 *Geo.* 3. *c.* 40.

By 38 *Geo.* 3. *c.* 24. the duty on gold and silver plate, under 24 *Geo.* 3. *st.* 2. *c.* 53. and 37 *Geo.* 3. *c.* 90. § 16. was repealed so far as related to plate used for watch-cases.

CLOERE. A prison or dungeon; it is conjectured to be of British original: the dungeon or inner prison of Wallingford Castle, *temp. H.* 2. was called *cloere brien*, i. e. *carcer brieni*, &c. Hence seems to come the Lat. *cloaca*, which was anciently the closest ward or nastiest part of the prison: the old *cloacerius* is interpreted *carceris custos:* and the present *cloacerius*, or keeper of a *jakes*, is an office in some religious houses abroad imposed on an offending brother, or by him chosen as an exercise of humility and mortification. *Cowel.*

CLOSE ROLLS AND CLOSE WRITS. Grants of lands, &c. from the crown, are contained in charters or letters *patent*, that is open letters, *literas patentes*, so called because they are not sealed up, but exposed to open view, with the Great Seal pendant at the bottom; and are usually addressed by the king to all his subjects at large. And therein they differ from other letters of the king, sealed also with his Great Seal, but directed to particular persons, and for particular purposes: which therefore, not being fit for public inspection, are closed up and sealed on the outside, and are thereupon called *writs close*, *literæ clausæ;* and are recorded in the *close rolls*, in the same manner as the others are in the *patent-rolls*. 2 *Comm.* 346.

CLOSH. Was an unlawful game forbidden by *stat.* 17 *Ed.* 4. *c.* 3. and 33 *H.* 8. *c.* 9. It is said to have been the same with our *nine-pins*, and is called *closhcayles* by *stat.* 33 *H.* 8. *c.* 9. At this time it is allowed, and called *hailes*, or *skittles*. See title *Gaming*.

CLOTH. No cloth made beyond sea shall be brought into the king's dominions, on pain of forfeiting the same, and the importers to be farther punished. *Stat.* 12 *Ed.* 3. *c.* 3. —See titles *Manufacturers*, *Wool*.

CLOTHIERS. Are to make broad-cloths of certain lengths and breadths, within the lists; and shall cause their marks to be woven in the cloths, and set a seal of lead thereunto, showing the true length thereof. *Stat.* 4 *Ed.* 4. *c.* 1. 27 *H.* 8. *c.* 12.—Exposing to sale faulty cloths, are liable to forfeit the same: and clothiers shall not make use of flocks or other deceitful stuff in making of broad-cloth, under the penalty of 5*l.* *Stat.* 5 & 6 *Ed.* 6. *c.* 6.—Justices of peace are to appoint searchers of cloth yearly, who have power to enter the houses of clothiers; and persons opposing them shall forfeit 10*l.* *Stats.* 30 *Eliz. c.* 20. 4 *Jac.* 1. *c.* 2. 21 *Jac.* 1. *c.* 18. All cloth shall be measured at the fulling-mill by the master of the mill; who shall make oath before a justice for true measuring; and the millman is to fix a seal of lead to cloths, containing the length and breadth, which shall be a rule of payment for the buyer, &c. *Stats.* 10 *An. c.* 16. —By *stat.* 1 *Geo.* 1. *c.* 15. broad-cloths must be put into water for proof, and be measured by two indifferent persons chosen by the buyer and seller, &c. And clothiers selling cloths before sealed, or not containing the quantity mentioned in the seals, incur a forfeiture of the sixth part of the value. Persons taking off, or counterfeiting seals, forfeit 20*l.* By *stat.* 12 *Geo.* 1. *c.* 34. if any weavers of cloth enter into any combination for advancing their wages, or lessening their usual hours of work, or depart before the end of their terms agreed, return any work unfinished, &c. they shall be committed by two justices of peace to the house of correction for three months: and clothiers are to pay their work-people their full wages agreed, in money, under the penalty of 10*l.* &c.; inspectors of mills and tenter-grounds to examine and seal cloths, are to be appointed by justices of peace in sessions; and mill-men sending clothiers any cloths before inspected, forfeit 40*s.* The inspector to be paid by the clothiers 2*d. per* cloth. *Stat.* 13 *Geo.* 1. *c.* 23.—If any cloth remaining on the tenters be stolen in the night, and the same is found upon any person, on a justice's warrant to search, such offender shall forfeit treble value, leviable by distress, &c. or be committed to gaol for three months; but for a second offence he shall suffer six months' imprisonment; and for the third offence be transported as a felon, &c. *Stat.* 15 *Geo.* 2. *cap.* 27.—See title *Drapery;* and more particularly titles *Manufacturers*, *Servants*, *Wool*.

CLOVE. The two-and-thirtieth part of a weigh of cheese, *i. e.* eight pounds. *Stat.* 9 *H.* 6. *c.* 8.

CLOUGH. A word made use of for a valley, in Domesday book. But among merchants, it is an allowance for the turn of the scale, on buying goods wholesale by weight. *Lex Mercat.*

CLUNCH. In Staffordshire, upon sinking of a coal-mine near the surface they meet with earth and stone, then with a substance called *blue clunch*, and after that they come to coal.

CLUTA, Fr. *clous.*] Shoes, clouted shoes: and most commonly horse shoes: it also signifies the streaks of iron or tie with which cart-wheels are bound. *Consuetud. Dom. de Farend. MS. fol.* 16. Hence *clutarium*, or *cluarium*, a forge where the *clous* or iron shoes are made. *Mon. Angl. tom.* 2. *pag.* 593.

CLYPEUS. A shield.—Metaphorically one of a noble family. *Clypei prostrati*, a noble family extinct. *Mat. Paris*, 463.

COACH, *currus.*] A convenience well known. For the regulating of hackney coaches and chairs in London, there are several statutes, *viz.* 9 *An. c.* 23. made perpetual by 3 *G.* 1. *c.* 7. and enlarged as to the number of coaches, by 11 *Geo.* 3. *c.* 24. 42 *Geo.* 3. *c.* 78. so as to make the whole number, to be licensed, 1100, and enlarged also as to chairs, by 10 *An. c.* 19. and 12 *Geo.* 1. *c.* 12. making the whole number of those 400.

By 48 *Geo.* 3. *c.* 87. the fares were increased. By 54 *Geo.* 3. *c.* 147. 200 hackney chariots were allowed to be licensed as part of the 1100, and by 55 *Geo.* 3. *c.* 159. 200 additional hackney chariots were allowed, and several regulations made as to the fares.

The other statutes now in force are, 12 *An. st.* 1. *c.* 14.

1 *Geo.* 1. *c.* 57. 30 *Geo.* 2. *c.* 22. (See *Carts.*) 4 *Geo.* 3. *c.* 36. 7 *Geo.* 3. *c.* 44. 10 *Geo.* 3. *c.* 44. 11 *Geo.* 3. *cc.* 24. 28. 12 *Geo.* 3. *c.* 49. 24 *Geo.* 3. *st.* 2. *c.* 27. 26 *Geo.* 3. *c.* 72. 32 *Geo.* 3. *c.* 47.

STAGE COACHES. Several acts have been from time to time made for regulating passengers in those useful (but when over laden, dangerous) vehicles; the last in force is 50 *Geo.* 3. *c.* 48. They are subject to certain mileage duties under the commissioners of stamps. See 55 *Geo.* 3. *c.* 185.

As to the liability of masters, &c. of coaches as common carriers, see title *Carrier.*

COACHMAKERS. The wares of coachmakers shall be searched, by persons appointed by the sadlers' company. *Stat.* 1. *Jac.* 1. *c.* 22. Makers of coaches, chariots, chaises, &c. must take out annual licences from the excise office, and pay a duty for every carriage, built by them for sale.

COADJUTOR, *Lat.*] A fellow-helper or assistant; particularly applied to one appointed to assist a Bishop, being grown old and infirm, so as not to be able to perform his duty.

COAL-MINES. Maliciously setting fire to coal mines, or to any delph of coal is felony. 10 *Geo.* 2. *c.* 32. *sect.* 6. See titles *Black-Act*, *Felony.*

COALS. By *stats.* 7 *E.* 6. *c.* 7. 16 & 17 *Car.* 2. *c.* 2. [made perpetual by 7 & 8 *W.* 3. *c.* 36. § 2.] and 17 *Geo.* 2. *c.* 35. The sack of coals is to contain four bushels of clean coals: and sea coals brought into the river Thames, and sold, shall be after the rate of thirty-six bushels to the chaldron; and one hundred and twelve pounds the hundred, &c. The Lord Mayor and Court of Aldermen in London, and justices of the peace of the several counties, or three of them, are impowered to set the price of all the coals to be sold by retail; and if any persons shall refuse to sell for such prices, they may appoint officers to enter wharfs or places where coals are kept, and cause the coals to be sold at the prices appointed. The *stat.* 12 *An. st.* 2. *c.* 17. regulates the contents of the coal bushel, which is to hold one Winchester bushel, and one quart of water. By *stats.* 9. *H.* 5. *st.* 1. *c.* 10. 30 *Car.* 2. *c.* 8. 6 & 7 *Will.* 3. *c.* 10. 11 *Geo.* 2. *c.* 15. 15 *Geo.* 3. *c.* 27. and 31 *Geo.* 3 *c.* 36. Commissioners are ordained for the measuring and marking of keels, and boats, &c. for carrying coals, and vessels carrying coals before measured and marked, shall be forfeited, &c. For the duties and drawbacks on coals and culm, see *stat.* 9 & 10 *W.* 3. *c.* 13. 9 *An. c.* 6. 22. 28. 8 *Geo.* 1. *c.* 14. 14 *Geo.* 2. *c.* 41. 22 *Geo.* 2. *c.* 37. 31 *Geo.* 2. *c.* 15. 33 *Geo.* 2. *c.* 15. and 27 *Geo.* 3. *c.* 32.

For the duty on coals in London, see *stats.* 9 *An. c.* 22. and 5 *Geo.* 1. *c.* 9. the duties payable under which of 3*s.* per chaldron, are made perpetual by *stat.* 6 *Geo.* 1. *c.* 4. § 1. and 1 *Geo.* 2. *st.* 2. *c.* 8. See also *stat.* 27 *Geo.* 3. *c.* 13. explained as to coals carried coastwise in Scotland, by 33 *Geo.* 3. *c.* 69. as to the 1*s.* duty under *stat.* 19 *Car.* 2. *c.* 3. § 36.

By *stat.* 9. *An. c.* 28. Contracts between coal owners and masters of ships, &c. for restraining the buying of coals are void; and the parties to forfeit 100*l.* And selling coals for other sorts than they are, shall forfeit 50*l.* Not above fifty laden colliers are to continue in the port of Newcastle, &c. And work people in the mines there, shall not be employed who are hired by others, under the penalty of 5*l.*

By 37 *Geo.* 3. *c.* 122. the provisions of *stat.* 12 *Geo.* 1. *c.* 34. and 22 *Geo.* 2. *c.* 27. as to payment of wages in money are extended to labourers in the Collieries in Great Britain and Ireland.

By *stat.* 3 *Geo.* 2. *c.* 26. containing several regulations as to lightermen and coal buyers, and explained by *stat.* 11 *Geo.* 2. *c.* 15. coal sacks shall be sealed and marked at Guildhall, &c. on pain of 20*s.* Also sellers of coals are to keep a lawful bushel, and put three bushels to each sack, which bushel and other measures shall be edged with iron, and sealed: and using others, or altering them, incurs a forfeiture of 50*l.* &c. The penalties above 5*l.* recoverable by action of debt, &c. and under that sum before justices of peace.

The offence of selling coals of a different description from those contracted for, upon the *stat.* 3 *Geo.* 2. *c.* 26. § 4. is complete in the county where the coals are *delivered*, and not where they are *contracted* for, the contract not being for any specific parcel of coals, but for a certain quantity of a certain description. But *though not justly measuring* such coals is a local omission of a local act, required by the 13 section of the act to be performed at the place where the coals are kept for sale, at which place the bushel of queen Anne is required to be kept and used, for the purpose of measuring the coals into sacks of a certain description, in which they are to be carried to the buyer: and therefore the offence is local, and must be laid in the county where the coals were put into the sacks without having been so *justly measured.* *Butterfield qui tam* v. *Windle* and another. 4 *East.* 385.

A dealer in coals by the chaldron, who sold to another by *the chaldron* a certain quantity *as and for* 10 *chaldron of coals pool measure*, without justly measuring the same with the lawful bushel of queen Anne, is liable to the penalty of 50*l.* imposed by the 13th sect. of the *stat.* 3 *Geo.* 2. *c.* 26. upon such defaulters who sell coals *by the chaldron, or lesser quantity* without measuring them. *Parish qui tam* v. *Thompson, E.* 43 *Geo.* 3.—3 *East.* 525.

By *stat.* 4. *Geo.* 2. *c.* 80. owners or masters of ships, shall not enhance the price of coals in the river of Thames, by keeping of turn in delivering of coals there, under the penalty of 100*l.* &c.

*Stat.* 13 *Geo.* 2. *c.* 21. inflicts penalty of treble damages on persons damaging or destroying coal-works.

See the *stat.* 6 *Geo.* 3. *c.* 22. *now in force,* as to the lading coal ships, at Newcastle and Sunderland in turn, according to lists to be made there.

By the *stat.* 7 *Geo.* 3. *c.* 23. explained and amended by 26 *Geo.* 3. *c.* 83. and 38 *G.* 3. c. lvi. (loc. and pers.) (in force till June 1, 1812. See *ante.*) *The Land Coal Meter's Office* for London, and between the Tower and Limehouse-hole, is established and regulated. And the duty of that officer and the labouring coal-meters in measuring coals is ascertained. By the same *stat.* 26 *Geo.* 3. *c.* 83. further regulations are made as to the coal-meter's sacks, which when sealed are to be four feet four inches long, and twenty-six inches broad. Penalties are imposed on the labouring meters and drivers for misbehaviour, and the mode of remeasurement settled, if required by the consumer.

By 51 *Geo.* 3. *c.* 84. the act 22 *Geo.* 3. *c.* 41. (prohibiting persons concerned in the customs, from voting for Members of Parliament) is declared *not* to affect the 15 Coal-meters [and 10 Corn-meters] of London.

Drawbacks of duties of customs are allowed on coals used in mines, &c. by various acts.

*Stat.* 28 *Geo.* 3. *c.* 53. was past to indemnify the London coal buyers against certain penalties, which they had *literally* incurred under *stats.* 9 *An. c.* 28. and 3 *Geo.* 2. *c.* 26. and also for the purpose of putting an end to the *Society* at the Coal-Exchange, formed to *regulate* (*i. e.* to monopolize) the trade; subjecting all persons, above five in number, entering into covenant or partnerships, to punishment by indictment or information in B. R.

By *stat.* 52 *Geo.* 3. *c.* 9. (repealing 25 *Geo.* 3. *c.* 54) certain regulations are made for securing the duties of customs on coals and for measuring ships in the coal-trade. And see 55 *Geo.* 3. *c.* 118.

A great number of acts, confined in the extent of the district within which they are to operate, (and therefore classed not in the general body of statutes, but in the list of local and personal acts) have been from time to time passed to regulate the dealings, and prevent the frauds of dealers in coals.

See 45 *G.* 3. *c.* 128. 49 *G.* 3. *c.* 98. and 50 *G.* 3. *c.* 110. (continued by subsequent acts), for allowing a certain quantity of coals, &c. to be brought to London by inland navigation.

COAT-ARMOUR. *Coats of arms* were not introduced into seals, nor indeed into any other use, till about the reign of Richard the First, who brought them from the Croisade in the Holy Land; where they were first invented and painted on the shields of the knights, to distinguish the variety of persons of every Christian nation who resorted thither, and who could not, when clad in complete steel, be otherwise known or ascertained. 2 *Comm.* 306.

It is the business of the *Court military*, or the Court of *Chivalry*, according to Sir Matthew Hale, to adjust the right of armorial ensigns, bearings, crests, supporters, pennons, &c. and also rights of place or precedence, where the king's patent or act of parliament (which cannot be over-ruled by this ourt), have not already determined, it. 3 *Comm.* 105.

COCHERINGS, or Cosherings. An exaction or tribute in Ireland, now reduced to chief rents. See *Bonaght.*

COCHINEAL. The importation of cochineal from ports in Spain declared lawful. *Stat.* 6. *An. c.* 33. Any persons may import cochineal into this kingdom, in ships belonging to Great Britain, or other country in amity, from any place whatsoever, by *stat.* 7 *Geo.* 2. *c.* 18. See title *Navigation Acts.*

COCKET, *cockettum.*] A seal belonging to the king's custom-house; or rather a scroll of parchment sealed, and delivered by the officers of the custom-house to merchants, as a warrant that their merchandises are customed: which parchment is otherwise called *literæ de cocketto*, or *literæ testimoniales de* coketto. *Stat.* 11 *Hen.* 6. *c.* 15. *Reg. Orig.* 179. 192.—See also *Mad. Excheq. vol.* 1. *c.* 18. The word *cockettum* or *cocket*, is also taken for the custom-house or office where goods to be transported were first entered, and paid their customs, and had a *cocket* or certificate of discharge; and *cocketta lana* is wool duly entered and *cocketted*, or authorised to be transported. *Mem. in Scac.* 23 *Ed.* 1.

*Cocket* is likewise used for a sort of measure; *Fleta*, *lib.* 2. *cap.* 9. *Panis vero integer quadrantalis frumenti ponderabit unum* cocket *et dimidium:* and it is made use of for a distinction of bread, in the statute of bread and ale, 51 *H.* 3. *stat.* 1. *ord. pro pistor;* where mention is made of *wastel bread*, cocket *bread*, *bread of treet*, and *bread of common wheat;* the wastel bread being what we now call the *finest bread*, or French bread; the *cocket* bread the second sort of *white bread;* bread of treet, and of common wheat, *brown*, or *household bread*, &c. See *Bread.*

COCKSETUS. A boatman, *cockswain* or coxon. *Cowel.*

COCULA. A cogue, or little drinking-cup, in form of a small boat, used especially at sea, and still retained in a cogue [cag or kegue] of brandy. These drinking cups are also used in taverns to drink new sherry, and other white wines which look foul in a glass.

CODICIL, *codicillus*, from *codex*, a book, a writing.] A schedule or supplement to a will, where any thing is omitted which the testator would add, or where he would explain, alter or retract what he hath done. See titles *Will*, *Devise.*

CO-EXECUTORS. See Executors.

COFFEE, Tea, Chocolate, and Cocoa Nuts.

The duties on these articles form a branch of the public revenue, under the head of *Customs* and *Excise;* and, like all other subjects of those jurisdictions, are liable to a variety of penal regulations by acts of parliament, necessary to prevent the numerous frauds and evasions daily endeavoured to be practised, to the impoverishment of Government, and the injury of the fair trader. See titles *Excise*, *Customs*, and also title *Navigation Acts.*

COFFRA. A coffer, chest, or trunk. *Munimenta Hospit. SS. Trinit. de Pontefracto, MS. fol.* 50.

COFFERER OF THE KING'S HOUSEHOLD. Is a principal officer of the King's house, next under the Controller, who, in the counting-house, and elsewhere, hath a special charge and oversight of other officers of the household, to all which he pays their wages: this officer passes his accounts in the Exchequer. See *stat.* 39 *Eliz. c.* 7.

COGGLE. A small fishing-boat, upon the coasts of Yorkshire: and *cogs* (*cogones*) are a kind of little ships, or vessels used in the rivers Ouse and Humber, *stat.* 23 *H.* 8. *c.* 18.—See *Mat. Paris*, *anno* 1066. And hence the *cogmen*, boatmen or seamen, who after shipwreck or losses by sea, travelled and wandered about to defraud the people by begging and stealing. *Du Fresne.*

COGNATI. Relations by the mother, as the *agnati* are relations by the father.

COGNATIONE. A writ of Cousenage. See *Cosenage.*

COGNISANCE, or Conusance, Fr. *connusaunce*, Lat. *cognitio.*] Is used diversely in our law: sometimes for an acknowledgment of a *fine.* See title *Fine.* In replevin, *cognisance*, or *conusance*, is the answer given by a defendant, who hath acted as *bailiff*, &c. to another, in making a distress. See titles *Distress*, *Replevin.*

Cognisance also signifies the badge of a servant, as the crest of any nobleman or gentleman.

The most usual sense in which this term is now used, is relative to the claim of *Cognizance of Pleas.* This is a privilege granted by the King to a city or town, to hold plea of all contracts, &c. within the liberty of the franchise; and when any man is impleaded for such matters in the courts of Westminster, the mayor, &c. of such franchise may ask cognisance of the plea, and demand that it shall be determined before them: but if the courts at Westminster are possessed of the plea before *cognisance* be demanded, it is then too late. *Termes de Ley.* See *stats.* 9 *H.* 4. *c.* 5. 8 *H.* 6. *c.* 26. 3 *Comm* 298. 4 *Comm.* 277. See tit. *Pleading.*

*Cognisance of Pleas* extends not to assises; and when granted, the original shall not be removed: it lies not in a *quare impedit*, for they cannot write to the bishop, nor of a plea out of the county court, which cannot award a resummons, &c. *Jenk. Cent.* 31. 34. This *cognisance* shall be demanded the first day: and if the demandant in a plea of land counterpleads the franchise, and the tenant joins with the claim of the franchise, and it is found against the franchise, the demandant shall recover the land; but if it be found against the demandant, the writ shall abate. *Ibid.* 18.

There are *three sorts of inferior jurisdictions*, one whereof is *tenere placita*, and this is the lowest sort; for it is only a concurrent jurisdiction, and the party may sue there, or in the King's courts, if he will. The second is *conusance of pleas*, and by this a right is vested in the lord of the franchise to hold the plea, and he is the only person who can take advantage of it. The third sort is an *exempt jurisdiction*, as where the king grants to a great city, that the inhabitants thereof shall be sued within their city, and not elsewhere; this grant may be pleaded to the jurisdiction of the court of K. B. if there be a court within that city which can hold plea of the cause, and *no body can take advantage of this privilege but a defendant;* for if he will bring *certiorari*, that will remove the cause, *but he may wave it if he will*, so that the privilege is only for his benefit. 3 *Salk.* 79. 80. *pl.* 4. *Hil.* 1. *An. B. R. Crosse* v. *Smith.*

King Hen. VIII. by *letters patent* of the 14th of his reign, and confirmed by parliament, *granted to the University of Oxford conusance of pleas, in which a scholar or servant of a college should be party, ita quod justiciarii de utroque banco se non intromittant.* An *attorney of C. B. sued a scholar, in C. B. for battery.* By the court, this general grant does not extend to take away the special privilege of any court without special words. *Lit. Rep.* 304. *Oxford* (University's) *case.*

If a *scholar* of Oxford or Cambridge be *sued in Chancery for a special performance of a contract to lease lands in* Middlesex, the University shall not have conusance, because they cannot sequester the lands. *Gilb. Hist. of C. P.* 194. cites 2 *Vent.* 363.

Conusance must be demanded *before an imparlance*, and *the same term the writ is returnable, after the defendant appears;* because, till he appears there is no cause in court, otherwise there would be a delay of justice; for if after imparlance, when the defendant has a day already allowed him, he would have two days, since when the conusance is allowed, the franchise prefixes a day to both parties to appear before them; and it is the lord's laches if he does not come soon enough not to delay the parties. *Gilb. Hist. of C. P.* 196.

Conusance was granted to the University of Oxford (no cause being shown to the contrary) in Easter Term, 9 *Geo.* 2. in the case of Woodcocke and Brooke. *Hardw.* 241.

A claim of conusance made by the Vice-Chancellor of the University of Oxford (in the vacancy of the office of Chancellor by death), on behalf of the University, allowed, in a plea of Trespass. 11 *East Rep.* 543. and see 15 *E. R.* 634.

Conusance of a plea of trespass sued against a resident member of the University of Cambridge for a cause of action, verified by affidavit to have arisen within the town and suburbs of Cambridge, over which the university court has jurisdiction, was allowed upon the claim of the Vice-Chancellor, on behalf of the Chancellor, Masters, and Scholars of the University, entered on the roll in due form, setting out their jurisdiction under charters confirmed by acts of parliament, and averring the cause of action to have arisen within such jurisdiction. Though it was objected,

1st, That the claim of conusance was stated on the roll to be made by the attorney of the V. C. when the power which constituted the person attorney was executed by the V. C. as V. C. and deputy of the Chancellor, Masters, and Scholars of the University; and therefore that the claim ought to have been made by the attorney in their names. But it sufficiently appeared that he was attorney for the V. C. claiming *ex officio*.

2dly, That the claim was preferred too early, upon the mere issuing of the writ of *latitat* against the privileged member to answer in a plea of trespass, before declaration; by which it could not appear where the cause of action arose, and consequently that it arose within the town and suburbs of Cambridge, to which the jurisdiction of the University court in personal actions is confined: and that it was not sufficient to supply that fact by affidavit. But held that it was the usual course to support claims of conusance by affidavits verifying the necessary facts, which it was competent to the plaintiff to deny in the same mode; and that the difficulty was not greater before than after declaration; and the sooner the claim, if founded, was preferred, the better.

3dly, That if the claim might be preferred upon the *latitat*, before declaration, then it ought to be preferred, *in the first instance*, after the return of the *latitat;* namely, upon the day of appearance given by the rule of court, *i. e.* in eight days. But held that *the first instance after the return-day of the writ*, which is the first step of the plaintiff entered on the record, continued till the declaration filed, which is the next step taken by the plaintiff on the record; within which time the claim was made.

4thly, That it appeared by the roll on which the power of attorney to claim the conusance, and the claim itself, were entered, that the claim was made on the return day of the writ, *i.e.* the 15th of November, before the power of attorney to claim it was executed, which bore date on the 27th. But the Court took notice that the claim was in fact made on the 28th, in the letter missive and significatory of the V. C. to them; although, in making up the roll, it was entered by their officer as on the return-day of the writ by relation; no subsequent day in Court being then given on the record.

5thly, That taking the letter missive and significatory of the V. C. to be the original and proper claim of conusance, it was defective in not alleging that the cause of action arose within the jurisdiction; and that this could not be supplied by the formal entry of the claim on the roll made by the officer of the court, in which that averment is made from the affidavit. But held that such averment made in the formal entry of the claim on the roll, verified by affidavit, of which the Court would take notice, was sufficient. *Browne* v. *Renouard*, *H.* 50 *Geo.* 3. 12 *East's Rep.* 12. See further under title *Courts of the University*.

COGNISOR AND COGNISEE. *Cognisor* is he that passeth or acknowledgeth a fine of lands or tenements to another; and *cognisee* is he to whom the fine of the said lands, &c. is acknowledged. *Stat.* 32 *H.* 8. *c.* 5.

*Cognition.* Is the process whereby molestation is determined. *Sotch Dict.*

COGNITIONES. Ensigns and arms, or a military coat painted with arms. *Mat. Paris*, 1250.

COGNITIONIBUS MITTENDIS. A writ to one of the King's Justices of the Common Pleas, or other that hath power to take a fine, who having taken the fine defers to certify it, commanding him to certify it. *Reg. Orig.* 68.

COGNOVIT ACTIONEM. Is where a defendant *acknowledges* or confesses the plaintiff's cause against him to be just and true; and, before or after issue, suffers judgment to be entered against him without trial. And here the confession generally extends no further than to what is contained in the declaration; but if the defendant will confess more, he may. 1 *Rol.* 929. *Hob.* 178.

COGWARE. Is said to be a sort of coarse cloths, made in divers parts of England, of which mention is made in the *stat.* 13 *R.* 2. *cap.* 10.

COHUAGIUM. A tribute paid by those who met promiscuously in the market or fair; *chua* signifying a promiscuous multitude of men in a fair or market.—*Quieti ab omni thelonio, passagio, pontagio,* cohuagio, *pallagio,* &c. *Du Cange.*

COIF, *coifa.*] A title given to Serjeants at law; who are called *Serjeants of the coif*, from the lawn *coif* they wear on their heads under their caps when they are created. The use of it was anciently to cover *tonsuram clericalem*, otherwise called *corona clericalis;* because the crown of the head was close shaved, and a border of hair left round the lower part, which is made to look like a crown. *Blount.* See title *Clerk.*

COIN, *cuna pecunia.*] Seems to come from the Fr. *coign*, i. e. *angulus*, a corner, whence it has been held, that the ancientest sort of *coin* was square with corners, and not round as it now is: it is any sort of money *coined*. *Cromp. Jurisd.* 220. *Coin* is a word collective, which contains in it all manner of the several stamps and species of money in any kingdom: and this is one of the royal prerogatives belonging to every sovereign prince, that he alone in his own dominions may order and dispose the quantity, value, and fashion of his *coin*. But the *coin* of one king is not current in the kingdom of another, unless it be at great loss; though our king by his prerogative may make any foreign *coin* lawful money of England at his pleasure, by proclamation. *Termes de Ley.* If a man binds himself by bond to pay one hundred pounds of lawful money of Great Britain, and the person bound, the obligor pays the obligee the money in French, Spanish, or other *coin*, made current either by act of parliament, or the king's proclamation, the obligation will be well performed. *Co. Lit.* 207. But it is said a payment in farthings is not a good payment. 2 *Inst.* 517. See *post*.

When a person has accepted of money in payment from another, and put the same into his purse, it is at his peril after his allowance; and he shall not then take exception to it as bad, notwithstanding he presently reviews it. *Termes de Ley.*

The *Coining of money* is in all States the act of the *Sovereign Power;* that its value may be known on inspection. And with regard to coinage in general, there are three things to be considered therein; the materials, the impression, and the denomination. With regard to the *materials*, Sir Edward Coke lays it down (2 *Inst.* 577.) that the money of England must either be of gold or silver: and none other was ever issued by the royal authority till 1672, when copper farthings and halfpence were coined by Charles II.: and ordered by proclamation to be current in all payments, under the value of sixpence, and not otherwise. But this copper coin is not upon the same footing with the other in many respects, particularly with regard to the offence of counterfeiting it, as has been already noticed. And as to the silver coin, it was enacted by *stat.* 14 *Geo.* 3. *c.* 42. that no tender of payment in silver money, exceeding twenty-five pounds at one time, shall be a sufficient tender in law for more than its value by weight, at the rate of 5*s.* 2*d.* an ounce. This was a clause in a temporary act, which expired in 1783, was revived by 38 *Geo.* 3. *c.* 59. and made perpetual by 39 *Geo.* 3. *c.* 75. but repealed by 56 *Geo.* 3. *c.* 68. § 12. *see post.*

As to the *Impression*, the stamping thereof is the unquestionable prerogative of the Crown: for, though divers bishops and monasteries had formerly the privilege of coining money, yet, as Sir Matthew Hale observes (1 *Hist. P. C.* 191.), this was usually done by special grant from the king, or by prescription which supposes one; and therefore was derived from, and not in derogation of, the royal prerogative. Besides that, they had only the profit of the coinage, and the power of instituting either the impression or denomination; but had usually the stamp sent them from the Exchequer.

The *Denomination*, or the value for which the coin is to pass current, is likewise in the breast of the king; and, if any unusual pieces are coined, that value must be ascertained by proclamation. In order to fix the value, the weight and the fineness of the metal are to be taken into consideration together. When a given weight of gold or silver is of a given fineness, it is then of the true standard and called Esterling, or sterling metal; a name for which there are various reasons given, but none of them entirely satisfactory. See *Spelm. Gloss.* 203. *Dufresne*, 3. 165. The most plausible opinion seems to be that adopted by those two etymologists, that the name was derived from the *Esterlings* or Easterlings, as those Saxons were anciently called, who inhabited that district of Germany now occupied by the Hans-towns and their appendages: the earliest traders in modern Europe. Of this sterling or esterling metal all the coin of the kingdom must be made, by *stat.* 25 *E.* 3. *c.* 13.—So that the King's prerogative seemeth not to extend to the debasing or enhancing the value of the coin, below or above the sterling value. 2 *Inst.* 577. though Sir Matthew Hale (1 *Hal. P. C.* 194.) appears to be of another opinion. The king may also by his proclamation legitimate foreign coin, and make it current here; declaring at what value it shall be taken in payments. 1 *H. P. C.* 197. But this, it seems, ought to be by comparison with the standard of our own coin, otherwise the consent of parliament will be necessary. The king may also at any time decry, or cry down, any coin of the kingdom, and make it no longer current. 1 *Hal. P. C.* 197.

This *standard* hath been frequently varied in former times; but hath for many years past been thus invariably settled. The pound troy of gold, consisting of twenty-two carats (or 24th parts) fine, and two of alloy, is divided into forty-four guineas and a half of the present value of 21*s.* each. And the pound troy of silver (consisting of eleven ounces and two penny-weights fine, and eighteen penny-weights alloy) was, from the end of the reign of Queen Elizabeth until 56 George III. divided into sixty-two shillings. See *Folkes on English Coins*, and *st.* 14 *G.* 3. *c.* 42,

Guineas have been raised and fallen, as money has been scarce or plenty, several times by statute: and *anno* 3 *Geo.* 1. guineas were valued by proclamation at 21*s.* at which they now pass.

In the 7th year of King William III. an act 7, 8 *W.* 3. *c.* 1. was made for calling in all the old *coin* of the kingdom, and to melt it down and re-coin it; the deficiencies whereof were to be made good at the public charge: and in every hundred pound *coined* 40*l.* was to be shillings, and 10*l.* sixpences, under certain penalties.

By *stat.* 56 *G.* 3. *c.* 68. to provide for a new *silver coinage*, and to regulate the *currency* of the *gold and silver coin* of the realm, so much of *st.* 18 *Car.* 2. *c.* 5. as related to coining silver brought to the Mint without any charge was repealed; so much of *st.* 7, 8 *W.* 3. *c.* 1. as related to the weight and fineness of silver coin under the Mint-indenture; and so much of 14 *Geo.* 3. *c.* 42. as required the pound troy of silver to be coined into 62 shillings, was also repealed; and a temporary act, 38 *G.* 3. *c.* 59. by which the coinage of any silver at the Mint was prohibited, was also repealed, § 1—3.

By § 4. &c. of the said act, 56 *Geo.* 3. *c.* 68. it is enacted, that the pound troy of standard silver, 11 oz. 2 penny-weights fine, and 18 dwts. alloy, should be coined into 66 shillings.—Provisions were by this act made for calling in the old Silver Coin; and by § 9, 10. it was enacted, that after a certain time Silver Coin and bullion might be brought to the Mint to be coined at the rate of 66*s.* per pound troy of standard silver, of which 62*s.* should be delivered to the party bringing the bullion, and 4*s.* be retained for charge of assaying, coinage, &c.

By § 11. 12. of this act, 56 *G.* 3. *c.* 68. it is further enacted, that the *Gold Coin* of the realm shall be and be considered *the only legal tender* for payments (except for sums not exceeding 40*s.*, for which Silver Coin is made a legal tender) within the *United Kingdom* of Great Britain and Ireland;—that the Gold Coin should continue to hold its former weight and fineness:—and that Gold Coin of any new denomination to be coined should be of weight proportioned to the weight of the gold coin then current.—Under this last provision Gold Sovereigns were coined to pass for 20*s.* each, containing 20-21th parts of the weight of a Guinea.

Lastly, by § 13. &c. of the said act, 56 *G.* 3. *c.* 68. it was enacted, that the Current Gold Coin shall not be received or paid for more or less than its value, according to its denomination; on penalty of imprisonment, for the first offence, for 6 months; 2d offence, one year; and subsequent offence, two years, &c.

All former acts relating to the Coin are extended to the Silver Coin coined under this act.

*Of Offences relating to the Coin.*—Two offences respecting the *coin*, are made *treason* by the statute 25 *E.* III. *c.* 2. These are the actual *counterfeiting* the gold and silver coin of this Kingdom; or the *importing* such counterfeit money with an intent to utter it, knowing it to be false. But these not being found sufficient to restrain the evil practices of coiners and false moneyers, other statutes have been since made for that purpose.

By *stat.* 1 *Mar. st.* 2. *c.* 6. if any person shall falsely forge or counterfeit any such kind of coin of gold or silver, as is not the proper coin of this realm, but shall be current within this realm by consent of the Crown; such offence shall be deemed *high treason.* And by *stat.* 1 & 2 *P. & M. c.* 11. if any person do bring into this realm such false or counterfeit foreign money, being current here, knowing the same to be false, with intent to utter the same in payment, they shall be deemed offenders in high treason. The money, referred to in these statutes, must be such as is absolutely current here, in all payments, by the King's proclamation; of which there is none at present, Portugal money being only taken by

consent, as approaching the nearest to our standard, and falling in well enough with our divisions of money into pounds and shillings: therefore to counterfeit that is not high treason, but another inferior offence; but see as to counterfeiting Spanish dollars, made current coin, 44 *G.* 3. *c.* 71. and 45 *G.* 3. *c.* 42. by which persons counterfeiting dollars, or tokens issued by the Banks of England or Ireland, were declared felons punishable by transportation. During the time that such tokens were allowed to be issued, several laws were made for their protection, all of which are expired. See 48 *G.* 3. *c.* 31. 51 *G.* 3. *c.* 110. 52 *G.* 3. *c.* 138. 53 *G.* 3. *c.* 106. &c.—All tokens issued by private persons were prohibited by 52 *G.* 3. *c.* 157.

Clipping or defacing the genuine coin was not hitherto included in these statutes; but by *stat.* 5 *Eliz. c.* 11. clipping, washing, *rounding*, or filing for wicked gains' sake, any of the money of this realm, or other money suffered to be current here, shall be adjudged high treason; and by *stat.* 18 *Eliz. c.* 1. the same species of offence is described in other more general words; *viz.* impairing, diminishing, falsifying, scaling, and lightening, are made liable to the same penalties.

By *stat.* 8 & 9 *W.* 3. *c.* 26. (made perpetual by 7 *Ann. c.* 25.) whoever, without proper authority, shall knowingly make or mend, or assist in so doing, or shall buy, sell, conceal, hide, or knowingly have in his possession, any implements of coinage specified in the act, or other tools or instruments proper *only* for the coinage of money; or shall convey the same out of the King's mint; he, together with his counsellors, procurers, aiders, and abettors, shall be guilty of high treason; which is much the severest branch of the coinage law. The statute further enacts, that to mark any coin on the edges with letters, or otherwise, in imitation of those used in the mint: or to colour, gild, or case over any coin resembling the current coin, or even round blanks of base metal, shall be construed high treason. But all prosecutions on this act are to be commenced within *three* months after the commission of the offence: except those for making or mending any coining tool or instrument, or for the making letters on money round the edges; which are directed to be commenced within *six* months after the offence committed. See *stat.* 7 *Ann. c.* 25.

And, lastly, by *stat.* 15 & 16 *Geo.* 2. *c.* 28. if any person colours or alters any shilling or six-pence, either lawful or counterfeit, to make them respectively resemble a guinea or half guinea: or any half-penny or farthing to make them respectively resemble a shilling or six-pence; this is also high treason; but the offender shall be pardoned, in case (being out of prison) he discovers and convicts two other offenders of the same kind.

Offences relating to the *coin*, *not amounting to treason*, and under which may be ranked some inferior misdemeanors not amounting to felony, are thus declared by a series of statutes, here recited in the order of time.—By *stat.* 27 *E.* 1. *c.* 3. none shall bring pollards and crockards (which were foreign coins of base metal) into the realm, on pain of forfeiture of life and goods. By *stat.* 9 *E.* 3. *st.* 2. no sterling money shall be melted down, upon pain of forfeiture thereof.—By *stat.* 17 *E.* 3. none shall be so hardy to bring false and ill money into the realm, on pain of forfeiture of life and members of the persons importing, and the searchers permitting such importation.—By *stat.* 3 *H.* 5. *st.* 1. to make, coin, buy, or bring into the realm any gally-halfpence, suskins, or dotkins, in order to utter them, is felony: and knowingly to receive or pay them *or blanks* (*stat.* 2 *Hen.* 6. *c.* 9.) incurs a forfeiture of an hundred shillings.—By *stat.* 5, 6 *Ed.* 6. *c.* 19. no person shall exchange any coined gold, coined silver, or money, giving, receiving, or paying more in value or benefit than the same shall be declared by proclamation to be current for, on pain of forfeiting the same, and suffering imprisonment four years, and making fine to the king.

It was determined that under this statute it was not an offence to cash any guineas for *Bank notes*, taking the guineas at a higher value than they were current for by proclamation: 14 *East's Rep.* 402. *R. v. De Yonge.*

In consequence of this determination the act 51 *Geo.* 3. *c.* 127. was passed to prevent such offences, continued and amended by 52 *Geo.* 3. *c.* 50. 54 *Geo.* 3. *c.* 52. now more effectually provided for by 56 *Geo.* 3. *c.* 68. See *ante.*

By *stat.* 14 *Eliz. c.* 3. such as forge any foreign coin, although it be not made current here by proclamation, shall (with their aiders and abettors) be guilty of misprision of treason. See tit. *Misprision.*—By *stat.* 13 & 14 *Car.* 2. *c.* 31. the offence of melting down any current silver money, shall be punished with forfeiture of the same, and also the double value: and the offender, if a freeman of *any* town, shall be disfranchised; if not, shall suffer six months' imprisonment.—By *stat.* 6 & 7 *W.* 3. *c.* 17. if any person buys or sells, or knowingly has in his custody, any clippings or filings of the coin, he shall forfeit the same and 500*l.* one moiety to the king, and the other to the informer; and be branded in the *cheek* with the letter R. [But see title *Clergy.*]—By *stat.* 8 & 9 *W.* 3. *c.* 26. no person shall blanch, or whiten, copper for sale (which makes it resemble silver), nor buy or sell or offer for sale any malleable composition, which shall be heavier than silver, and look, touch, and wear like gold, but beneath the standard: nor shall any person receive or pay at a less rate than it imports to be of (which demonstrates a consciousness of its baseness, and a fraudulent design) any counterfeit or diminished milled money of this kingdom, not being cut in pieces; an operation which is expressly directed to be performed when any such money shall be produced in evidence, and which any person, to whom any gold or silver money is tendered, is empowered (by *stats.* 9 & 10 *W.* 3. *c.* 21. 13 *Geo.* 3. *c.* 71. and 14 *Geo.* 3. *c.* 70.) to perform at his own hazard; and the officers of the Exchequer and the receivers-general of the taxes are particularly required to perform: and all such persons so blanching, selling, &c. shall be guilty of felony, and may be prosecuted for the same at any time within three months after the offence committed.

But these precautions not being found sufficient to prevent the uttering of false or diminished money, which was only a misdemeanor at common law, it is enacted by *stats.* 15 & 16 *Geo.* 2. *c.* 28. that if any person shall utter or tender in payment any counterfeit coin, knowing it to be so, he shall for the first offence be imprisoned six months, and find sureties for his good behaviour for six months more; for the second offence shall be imprisoned two years, and find sureties for two years longer: and, for the third offence, shall be guilty of felony without benefit of clergy. Also if a person knowingly tenders in payment any counterfeit money, and at the same time has more in his custody: or shall, within ten days after, knowingly tender other false money; he shall be deemed a common utterer of counterfeit money; and shall for the first offence be imprisoned one year, and find sureties for his good behaviour two years longer: and for the second be guilty of felony without benefit of clergy. By the same *statute* it is also enacted that if any person counterfeits the *copper coin*, he shall suffer two years' imprisonment, and find sureties for two years more. It seems not to be an indictable offence at common law to have counterfeit money in possession, with intent to pay away the same as good and current coin, and no notice is taken of such a case in the statute. See *Parker's case*, *Leach's Crown Law Cases*, 49.

By *stat.* 11 *Geo.* 3. *c.* 40. persons counterfeiting *copper halfpence* or farthings, with their abetters; or buying, selling, receiving, or putting off any counterfeit copper money (not being cut in pieces or melted down) at a less value than it imports to

be of; shall be guilty of single felony. And by *stat.* 14 *Geo.* 3. *c.* 42. (made perpetual by 39 *Geo.* 3. *c.* 75.) if any quantity of money exceeding the sum of five pounds, being or purporting to be the silver coin of this realm, but below the standard of the mint in weight or fineness, shall be imported into Great Britain or Ireland, the same shall be forfeited, in equal moieties, to the crown and prosecutor.

By 43 *G.* 3. *c.* 139. counterfeiting foreign copper coin, &c. is punishable by imprisonment; and for second offence transportation; and houses of suspected persons may be searched, and counterfeited coin seized, &c.

A duty of 10*s.* *per* ton was imposed on wine, beer, and brandy imported, called the *coinage duty*, granted for the expence of the King's *coinage*, but not to exceed 3000*l.* *per ann.* *Stat.* 18 *Car.* 2. *cap.* 5. This duty for *coinage* hath been continued and advanced, from time to time by divers statutes; and by *stat.* 27 *Geo.* 2. *c.* 11. (explained by *stat.* 27 *Geo.* 3. *c.* 13. § 64.) the Treasury is to apply 15,000*l.* a-year to the expenses of the mints in England and Scotland. —*Stat.* 14 *Geo.* 3. *c.* 92. regulates the stamping of *money-weights*, the fees for which are settled by *stat.* 15 *Geo.* 3. *c.* 30. at 1*d.* for every 12 weights.

COLIBERTS, *coliberti.*] Were tenants in socage; and particularly such villains as were manumitted or made freemen. *Domesday.* But they had not an absolute freedom; for though they were better than servants, yet they had superior lords to whom they paid certain duties, and in that respect they might be called servants, though they were of middle condition, between freeman and servants.—*Libertate carens* colibertus *dicitur esse.* Du Cange.

COLLATERAL, *collateralis.*] From the Lat. *lateralè*, sideways, or that which hangeth by the side, not direct: as *collateral assurance* is that which is made over and above the deed itself: *collateral* security, is where a deed is made of other land, besides those granted by the deed of mortgage: and if a man covenants with another, and enters into bond for performance of his covenant the bond is a *collateral* assurance; because it is external, and without the nature and essence of the covenant. If a man hath liberty to pitch booths or standings, for a fair or market, in another person's ground, it is *collateral* to the ground. The private woods of a common person, within a forest, may not be cut down without the King's licence; it being a prerogative *collateral* to the soil. And to be subject to the feeding of the King's deer, is *collateral* to the soil of a forest. *Cromp. Jurisd.* 185. *Manwood, p.* 66.

Collateral Consanguinity, or Kindred. *Collateral* relations agree with the lineal in this, that they descend from the same stock or ancestor; but differ in this, that they do not descend from each other. *Collateral kinsmen*, therefore, are such as lineally spring from one and the same ancestor, who is the *stirps* or root, the *stipes*, trunk, or common stock, from whence these relations are branched out. 2 *Comm.* 204. See title *Descent.*

Collateral Descent, and Collateral Warranty. See *Descent* and *Warranty.*

Collateral Issue. Is where a criminal convict pleads any matter, allowed by law, in bar of execution, as *pregnancy*, the King's *pardon*, an *act* of *grace*, or *diversity* of *person*, *viz.* that he or she is not the same that was attainted, &c. whereon issue is taken, which issue is to be tried, by a jury, *instantèr.*

COLLATIO BONORUM. Is in law where a portion or money advanced by the father to a son or daughter, is brought into *hotchpot*, in order to have an equal distributory share of his personal estate, at his death, according to the intent of the *stat.* 22 & 23 *Car.* 2. *c.* 10. *Abr. Cas. Eq. p.* 254. See titles *Hotchpot*, *Executor.*

COLLATION TO A BENEFICE, *collatio beneficii.*] Signifies the bestowing of a *benefice* by the bishop, or other ordinary, when he hath right of patronage. See title *Advowson.*

Collatione facta uni post Mortem alterius. A writ directed to the Justices of the Common Pleas, commanding them to issue their writ to the bishop, for the admission of a clerk in the place of another presented by the King; who died during the suit between the King and the bishop's clerk: for judgment once passed for the King's clerk, and he dying before admittance, the King may bestow his presentation on another. *Reg. Orig.* 31.

Collatione Heremitagii. A writ whereby the King conferred the keeping of an *hermitage* upon a clerk. *Reg. Orig.* 303. 308.

COLLATION OF SEALS. This was when upon the same label, one seal was set on the back or reverse of the other.

COLLATIVE ADVOWSONS. See title *Advowson.*

COLLECTORS of money due to the King. *Stat.* 20 *Car.* 2. See *Receivers.*

COLLEGE, *collegium.*] A particular corporation, company, or society of men, having certain privileges founded by the King's licence: and for *Colleges* in reputation, see 4 *Rep.* 106. 108.

The establishment of Colleges or Universities, is a remarkable æra in literary history. The schools in Cathedrals and Monasteries confined themselves chiefly to the teaching of grammar. There were only one or two masters employed in that office. But in colleges, professors were appointed to teach all the different parts of science. The first obscure mention of academical degrees in the University of Paris (from which the other Universities in Europe have borrowed most of their customs and institutions) occurs A. D. 1215. Vide *Roberts. Hist. Emp. C. V.* 1. *v.* 323.

See the power of visitors of Colleges well explained in Dr. Walker's case. *Hardw.* 212. See further titles *Corporations*, *Leases*, *Universities.*

COLLEGIATE CHURCH. Is that which consists of a Dean and secular canons; or more largely, it is a church built and endowed for a society, or body corporate, of a dean or other president, and secular priests, as canons or prebendaries in the said church. There were many of these societies distinguished from the religious or regulars, before the reformation: and some are established at this time; as Westminster, Windsor, Winchester, Southwell, Manchester, &c.—See title *Chapter*, *Dean.*

COLLIGENDUM BONA DEFUNCTI (Letters *ad*). In defect of representatives and creditors to administer to an intestate, &c. the ordinary may commit administration to such discreet person as he approves of, or grant him these letters, *to collect the goods of the deceased*, which neither make him executor nor administrator; his only business being to keep the goods in his safe custody, and to do other acts for the benefit of such as are entitled to the property of the deceased. 2 *Comm.* 505. See title *Executor.*

COLLOQUIUM, *à colloquendo.*] A talking together, or affirming of a thing, laid in declarations for words in actions of slander, &c. *Mod. Cas.* 203. *Carthew*, 90.

COLLUSION, *collusio.*] Is a deceitful agreement or contract between two or more persons, for the one to bring an action against the other, to some evil purpose, as to defraud a third person of his right, &c. This *collusion* is either apparent, when it shews itself on the face of the act; or, which is more common, it is secret, where done in the dark, or covered over with a show of honesty. And it is a thing the law abhors: wherefore, when found, it makes void all things dependant upon the same, though otherwise in themselves good. *Co. Lit.* 109. 360. *Plowd.* 54. *Collusion* may sometimes be tried in the same action wherein the covin is, and sometimes in another action, as for lands aliened in mortmain

by a *quale jus;* and where it is apparent there needs no proof of it: but when it is secret it must be proved by witnesses, and found by a jury like other matters of fact. 9 *Rep.* 33. The statute of *Westm.* 2. 13 *Ed.* 1. *c.* 33. gives the writ *quale jus*, and inquiry in these cases: and there are several other statutes relating to deeds made by *collusion* and fraud. The cases particularly mentioned by the statute of *Westm.* 2. are of *quare impedit*, *assise*, *&c.* which one corporation brings against another, with intent to recover the land or advowson, for which the writ is brought, held in mortmain, &c. See title *Fraud.*

COLONIES. See title *Plantations.*

COLONUS. An husbandman or villager, who was bound to pay yearly a certain tribute; or at certain times in the year to plough some part of the lord's land; and from hence comes the word *clown.*

COLOUR, *color.*] Signifies a probable plea, but which is in fact false; and hath this end, to draw the trial of the cause from the jury to the judges: and therefore *colour* ought to be matter in law, or doubtful to the jury.

It is a rule in pleading, that no man be allowed to plead, specially, such a plea as amounts only to the general issue; but in such case he shall be driven to plead the general issue in terms, whereby the whole question is referred to a jury. But if a defendant, in an assise or action of trespass, be desirous to refer the validity of his title to the court rather than the jury, he may state his title specially, and at the same time *give colour* to the plaintiff, or suppose him to have an appearance or colour of title, bad indeed in point of law, but of which the jury are not competent judges. As if his own true title be that he claims by feoffment with livery from A. by force of which he entered on the lands in question, he cannot plead this by itself, as this plea amounts to no more than the general issue. But he may allege this specially, provided he goes farther, and says, that the plaintiff claiming *by colour* of a prior deed of feoffment, without livery, entered, upon whom he entered: and may then refer himself to the judgment of the court, which of the two titles is the best in point of law. *Doctor & Stud.* 2. *c.* 53.

Every *colour* ought to have these qualities following: 1. It is to be doubtful to the *lay gens*, as in case of a deed of feoffment pleaded, and it is a doubt whether the land passeth by the feoffment, without livery, or not. 2. *Colour* ought to have continuance, though it wants effect. 3. It should be such *colour*, that, if it were effectual, would maintain the nature of the action; as in assise, to give colour of frechold, &c. 10 *Rep.* 88. 90. *a*, 91. *Colour* must be such a thing, which is a good *colour* of title, and yet is not any title. *Cro. Jac.* 122. If a man justifies his entry for such a cause as binds the plaintiff or his heirs for ever, he shall not give any *colour:* but if he pleads a descent in bar, he must give *colour*, because this binds the possession, and not the right; so that when the matter of the plea bars the plaintiff of his right, no *colour* must be given. When the defendant entitles himself by the plaintiff; where a person pleads to the writ, or to the action of the writ; he who justifies for tithes, or where the defendant justifies as servant: in all these cases no *colour* ought to be given. 10 *Rep.* 91. *Lutw.* 1343. Where the defendant doth not make a special title to himself, or any other, he ought to give *colour* to the plaintiff. *Cro. Eliz.* 76. In trespass for taking and carrying away twenty loads of wood, &c. the defendant says, that A. B. was possessed of them, *ut de bonis propriis*, and that the plaintiff claiming them by *colour* of a deed after made, took them, and the defendant retook them; and adjudged, that the *colour* given to the plaintiff, makes a good title to him, and confesseth the interest in him. 1 *Lil. Abr.* 275. See title *Pleading.*

COLOUR OF OFFICE, *color officii.*] Is when an act is evilly done by the countenance of an office; and always taken in the worst sense, being grounded upon corruption, to which the *office* is as a shadow and *colour. Plowd. Comment.* 64. See *Bribery; Extortion.*

COLPICES, *colpicium*, *colpiciis.*] Young poles, which being cut down, make leavers or lifters; and in Warwickshire they are called *colpices* to this day. *Blount.*

COLPO. A small wax candle, *à copo de cere: Hoveden* says, that when the King of Scots came to the English Court, as long as he staid there, he had every day, *De liberatione triginta sol. & duodecim vassellos dominicos, & quadraginta grossos longos* colpones *de dominica candela regis, &c. anno* 1194.

COMBARONES. The fellow barons, or commonalty of the Cinque Ports. *Placit. temp. Ed.* 1. *& Ed.* 2. But the title of barons of the Cinque Ports is now given to their representatives in parliament; and the word *combaron* is used for a fellow member, the *baron* and his *combaron.* See tit. *Parliament.*

COMBATERRÆ. From Sax. *cumbo.* Brit. *kum*, Eng. *comb.*] A valley or low piece of ground or place between two hills; which is still so called in Devonshire and Cornwall: hence many villages in other parts of England have their names of *comb*, as *Wickcomb*, &c. from their situation. *Kennet's Gloss.*

COMBAT, Trial by. See *Battel.*

COMBINATIONS. To do unlawful acts, are punishable before the unlawful act is executed; this is to prevent the consequence of *combinations*, and conspiracies, &c. 9 *Rep.* 57. See titles *Confederacy*, *Conspiracy.*

COMBUSTIO PECUNIÆ. The ancient way of trying mixt and corrupt money, by melting it down upon payments into the Exchequer. In the time of King Henry II. a constitution was made, called the *trial by combustion;* the practice of which differed little or nothing from the present method of *assaying* silver. But whether this examination of money by *combustion*, was to reduce an equation of money only of *sterling*, *viz.* a due proportion of allay with copper; or to reduce it to a fine pure silver without allay, doth not appear. On making the constitution for trial, it was considered, that though the money did answer *numero & pondere*, it might be deficient in value: because mixed with copper or brass, &c. Vide *Lowndes's Essay upon Coin, p.* 5. See title *Coin.*

COMITATUS. A county. *Ingulphus* tells us, That England was first divided into counties by King Alfred; and counties into hundreds, and these again into tithings; and *Fortesque* writes, that *regnum* Angliæ *per* comitatus *ut regnum* Franciæ *per ballivatus distinguitur.* It is also taken for a territory or jurisdiction of a particular place, as in *Mat. Paris anno* 1234, and divers old charters. See titles *County*, *Sheriff.*

According to Lord Littelton, in his *History of Hen. II. lib.* 2. *fo.* 217. each county was anciently an earldom, so that, previous to the reign of King Stephen, there were not any titular earls, nor more earls than counties, though there might be fewer. As to the division of counties into hundreds and tithings, see *Ld. Lit. l.* 2. *fo.* 259. Also see *Bract. l.* 3. *c.* 10.

Comitatu Commisso. Is a writ or commission whereby a sheriff is authorized to take upon him the charge of the county. *Reg. Orig.* 295.

Comitatu et Castro Commisso. A writ by which the charge of a county, together with the keeping of a castle, is committed to the sheriff. *Reg. Orig.* 295.

COMITIVA. A companion or fellow traveller; it is mentioned in *Brompton, Regn. II.* 2. And sometimes it signifies a troop or company of robbers: as in *Walsingham, anno* 1366.

COMMANDERY, *præceptoria.*] Was any manor or chief messuage, with lands and tenements thereto appertaining, which belonged to the priory of St. John of Jerusalem in England; and he who had the government of such a manor or

house was stiled the *commander;* who could not dispose of it but to the use of the priory, only taking thence his own sustenance, according to his degree. New Eagle in Lincolnshire was and still is called the *Commandery of Eagle*, and did anciently belong to the said priory of St. John: So Selbach in Pembrokeshire, and Shingay in Cambridgeshire, were *commanderies* in the time of the knights templars, says *Camden:* and these in many places of England are termed *Temples*, because they formerly belonged to the said templars. See *stat.* 26 *H.* 8. *c.* 2. The manors and lands belonging to the priory of St. John of Jerusalem, were given to King Hen. VIII. by *stat.* 32 *Hen.* 8. *c.* 20; about the time of the dissolution of abbies and monasteries: so that the name only of *commanderies* remains, the power being long since extinct.

COMMANDMENT, *præceptum.*] Is diversely taken: as the *commandment of the King*, when upon his own motion he had cast any man into prison. *Commandment of the justices*, absolute or ordinary; absolute, where upon their own authority they commit a person for contempt, &c. to prison, as a punishment; ordinary is when they commit one rather for safe custody, than for any punishment: and a man committed upon such an ordinary *commandment* is replevisable. *Staundf. P. C.* 72. 73. Persons committed to prison by the special *command* of the King, were not formerly bailable by the court of King's Bench; but at this day the law is otherwise. 2 *Hawk. P. C. c.* 15. § 36. See title *Bail.*

In another sense of this word, magistrates may *command* others to assist them in the execution of their offices, for the doing of justice; and so may a justice of peace to suppress riots, apprehend felons; an officer to keep the King's peace, &c. *Bro.* 3. A master may *command* his servant to drive another man's cattle out of his ground, to enter into lands, seize goods, distrain for rent, or do other things; if the thing be not a tresspass to others. *Fitz. Abr.* The *commandment* of a thing is good, where he that *commands* hath power to do it: and a verbal *command* in most cases is sufficient; unless it be where it is given by a corporation, or when a sheriff's warrant is to a bailiff to arrest, &c. *Bro.* 288. *Dyer.* 202.

*Commandment* is also used for the offence of him that willeth another man to transgress the law, or do any thing contrary to it; and in the most common signification, it is taken where one willeth another to do an unlawful act; as murder, theft, or the like; which the civilians called *mandatum. Bract. lib.* 3. *c.* 19. See title *Accessory.*

In forcible entries, &c. an infant or feme covert may be guilty in respect of actual violence done by them in person; though not in regard to what shall be done by others at their *command*, because all such *commands* of theirs are void. *Co. Lit.* 357. 1 *Hawk. P. C. c.* 64. § 35. See title *Infant.* In trespass, &c. the master shall be charged criminally for the act of the servant, done by his *command;* but servants shall not be excused for committing any crime, when they act by *command of their masters*, who have no authority over them to give such *command. Doct. & Stud. c.* 42. *H. P. C.* 66. *Kel.* 13. And if a master commands his servant to distrain, and he abuseth the distress, the servant shall answer it to the party injured, &c. *Kitch.* 372. See title *Servant.*

COMMARCHIO. The confines of the land; from whence probably comes the word *marches.—Imprimis de nostris landimēris*, commarchionibus. *Du Cange.*

COMMENDAM, *ecclesia* commendata, *vel custodia ecclesiæ alicui commissa.*] Is the holding of a benefice or church-living, which being void, is *commended* to the charge and care of some sufficient clerk, to be supplied until it may be conveniently provided of a pastor: and he to whom the church is *commended*, hath the profits thereof only for a certain time, and the nature of the church is not changed thereby, but is as a thing deposited in his hands in trust, who hath nothing but the custody of it, which may be revoked. When a parson is made bishop, there is a cession or voidance of his benefice, by the promotion; but if the King by special dispensation gives him power to retain his benefice notwithstanding his promotion; he shall continue parson, and is said to hold it *in commendam. Hob.* 144. *Latch.* 236. As the King is the means of avoidances on promotions to dignities, and the presentations thereon belong to him, he often on the creation of bishops grants them licences to hold their benefices *in commendam;* but this is usually where the bishopricks are small, for the better support of the dignity of the bishop promoted: and it must be always before consecration; for afterwards it comes too late, because the benefice is absolutely void.—A *commendam*, founded on the *statute* 25 *H.* 8. *c.* 21. is a dispensation from the supreme power, to hold or take an ecclesiastical living *contra jus positivum:* and there are several sorts of *commendams;* as a *commendam semestriss*, which is for the benefit of the church without any regard to the *commendatary*, being only a provisional act of the ordinary, for supplying the vacation of *six months*, in which time the patron is to present his clerk, and is but a sequestration of the cure and fruits until such time as the clerk is presented: a *commendam retinere*, which is for a bishop to retain benefices, on his preferment; and these *commendams* are granted on the king's mandate to the archbishop, expressing his consent, which continues the incumbency, so that there is no occasion for institution. A *commendam recipere* is to take a benefice *de novo* in the bishop's own gift, or in the gift of some other patron, whose consent must be obtained. *Dyer*, 228. 3 *Lev.* 381. *Hob.* 143. *Danv.* 79.

A *commendam* may be temporary for six or twelve months; two or three years, &c.; or it may be perpetual, *i. e.* for life; when it is equal to a presentation, without institution or induction. But all dispensations beyond six months were only permissive at first, and granted to persons of merit: the *commendam retinere* is for one or two years, &c. and sometimes for three or six years, and doth not alter the estate which the incumbent had before: a *commendam retinere*, as long as the *commendatary* should live and continue bishop, hath been held good. *Vaugh.* 18.

The *commendam recipere* must be for life, as other parsons and vicars enjoy their benefices; and as a patron cannot present to a full church, so neither can a *commendam recipere* be made to a church that is then full. *Show.* 414. A benefice cannot be *commended* by parts, any more than it may be presented unto by parts; as that one shall have the glebe, another the tithes, &c. Nor can a *commendatary* have a *juris utrum*, or take to him and his successors, sue or be sued, in a writ of annuity, &c. But a *commendatary in perpetuum* may be admitted to do it. 11 *H.* 4.

These *commendams* are now in fact seldom or never granted to any but bishops; and in that case the bishop is made Commendatary of the benefice while he continues bishop of such diocese: as the object is to make an addition to a small bishoprick: and it would be unreasonable to grant it to a bishop for life, who might afterwards be translated to one of the richest sees.—See the case of *Commendams*, *Hob.* 140. and *Collier's Eccl. Hist.* 2. 710.

COMMENDATARY, *commendatarius.*] He that holdeth a church living or preferment *in commendam.*

COMMENDATORS. Are secular persons, upon whom ecclesiastick benefices are bestowed, called so, because the benefices were commended and intrusted to their oversight, they are not proprietors, but only trustees or tutors. *Scotch Dict.*

COMMENDATORY LETTERS. Are such as are written by one bishop to another in behalf of any of the clergy, or others of his diocese, travelling thither, that they may be received among the faithful: or that the clerk may be promoted; or necessaries administered to others, &c. several

forms of these letters may be seen in our historians, as in *Bede, lib.* 2. *c.* 18.

COMMENDATUS. One that lives under the protection of a great man. *Spelm.—Commendati homines* were persons who by voluntary homage put themselves under the protection of any superior lord: for ancient homage was either *predial*, due for some tenure; or personal, which was by compulsion, as a sign of necessary subjection; or voluntary, with a desire of protection: and those, who by voluntary homage put themselves under the protection of any men of power, were sometimes called *homines ejus commendati:* and sometimes only *commendati*, as often occurs in *Domesday*. *Commendati dimidii* were those who depended on two several lords, and paid one half of their homage to each: and *sub-commendati* were like under-tenants, under the command of persons that were dependants themselves on a superior lord: also there were *dimidii sub-commendati*, who bore a double relation to such depending lords. *Domesday*. This phrase seems to be still in use, in the usual compliment, *Commend me to such a friend, &c.* which is to let him know, *I am his humble servant*. *Spelm. of Feuds, cap.* 20.

COMMERCE, *commercium.*] Traffick, trade or merchandize in buying and selling of goods.

There is a distinction between *commerce* and *trade;* the former relates to our dealings with foreign nations, or our colonies, &c. abroad; the other to our mutual traffick and dealings among ourselves at home.

No municipal laws can be sufficient to order and determine the very extensive and complicated affairs of traffick and merchandize: neither can they have a proper authority for this purpose: for as these are transactions carried on between subjects of independent states, the municipal laws of one will not be regarded by the other.—For this reason the affairs of commerce are regulated by a law of their own, called the Law-merchant or *Lex-mercatoria*, which all nations agree in and take notice of. And in particular it is held to be part of the law of England, which decides the causes of merchants by the general rules which obtain in all commercial countries. See further title *Merchant*. See also title *Bill of Exchange*.

COMMISSARY, *commissarius.*] A title in the ecclesiastical law, belonging to one that exerciseth spiritual jurisdiction, in places of a diocese which are so far from the episcopal city, that the chancellor cannot call the people to the bishop's principal consistory court, without their too great inconvenience. This commissary was ordained to supply the bishop's jurisdiction and office in the out-places of the diocese; or in such places as are peculiar to the bishop, and exempted from the jurisdiction of the archdeacon: for where, either by prescription or composition, archdeacons have jurisdiction within their archdeaconries, as in most places they have, this *commissary* is superfluous and oftentimes vexatious, and ought not to be; yet in such cases, a *commissary* is sometimes appointed by the bishop, he taking prestation money of the archdeacon yearly *pro exteriori jurisdictione*, as it is ordinarily called. But this is held to be a wrong to archdeacons and the poorer sort of people. *Cowel's Interp.* 4 *Inst.* 338.

There are also *commissaries* in time of war. Persons sent abroad to take care of the supply and distribution of provisions for the army.

COMMISSION, *commissio.*] The warrant or letters-patent, which all persons exercising jurisdiction either ordinary or extraordinary, have to authorize them to hear or determine any cause or action: as the *commission* of the judges, &c. *Commission* is with us as much as *delegatio* with the civilians: and this word is sometimes extended farther than to matters of judgment; as the *commission of purveyance*, &c. *Commissions* of inquiry shall be made to the justices of one bench or the other, &c. and to do lawful things, are grantable in many cases: also most of the great officers, judicial and ministerial, of the realm, are made by *commission*. And by such *commissions*, treasons, felonies, and other offences, may be heard and determined; by this means likewise, oaths, cognisances of fines, and answers, are taken, witnesses examined, offices found, &c. *Bro. Ab.* 12. *Rep.* 39.—See *stat.* 42 *E.* 3. *c.* 4. And most of these *commissions* are appointed by the King under the Great Seal of England; but a *commission* granted under the Great Seal may be determined by a Privy Seal: and by granting another new *commission* to do the same thing, the former *commission* determines; and on the death or *demise* of the King, the *commissions* of Judges and officers generally cease. *Bro. Commis.* 2 *Dyer*, 289. There was formerly a *High-commission* Court founded on 1 *Eliz. c.* 1. but it was abolished by *stats.* 16 *Car.* 1. *c.* 11. and 13 *Car.* 2. *c.* 2. Of *commissions* divers may be seen in the table of the *Register of Writs*. See also *stats.* 4 *Hen.* 4. *c.* 9. 7 *Hen.* 4. *c.* 11. 6 *An. c.* 7. By which last act, § 27. it is provided that no greater number of commissioners shall be made for the execution of any office than had been previously usual.

Commission of Anticipation. Was a *commission* under the Great Seal to collect a tax or subsidy before the day. 15 *H.* 8.

Commission of Array. See title *Militia*.

Commission of Association. A *commission* to *associate* two or more learned persons with the justices in the several circuits and countries of Wales, &c. See title *Assise, Circuit*.

Commission of Bankrupt. See title *Bankrupt*.

Commission of Charitable Uses. Goes out of the *Chancery* to the bishop and others, where lands given to charitable uses are misemployed, or there is any fraud or disputes concerning them, to inquire of and redress the abuse, &c. *Stat.* 43 *Eliz. c.* 4.—See titles *Charitable Uses, Mortmain*.

Commission del credere. Is an absolute engagement to the principal from an insurance broker in effecting an insurance, and makes him liable in the first instance, and at all events, though the principal may resort to the underwriter as a collateral security. 1 *T. R.* 112. (See further for the general nature of a commission *del credere*, 1 *T. R.* 285. 6 *T. R.* 359. and *Mackenzie v. Scott, in Dom. Proc.* 19 *Dec.* 1796.) and this *Dict.* title *Insurance*.

Commission of Delegates. Is a commission under the Great Seal to certain persons, usually two or three temporal lords, as many bishops, and two judges of the law, to sit upon an appeal to the King in the court of Chancery, where any sentence is given in any ecclesiastical cause by the archbishop. *Stat.* 25 *H.* 8. *c.* 19. Now generally three of the common law judges, and two civilians, sit as delegates.

Commission to inquire of Faults against the Law, was an ancient commission set forth on extraordinary occasions and corruptions.

Commissions of the Peace. See title *Justices of Peace*.

Commission of Lunacy. A commission out of Chancery to inquire whether a person represented to be a lunatick be so or not; that if lunatick, the King may have the care of his estate, &c. See title *Lunatick*.

Commission of Oyer and Terminer. An English term, is a commission especially granted to some eminent persons of the hearing and determining one or more causes; and it is the first and largest of the five commissions, by which the English judges of assize do sit in their several circuits. *Scotch Dict.* See title *Oyer and Terminer*.

Commission of Rebellion. Otherwise called a writ of rebellion, issues when a man after proclamation made by the sheriff, upon a process out of the Chancery, on pain of his allegiance, to present himself to the court by a day assigned, makes default in his appearance: and this commission is directed to certain persons, to the end they, three, two, or one of them apprehend the party, or cause him to be apprehended as a *rebel* and contemner of the king's laws, where-

soever found within the kingdom, and bring or cause him to be brought to the court on a day therein assigned: this writ or commission goes forth after an attachment returned, *non est inventus, &c. Termes de Ley.*—See titles *Attachment*, *Chancery*.

COMMISSION OF SEWERS, is directed to certain persons to see drains and ditches well kept and maintained in the marshy and fenny parts of England, for the better conveyance of the water into the sea, and preserving the grass upon the land. *Stat.* 23 *H.* 8. *c.* 5. 13 *Eliz. c.* 9. See title *Sewers*.

COMMISSION OF TREATY WITH FOREIGN PRINCES. Is where leagues and treaties are made and transacted between states and kingdoms, by their ambassadors and ministers, for the mutual advantage of the kingdoms in alliance.

COMMISSION TO TAKE UP MEN FOR WAR. Was a commission to press or force men into the king's service. This power of *impressing* has been heretofore doubted, but the legality of it is now fully established. Vide *Fost. Rep.* 154. 1 *Comm.* 419. *Broadfoot's* case, *Comb.* 245. *Tubb's* case. *Cowp.* 517.—See titles *Mariner*, *Navy*.

COMMISSIONER, *commissionarius.*] He that hath a commission, letters patent, or other lawful warrant to examine any matters, or to execute any public office, &c. And some *commissioners* are to hear and determine offences, without any return made of their proceedings; and others to inquire and examine, and certify what is found. *Stat.* 4 *Hen.* 4. *c.* 9. *Commissioners*, by the common law, must pursue the authority of the *commission*, and perform the effect thereof; and they are to observe the ancient rules of the courts whence they come; and if they do any thing for which they have not authority, it will be void. 2 *Co. Rep.* 25. *Co. Lit.* 157. The office of commissioners is to do what they are commanded; and it is necessarily implied, that they may do that also, without which what is commanded cannot be done: their authority, when appointed by any statute law, must be used as the statutes prescribe. 12 *Rep.* 32. If a commission is given to *commissioners* to execute a thing against law, they are not bound to accept or obey it: *commissioners* not receiving a commission may be discharged, upon oath before the Barons of the Exchequer, &c. and the king by *supersedeas* out of Chancery, may discharge *commissioners*. Besides *commissioners* relating to judicial proceedings, there are *Commissioners* of the *Treasury*, of the *Customs*, *Wine-licences*, *Alienations*, *&c.* of which there are an infinite number.

COMMISSIONERS FOR VALUATION OF TEINDS. Are those appointed by the parliament to value Teinds. *Scotch Dict.*

COMMITTEE. Are those to whom the consideration or ordering of any matter is referred, by some court, or by consent of parties to whom it belongs: as in parliament, a bill either consented to and passed, or denied, or neither, but being referred to the consideration of certain persons appointed by the House farther to examine it, they are thereupon called a *committee*. And when a parliament is called, and the speaker and members have taken the oaths, and the standing orders of the House are read, *committees* are appointed to sit on certain days, *viz.* the *committee of privileges*, of *religion*, of *grievances*, of *courts of justice*, and of *trade*; which are the standing *committees*. But though they are appointed by every new parliament, they do not all of them act, only the *committee* of privileges; and this being not of the whole House, is first called in the Speaker's chamber, from whence it is adjourned into the House, every one of the House having a vote therein, though not named, which makes the same usually very numerous: and any member may be present at any select *committee*; but is not to vote unless he be named. The chairman of the *grand committee* who is always some leading member, sits in the clerk's place at the table, and writes the votes for and against the matter referred to them; and if the number be equal, he has a casting voice, otherwise he hath no vote in the *committee*; and after the chairman hath put the question for reporting to the House, if that be carried, he leaves the chair, and the Speaker being called to his chair (who quits it in the beginning, and the mace is laid under the table), he is to go down to the bar, and so bring up his report to the table. After a bill is read a second time in the House of Commons, the question is put, whether it shall be committed to a *committee of the whole house*, or a *private committee*; and the *committees* meet in the Speaker's chamber, and report their opinion of the bill, with the amendments, &c. And if there be any exceptions against the amendments reported, the bill may be *recommitted*: eight persons make a *committee*, which may be adjourned by five, &c. *Lex Constitutionis*, 147. 150.—See title *Parliament*.

There is a *Committee of the King*, mentioned in *West's Symb.* tit. *Chancery*, sect. 144. And this hath been used, though improperly, for the widow of the king's tenant being dead, who is called the *Committee of the King*, that is one committed by the ancient law of the land to the king's care and protection. *Kitch. fol.* 160.

The *Committee* of a lunatick, idiot, &c. is the person to whom the care and custody of such lunatick is *committed* by the Court of *Chancery*. See title *Lunatick*.

Most Corporations have their *committees* of select members to perform the general routine of business. See title *Corporation*.

## COMMITMENT.

The sending of a person to prison, by warrant or order, who hath been guilty of any crime.

Anciently more felons were committed to gaol without a *mittimus* in writing, than were with it; such were commitments by watchmen, constables, &c. See 1 *H. H.* 610.—But now since the *Habeas-corpus* act, a commitment *in writing* seems more necessary than formerly; otherwise a prisoner may be admitted to bail under that act, whatsoever his offence may have been. *Burn's Justice*, title *Commitment*.

I. *What kind of Offenders may be committed; and by whom; and in what manner.*
II. *To what Prison they may be committed; and at whose Charge.*
III. *How they may be removed and discharged.*

I. There is no doubt but that persons apprehended for offences which are not bailable, and also all persons who neglect to offer bail for offences which are bailable, must be committed. 2 *Hawk. P. C. c.* 16. § 1.—It is said, that wheresoever a justice of peace is empowered by any statute to bind a person over, or to cause him to do a certain thing, and such person being in his presence shall refuse to be bound, or to do such thing, the justice may commit him to the gaol to remain there till he shall comply. *Id. ib.* § 2.

It seems agreed by all the old books, that wheresoever a constable or private person may justify the arresting another for a felony or treason, he may also justify the sending or bringing him to the common gaol; and that every private person hath as much authority in cases of this kind, as the sheriff or any other officer; and may justify such imprisonment by his own authority, but not by the command of another.—2 *Hawk, P. C. c.* 16. § 3.

But inasmuch as it is certain, that a person lawfully making such an arrest may justify bringing the party to the constable, in order to be carried by him before a justice of peace; and inasmuch as the statutes of 1 & 2 *P. & M. cap.* 13. and 2 & 3 *P. & M. cap.* 10. which direct in what manner persons brought before a justice of the peace for felony, shall be examined by him, in order to their being committed or bailed, seem clearly to suppose, that all such persons are to be brought

before such justice for such purpose; and inasmuch as the statute of 31 *Car* 2. *c.* 2. commonly called the *Habeas-corpus* act, seems to suppose that all persons, who are committed to prison, are there detained by virtue of some warrant in writing, which seems to be intended of a commitment by some magistrate, and the constant tenor of the late books, practice, and opinions, are agreeable hereto; it is certainly most adviseable at this day, for any private person who arrests another for felony, to cause him to be brought, as soon as conveniently he may, before some justice of the peace, that he may be committed or bailed by him. 2 *Hawk. P. C. c.* 16. § 3.

It is certain, that the *Privy Council*, or any one or two of them, or *Secretary of State*, may lawfully commit persons for *treason*, and for *other offences* against the State, as in all ages they have done. 2 *Hawk. P. C.* 117.

As to commitments by the *Privy Council*, two cases in *Leonard* (1 *Leon.* 71. 2 *Leon.* 175.) pre-suppose some power for this purpose, without saying what; and the case in 1 *Anders.* 297. plainly recognises such a power in *High Treason.* But as to the jurisdiction of Privy Councillors in *other* offences, it does not appear to have been either claimed or exercised. But see *post*, as to commitments by the Secretary of State for *libel*; the cases of *Derby* and *Earbury*; which *Lord Camden* said are established, and the court has no right to overturn them. 11 *S. T.* 323.

As to commitments by the *Secretary of State*; in the case of *Entick* v. *Carrington*, *C. B. Mich.* 6 *Geo.* 3. upon a special verdict, respecting the validity of a Secretary of State's warrant to seize persons *and papers* in the case of *libels*, a very critical inquiry was made into the source of this power in that officer, in cases of libels and *other State crimes*. 2 *Wils.* 275. 11 *S. T.* 317. 9.—It appears that the king being the principal conservator of the realm, the Secretary of State has so much of the royal authority transferred to him as justifies *commitment* for these crimes, but not the *seizure of papers.*

The following instances of commitments by the Privy Council and Secretary of State, will further explain the nature of this power.—1. Howell was committed in the 28th *Eliz.* and Hollyard in the 30th *Eliz.* by Secretary Walsingham, Privy Councillor; and it was determined that where the commitment is not by the whole council, the cause must be expressed in the warrant. 1 *Leon.* 71. 2 *Leon.* 175. Sed vide *stat.* 31 *Car.* 2. *c.* 2. *Lord Raymond*, 65.—2. *Anno* 34 *Eliz.* the Judges remonstrated against the exercise of this power; and declared that all prisoners may be discharged, unless committed by the Queen's command, or by her whole council, or by one or two of them for *High Treason.* 1 *And.* 297. —3. Melvin was committed *an.* 4 *C.* 1. by Secretary Conway, on suspicion of high-treason: but the Court thought the cause of the suspicion should have been expressed. *Palm.* 558. —4. Crofton was committed by the *council*, *an.* 14 *C.* 2. for high-treason generally. *Vaugh.* 142. 1 *Sid.* 78. 1 *Keb.* 305. —5. Fitzpatrick by the *Privy Council*, *an.* 7 *W.* 3. for high-treason, in aiding an escape; and bailed for neglect of prosecution. 1 *Salk.* 105.—6. Yaxley was committed, *an.* 5 *W. & M.* by the Secretary of State, Lord Nottingham, for refusing to declare if he was a Jesuit. *Carth.* 291. *Skinn.* 369. —7. Kendal and Roe were committed, *an.* 7 *W.* 3. by Secretary Trumbal for high-treason, in assisting the escape of Montgomery; and by *Holt*, C. J. held good, but the prisoners were bailed. 4 *S. T.* 559. 5 *Mod.* 78. *Skin.* 596. *Holt.* 144. *Lord Raym.* 61. 5. *Comb.* 343. 12 *Mod.* 82. 1 *Salk.* 347. —8. Derby was committed, 10 *An.* for publishing a libel (quære for *felony*, 11 *S. T.* 311.), called the Observator; and the court held the warrant good and legal. *Fortesc.* 140. 11 *S. T.* 309.—9. Sir W. Wyndham was committed, *an.* 4 *G.* 1. by Secretary Stanhope for high-treason: and by *Parker*, C. J. held good. *Stra.* 3. 3 *Vin.* 516.—10. Lord Scarsdale and Duplin and Harvey were committed, *an.* 2 *Geo.* 1. by Lord Townsend, Secretary of State, for treasonable practices, and admitted to bail. 3 *Vin.* 534.—11. Earbury was arrested and committed by warrant from the Secretary of State, for being the author of a seditious libel, and his papers seized, and he continued on his recognizance, *an.* 7 *Geo.* 2. 8 *Mod.* 177. 11 *S. T.* 309.—12. Hensey was committed, *an.* 31 *Geo.* 2. by the Earl of Holderness, Secretary of State, for high-treason, in adhering to the king's enemies. 1 *Burr.* 642.—13. Shebbear was committed, 31 *Geo.* 2. on two warrants from the Secretary of State, for a libel. 1 *Burr.* 640.—14. Wilkes was committed, *an.* 3 *Geo.* 3. by warrant from the Earl of Halifax, Secretary of State, for a libel, but discharged by his privilege of parliament. 2 *Wils.* 150. 11 *S. T.* 302.—15. Sayer was apprehended, 18 *Geo.* 3. by warrant from the Earl of Rochford, Secretary of State, for high-treason, and bailed by *Lord Mansfield*. *Black. Rep.* 1165.—See further title *Bail*, II. and also title *Arrest.*

As to the manner of commitment, it is enacted by 2 and 3 *P. & M. c.* 10. that justices of peace shall examine persons brought before them for felony, &c. or suspicion thereof, before they commit them to prison, and shall bind their accusers to give evidence against them. See 2 *Hawk. P. C. c.* 16. § 11.

A Justice of the peace may detain a prisoner a reasonable time, in order to examine him; and it is said, that three days is a reasonable time for this purpose. 2 *Hawk. P. C. c.* 16. § 12. *Dalt. c.* 125. 2 *Inst.* 52. 591.

Every commitment must be in writing, and under the hand and seal, and shew the authority of him that made it, and the time and place, and must be directed to the keeper of the prison. It may be either in the king's name, and only attested by the justice, or in the justice's name. It may command the gaoler to keep the party in safe and close custody; for this being what he is obliged to do by law, it can be no fault to command him so to do. 2 *Hawk. P. C. c.* 16. § 13. 14. 15.

It ought to set forth the crime with convenient certainty, whether the commitment be by the Privy Council, or any other authority; otherwise the officer is not punishable by reason of such *mittimus*, for suffering the party to escape; and the court before whom he is removed by *habeas corpus*, ought to discharge or bail him; and this doth not only hold where no cause at all is expressed in the commitment, but also where it is so loosely set forth, that the court cannot judge whether it were a reasonable ground for imprisonment or not. 2 *Hawk. P. C. c.* 16. § 17. See titles *Arrest*, *Bail.*

A commitment for high treason or felony in general, without expressing the particular species, has been held good. 2 *Hawk. P. C. c.* 16. § 16. But now, since the *Habeas-corpus* act, it seems that such a general commitment is not good; and therefore where A. and B. were committed for aiding and abetting Sir James Montgomery to make his escape, who was committed by a warrant of a Secretary of State for high-treason; on a *Habeas-corpus* they were admitted to bail, because it did not appear of what species of treason Sir James was guilty. *Skin.* 596. 1 *Salk.* 347. S. C.

It is safe to set forth that the party is charged upon oath; but this is not necessary, for it hath been resolved, that a commitment for treason, or for suspicion of it, without setting forth any particular accusation or ground of the suspicion is good. 2 *Hawk. P. C. c.* 16. § 17. This resolution was in the case of Sir W. Wyndham, 2 *Geo.* 1. who was committed by the Secretary of State for high-treason, generally. *Stra.* 2. 3 *Vin.* 515. at large. It was confirmed by *Pratt*, C. J. in Wilkes's case, committed by a similar warrant for a libel. 2 *Wils.* 158. 11 *S. T.* 304. And Mr. J. *Foster* says, in cases wherein the justice of the peace *hath jurisdiction*, the legality of his warrant will never depend on the truth of the information whereon it is grounded. *Curtis's Case.* 136.

Every such *mittimus* ought to have a lawful conclusion, *viz.* that the party be safely kept till he be delivered by law, or by order of law, or by due course of law; or that he be kept till further order (which shall be intended of the order of law), or to the like effect; and if the party be committed only for want of bail, it seems to be a good conclusion of the commitment, that he be kept till he find bail: but a commitment till the person who makes it shall take further order, seems not to be good; and it seems that the party committed by such or any other irregular *mittimus* may be bailed. 2 *Hawk. P. C. c.* 16. § 18.

Also a commitment grounded on an act of parliament ought to be conformable to the method prescribed by such statute; as where the churchwardens of Northampton were committed on the 43 *Eliz. c.* 2. and the warrant concluded in the common form, *viz. Until they be duly discharged according to law;* but the statute appointing, *that the party should there remain until he should account*, for want of such conclusion they were discharged. *Carth.* 152. 153. And where a man is committed as a criminal, the conclusion must be, *until he be delivered by due course of law;* if he be committed for contumacy, it should be, *until he comply.*

II. All commitments must be to some prison within the realm of England. For,

By the *stat.* 31 *Car.* 2. *c.* 2. the *Habeas-corpus* act, it is enacted, "That no subject of this realm, being an inhabitant or resiant of this kingdom of England, dominion of Wales, or town of Berwick upon Tweed, shall or may be sent prisoner into Scotland, Ireland, Jersey, Guernsey, Tangier, or into any parts, garrisons, islands, or places beyond the seas, which then were, or at any time after should be, within or without the dominions of his Majesty."

By *stat.* 14 *Ed.* 3. *c.* 10. Sheriffs shall have the custody of the gaols as before that time they were wont to have, and they shall put in such under-keepers for whom they will answer. And this is confirmed by *stat.* 19 *Hen.* 7. *c.* 10. Also by *stat.* 5 *Hen.* 4. *c.* 10. it is enacted, "That none be imprisoned by any justice of the peace, but only in the common gaol, saving to lords, and others who have gaols, their franchise in this case." It seems that the king's grant since the statute 5 *H.* 4. *c.* 10. to privatep ersons to have the custody of prisoners committed by justices of the peace is void. And it is said, that none can claim a prison as a franchise, unless he have also a gaol-delivery. 2 *Hawk. P. C. c.* 16. § 7. See *stat.* 11 & 12 *W.* 3. *c.* 19. § 3. made perpetual by *stat.* 6. *G.* 1. *c.* 19. to enable justices of peace to build and repair gaols in their respective counties, where a clause like that in *stat.* 5 *H.* 4. *c.* 10. is inserted.

Also it hath been held, that regularly no one can justify the detaining a prisoner in custody out of the common gaol, unless there be some particular reason for so doing; as if the party be so dangerously sick, that it would apparently hazard his life to send him to the gaol; or there be evident danger of a *rescous* from rebels, &c. yet constant practice seems to authorise a commitment to a messenger; and it is said that it shall be intended to have been made in order for the carrying of the party to gaol. 2 *Hawk. P. C. c.* 16. § 8. 9.

And it is said, that if a constable bring a felon to gaol, and the gaoler refuse to receive him, the town where he is constable ought to keep him till the next gaol-delivery. *H. P. C.* 114. 2 *Hawk. P. C. c.* 16. § 9.

A prisoner in the custody of the King's messenger, on a warrant from the Secretary of State, who is brought into K. B. by *habeas-corpus* to be bailed, but has not his bail ready, cannot be committed to the same custody he came in; but must be committed to the custody of the marshal, which will prevent the necessity of suing out a new *habeas-corpus;* as he may be brought up from the prison of the court, by a rule of court, whenever he shall be prepared to give bail. 1 *Burr.* 460.

If a person arrested in one county for a crime done in it, fly into another county, and be retaken there, he may be committed by a justice of the first county to the gaol of such county. *H. P. C.* 93. But by the better opinion, if he had before any arrest fled into such county, he must be committed to the gaol thereof by a justice of such county. 2 *Hawk. P. C. c.* 16. § 8. *Dalt. c.* 118. Also it seems to be laid down as a rule by some books, that any offender may be committed to the gaol next to the place where he was taken, whether it lie in the same county or not. 2 *Hawk. P. C. c.* 16. § 8.—See *post. stat.* 24 *Geo.* 2. *c.* 55.

By *stat.* 6 *Geo.* 1. *c.* 19. vagrants and other criminals, offenders, and persons charged with small offences, may for such offences, or for want of sureties, be committed either to the common gaol, or house of correction, as the justices in their judgment shall think proper.

By *stat.* 24 *Geo.* 2. *c.* 55. if a person is apprehended upon a warrant indorsed, in another county, for an offence not bailable, or if he shall not there find bail, he shall be carried back into the first county, and be committed, or, if bailable, bailed by the justices in such first county.

As to the *charges* of commitment, it is enacted by *stat.* 3 *Jac.* 1. *c.* 10. that offenders committed are to bear their own charges, and the charges of those who are appointed to guard them; and if they refuse to pay, the charges may be levied by sale of their goods. And by *stat.* 27 *Geo.* 2. *c.* 3. if they have no goods &c. within the county where they are apprehended, the justices are to grant a warrant on the treasurer of the county for payment of the charges. But in Middlesex the same shall be paid by the overseers of the poor of the parish where the person was apprehended.

By the *stat.* 3 *Hen.* 7. *c.* 3. the sheriff shall certify the names of all prisoners in his custody to the justices of gaol-delivery.

III. As prisoners ought to be committed at first to the proper prison, so ought they not to be removed thence, except in some special cases; and to this purpose it is enacted by 31 *Car.* 2. *c.* 2. "that if any subject of this realm shall be committed to any prison, or in custody of any officer or officers whatsoever, for any criminal, or supposed criminal matter, that the said person shall not be removed from the said prison and custody, into the custody of any other officer or officers; unless it be by *habeas-corpus*, or some other legal writ; or where the prisoner is delivered to the constable or other inferior officer, to carry such prisoner to some gaol; or where any person is sent by order of any judge of assize, or justice of the peace, to any common work-house, or house of correction; or where the prisoner is removed from one prison or place to another within the same county, in order to a trial or discharge by due course of law; or in case of sudden fire or infection, or other necessity; upon pain that he who makes out, signs, or countersigns, or obeys, or executes such warrant, shall forfeit to the party grieved 100*l.* for the first offence, 200*l.* for the second, &c. 2 *Hawk. P. C. c.* 16. § 10.

A person legally committed for a crime, certainly appearing to have been done by some one or other, cannot be lawfully discharged by any other but by the King, till he be acquitted on his trial, or have an *ignoramus* found by the grand jury, or none to prosecute him on a proclamation for that purpose, by the justices of gaol-delivery. But if a person be committed on a bare suspicion, without any appeal or indictment, for a supposed crime, where afterwards it appears that there was none; as for the murder of a person thought to be dead, who afterwards is found to be alive: it hath been holden that he may be safely dismissed without any farther proceeding; for that he who suffers him to escape, is properly punishable only as an accessory to his supposed offence; and it is impossible there should be an accessory where there can be no principal; and it would be hard to punish one for a contempt

founded on a suspicion appearing in so uncontested a manner to be groundless. 2 *Hawk. P. C. c.* 16. § 22. But the safest way for the gaoler is to have the authority of some court or magistrate, for discharging the prisoner.

If the words of a statute are not pursued in a commitment, the party shall be discharged by *habeas-corpus*. See titles *Arrest, Bail, Imprisonment, Prisoner*, &c.

COMMOIGNE, *Fr.*] A fellow monk; one that lives in the same convent. 3 *Inst.* 15.

COMMONALTY, *populus, plebs, communitas.*] In *Art. super chartas*, 28 *Ed.* 1. *c.* 1. the words *Tout le Commune d'Engleterre* signify all the people of England. 2 *Inst.* 539.

But this word is generally used for the middle sort of the king's subjects, such of the commons as are raised beyond the ordinary sort, and coming to have the managing of offices, by that means are one degree under burgesses, which are superior to them in order and authority; and companies incorporated are said to consist of masters, wardens, and *commonalty*, the first two being the chief, and the others such as are usually called of the livery. The ordinary people, and freeholders, or at best knights and gentlemen, under the degree of baron, have been of late years called *communitas regni*, or *tota terræ communitas*; yet anciently, if we credit *Brady*, the barons and tenants *in capite* or military men, were the *community* of the kingdom; and those only were reputed as such in our most ancient histories and records. *Brady's Gloss. to his Introduct. to Engl. Hist.*

## COMMON,

*Communia.*] A right or privilege, which one or more persons claim to take or use, in some part or portion of that which another man's lands, waters, woods, &c. do naturally produce; without having an absolute property in such land, waters, wood, &c. It is called an *incorporeal right*, which lies in *grant*, as if originally commencing on some agreement between lords and tenants, for some valuable purposes: which by age being formed into a prescription continues, although there be no deed or instrument in writing which proves the original contract or agreement. 4 *Co.* 37. 2 *Inst.* 65. 1 *Vent.* 387.

I. *Of the several Kinds of Commons.*
II. *The Interest of the Owner of the Soil; wherein, of* Approvement *and* Inclosure.
III. *The Commoners' Interest in the Soil; and herein, of* Apportionment *and* Extinguishment.

I. There is not only common of *pasture*, but also common of *piscary* or *fishing*; common of *estovers*; common of *turbary*, which see under their several heads. The word *common*, however, in its most usual acceptation, signifies *common of pasture*. This is a right of feeding one's beast on another's land: for in those waste grounds usually called commons, the property of the soil is generally in the lord of the manor, as in *common fields*, it is in the particular tenants. This kind of common is divided into *common in gross, common appendant, common appurtenant*, and *common per cause de vicinage*.

*Common in gross* is a liberty to have *common* alone, without any lands or tenements, in another person's land, granted by deed to a man and his heirs, or for life, &c. *F. N. B.* 31. 37. 4 *Rep.* 30.

*Common appendant* is a right belonging to a man's arable land, of putting beasts *commonable* into another's ground. And *common appurtenant* is belonging to an estate for all manner of beasts *commonable* or not *commonable*. 4 *Rep.* 37. *Plowd.* 161.

*Common appendant* and *appurtenant* are in a manner confounded, as appears by *Fitzherbert*; and are by him defined to be a liberty of *common* appertaining to, or depending on a freehold; which *common* must be taken with beasts *commonable*, as horses, oxen, kine, and sheep; and not with goats, hogs, and geese. But some make this difference, that *common appurtenant* may be severed from the land whereto it pertains; but not *common appendant*; which, according to *Sir Edward Coke*, had this beginning: when a lord enfeoffed another of arable land to hold of him in *socage*, the feoffee, to maintain the service of his plough, had at first, by the curtesy or permission of the lord, *common* in his wastes for necessary beasts to eat and compost his land, and that for two causes; one, for that it was tacitly implied in the feoffment, by reason the feoffee could not till or compost his land without cattle, and cattle could not be sustained without pasture; so by consequence, the feoffee had, as a thing necessary and incident, *common* in the waste and lands of the lord; and this may be collected from the ancient books and statutes: and the second reason of this *common* was, for the maintenance and advantage of tillage, which is much regarded and favoured by the law. *F. N. B.* 180. 4 *Rep.* 37.

*Common per cause de vicinage*; *common* by reason of neighbourhood; is a liberty that the tenants of one lord in one town have to *common* with the tenants of another lord in another town: it is where the tenants of two lords have used, time out mind, to have *common* promiscuously in both lordships lying together and open to one another. 8 *Rep.* 78. And those that challenge this kind of *common*, which is usually called *intercommoning* may not put their cattle in the *common* of the other lord, for then they are distrainable; but they may turn them into their own fields, and if they stray into the *neighbouring common*, they must be suffered. *Termes de Ley.* The inhabitants of one town or lordship may not put in as many beasts as they will, but with regard to the freehold of the inhabitants of the other: for otherwise it were no good neighbourhood, upon which all this depends. *Ibid.*

If one lord encloses the *common*, the other town cannot then *common*: but though the *common of vicinage* is gone, *common appendant* remains. 4 *Rep.* 38. 7 *Rep.* 5. Every *common per cause de vicinage* is a *common* appendant. 1 *Danv. Abr.* 799.

This is indeed only a permissive right intended to excuse what in strictness is a trespass in both, and to prevent a multiplicity of suits. And therefore either township may inclose and bar out the other, though they have intercommoned time out of mind. 2 *Comm.* 34.

*Common appendant* is only to ancient *arable* land; not to a house, meadow, pasture, &c. It is against the nature of *common appendant* to be appendant to meadow or pasture: but if in the beginning, land be arable, and of late a house hath been built on some part of the land, and some acres are employed to meadow and pasture, in such case it is appendant; though it must be pleaded as appendant to the land, and not to the house, pasture, &c. 1 *Nels. Abr.* 457. This may be *common* appendant, though it belongs to a manor, farm, or plough-land: and *common* appendant is of *common* right: but it is not *common* appendant, unless it has been appendant time out of mind. 1 *Danv.* 746. It may be upon condition; be for all the year, or for a certain time, or for a certain number of beasts, &c. by usage: though it ought to be for such cattle as plough and compost the land, to which it is appendant. *Ibid.* 797. *Common* appendant may be to *common* in a field after the corn is severed, till the ground is re-sown: so it may be to have *common* in a meadow after the hay is carried off the same, till Candlemas, &c. *Yelv.* 185.

This *common*, which is in its nature without number, by custom may be limited as to the beasts: *common* appurtenant ought always to be for those *levant* and *couchant*, and may be *sans number*. *Plowd.* 161. A man may prescribe to have *common* appurtenant for all manner of cattle, at every season in the year. 25 *Ass.* 8. *Common* by prescription for all manner of *commonable* cattle as belonging to a tenement, &c.

must be for cattle *levant* and *couchant* upon the land (which is so many as the land will maintain), or it will not be good: and if a person grants *common sans number*, the grantee cannot put in so many cattle, but that the grantor may have sufficient *common* in the same land. 1 *Danv. Abr.* 798, 799. He who hath *common* appendant or appurtenant, can keep but a number of cattle proportionable to his land; for he can *common* with no more than the land to which his *common* belongs is able to maintain. 3 *Salk.* 93. *Common appurtenant* may be to a house, pasture, &c. though *common* appendant cannot; but it ought to be prescribed for as against *common* right: and uncommonable cattle, as hogs, goats, &c. are appurtenant: this *common* may be created by grant at this day; so may not *common* appendant. 1 *Inst.* 122. 1 *Rol. Abr.* 398.

*Common* appurtenant for a certain number of beasts may be granted over. 1 *Danv.* 802.

In Scotland, in those districts where there is no coal, the inhabitants are chiefly supplied with fuel from the mosses with which the country abounds. Where one estate has only a small quantity of this moss, it is not unusual for the proprietor of a neighbouring estate where there is a superfluity, to sell to the proprietor of the defective estate a perpetual liberty to his tenants to cut moss for fuel, on a certain annual rent, *per fine* or *finnilty* (which terms are synonymous), and this is called "an heritable moss tolerance." See *Dingwall* v. *Farquharson. Dom. Proc. Journals* sub an. 1797.

II. The property of the soil in the *common* is entirely in the lord; and the use of it, jointly in him and the *commoners*.

Lords of manors may depasture in *commons* where their tenants put in *cattle;* and a prescription to exclude the lord is against law. 1 *Inst.* 122.

The lord may agist the cattle of a stranger in the *common* by prescription: and he may license a stranger to put in his cattle, if he leaves sufficient room for the *commoners*. 1 *Danv.* 795. 2 *Mod.* 6. Also the lord may surcharge, &c. an overplus of the *common:* and if, where there is not an overplus, the lord surcharges the *common*, the *commoners* are not to distrain his beasts; but must commence an action against the lord. *F. N. B.* 125. But it is said, if the lord of the soil put cattle into a *close*, contrary to custom, when it ought lie fresh, a *commoner* may take the cattle damage-feasant: otherwise it is a general rule that he cannot distrain the cattle of the lord. 1 *Danv.* 807.

The lord may distrain where the *common* is surcharged; and bring action of trespass for any trespass done in the *common*. 9 *Rep.* 113.

A lord may make a pond on the *common:* though the lord cannot dig pits for gravel or coal; the statutes of *approvement* extending only to inclosure. 3 *Inst.* 204. 9 *Rep.* 112. 1 *Sid.* 106. If the lord makes a warren on the *common*, the *commoners* may not kill the conies; but are to bring their action, for they may not be their own judges. 1 *Rol.* 90. 405.

The right of commoners in the common may be subservient to the right of the lord in the soil, so that the lord may dig clay-pits there, or empower others so to do, without leaving sufficient herbage for the commoners, if such a right can be proved to have been always exercised by the lord. 5 *T. R.* 411.

So the lord may, with the consent of the Homage, grant part of the soil of the common for building, if he has immemorially exercised such a right. 5 *T. R.* 417. *n.*

By statute 20 *H.* 3. *c.* 4. (*Stat. of Merton*), lords may *approve* against their tenants, *viz.* inclose part of the waste, &c. and thereby discharge it from being *common*, leaving *common* sufficient; and neighbours as well as tenants claiming *common of pasture*, shall be bound by it.—If the lord incloses on the *common*, and leaves not *common* sufficient, the *commoners* may not only break down the inclosures, but may put in their cattle, although the lord ploughs and sows the land. 2 *Inst.* 88. 1 *Rol. Abr.* 406.

Where the tenants of the manor have a right to dig gravel on the wastes, or to take estovers, there the lord has no right under the statute of *Merton*, to inclose and approve the wastes of the manor.—Yet a custom in a manor that any person being desirous of inclosing, may apply to the court, &c. first obtaining the consent of the lord, does not abridge the lord's common law-right of inclosing without any such application, provided he leave common sufficient for the tenants. 2 *Term Rep.* 391. 392.

Any person who is seised in fee of part of a waste within a manor may approve, leaving a sufficiency of common, though he be not lord of the manor. 3 *T. R.* 445.

The lord of a manor, or his grantee, may inclose and approve part of a common, against tenants having common of pasture, notwithstanding they have also some other right on the common, as a right to dig for sand, &c. if he leave sufficient common of pasture. 6 *T. R.* 741.

There can be no approvement by the lord in derogation of a right of common of Turbary. 1 *W. P. T.* 435.

By *stat.* 22 *Geo.* 3. *c.* 36. owners of common, with the consent of the majority, in number and value, of the commoners; the majority of the commoners, with consent of the owners; or any persons with the consent of both, may inclose any part of a common for the growth of wood. If the wood is destroyed, the offender may be punished according to *stat.* 1 *G.* 1. *c.* 48: if not convicted in six months, the owner shall have satisfaction from the adjoining parishes, &c. as for fences overthrown by *stat. West.* 2.—Persons cutting wood on commons shall incur the same penalty. And by *stat.* 31 *Geo.* 2. *c.* 41. the recompence is to be paid to persons interested, in proportion to their interest. Tenants for life, or for years determinable on lives, may consent for their term; but that binds not, after determination of their estate.

By *stat.* 13 *Geo.* 3. *c.* 81. § 21. *rams* are not to remain on commons from the 25th of August to the 25th of November.

III. A *commoner* hath only a special and limited interest in the soil, but yet he shall have such remedies as are commensurate to his right, and therefore may distrain beasts damage-feasant, bring an *action on the case*, &c. but not being absolute owner of the soil, he cannot bring a general action of *trespass* for a trespass done upon the *common*. See *Bridg.* 10. 11. *Godb.* 123. 124. 2 *Leon.* 201. 202.

Common for cattle levant and couchant cannot be claimed by prescription as appurtenant to a house without any curtilage or land. *Scholes* v. *Hargrave.* 5 *T. R.* 46. & see 8 *T. R.* 396.

A *commoner* cannot regularly do any thing on the soil which tends to the melioration or improvement of the *common*, as cutting down of bushes, fern, &c. 1 *Sid.* 251. 12 *Hen.* 8. *c.* 2. 13 *Hen.* 8. *c.* 115. Therefore if a *common* every year in a flood is surrounded with water, the *commoner* cannot make a trench in the soil to avoid the water, because he has nothing to do with the soil, but only to take the grass with the mouth of the cattle. 1 *Rol. Abr.* 405. 2 *Bulst.* 116. —But see *ante* II. and *post*.

Every *commoner* may break the *common* if it be inclosed; and although he does not put his cattle in at the time, yet his right of commonage shall excuse him from being a trespasser. *Lit. Rep.* 58. See 1 *Rol. Abr.* 406. That is, supposing the inclosure made by the lord, and that there is not sufficient *common;* or that the inclosure is made by any other person than the lord.

A commoner cannot justify cutting down trees planted by the lord on the waste, though there be not sufficiency of common left: but his remedy is by action on the case, or by assize. 6 *T. R.* 483. (*Affirmed in Cam. Scacc.* 1 *B. & P.* 13.)

If a tenant of the freehold ploughs it, and sows it with

corn, the *commoner* may put in his cattle, and therewith eat the corn growing upon the land; so if he lets his corn lie in the field beyond the usual time, the other *commoners* may notwithstanding, put in their beasts. 2 *Leon.* 202. 203.

The *commoner* cannot use *common* but with his own proper cattle: but if he hath not any cattle to manure the land, he may borrow other cattle to manure it, and use the *common* with them; for by the loan, they are in a manner made his own cattle. 1 *Danv.* 798. Grantee of *common* appurtenant, for a certain number of cattle, cannot *common* with the cattle of a stranger: he that hath *common in gross*, may put in a stranger's cattle, and use the *common* with such cattle. *Ibid.* 803. *Common* appendant or appurtenant cannot be made *common in gross:* and *approvement* extends not to *common in gross.* 2 *Inst.* 86.

A *commoner* may distrain beasts put into the *common* by a stranger, or every *commoner* may bring action of the case, where damage is received. 9 *Rep.* 11. But one *commoner* cannot distrain the cattle of another *commoner*, though he may those of a stranger, who hath no right to the *common.* 2 *Lutw.* 1238.

Wherever there is colour of right for putting in cattle, a commoner cannot distrain; where there is no colour he may: so he may distrain a stranger's cattle, but not those of a commoner, *though he exceeds* his number. Where writ of admeasurement lies, he cannot distrain.—*Quære*, whether he may distrain cattle surcharged, where the right of common is for a number certain. 4 *Burr.* 2426. 1 *Black. Rep.* 673.

The usual remedies for surcharging the common, are either by distraining so many of the beasts as are above the number allowed, or else by an action of trespass; both which may be had by the lord; or lastly, by a special action on the case for damages, in which any commoner may be plaintiff. *Freem.* 273. But the ancient and most effectual method of proceeding, is by writ of *admeasurement of pasture.* This lies, either where a common appurtenant or in gross is certain as to number; or where a man has common appendant, or appurtenant to his land, the quantity of which common has never yet been ascertained. In either of these cases, as well the lord, as any of the commoners, is entitled to this writ of admeasurement; which is one of those writs that are called *vicontiel* (2 *Inst.* 369. *Finch. L.* 314), being directed to the sheriff (*vicecomiti*), and not to be returned to any superior court, till finally executed by him.

It recites a complaint, that the defendant hath surcharged (*superoneravit*) the common; and therefore commands the sheriff to admeasure and apportion it; that the defendant may not have more than belongs to him, and that the plaintiff may have his rightful share. And upon this suit all the commoners shall be admeasured, as well those who have not, as those who have surcharged the common; as well the plaintiff as defendant. *F. N. B.* 125.—The execution of this writ must be by a jury of twelve men, who are upon their oaths to ascertain, under the superintendence of the sheriff, what and how many cattle each commoner is entitled to feed. And the rule for this admeasurement is generally understood to be, that the commoner shall not turn more cattle upon the common, than are sufficient to manure and stock the land to which his right of common is annexed: or, as our ancient law expressed it, such cattle as only are *levant* and *couchant* upon his tenement; (*Bro. Abr.* 1. *Prescription* 28;) which being a thing uncertain before admeasurement, has frequently, though erroneously, occasioned this unmeasured right of common to be called a common *without stint*, or *sans nombre* (*Hardr.* 117), a thing which, though possible in law, does in fact very rarely exist. *Lord Raym.* 407.

If, after the admeasurement has thus ascertained the right, the same defendant surcharges the common again, the plaintiff may have a writ of *second surcharge* (*de secundâ superoneratione*), which is given by the *stat. Westm.* 2. 13 *E.* 1. *c.* 8. and thereby the sheriff is directed to inquire by a jury, whether the defendant has in fact again surcharged the common, contrary to the tenor of the last admeasurement; and if he has, he shall then forfeit to the king the supernumerary cattle put in, and also shall pay damages to the plaintiff. *F. N. B.* 126. 2 *Inst.* 370.—This process seems highly equitable, for the first offence is held to be committed through mere inadvertence, and therefore there are no damages or forfeiture on the first writ, which was only to ascertain the right which was disputed: but the second offence is a wilful contempt and injustice, and therefore punished, very properly, with not only damages, but also forfeiture. And herein the right, being once settled, is never again disputed; but only the fact is tried, whether there be any second surcharge or no: which gives this neglected proceeding a great advantage over the modern method by action on the case, wherein the *quantum* of common belonging to the defendant must be proved upon every fresh trial, for every repeated offence.

This injury, by surcharging, can, properly speaking, only happen where the common is *appendant* or *appurtenant*, and of course limited by law; or where, when *in gross*, it is expressly limited and certain; for where a man hath common *in gross*, *sans nombre*, or without *stint*, he cannot be a surcharger. However, even where a man is said to have common without stint, still there must be left sufficient for the lord's own beasts. 1 *Rol. Abr.* 399. For the law will not suppose that, at the original grant of the common, the lord meant to exclude himself.

One commoner who has surcharged may nevertheless maintain an action against another for surcharging the common. 4 *T. R.* 471.

There is yet another disturbance of common, when the owner of the land, or other person, so incloses or otherwise obstructs it, that the commoner is precluded from enjoying the benefit, to which he is by law entitled. This may be done either by erecting fences, or by driving the cattle off the land, or by ploughing up the soil of the common. *Cro. Eliz.* 198. Or it may be done by erecting a warren therein, and stocking it with rabbits in such quantities, that they devour the whole herbage, and thereby destroy the common. For in such case, though the commoner may not destroy the rabbits, yet the law looks upon this as an injurious disturbance of his right, and has given him his remedy by action against the owner. *Cro. Jac.* 195. This kind of disturbance does indeed amount to a disseisin, and if the commoner chuses to consider it in that light, the law has given him an assise of *novel disseisin*, against the lord, to recover the possession of his common. *F. N. B.* 179.—Or it has given a writ of *quod permittat*, against any stranger as well as the owner of the land, in case of such a disturbance to the plaintiff as amounts to a total deprivation of his common; whereby the defendant shall be compelled to *permit* the plaintiff to enjoy his common as he ought. *Finch. L.* 275. *F. N. B.* 123. But if the commoner does not chuse to bring a *real* action to recover seisin, or to try the right, he may (which is the easier and more usual way) bring an action on the case for his damages, instead of an assise, or a *quod permittat. Cro. Jac.* 195. See 3 *Comm.* 238—240.

Twenty years' adverse possession of a waste inclosed is a bar to the entry of a commoner. 2 *W. P. T.* 156.

If any *commoner* incloses, or builds on the *common*, every *commoner* may have an action for the damage. Where turf is taken away from the *common*, the lord only is to bring the action: but it is said the *commoners* may have an action for the injury, by entering on the *common*, &c. 1 *Rol. Abr.* 89. 398. 2 *Leon.* 201.

If a *commoner* who hath a *freehold* in his *common* be ousted of, or hindered therein, that he cannot have it so beneficially as he used to do; whether the interruption be by the lord or

any stranger, he may have an *assise* against him: but if the *commoner* hath only an *estate for years*, then his remedy is by *action on the case*. And if it be only a small trespass, that is little or no loss to the *commoner*, but he hath *common* enough besides, the *commoner* may not bring any action. 4 *Rep.* 37. 8 *Rep.* 79. *Dyer* 316.

A *commoner* may maintain an action on the case for an injury done to the *common* by taking away from thence the manure which was dropped on it by the cattle: though his proportion of the damage amount only to a farthing: at least the smallness of the damage found is no ground for a non-suit. 2 *T. R.* 154.

A *commoner* cannot dig clay on the *common*, which destroys the grass, and carrying it away doth damage to the ground: so that the other *commoners* cannot enjoy the *common*, *in tam amplo modo* as they ought. *Godb.* 344. Also a *commoner* may not cut bushes, dig trenches, &c. in the *common*, without a custom to do it. 1 *Nels.* 462. If he makes any thing *de novo* he is a trespasser: he can do nothing to impair the *common*; but may reform a thing abused, fill up holes, &c. 1 *Browl.* 208.

A *commoner* may abate hedges erected on a *common*; for though the lord hath an interest in the soil, by abating the hedges, the *commoner* doth not meddle with it. 2 *Mod.* 65. Any man may by prescription have *common* and feeding for his cattle in the king's highway, though the soil doth belong to another. But the occupation of *common* by usurpation, will not give title to him that doth occupy it, unless he hath had it time beyond memory.

Upon agreement between two *commoners* to inclose a *common*, a party having interest not privy to the agreement, will not be bound; but one or two wilful persons shall not hinder the public good. *Chan. Rep.* 48. *Commons* must be driven yearly at Michaelmas, or within fifteen days after: infected horses, and stone-horses under size, &c. are not to be put into *commons*, under forfeitures, by *stat.* 32 *H.* 8. *c.* 13. New erected cottages, though they have four acres of ground laid to them, ought not to have *common* in the waste. 2 *Inst.* 740. In law proceedings, where there are two distinct *commons*, the two titles must be shewn: cattle are to be alledged *commonable*; and *common* ought to be in lands *commonable*: and the place is to be set forth where the messuage and lands lie, &c. to which the *common* belongs. 1 *Nels.* 462. 463.

*Common* appendant, because it is of *common* right, shall be *apportioned* by the *commoner's* purchase of part of the land in which he hath such *common*; but *common* appurtenant shall be extinct by the *commoner's* purchase of part of the land, in which, &c. Both *common* appendant and appurtenant shall be *apportioned* by alienation of part of the land to which the *common* is appendant or appurtenant. *Co. Lit.* 122. *Hob.* 235. 8 *Co.* 78. *Owen* 122. 4 *Co.* 37. *Cro. Eliz.* 594.

A release of *common* in one acre, is an extinguishment of the whole *common*. See 4 *Co.* 37.

If A. hath *common* in the lands of B. as appurtenant to a messuage, and after B. enfeoffs A. of the said lands, whereby the *common* is extinguished; and then A. leases to B. the said messuage and lands, with all *commons*, &c. used or occupied with the said messuage; this is a good grant of a new *common* for the time. *Cro. Eliz.* 570. If several persons are seised of several parts of a *common*, and a *commoner* purchases the inheritance of one part, his entire *common* is extinct. 1 *And.* 159. When a man hath *common* appendant for a certain number of cattle, and to a certain parcel of land, if he sell part of it, the *common* is not extinguished; for the purchaser shall have *common pro rata*: but it is otherwise in *common* appurtenant. 8 *Rep.* 78. 1 *Nels.* 460. See *Fitz. Abr. tit. Comm. per tot.*

By *stat.* 13 *Geo.* 3. *c.* 81. in every parish where there are *common field lands*, all the arable lands lying in such fields, shall be cultivated by the occupiers, under such rules as 3-4ths of them in number and value, (with the consent of the land and tithe owners, [the latter not to receive any fines, only rents, § 23.]) shall appoint by writing under their hands: the expence to be borne proportionably, § 1. 2. 4. 7.—Under the management of a *field-master*, or *field reeve*, to be appointed annually in May, § 3. 5. 6.

Persons having right of common, but not having land in such fields, and persons having sheep-walks, may compound for such right, by written agreement, or may, with their consent, have parts allotted them to common upon, § 8. 9. 10. and the balks, slades and meres may be ploughed up, § 11—14.

Lords of manors with the consent of 3-4ths of the commoners, on the wastes and commons within their manors, may demise (for not more than four years) any part of such wastes, &c. not exceeding 1-12th part; and the clear rents reserved for the same, shall be applied in improving the residue of such wastes, § 14.

In every manor where there are *stinted commons*, in lieu of demising part thereof, assessments on the lords of such manors, and the owners and occupiers of such commons may be made, and the money employed in the improvement of the commons, under the direction of the majority; which (or in some instances 2-3ds) may regulate the depasturing, opening, shutting-up, breaking and unstocking the commons, and the kind of cattle to be allowed the commoners, § 16—21.

All rights relative to commons, previous to this act, are saved: except as against persons who become subject to regulations made under the *statute*, § 27.

As to *Common* in general, see further *Com. Dig.* title *Common*.

Common of Estovers, or *estouviers*, that is *necessaries*, from *estoffer* to furnish.] A liberty of taking necessary wood for the use or furniture of a house, or farm, from off another's estate. 2 *Comm.* 35. Or in the language of the law, for *house-bote*, *plough-bote*, and *hay-bote*. See title *Bote*. What botes are necessary, tenants may take, notwithstanding no mention be made thereof in their leases; but if a tenant take more house-bote than is needful, he may be punished for waste. *Termes de Ley*. Tenant for life may take upon the land demised reasonable estovers, unless restrained by special covenant; and every tenant for years hath three kinds of estovers incident to his estate. 1 *Inst.* 41. When a house, having estovers appendant or appurtenant, is blown down by wind, if the owner rebuilds it in the same place and manner as before, his estovers shall continue: so if he alters the rooms and chambers, without making new chimneys; but if he erect any new chimneys, he will not be allowed to spend any estovers in such new chimneys. 4 *Rep.* 87. 4 *Leon.* 383. If one have a dwelling-house whereunto *common of estovers* doth belong, and the house by fire is burnt down, and a new one built near to the place, or in the place in another form, the estovers are gone: but if the old house be only some of it down, it is otherwise; and in all cases where the alterations to a house do no prejudice to the tertenant or owner of the land or wood, the estovers will remain. *F. N. B.* 180. Where a man hath estovers for life, if the owner cut down all the wood, that there is none left for him, he may bring an *assise of estovers*; and if the tenant have but an estate for years, or at will, he may have an action on the case. *Moor Ca.* 65. 9 *Rep.* 112. If the tenant who hath *common of estovers*, shall use them to any other purpose than he ought, he that owns the wood may bring trespass against him: as where one grants twenty loads of wood to be taken yearly in such a wood, ten loads to burn, and ten to repair pales; here he may cut and take the wood for the pales, though they need no amending, but then he must keep it for that use. 9 *Rep.* 113. *F. N. B.* 58. 159.

*Common of Pasturage*, is the right of pasturing the goods and cattle of the dominant tenement, upon the ground of the servient. *Scotch Dict.*

COMMON OF PISCARY. Is a liberty of fishing in another man's water. *Common of Piscary* to exclude the owner of the soil, is contrary to law: though a person by prescription may have a separate right of fishing in such water, and the owner of the soil be excluded; for a man may grant the water, without passing the soil; and if one grant *separaliam piscariam*, neither the soil nor the water pass, but only a right of fishing. 1 *Inst.* 4. 122. 164. 5 *Rep.* 34. See *Fish* and *Fishery*.

COMMON OF TURBARY. Is a licence to dig turf upon the ground of another, or in the lord's waste. This common is appendant or appurtenant to an house, and not to lands; for turfs are to be burnt in the house: and it may be *in gross*; but it does not give any right to the land, trees, or mines. It cannot exclude the owner of the soil. 1 *Inst.* 4. 122. 4 *Rep.* 37.

There is also a *common* of digging for *coals, minerals, stones*, and the like. All these bear a resemblance to common of pasture in many respects; though in one point they go much farther; common of pasture being only a right of feeding on the herbage or vesture of the soil which renews annually; but common of turbary and those just mentioned, are a right of carrying away the very soil itself.—These several species of common do however all originally result from the same necessity as common of pasture: *viz.* for the maintenance and carrying on of husbandry: common of piscary being given for the sustenance of the tenant's family; common of turbary and fire-bote for his fuel: and house-bote, plough-bote, cart-bote and hedge-bote for repairing his house, his instruments of tillage, and the necessary fences of his grounds. 2 *Comm.* 34. 35.

COMMON BENCH, *Bancus communis*, from the Sax. *banc*, bank, and thence metaphorically a *bench*, high seat or tribunal.] The court of Common Pleas was anciently called *Common Bench*, because the pleas of controversies between *common persons* were there tried and determined. *Camd. Britan.* 113. In law books and references the court of Common Pleas is written C. B. from *Communi Banco* (or C. P.). And the justices of that court are stiled *Justiciarii de Banco*. See title *Common Pleas*.

COMMON DAY OF PLEA IN LAND. Signifies an ordinary day in court, as *Octabis Hilarii, Quindena Paschæ*, &c. It is mentioned in the *stat.* 51 *H.* 3. *stat.* 2. and *stat.* 3. Concerning general *days in bank*, see title *Days in Bank*.

COMMON FIELD LAND. See title *Common*.

COMMON FINE, *finis communis.*] A small sum of money, which the resiants within the liberty of some leets pay to the lords, called in divers places *head silver* or *head pence*, in others *cert money*; and was first granted to the lord, towards the charge of his purchase of the *court-leet*, whereby the resiants have the ease to do their suit within their own manors, and are not compellable to go to the *sheriff's turn*: in the manor of Sheepshead in the county of Leicester, every resiant pays 1*d. per* poll to the lord at the court held after *Michaelmas*, which is there called *common fine*. For this *common fine* the lord may distrain: but he cannot do it without a prescription. 11 *Rep.* 44. There is also *common fine of the county*. See *Fleta, lib.* 7. *c.* 48. and *stat.* 3 *Ed.* 1. *c.* 18.

COMMONS HOUSE OF PARLIAMENT. Is the Lower House of Parliament, so called, because the *Commons* of the realm, that is the knights, citizens, and burgesses returned to parliament, representing the whole body of the Commons do sit there. *Cromp. Jurisd.* See title *Parliament*.

COMMON INTENDMENT. Is common meaning or understanding, according to the subject matter, not strained to any extraordinary or foreign sense: *bar to common intendment* is an ordinary or general bar, which is commonly an answer to the plaintiff's declaration. There are several cases in the law where *common intendment*, and intendment take place; and of *common intendment* a will shall not be supposed to be made by collusion. *Co. Lit.* 78. See *Co. Lit.* 303. *a, b. &c.*

COMMON LAW, *Lex Communis.*] Is taken for the law of this kingdom simply, without any other laws; as it was generally holden before any statute was enacted in parliament to alter the same; and the king's courts of justice are called the *Common Law Courts*. The *Common Law* is grounded upon the *general customs* of the *realm*; and includes in it the *law of nature*, the *law of God*, and the *principles* and *maxims* of the *law*; it is founded upon *reason*: and is said to be the perfection of *reason*, acquired by long study, observation and experience, and refined by learned men in all ages. And it is the common birth-right, that the subject hath for the safe-guard and defence, not only of his goods, lands, and revenues; but of his wife and children, body, fame, and life also. *Co. Lit.* 97. 142. *Treatise of Laws, p.* 2.

According to *Hale*, the *Common Law of England*, is the common rule for administering justice, within this kingdom, and asserts the king's royal prerogatives, and likewise the rights and liberties of the subject: it is generally that law, by which the determinations in the king's *ordinary courts* are guided; and this directs the course of descents of lands; the nature, extent and qualification of estates; and therein the manner and ceremonies of conveying them from one to another; with the forms, solemnities and obligation of contracts; the rules and directions for the exposition of deeds, and acts of parliament: the process, proceedings, judgments and executions of our courts of justice; also the limits and bounds of courts, and jurisdictions; the several kinds of temporal offences and punishments, and their application, &c. *Hale's Hist. of the Common Law, pag.* 24. 44. 45.

As to the *rise of the Common Law*, this account is given by some ancient writers: After the decay of the Roman empire, three sorts of the German people invaded the Britons, *viz.* the Saxons, the Angles, and the Jutes; from the last sprung the Kentish men, and the inhabitants of the Isle of Wight; from the Saxons came the people called East, South, and West Saxons; and from the Angles, the East Angles, Mercians and Northumbrians. These people having different customs, they inclined to the different laws by which their ancestors were governed; but the customs of the West Saxons and Mercians, who dwelt in the midland counties, being preferred before the rest, were for that reason called *jus Anglorum*; and by these laws those people were governed for many ages: but the East Saxons having afterwards been subdued, by the Danes, their customs were introduced, and a third law was substituted, which was called *Dane lage*; as the other was then stiled *West Saxon lage*, &c. At length the Danes being overcome by the Normans, William called the Conqueror, upon consideration of all those laws and customs, abrogated some, and established others; to which he added some of his own country laws, which he judged most to conduce to the preservation of the peace: and this is what we now call the *Common Law*.

But though we usually date our *Common Law* from hence, this was not the original of the *Common Law*; for Ethelbert, the first Christian king of this nation, made the first Saxon laws, which were published by the advice of some wise men of his council: and king Alfred, who lived 300 years afterwards, collected all the Saxon *laws* into one book, and commanded them to be observed through the whole kingdom, which before only affected certain parts thereof; and it was therefore properly called the *Common Law*, because it was common to the whole nation: and soon after it was called, the *folc-right, i. e.* the *people's right*.

Alfred was stiled *Anglicarum legum conditor*: and when the Danes, on the conquest of the kingdom, had introduced their laws, they were afterwards destroyed; and Edward the Confessor out of the former laws composed a body of the *Common Law*; wherefore he is called by our historians *Anglicarum legum restitutor. Blount.* In the reign of *Edw.* 1.

Britton wrote his learned book of the *Common Law* of this realm; which was done by the king's command, and runs in his name, answerable to the *Institutions* of the *Civil Law*, which Justinian assumes to himself, though composed by others. *Staundf. Prerog.* 6. 21. But Justinian ought to be entitled to the honour, as the *Institutes* were composed by his direction. This Britton is mentioned by *Gwin* to have been bishop of Hereford.

Bracton, a great lawyer, in the time of Hen. 3. wrote a very learned treatise of the *Common Law of England*, held in great estimation; and he was said to be Lord Chief Justice of the kingdom. Also the famous and learned Glanvil, Lord Chief Justice in the reign of Hen. 2. wrote a book of the *Common Law*, which is said to be the most ancient composition extant on that subject. Besides these, in the time of Ed. 4. the renowned lawyer Littleton wrote his excellent book of *English Tenures*. In the reign of King James the First, the great oracle of the law, Sir Edward Coke, published his learned and laborious *Institutes* of our law, and commentary on Littleton. About the same time likewise Dr. Cowel, a civilian, wrote a short Institute of our laws. In the reign of King George the First, Dr. Tho. Wood, a civilian and common lawyer, and at last a divine, wrote an Institute of the laws of England, which is something after the manner of the Institutes of the Civil Law.

To conclude the whole of this head, the late learned Judge Blackstone in the reign of George the Third, published his *Commentaries* on the Laws of England, the best *analytic* and most *methodic* system of our laws which ever was published. It is equally adapted for the use of students, and of those gentlemen who choose to acquire that knowledge of our laws, which is, in fact, essentially necessary for every one. See particularly those *Commentaries*, *vol.* 1. *p.* 637. and *vol.* 4. *p.* 411. on this subject.

COMMON PLEAS, *communia placita.*] Is one of the king's courts now constantly held in Westminster Hall; but in ancient time was moveable, as appears by *Magna Charta*, *cap.* 11. Before this charter, of King John and Hen. III. there were but two courts, called the king's courts, *viz.* the King's Bench and the Exchequer, which were then stiled *Curia Domini Regis*, and *Aula Regis*, because they followed the court of the king: and upon the grant of the great charter, the court of Common Pleas was erected and settled in one certain place, i. e. Westminster Hall; and after that, all the writs ran *Quod sit coram justiciariis meis apud Westm.* whereas before, the party was required by them to appear *Coram me vel justiciariis meis*, without any addition of place, &c. But Sir Edward Coke is of opinion in his preface to the eighth report, and 1 *Inst.* 71. *b*, that the court of Common Pleas existed as a distinct court before the Conquest; and was not created by *Magna Charta*, at which time there were *Justiciarii de Banco*, &c. Though before this act, *Common Pleas* might have been held *in Banco Regis*; and all original writs were returnable there.

According to *Madox* the origin of the court of *Common Pleas* is of a much later date than that assigned by Lord *Coke*. He so far agrees with Lord *Coke* as to admit that the *Magna Charta* of Hen. III. rather confirmed than erected the *Bank* or *Common Pleas*; and that such a court was in being several years before the *Magna Charta* of 17 of King John, though it was *then* first made stationary: but in other respects Lord *Coke* and Mr. *Madox* differ widely; for the latter thinks that some time after the conquest there was one great and supreme judicature, called the *Curia Regis*, which he supposes to have been of Norman and not Anglo Saxon original, and to have exercised jurisdiction over common as well as other pleas: that the *Common Pleas* and *Exchequer* were gradually separated from the *Curia Regis*, and became jurisdictions wholly distinct from it; and that the separation of the *Common Pleas* began in the reign of Richard I. or early in the reign of King John, and was completed by Hen. III. See *Mad. Hist. Exc.* 63. 549. fo. ed. 3 *Comm.* 37. 4 *Inst.* 99. 1 *Inst.* 71. *b*; and the note there.

Writs returnable in this court, are now *coram justicariis nostris apud Westm.* But original writs, &c. returnable in B. R. are *Coram nobis ubicunque fuerimus in Angliâ.* The jurisdiction of the court of C. P. is general, and extends itself throughout England: it holds plea of all civil causes at Common Law, between subject and subject, in actions real, personal and mixed; and it seems to have been the only court for real causes. In personal and mixed actions it hath a concurrent jurisdiction with the *King's Bench*: but it hath no cognisance of pleas of the crown; and *Common Pleas* are all pleas that are not such.

The court of *Common Pleas* does not possess any *original* jurisdiction; nor has it, like the court of *King's Bench*, any mode of proceeding in *common* cases peculiar to itself. It's authority is founded on original writs issuing out of the court of *Chancery*: which original writs are the king's mandates for the court to proceed in the determination of the causes mentioned therein. The reason of original writs issuing out of *Chancery* is, because when the courts were united, which was formerly the case, the chancellor held the seal: therefore when they were divided, he still keeping the seal, sealed all original writs. *Gilb. H. C. P.* 3. In all personal actions therefore brought by and against common persons, the only way of proceeding in this court is by original.

There is indeed one other way of proceeding in this court, in *common* cases, which is sometimes used: and which is called proceeding by *original quare clausum fregit*. This method of proceeding is grounded, in point of law, upon the same kind of original writ as the usual proceeding by *capias* is, the only difference between them being in the *mesne process* after the original is sued out; or at least supposed so to be. Instead of the process to compel the appearance of the defendant being by *capias* against his person, it is in this case by summons and distress against his goods. In a word it is the same as the ancient mode of proceeding in this court was before the general introduction of the *capias*. (See this Dict. title *Capias*.) The advantage and use of this mode of proceeding by *original q. c. f.* is where a defendant has effects which can be distrained, but he himself cannot be met with to be *personally* served; the process by *capias* requiring personal service, which is not required in the process by summons.

All actions belonging to this court, come hither either by original, as arrests and outlawries; or by privilege or attachment, for or against privileged persons; or out of inferior courts not of record, by *pone*, *recordare*, *accedas ad curiam*, *writ of false judgment*, &c. Actions popular, and actions penal, of debt, &c. upon any statute, are cognisable by this court: and besides having jurisdiction for punishment of its officers and ministers, the court of *Common Pleas* may grant prohibitions, to keep temporal and ecclesiastical courts within due bounds. 4 *Inst.* 99. 100. 118. In this court are four judges, created by letters patent; the seal of the court is committed to the custody of the Chief Justice.

The other officers of the *Common Pleas* are the *Custos Brevium*, three *Prothonotaries* and their *Secondaries*, the Clerk of the *Warrants*, Clerk of the *Essoins*, fourteen *Filazers*, four *Exigenters*, a Clerk of the *Juries*, the *Chirographer*, Clerk of the *King's Silver*, the Clerk of the *Treasury*, Clerk of the *Seal*, of *Outlawries*, and the Clerk of the *Inrolment of Fines and Recoveries*, Clerk of the *Errors*, &c. The *Custos Brevium* is the chief clerk in this court, who receives and keeps all writs returnable therein; and all records of *Nisi Prius*, which are delivered to him by the clerks of the assise of every circuit, &c. and he files the rolls together, and carries them into the treasury of records: he also makes out exemplifications,

and copies of all writs and records, &c. The *Prothonotaries* enter and enrol all declarations, pleadings, judgments, &c. and they make out all judicial writs of execution, writs of privilege, *procedendos*, &c. The *Secondaries* are assistants to the *Prothonotaries* in the execution of their offices: and they take minutes, and draw up all orders and rules of court. The *Filazers*, who have the several counties of England divided among them, make out all mesne process, as *capias*, *alias*, *pluries*, &c. between the original writ and the declaration: and they make all writs of *view*, &c. The *Exigenters* appointed for several counties, make out all exigents and proclamations in order to outlawry. The *Clerk of the Warrants*, enters all warrants of attorney; inrolls deeds of bargain and sale, and estreats all issues. The *Clerk of the Essoins*, keeps the roll of the essoins wherein he enters them, and non-suits, &c. The *Clerk of the Juries*, makes out all writs of *habeas corpora jurator'*, for juries to appear; and he enters the continuances till the verdict given. The *Clerk of the Treasury* keeps the records of the court, and makes exemplifications of records, copies of issues, judgments, &c. The *Clerk of the Seals*, seals all writs and mesne process; also writs of outlawry and supersedeas, and all patents. The *Clerk of the Outlawries* makes out the writs of *capias utlagatum*. The *Clerk of the Errors* is for the allowance of writs of error, &c. The *Clerk of the Inrolments* of fines and recoveries, returns all writs of covenant, writs of entry and seisin, and enrols and exemplifies fines, &c. The *Clerk of the King's Silver* enters the substance of the writ of covenant: and the *Chirographer* ingrosseth all fines, and delivers the indentures to the parties, &c.

To these officers may be added, a *Proclamator*; a *Keeper* of the court; *Cryer*; and *Tipstaffs*; besides the *Warden of the Fleet*. There are also *Attornies* of this court whose number is unlimited; none may plead at the bar of the court, in Term-time, or sign special pleadings, but *Serjeants* at law.

COMMON PRAYER, *Preces Publicæ*.] The liturgy or prayers used in our church. It is the particular duty of Clergymen, every Sunday, &c. to use the public form of prayer, prescribed by the *Book of Common Prayer*: and if any incumbent be resident upon his living, as he ought to be, and keep a curate, he is obliged by the *act of uniformity*, once every month at least, to read the *common prayers* of the church, according as they are directed by the book of *common prayer*, in his parish church, in his own person; or he shall forfeit *5l.* for every time he fails therein. *Stat.* 13 & 14 *Car.* 2. *c.* 4. Also by that statute the book of *common prayer* is to be provided in every parish, under the penalty of *3l.* a month: and the *common prayer* must be read before every *lecture*; the whole appointed for the day, with all the circumstances, and ceremonies, &c. Ministers before all *sermons*, are to move the people to join in a short prayer for the Catholic church; and the whole congregation of Christian people, &c. for the King and Royal Family; the ministers of God's word, nobility, magistrates, and whole commons of the realm, &c. and conclude with the *Lord's Prayer*, *Can.* 55. Refusing to use the *Common Prayer*, or using any other open *prayers*, &c. is punishable by *stat.* 1 *Eliz. c.* 2. See titles *Church*, *Church-warden*, *Parson*, *Service*, and *Sacrament*.

COMMON WEAL. Is understood in our law to be *bonum publicum*, and is a thing much favoured; and therefore the law doth tolerate many things to be done for common good, which otherwise might not be done; and hence it is, that *monopolies* are *void* in law; and that *bonds* and *covenants* to *restrain free trade*, *tillage*, or the like, are adjudged *void*. 11 *Co. Rep.* 50. *Plowd.* 25. *Shep. Epit.* 270.

COMMORANCY, *commorantia*, from *commoro*.] An abiding, dwelling or continuing in any place; as an inhabitant of a house in a vill, &c. Commorancy consists in usually lying in a certain place. 4 *Com.* 273. See title *Poor*.

COMMORTH OR COMORTH, *comortha*.] From the Brit. *cymmorth*, i. e. *subsidium*: a contribution which was gathered at marriages, and when young priests said or sung the first masses, &c. See *stat.* 4 *Hen.* 4. *c.* 27. But *stat.* 26 *H.* 8. *c.* 6. prohibits the levying any such in Wales, or the Marches, &c. *Cowell*.

COMMOTE. In Wales, is half a *cantred* or hundred, containing fifty villages. *Stat. Wallia*. 12 *Ed.* 1. Wales was anciently divided into three provinces; and each of these were again subdivided into *cantreds*, and every *cantred* into *commotes*. *Doderige's Hist. Wal. fol.* 2. *Commote* also signifies a great seignory or lordship, and may include one or divers manors. *Co. Lit.* 5.

COMMONANCE. The commoners, or tenants, and inhabitants, who had the right of common, or commoning in open field, &c. were formerly called the *communance*. *Cowel*.

COMMUNE CONCILIUM REGNI ANGLIÆ. The common council of the king and people assembled in parliament.

COMMUNIA PLACITA NON TENENDA IN SCACCARIO. An ancient writ directed to the treasurer and barons of the Exchequer, forbidding them to hold plea between *common persons*, (*i. e.* not debtors to the king, who alone originally sued and were sued there,) in that court, where neither of the parties belong to the same. *Reg. Orig.* 187. But little obedience would perhaps be now paid to such a writ, was any officer to dare to issue it: for the court of Exchequer, seems by prescription, to have attained a concurrent jurisdiction in civil suits, with the other courts in Westminster-hall. See titles *Courts*, *Exchequer*.

COMMUNI CUSTODIA. A writ which anciently lay for the lord, whose tenant holding by knight's service died, and left his eldest son under age, against a stranger that entered the land, and obtained the ward of the body. *F. N. B.* 89. *Reg. Orig.* 161. Since the statute 12 *Car.* 2. *c.* 24. hath taken away wardships, this writ is become of no use.

COMMUNITY. Of the kingdom. See title *Commonalty*.

COMPANAGE, Fr.] All kind of food, except bread and drink: and *Spelman* interprets it to be *quicquid cibi* cum pane *sumitur*. In the manor of Feskerton in the county of Nottingham, some tenants when they performed their boons or work-days to the lords, had three boon loaves with *companage* allowed them. *Reg. de Thurgarton.* cited in *Antiq. Nottingham*.

COMPANION OF THE GARTER. Is one of the knights of that most noble order; at the head of which is the King as Sovereign. See *stat.* 24 *H.* 8. *c.* 13. and title *Garter*.

COMPASS. An instrument used in navigation, by the direction and assistance whereof vessels are steered to the most distant parts of the world. It was invented soon after the close of the holy war, and thereby navigation was rendered more secure as well as more adventurous, the communication between remote nations was facilitated, and they were brought nearer to each other. See *Roberts. Hist. Emp. C. V.* 1. *v.* 78. See title *Longitude*.

COMPELATIVUM. An adversary or accuser. *Leg. Athelstan*.

COMPERTORIUM. A judicial inquest in the Civil Law, made by delegates, or commissioners to find out and relate the truth of a cause. *Paroch. Antiq.* 575.

COMPOSITION, *compositio*.] An agreement or contract between a parson, patron and ordinary, &c. for money or other thing in lieu of tithes. Land may be exempted from the payment of tithes, where *compositions* have been made: and real *compositions* for tithes are to be made by the concurrent consent of the parson, patron and ordinary. Real *compositions* are distinguished from personal contracts: for a *composition* called a personal contract is only an agreement between the parson and the parishioners, to pay so much instead of tithes;

and though such agreement is confirmed by the Ordinary, yet (if the parson is not a party) that doth not make it a real *composition*, because he ought to be a party to the deed of *composition*. *March's Rep.* 87. The *compositions* for tithes made by the consent of the parson, patron, and ordinary, by virtue of *stat.* 13 *Eliz. c.* 10. shall not bind the successor, unless made for twenty-one years or three lives, as in case of leases of ecclesiastical corporations, &c. *Compositions* were at first for a valuable consideration, so that though, in process of time, upon the increase of the value of the lands such *compositions* do not amount to the value of the tithes, yet custom prevails, and from hence arises what we call a *modus decimandi*. *Hob.* 29. See further title *Tithes*.

The word *composition* hath likewise another meaning, i. e. *decisio litis*. *Compositions* were in ancient times allowed for crimes and offences, even for murder.—An expedient employed by the civil magistrate, in order to set some bounds to the violence of private revenge. This custom may be traced back to the ancient Germans. *Tacit. de Morib. Ger. c.* 21. *Lord Kaim's Hist. Law. Tr.* 1. *p.* 41. 42. &c.

COMPOSITIO MENSURARUM. Is the title of an ancient ordinance for measures not printed.

COMPOSTUM. Dung, soil, or compost laid on lands. *Register. Eccl. Cantuar. MS.*

COMPOUNDING FELONY, or *theft-bote*. Is where the party robbed not only knows the felon, but also takes his goods again, or other amends upon agreement not to prosecute. It was formerly held to make a man an accessary; but is now punished only with fine and imprisonment. 1 *Hawk. P. C. c.* 59. § 6. To take any reward for helping a person to stolen goods is made felony by *stat.* 4 *Geo.* 1. *c.* 11. And to advertise a reward for the return of things stolen, incurs a forfeiture of 50*l.* by *stat.* 25 *Geo.* 3. *c.* 36. See titles *Advertisement*; and also *Felony*, *Misprision*.

COMPRINT. A surreptitious printing of another bookseller's copy, to make gain thereby, which was contrary to Common Law, and is now restrained by statute. See title *Literary Property*.

COMPROMISE, *compromissum*.] A mutual promise of two or more parties at difference, to refer the ending of their controversy to arbitrators; and *West* says it is the faculty or power of pronouncing sentence between persons at variance, given to arbitrators by the parties' private consent. *West. Symb. sect.* 1. Matters *compromised*, are also matters of law referred, or made an end of. See title *Award*.

*Comptroller*, is one who observes and examines the accounts of collectors of public money. *Scotch Dict.*

*Comptroller of the Pipe*, is an officer of the Exchequer, that writeth out summons twice every year to the sheriffs, to levy the farms and debts of the Pipe, and also keepeth a contra-rollment of the Pipe. *Scotch Dict.*

COMPURGATOR. One that by oath justifies another's innocence. *Compurgators* were introduced as evidence in the jurisprudence of the middle ages. Their number varied according to the importance of the subject in dispute, or the nature of the crime with which a person was charged. *Du Cange, voc. Juramentum, vol.* 3. *p.* 1599. See *Oath*, and 3 *Comm.* 342. 4 *Comm.* 361. 407.—See also title *Clergy*.

COMPUTATION, *Computatio*.] The true account and construction of time; and to the end neither party to an agreement, &c. may do wrong to the other, nor the determination of time be left at large, it is to be taken according to the just judgment of the law. A deed dated the 20th day of August, to hold from the day of the date, shall be construed to begin on the 21st day of August: but if in the *habendum* it be to hold from the making, or from thenceforth, it shall begin on the day delivered. 1 *Inst.* 46. 5 *Rep.* 1. If an indenture of lease dated the 4th day of July, made for three years from thenceforth, be delivered at four of the clock in the afternoon of the said 4th day of July, the lease shall end the 3d day of July in the third year: and the law in this *computation* rejects all fractions or divisions of the day. See *Day*, *Month*, *Year*, *Time*, *Age*, *&c. &c.*

*Computation of miles* after the English manner, is allowing 5280 feet, or 1760 yards to each mile; and the same shall be reckoned not by straight lines, as a bird or arrow may fly, but according to the nearest and most usual way. *Cro. Eliz.* 212. See *Mile*.

COMPUTO, *Lat.*] A writ to compel a bailiff, receiver, or accountant, to yield up his accounts: it is founded on the statute of *Westm.* 2. *cap.* 12. And also lies against guardians, &c. *Reg. Orig.* 135.

CONCEALERS, *concelatores*, so called *à concelando*, as *mons à movendo*, by an *antiphrasis*.] Such as were used to find out *concealed* lands, *i. e.* such lands as are privily kept from the king by common persons, having nothing to show for their title or estate therein. See *stat.* 39 *Eliz. cap.* 22. There are also *concealers of crimes*; and as to *concealing treason*, &c. see title *Misprision*.

CONCESSI, *I have granted*. A word of frequent use in conveyances, creating a covenant in law; as *dedi* (I have given,) makes a warranty. *Co. Lit.* 384. This word is of a general extent, and said to amount to a grant, feoffment, lease and release, &c. 2 *Saund.* 96.

CONCESSIT SOLVERE. This is an action of debt *upon simple contract*, and lies by custom in the courts of the cities of London and Bristol, and the great sessions in Wales. *Sti.* 198. *Paschall* v. *Sparing*. The present form of declaring in this action in London is, that the defendant in consideration of divers sums of money before that time due and owing from the said defendant to the said plaintiff, and then in arrear and unpaid, *granted and agreed to pay* (*concessit solvere*) to the said plaintiff 100*l.* where and when the same should afterwards be demanded, yet, &c. And this general form has been held good upon a writ of error. 1 *Roll. Abr.* 564. *pl.* 21. 2 *Lord Raym.* 1. 32. *Story* v. *Atkins*. In the court of great sessions in Wales, the form of declaring in this action is still more general, for there it is sufficient merely to state that the defendant, on, &c. at, &c. *granted to pay* to the plaintiff such a sum of money, without adding any thing more. But to prevent a surprise upon the defendant from this very general way of declaring, it is necessary for the plaintiff to give notice in writing of the particular cause of action. It is observable, however, that in a case, 39 *H.* 6. 29. abridged *Bro. London*, 15. it is said that it was agreed for law, that in debt in London upon a *concessit solvere* by the custom, the declaration shall be, that for *merchandizes to him before sold* he granted to pay 10*l.* so that the merchandize must be mentioned in this action of *debt*, the defendant may wage his law. *Bro. Ley Gager*, 69. It does not lie against executors or administrators, because as they are presumed to be ignorant of the contract made by their testator or intestate, they cannot wage their law. 9 *Rep.* 87. *b. Pinchon's* case, *Sti.* 199. *Hodges* v. *Jane*, ibid. 228. *Oreswich* v. *Amery*. However if the action be brought against an executor or administrator, he must *demur*; for it cannot be taken advantage of in arrest of judgment, or upon error. *Plowd.* 182. *Norwood* v. *Read*, *Vaugh.* 97. 100. and the authorities there cited: by the custom of London, indeed, a defendant cannot wage his law in this action. 1 *Wils.* 277. *Gunn* v. *Mackherry*, and therefore it lies there against an executor or administrator, upon a contract made with the deceased. 8 *Rep.* 126. *a.* The city of *London's* case, 5 *Rep.* 82. *b. Snelling's* case, *Cro. Eliz.* 409. *S. C.* See *Williams* v. *Saunders*, 1 *Co. n.* 2.

CONCIONATORES. Common-council men, freemen, called to the hall or assembly, as *most worthy*.—*Quodam tempore cum convenissent* concionatores *apud London*, &c. *Histor. Elien. edit. Gale, c.* 46.

CONCLUSION, *conclusio.*] Is when a man by his own act upon record hath charged himself with a duty or other thing, or confessed any matter whereby he shall be concluded: as if a sheriff returns that he hath taken the body upon *capias*, and hath not the body in court at the day of the return of the writ; by this return the sheriff is *concluded* from plea of escape, &c. *Termes de Ley.* In another sense, this word *conclusion* signifies the end of any plea, replication, &c. and a plea to the writ is to conclude to the writ; a plea in bar, to conclude to the action, &c. See title *Pleading*.—And as to the conclusion of Deeds, see title *Deeds.*

CONCORD, *concordia.*] Is an agreement made between two or more, upon a trespass committed; and is divided into *Concord executory* and *Concord executed. Plowd.* 5. 6. 8. These concords and agreements are by way of satisfaction for the trespass, &c. See titles *Accord, Satisfaction.*

*Concord* is also an agreement between parties, who intend the levying of a fine of lands one to the other, how and in what manner the lands shall pass: it is the foundation and substance of the fine, taken and acknowledged by the party before one of the judges of C. B. or by commissioners in the country. See title *Fine.*

CONCUBARIA. A fold, pen, or place where cattle lie. *Cowel.*

CONCUBEANT. Lying together. *Stat.* 1 *H.* 7. *cap.* 6.

CONCUBINAGE, *concubinatus.*] In common acceptation, the keeping of a harlot or concubine: but in a legal sense, it is used as an exception against her that sueth for dower, alleging thereby that she was not a wife lawfully married to the party, in whose land she seeks to be endowed, but his *concubine. Brit. c.* 107. *Bract. lib.* 4. *tract.* 6. *cap.* 8. There was a *concubinage* allowed in Scripture to the Patriarchs, *secundum legem matrimonii*, &c. *Blount.*

CONDERS, from the Fr. *conduire*, to conduct.] Such as stand upon high places near the sea coast, at the time of herring-fishing, to make signs with boughs, &c. to the fishermen at sea, which way the shoals of herrings pass; for this may be better discovered by such as stand upon some high cliff on the shore, by reason of a kind of blue colour which the herrings cause in the water, than by those that are in the ships or boats for fishing. These are otherwise called *huers* and *balkers*, *directors* and *guiders.* See *stat.* 1 *Jac.* 1. *c.* 23.

## CONDITION.

*Conditio.*] A restraint annexed to a thing, so that by the non-performance, the party to it shall receive prejudice and loss; and by the performance, commodity and advantage. Or it is a restriction of men's acts, qualifying or suspending the same, and making them uncertain whether they shall take effect or not. Also it is defined to be what is referred to an uncertain chance, which may happen or not happen. *West's Symb. part* 1. *lib.* 2. *sect.* 156.

A *Condition* is also defined to be a kind of law or bridle, annexed to one's act, staying or suspending the same, and making it uncertain whether it shall take effect or no: or it is a *modus*, a quality, annexed by him that hath estate, interest, or right to the land, &c. whereby an estate, &c. may either be created, defeated, or enlarged, upon an uncertain event. This differs from a *limitation*, which is the bounds or compass of an estate, or the time how long an estate shall continue. *Shep. Touchst.* 117. See title *Limitation.*

A *Condition* may be also considered as one of the terms upon which a grant may be made: in this sense a condition in a deed is a *clause of contingency* on the happening of which the estate granted may be defeated. 2 *Comm.* 299.

Of *Conditions* there are divers kinds, *viz. conditions* in *deed*, or *express*; and in *law*, or *implied*; *conditions precedent*, and *subsequent*; *conditions inherent*, and *collateral*, &c.

A *Condition in a deed* or *express*, is that which is joined by express words to a feoffment, lease, or other grant; as if a man makes a lease of lands to another, reserving a rent to be paid at such a feast, upon *condition* if the lessee fail in payment at the day, then it shall be lawful for the lessor to enter. *Condition* in *law* or implied is, when a person grants another an office, as that of keeper of a park, steward, bailiff, &c. for term of life; here, though there be no *condition* expressed in the grant, yet the law makes one; which is, if the grantee do not justly execute all things belonging to the office, it shall be lawful for the grantor to enter and discharge him of his office. *Lit. lib.* 3. *c.* 5.

*Condition Precedent* is when a lease or estate is granted to one for life, upon *condition* that if the lessee pay to the lessor a certain sum at such a day, then he shall have fee simple; in this case the *condition* precedes the estate in fee, and on performance thereof gains the fee-simple. *Condition subsequent* is when a man grants to another his manor of *Dale*, &c. in fee, upon *condition* that the grantee shall pay to him at such a day such a certain sum, or that his estate shall cease: here the *condition* is subsequent, and following the estate, and upon the performance thereof continues and preserves the same: so that a *condition precedent* doth *get* and *gain* the thing or estate made upon *condition* by the performance of it; as a *condition subsequent keeps* and *continues* the estate by the performance of the *condition.* 1 *Inst.* 201. 327. *Termes de Ley.* If one agree with another to do such an act, and for the doing thereof the other shall pay so much money: here the doing the act is a *condition precedent* to the payment of the money, and the party shall not be compelled to pay till the act is done: but where a day is appointed for the payment of money, which day happens before the thing contracted for can be performed, there the money may be recovered before the thing is done; for here it appears that the party did not intend to make the performance of the thing a *condition precedent.* 3 *Salk.* 95. See *post*, I. IV.

*Inherent Conditions* are such as descend to the heir with the land granted, &c.

A *Collateral Condition* is that which is annexed to any collateral act.

*Conditions* are likewise *affirmative*, which consist of doing; *negative*, and consist of not doing; some are further said to be *restrictive*, for not doing a thing; and some *compulsory*, as that the lessee shall pay the rent, &c.

Also some *conditions* are *single*, to do one thing only; some *copulative*, to do divers things; and others *disjunctive*, where one thing of several is required to be done. *Co. Lit.* 201. See further *Shep. Touch.* 117. &c.

As to certain estates on condition expressed or implied, see more particularly titles *Mortgage*, *Statute-Merchant*, *Elegit.*

Among these several kinds of conditions, the cases which most frequently occur fall under the distinctions of conditions *precedent* and *subsequent.* We shall therefore speak of them more at large under the following divisions: wherein shall be considered; in the first place, generally,

I. 1. *Of Estates on Conditions implied; and* 2. *On Condition expressed.*—Then more particularly,
II. *To what Conditions may be annexed: what Conditions are good: and by what Words they may be created.*
III. *What shall be a good Performance of a Condition and in what Manner the Breach of it must be taken Advantage of.*
IV. *Of Conditions* precedent *and* subsequent.

I. 1. Estates upon condition *implied in law*, are where a grant of an estate has a condition annexed to it inseparably, from its essence and constitution; although no condition be

expressed in words. As if a grant be made to a man of an *office*, generally, without adding other words; the law tacitly annexes hereto a secret condition, that the grantee shall duly execute his office; (*Lit.* § 378.); on breach of which condition it is lawful for the grantor, or his heirs, to oust him, and grant to another person. *Lit.* § 379. For, an office, either public or private, may be forfeited by *mis-user* or *non-user*, both of which are breaches of this implied condition.—By *mis-use* or *abuse*: as if a judge takes a bribe, or a park-keeper kills deer without authority. By *non-user*, or neglect; which in public offices, that concern the administration of justice, or the Commonwealth, is of itself a direct and immediate cause of forfeiture; but non-user of a private office is no cause of forfeiture, unless some special damage is proved to be occasioned thereby. *Co. Lit.* 233. For in the one case delay must necessarily be occasioned in the affairs of the public, which require a constant attention; but, private offices not requiring so regular and unremitted a service, the temporary neglect of them is not necessarily productive of mischief, upon which account some special loss must be proved, in order to vacate these. Franchises also, being regal privileges in the hands of a subject, are held to be granted on the same condition of making a proper use of them, and therefore they may be lost and forfeited, like offices, either by abuse or by neglect. 9 *Rep.* 50.

Upon the same principle proceed all the forfeitures which are given by law of life-estates and others; for any acts done by the tenant himself, that are incompatible with the estate which he holds. As if tenant for life or years enfeoff a stranger in fee-simple: this, is, by the Common Law, a forfeiture of their several estates; being a breach of the condition, which the law annexes thereto, *viz.* that they shall not attempt to create a greater estate than they themselves are entitled to. *Co. Lit.* 215. So if any tenants for years, for life, or in fee, commit a felony; the king or other lord of the fee is entitled to have their tenements, because their estate is determined by the breach of the condition, "that they shall not commit felony, which the law tacitly annexes to every feodal donation.

2. An estate on condition *expressed in the grant* itself, is where an estate is granted either in fee-simple or otherwise, with an express qualification annexed, whereby the estate granted shall either commence, be enlarged, or be defeated, upon performance or breach of such qualification or condition. *Co. Lit.* 201.

These conditions are therefore either *precedent* or *subsequent*. Precedent are such as must happen or be performed before the estate can vest or be enlarged; subsequent are such, by the failure or non-performance of which an estate already vested may be defeated. Thus, if an estate for life be limited to A. upon his marriage with B. the marriage is a precedent condition, and till that happens no estate is vested in A. *Show. P. C.* 83. &c. Or if a man grant to his lessee for years, that upon payment of an hundred marks within the term, he shall have the fee, this also is a condition precedent, and the fee-simple passeth not till the hundred marks be paid. *Co. Lit.* 217.—But if a man grant an estate in fee-simple, reserving to himself and his heirs a certain rent, and that, if such rent be not paid at the times limited, it shall be lawful for him or his heirs to re-enter, and avoid the estate: in this case the grantee and his heirs have an estate upon condition subsequent, which is defeasible, if the condition be not strictly performed. *Lit.* § 225. See *post* IV.

To this class may also be referred all base fees and fee-simples conditional at the common law. Thus an estate to a man and his heirs, *tenants of the manor of Dale*, is an estate on condition that he and his heirs continue tenants of that manor. And so, if a personal annuity be granted at this day to a man and the heirs of his body; as this is no tenement within the statute of *West.* 2. it remains as at common law, a fee-simple on condition that the grantee has heirs of his body. Upon the same principle depend all determinable estates of freehold, as *durante viduitate*, &c. These are estates upon condition that the grantee do not marry and the like. And, on the breach of any of these subsequent conditions by the failure of the contingencies, by the grantee not continuing tenant of the manor of Dale, by not having heirs of his body, or by not continuing sole, the estates which were respectively vested in each grantee are wholly determined and void.

A distinction is however made between *a condition in deed*, and a *limitation*, which *Littleton*, § 380. 1 *Inst.* 234. denominates also a *condition in law*. For when an estate is so expressly confined and limited by the words of its creation, that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail, this is denominated a *limitation*: as when land is granted to a man *so long as* he is parson of Dale, or *while* he continues unmarried, or *until* out of the rents and profits he have made 500*l.* and the like; in such case the estate determines as soon as the contingency happens (when he ceases to be parson, marries a wife, or has received the 500*l.*); and the next subsequent estate, which depends upon such determination, becomes immediately vested, without any act to be done by him who is next in expectancy. See 10 *Rep.* 41.—But when an estate is, strictly speaking, upon *condition in deed* (as if granted expressly *upon condition* to be void upon the payment of 40*l.* by the grantor, or *so that* the grantee continues unmarried, or *provided* he goes to York, &c.) the law permits it to endure beyond the time when such contingency happens, unless the grantor, or his heirs or assigns, take advantage of the breach of the condition, and make either an entry or a claim, in order to avoid the estate. *Lit.* § 347. *Stat.* 3 *Hen.* VIII. *c.* 34. See 10 *Rep.* 42. Yet though strict words of condition be used in the creation of the estate, if on breach of the condition the estate be limited over to a third person, and does not immediately revert to the grantor or his representatives (as if an estate be granted by A. to B. on condition that within two years B. intermarry with C. and on failure thereof then to D. and his heirs); this the law construes to be a limitation and not a condition: 1 *Vent.* 202. because if it were a condition, then, upon the breach thereof, only A. or his representatives could avoid the estate by entry, and so D.'s remainder might be defeated by their neglecting to enter; but, when it is a limitation, the estate of B. determines, and that of D. commences, and he may enter on the lands, the instant that the failure happens. So also, if a man by his will devises lands to his heir at law, on condition that he pays a sum of money, and for non-payment, devises it over, this shall be considered as a limitation; otherwise no advantage could be taken of the non-payment, for none but the heir himself could have entered for a breach of condition. *Cro. Eliz.* 205. 1 *Rol. Abr.* 411.

In all these instances, of limitations or conditions *subsequent*, it is to be observed, that so long as the condition either express or implied, either in deed or in law, remains unbroken, the grantee may have an estate of freehold; provided the estate upon which such condition is annexed be in itself of a freehold nature; as if the original grant express either an estate of inheritance, or for life, or no estate at all, which is constructively an estate for life. For the breach of these conditions being contingent and uncertain, this uncertainty preserves the freehold. *Co. Lit.* 42. because the estate is capable to last for ever, or at least for the life of the tenant, supposing the condition to remain unbroken. But where the estate is at the utmost, a chattel-interest, which must determine at a time certain, and may determine sooner (as a grant for ninety-nine years, provided A. B. and C. or the survivor of them, shall so long live), this still continues a mere chattel, and is not, by such its uncertainty, ranked among estates of freehold.

These express conditions, if they be *impossible* at the time of their creation, or afterwards become inpossible by the act of God, or the act of the feoffor himself, or if they be *contrary to law*, or *repugnant* to the nature of the estate, are void. In any of which cases, if they be conditions *subsequent*, that is, to be performed after the estate is vested the estate shall become absolute in the tenant. As if a feoffment be made to a man in fee-simple, on condition, that unless he goes to Rome in twenty-four hours; or unless he marries with A. B. by such a day (within which time the woman dies, or the feoffor marries her himself); or unless he kills another; or in case he aliens in fee; that then and in any of such cases the estate shall be vacated and determined: here *the condition is void*, and the estate made absolute in the feoffee. For he hath by the grant the estate vested in him, which shall not be defeated afterwards, by a condition either impossible, illegal, or repugnant. *Co. Lit.* 206. But if the condition be *precedent*, or to be performed before the estate vests, as a grant to a man that, if he kills another or goes to Rome in a day, he shall have an estate in fee; here the void *condition* being precedent, the *estate* which depends thereon is also *void*, and the grantee shall take nothing by the grant: for he hath no estate until the condition be performed. *Ibid.* 2 *Comm.* 152—7.

II. *Conditions* may be annexed to any estate, whether in fee-simple, fee-tail, for life or years: they run with the estate, and bind in the hands of whomsoever they come. *Lit. Rep.* 128. But a *condition* may not be made but on the part of the lessor, donor, &c. for no man may annex a *condition* to an estate, but he that doth create the estate itself. *Conditions* are good to enlarge or limit estates: There are four incidents, which conditions to create and increase an estate ought to have. 1. They should have a particular estate, as a foundation whereupon the increase of the greater estate shall be built. 2. Such particular estate shall continue in the lessee or grantee, until the increase happens. 3. It must vest at the time the contingency happens, or it shall never vest. 4. The particular estate and increase must take effect by the same deed, or by several deeds delivered at the same time. 8 *Rep.* 75.

*Conditions* to create estates shall be favourably construed: but *conditions* which tend to destroy, or restrain an estate, are to be taken strictly. A feoffment upon *condition*, that the feoffee shall not alien, is void: but a *condition* in a feoffment not to alien for a particular time, or to a particular person, may be good. *Hob.* 13. 261. And if a *condition* is, that tenant in tail shall not alien in fee, &c. or tenant for life or years not alien during the term, these *conditions* are good: where the reversion of an estate is in the donor, he may restrain an alienation by *condition*. 10 *Rep.* 39. 1 *Inst.* 222. If one make a gift in *tail*, on *condition* that the donee or his heirs shall not aliene, this is good to some intents, and void to others: for if he make a feoffment in *fee*, or any other estate by which the reversion is discontinued tortiously, the donor may enter; but it is otherwise if he suffer a common recovery. 1 *Inst.* 223.

A liberty inseparable from an estate cannot be restrained; and therefore a *condition* that a tenant in tail shall not levy a fine, within the *stat.* 4 *H.* 7. *c.* 24. or suffer a recovery; or not make a lease within the *stat.* 32 *H.* 8. *c.* 36. is void and repugnant. But if the *condition* restrain levying a fine at common law, it may be good. 2 *Danv. Abr.* 22. A gift in tail, or in fee, upon condition that a feme shall not be endowed; or baron be tenant by the curtesy, is repugnant and void. So is a *condition* in a lease, &c. that the lessee shall not take the profits: and where a man grants a rent-charge out of land, provided it shall not charge the lands. *Co. Lit.* 146.

*Conditions* repugnant to the estate, impossible, &c. are void: and if they go before the estate, the estate and *condition* are void; if to follow it, the estate is absolute, and the *condition* void. 1 *Inst.* 206. 9 *Rep.* 128. But if at the time of entering into a *condition*, a thing be possible to be done and become afterwards impossible by the act of God, the estate of a feoffee (created by livery) shall not be avoided. 2 *Mod.* 204. See *ante* I. 2.

Where a *condition* is of two parts, one possible, and the other not so, it is a good *condition* for performing that part which is possible. *Cro. Eliz.* 780. Though if a *condition* is of two parts *dis-junctivè*, and one part becomes impossible, by the act of God, the person bound is not obliged to perform the other. 1 *Rol. Abr.* 446. *l.* 45. 2 *Mod.* 202. 203. If a condition be in the *copulative*, and is not possible to be performed, it is said it may be taken in the dis-junctive. 1 *Danv. Abr.* 73.

Where an estate is to be wholly created upon a *condition* impossible to be performed, there the estate shall never come *in esse*. 1 *Leon. c.* 311. A woman makes a feoffment to a man that is married, upon condition that he shall marry her; this condition is not impossible, for the man's wife may die, and then he may marry her. 2 *Danv.* 25. A reversion may be granted in tail upon condition, that if the grantee pays so much, he shall have the fee. 8 *Rep.* 73. But if a man grants lands, &c. for *years*, upon condition that if the lessee pay 20*s.* within one year, that he shall have it for *life*: and that if he after the year pay 20*s.* he shall have the *fee*; though both sums are paid, he shall have *but* an *estate* for *life*: the *estate* for *life*, at the time of the grant, being only in *contingency*, and a *possibility* cannot increase upon a *possibility*, nor can the *fee* increase upon the *estate* for *years*. 8 *Rep.* 75.

If a lease be made to two, with condition to raise a fee, and one dies, the survivor may preform the condition, and have the fee; but if they make partition, the condition is destroyed. 8 *Rep.* 75. 76. If a feoffee grant the reversion of part of the land, on a lease for years, on which a rent upon condition is reserved, all the condition is confounded and gone; though if the *lessee* assign part, the condition remains, for *he* cannot discharge the estate of the condition. 2 *Danv. Abr.* 119. A man makes a feoffment upon condition, and after levies a fine to a stranger, the condition is gone. *Ibid.* 120. If a feoffee upon condition to infeoff another, infeoff a stranger; or if it be to re-infeoff the feoffor, and he grant the land to another person, upon condition to perform the condition, the condition is broken, because the feoffee hath disabled himself to do it: so where such feoffee, upon condition to re-infeoff, &c. takes a wife, that the land is subject to the dower of the wife; and so if the land is recovered, and execution sued out by another, the condition is broken. *Co. Lit.* 221. 1 *Danv.* 79.

If one disseise the feoffee, or any other who hath land by just title, and thereof infeoff a stranger on condition, and the land is lawfully recovered from him that hath the title; by this the condition is destroyed: and if a disseisor make a feoffment in fee upon condition, and after the disseisee doth enter upon the feoffee, this doth extinguish the condition. *Perk. sect.* 821. If the feoffee makes a feoffment of all or part of the land to the feoffor, before the condition is broken; the condition is gone for ever; and if he make a lease for life or years only, then the condition will be suspended for that time. *Co. Lit.* 218. But it is otherwise where the feoffment or lease for life or years, are made to any other but the feoffor. *Ibid.* Where the condition of a feoffment is that if the feoffor or his heir pay a certain sum of money to the feoffee such a day, and before that day, the feoffor dieth without heir: or if the feoffment be made by a woman on condition to pay her 10*l.* or that the feoffee infeoff her by a certain day, and they inter-marry before the day, and the marriage doth continue till after it; in these cases the condition is gone. *Perk. sect.* 763. 764.

A condition that would take away the whole effect of a grant is void; and so it is if it be contrary to the express words of it. Conditions against law are void; but what may be prohibited by law, may be prohibited by deed. 1 *Inst.* 206, 220. He that taketh an estate in remainder, is bound by condition in a deed, though he doth not seal it.

*Conditions in restraint of marriage* have not generally been favoured, as contrary to sound policy; but where a legacy has been given over to another, there the condition has always been held good; and it seems that such conditions, as only reasonably restrain children from imprudent marriages will be always supported.—That is to say, where they operate only as particular, not as universal restrictions. In the case of *Scott* v. *Tyler*, 2 *Bro. C. R.* 431. &c. it was determined after very long arguments, that a condition annexed to a legacy, that the legatee should not marry *under twenty-one*, without consent of her mother, (or rather that the legacy should vest previous to twenty-one, if the legatee married with such consent,) was a valid condition.—And upon marriage without such consent, it was determined to go to the mother under a gift of a general residue.—See the first paragraph of Div. III. of this title.—And the cases of *Peyton* v. *Bury*, 2 *P. Wms.* 626. and the following cases cited in Mr. *Cox's* note there, *viz. Bellases* v. *Ermine*, 1 *C. C.* 22. *Fry.* v. *Porter*, 1 *C. C.* 138. *Jervoise* v. *Duke*, 1 *Vern.* 19. *Stratton* v. *Grymes*, 2 *Vern.* 357. *Aston* v. *Aston*, 2 *Vern.* 452. *Creagh* v. *Wilson*, 2 *Vern.* 572. *Gillet* v. *Wray*, 1 *P. Wms.* 284. *Piggot* v. *Morris*, *S. C. C.* 26. *Semphill* v. *Bayly*, *Prt. Ch.* 562. *King* v. *Withers*, *Gilb.* 26. *Harvey* v. *Aston*, *Talb.* 212. *Com. Rep.* 726. *and* 1 *Atk.* 361. *Pullen* v. *Ready*, 1 *Wils.* 21. *Underwood* v. *Morris*, 2 *Atk.* 184. *Daley* v. *Deshouverie*, 2 *Atk.* 265. *Elton* v. *Elton*, 1 *Wils.* 159. *Chauncy* v. *Graydon*, 2 *Atk.* 616. *Reynish* v. *Martin*, 3 *Atk.* 330. *Wheeler* v. *Bingham*, 3 *Atk.* 364. 1 *Wils.* 135. *Long* v. *Dennis*, 4 *Burr.* 2052. *Himings* v. *Munckley*, 1 *Bro. C. R.* 303.—That where a legacy is given on consideration that the legatee should not marry without consent, and there is no devise over, the condition is void. See 4 *Burr.* 2055. *Comm. Rep.* 739. and the cases there cited.—The case of *Scott* v. *Tyler* above mentioned, and *Amos* v. *Horner*, 1 *Eq. Ab.* 112. *p.* 9. have determined that a bequest of *the residue*, notwithstanding some contradictory authorities, is equivalent to a limitation over; where the condition is precedent and never performed.—As to the invalidity of a legacy in perfect restraint of marriage, see *Knap* v. *Noyes*, *Ambl.* 662. and *Elton* v. *Elton*. 1 *Wils* 159. And the rule of the ecclesiastical law is, that where a portion is given in consideration that a daughter should never marry, the condition is void. *Swimb.* —See also *Rose's* notes on *Com. Rep.* 728. and the cases there cited; and at large on this subject, *Fonblanque's Treatise of Equity*, i. 245. &c. and this Dict. title *Marriage*.

The word "If" will not always make a condition; but sometimes it makes a limitation, as where a lease is made for years, *if* A. B. lives so long. And this is contrary to a condition; for a stranger may take advantage of an estate determined thereby, &c. *Co. Lit.* 236. *Dyer* 300. *Sub conditione* is the most proper word to make a condition; *proviso* is as good a word, when not dependant upon another sentence; but in some cases, the word *proviso* may make no *condition*, but be only a qualification or explanation of a covenant. 2 *Danv.* 1. 2. And neither the word *proviso*, nor any other makes a condition, unless it is *restrictive*. *Plowd.* 34. 1 *Nels.* 466.

Regularly the word "for" does not import a condition, though it has the force of a condition *when the thing granted is* executory, *and the consideration of the grant is a* service, *or some such thing, for which there is no remedy, other than the stopping the thing granted*; as in the case of an annuity granted *pro consilio*, or for executing the office of a steward of a court or the service of a captain or keeper of a fort, here the failure of giving counsel, or performing the service, is a kind of eviction of that which is to be done for the annuity, the grantor having no means either to exact the counsel, or recompence for it, but by stopping the annuity; and in these cases the *condition* is *not precedent*, and therefore the *performance* thereof *need not* be *averred* when the annuity is demanded. *Per Hobart* Ch. J. *Hob.* 41. *Mich.* 10. *Jac.* in the case of *Cowper* v. *Andrews*.

As the intent of the testator chiefly governs in wills, such construction is always made of the words, as will best support his intent, and therefore these words *ad faciendum*, *faciendo*, *ea intentione*, *ad effectum*, &c. in a will create a *condition*. *Co. Lit.* 204 *a*. See titles *Devise*, *Will*.

A grant to one to the intent he shall do so and so, is no *condition*, but a *trust* and *confidence*. *Dyer* 138. Some words in a lease do not make a *condition* but a *covenant*, upon which the lessor may bring his action. A lease being the deed of lessor and lessee, every word is spoken by both; and a *condition* may be therein, though it sounds in *covenant*. 1 *Nels.* 464. A *covenant* not to grant, sell, &c. *may* be a *condition*; and *covenant* that, paying the rent, the lessee shall enjoy the land, is *conditional*. 2 *Danv.* 2. 6. Where words are indefinite, and proper to defeat an estate, they shall be taken to have the force of a *condition*. *Palm.* 503.

III. A condition may be well performed, when it is done as near to the intent as may be: for if the condition of a feoffment be that the feoffee shall make an estate back to the feoffor and his wife, and the heirs of their two bodies, remainder to the right heirs of the feoffor; in this case, if the feoffor die before, the estate shall be made to the wife without impeachment of waste, the remainder to the heirs of the body of the husband begotten on the wife, &c. *Co. Lit.* 219. 8 *Rep.* 69. If a condition be performed in *substance* and *effect*, it is good although it differs in words; and where it is to deliver letters-patent, and the party bound having lost them, delivers an exemplification, &c. 2 *Danv.* 40. Though payment of the money before the day, is payment at the day, in performance of a condition; yet a feoffor, &c. cannot re-enter, and revest his old estate by force of the condition, till the day whereon the condition gives him power to re-enter. *Ibid.* 121. If a man seised of land in right of his wife, make a feoffment in fee on condition, and dies; if the heir of the feoffor enters for the condition broken, and defeats the feoffment, his estate vanishes, and presently it is vested in the wife. *Co. Lit.* 202. And if a person seised of land, as *heir* on the part of his *mother*, makes a feoffment on *condition* and dieth; though the heir on the part of the *father*, who is *heir* at *Common Law*, may *enter* for the *condition* broken, the *heir* on the part of the *mother* shall enter upon him, and enjoy the land. *Ibid.* 12.

Where there is a condition in a feoffment or lease, that if no distress can be found, the feoffor, &c. shall re-enter; if the place is not open to the distress, as if there be only a cupboard in the house, which is locked, &c. it is all one as if there was no distress there, and the feoffor, &c. may enter. 2 *Danv.* 46. When a rent is to be paid upon condition at a certain day, the lessor cannot enter for the condition broken, before *demand* of the *rent*. *Ibid.* 98. And the lessor ought to demand the rent *at the day*, or the condition shall not be broken by the non-payment of the rent. A re-entry may be given on a feoffment, &c. though none be reserved: if one make a lease for life or feoffment upon condition, that if the feoffee or lessee does such an act, the estate shall be void: now although the estate cannot be void before entry, this is a good condition, and shall give an entry to the lessor, &c. by implication. 1 *Rol. Abr.* 408. A lease for life on condition, being a freehold, cannot cease without entry; but if it be a lease for years, the lease is void *ipso facto*, on breach of

the condition without any entry. 1 *Inst.* 214. If a lease for years is, that, on breach of the condition, the term shall cease, the term is ended without entry; but where the words are, that the lease shall be void, it is otherwise. *Cro. Car.* 511. 3 *Rep.* 64. Regularly, where one will take advantage of a condition, if he may enter, he must do it; and if he cannot enter, he must make a claim. *Co. Lit.* 218. Where on condition broken, lessor brings an *ejectment*, *entry* is not necessary: if tenant defends, he is bound by the rule, to confess *entry*.

No one can reserve the power or benefit of re-entry, on breach of a condition to any other but himself, his heirs, executors, &c. parties and privies, in right and representation: privies in law, grantees of reversions, &c. are to have no advantage by it. But by the *stat.* 32 *H.* 8. *c.* 28. Grantees of reversions may take advantage against lessees, &c. by action. 1 *Inst.* 214. 215. *Plowd.* 175. Where one doth enter for a condition broken, it generally makes the estate void *ab initio*, and the party comes in of his first estate; and he shall have the land in the same manner it was when he parted with it; and his possession at the time of making the condition; therefore he shall avoid all subsequent charges on the lands. 4 *Rep.* 120. *Plowd.* 186. *Co. Lit.* 233. If one enters on a condition performed, he shall avoid all incumbrances upon the land after the condition made: and a condition when broken, or performed, &c. will defeat the whole estate. So that if there be a lease for life, remainder in fee on condition that the lessee for life shall pay 20*l.* to the lessor; if he pay not this money, the estate in remainder will be avoided also. *Dyer* 127. 8 *Rep.* 90. But this may be otherwise by special limitation to an use: and if tenant for life, and he in remainder join in a feoffment on condition, that if, &c. then the tenant for life shall re-enter, this may be good without defeating the whole estate; though regularly a condition may not avoid part of an estate, and leave another part entire, nor can the estate be void as to some persons, and good as to others. 8 *Rep.* 190. 1 *Inst.* 214.

Lessee for life makes a feoffment on condition, and enters for the condition broken; by this he shall be restored to his estate for life, and reduce the reversion to the lessor; and the rent due to the lessor shall be revived: but in this case the lessee will not be in the same course as he was before, for his estate is subject to a forfeiture, though he be tenant for life still. *Roll.* 474. *Shep. Abr.* 405.

Tenants by the curtesy, tenant in tail after possibility of issue extinct, tenant in dower, for life, or years, &c. hold their estates subject to a condition in law, not to grant a greater estate than they have, nor to commit waste, &c. 1 *Inst.* 233. And estates made by deed to infants, and feme coverts, upon condition, shall bind them, because the charge is on the land. 2 *Danv.* 30. A release of all a man's right may be upon condition; a lessee may surrender upon condition: a contract may be upon condition, &c. But a parson cannot resign upon condition, any more than be admitted upon condition: and a condition cannot be released on condition. 9 *Rep.* 85.

No person shall defeat any estate of freehold upon condition without shewing the deed wherein the condition is contained: but of chattels real or personal, &c. a man may plead that such grants or leases were made upon condition without shewing the deeds; and in the case of a condition to avoid a freehold, though it may not be pleaded without the deed, it may be given in evidence to a jury, and they may find the matter at large. *Lit.* 374. 5 *Rep.* 40. A condition may be apportioned by act of law, or of the lessee. 4 *Rep.* 120. But a man cannot by his own act divide, or apportion a condition, which goes to the destruction of an estate. 1 *Nels. Abr.* 474. A condition in a *will* is a thing odious in law, which shall not be created without sufficient words. 2 *Leon.* 40. A devise to the heir at law, provided he pay to A. B. 20*l.* is a void condition, because there is no person to take advantage of the non-performance. 1 *Lutw.* 797. Yet conditional devises as well of lands as of goods, are allowed by our law, and not being performed, the heir or executors shall take advantage of them. 1 *Nels.* 467.

Where there are *negative* and *affirmative conditions*, the pleader must shew, not only that he has *not broke* the *negative* ones, but also that he has *performed* the *affirmative* ones. *Fletcher* v. *Richardson*, *Hardw.* 322.

As to *relief* against the breach of conditions. Some say that in all cases of penalty or forfeiture that lie in compensation, Equity will relieve; for where they can make compensation, no harm is done. So that although an express time be appointed for the performance of a condition, the judge may, after that day is past, allow a reasonable space to the party, making reparation for the damage, if it be not very great, nor the substance of the covenant destroyed by it. See *Fonblanque's Treat. Eq.* i. 387. and the cases there cited.

The substantial distinction which governs the interference of Courts of Equity in cases of conditions broken, is not whether the condition be precedent or subsequent, but whether compensation can or cannot be made: and therefore, where A. conveyed lands to B. &c. upon trust, that if C. the son of A. within six months after the death of A. should secure to trustees 500*l.* for the younger children of C. then after such security given to convey to C. and his heirs; and until the time for giving such security in trust for the eldest son of C. and in default of such security, to convey to such eldest son and his heirs; C. died before such security given: yet this *condition precedent* being only in the nature of a penalty, *the intent of the trust* shall be regarded, which was to secure 500*l.* to the younger children. *Wallis* v. *Crimes*, 1 *C. C.* 89. See *Glascock* v. *Brownell*, *Finch.* 178. *Pitcairne* v. *Bruce*, *Finch.* 403. *Woodman* v. *Blake*, 2 *Vern.* 222. *Bertie* v. *Falkland*, 2 *Vern.* 339. *Hayward* v. *Angell*, 1 *Vern.* 222. *Bland* v. *Middleton*, 2 *C. C.* 1. *Francis's Maxims*, *p.* 49.

But though Equity will, under some circumstances, relieve against the breach of a condition precedent, where damages are *certain*; yet it seems, that they will not where the damages accrued are contingent, and cannot be estimated. *Sweet* v. *Anderson*, 5 *Vin.* 93. *pl.* 15. See *Treatise of Equity*, *p.* 209. 387. 391.

IV. There are no precise technical words required in a deed, to make a stipulation a condition *precedent* or *subsequent*; neither does it depend on the circumstance whether the clause is placed prior or posterior in the deed, so that it operates as a proviso or covenant; for the same words have been construed to operate as either the one or the other according to the nature of the transaction, *per Ashhurst* Justice. 1 *Term Rep.* 645.—Further, as to the nature of conditions precedent and subsequent, see 3 *Atk.* 364. 2 *P. Wms.* 419. 626. 1 *Vern.* 83. 3 *C. C.* 130. 3 *Lev.* 132. *Fearne on Cont. Rem.* 2 *Burr.* 899. 4 *Burr.* 1930. 1 *Wils.* 105. 136. 2 *Bro. C. R.* 67. and *Ib.* 431. 489. as to a condition annexed to a legacy, that the legatee should marry with consent of her mother, which was held to be valid. In 1 *Eq. Ab.* 108. it is said that conditions precedent are such as are annexed to estates, and must be punctually performed *before* the estate can vest. A condition subsequent, is when the estate is executed; but the *continuance* of such estate depends on the breach or performance of the condition. The two most material points of discussion respecting the doctrine and different operations at law, and in equity, of conditions precedent and subsequent arise, 1. From cases where conditions are annexed to devises, making them void on the marriage of the devisee without consent: See *ante* II. and title *Marriage*: And 2. From cases arising on the *vesting* of portions and legacies made payable at a future time. See titles *Devise*, *Legacy*, *Portions*.

Conditions *precedent* are such as must be punctually performed before the estate can vest; but on a condition *subsequent*, the estate is immediately executed: yet the *continuance* of such estate dependeth on the breach or performance of the condition. *Co. Lit.* 218. *Eq. Abr.* 108. As if I grant, that if A. will go to such a place, about my business, that he shall have such an estate, or that he shall have 10*l.* &c. this is a condition *precedent*. 1 *Rol. Abr.* 414. So if I retain a man for 40*s.* to go with me to Rome, this is a condition precedent, for the duty commences by going to *Rome*. 1 *Rol. Abr.* 914. So if a man, by will devises certain legacies, and then devises all the residue of his estate to his executor, after debts, legacies, &c. paid and discharged, this is a condition precedent; so that the executor cannot have the residue of the estate before the debts and legacies are discharged. 1 *Rol. Abr.* 415. 1 *Jones* 327. *Cro. Car.* 335.

But if a man devises a term to A. and that if his wife suffers the devisee to enjoy it for three years, that she shall have all his goods as executrix; but if she disturbs A. then he makes B. executor, and dies, his wife is executrix presently; for though in *grants* the estate shall not vest till the condition precedent is performed, yet it is otherwise in a *will*, which must be guided by the intent of the parties; and this shall not be construed as a condition *precedent*, but only as a condition to abridge the power of being executrix, if she perform it not. *Cro. Eliz.* 219.

Where the *one promise* is the consideration *of the other*, and where the performance and not the promise is, *must be gathered from the words and nature of the agreement*, and depends intirely thereupon; for, if there was a *positive* promise that one should release his equity of redemption, and on the other side, that the other would pay 7*l.* then the one might bring his action without any averment of performance; but where the agreement is, that the plaintiff should release his equity of redemption, in consideration whereof the defendant was to pay him 7*l.* so that the *release is the consideration*, and therefore being *executory*, it is a condition *precedent*, which must be averred. 12 *Mod.* 455. 460. *Thorp* v. *Thorp*.

So in an action against the hundred on the *stat* 9 *G.* 1. *c.* 22. for damage sustained by the wilful burning of the party's barn, it is a precedent condition that the party grieved should, within the time limited, give in his examination upon oath before a magistrate, whether or not he *knew* the offender or offenders, or *any of them*: and an examination on oath, in which the party only swore that he *suspected* that the fact was done by *some person or persons to him unknown*, is not sufficient within the statute; still less in support of an averment in the declaration, that he gave in such examination, &c. *in and by which it appeared* that the plaintiff did *not know* the person or persons who committed the fact. For *non constat* by the terms of such examination, that the plaintiff did not know some of the offenders if there were several. *Thurtell* v. *Mutford, and Lothingland Hundred.* 3 *East.* 400.

By the proposals of the Phœnix company, it is stipulated that "persons insured shall give notice of the loss forthwith, deliver in an account, and procure a certificate of the minister and church-wardens, &c. importing that they knew the character, &c. of the assured, and believe that he really sustained the loss, without fraud;" *the procuring such certificate, is a condition precedent to the right of the assured, to recover on the policy*; and it is immaterial that the minister, &c. wrongfully refused to sign the certificate. *Worsly* v. *Wood*; in error. 6 *Term Rep.* 720.

If there be a *day set for the payment* of money, *or doing the thing* which one promises, agrees or covenants to do *for* another thing, and that day *happens to incur before* the time, *the thing* for which the promise, agreement or covenant *is made, is to be performed by the tenor of the agreement*; there, though the words be, that the party shall pay the money, or do the thing for such a thing, or in consideration of such a thing; after the day is past the other shall have action for the money, or other thing, though the thing for which the promise, agreement, or covenant was made, be not performed; for it would be repugnant there to make it a condition *precedent*; and therefore they are in that case left to mutual remedies, on which, by the express words of the agreement, they have depended. *Per Holt* Ch. Justice. 12 *Mod.* 461. *Pasch.* 13 *W.* 3. *Thorp* v. *Thorp*.

M. agrees *to give A. so much for the use of a coach and horses for a year*, and A. *agreed* further with M. *to keep the coach in repair*; it was averred the coach and horses were delivered to M. but nothing of the repair; and *Holt* Ch. Justice held upon this evidence, that *repairing* was not a condition *precedent*, and therefore need not be averred. *Per Holt* Ch. Justice at Guildhall, and judgment *pro querente*. 12 *Mod.* 503. *Pasch.* 13 *Will.* 3. *Atkinson* v. *Morris*.

But if the agreement had been that A. had agreed *to give* M. *a coach and horses for a year, and to repair the coach, and* that *for that M. promised so much money, then* the repairing had been a condition *precedent* necessary to be averred. *Per Holt* Ch. Justice. 12 *Mod.* 503. *Pasch.* 13 *W.* 3. in S. C.

Condition that A. shall do, and *for the doing B. shall pay*, is a condition *precedent*, but *time fixed for payment* will verify the condition; *per Holt* Ch. Justice. 1 *Salk.* 171. *Pasch.* 13 *Will.* 3. *B. R. Thorp* v. *Thorp*.—See this *Dict.* title *Award*.

If A. makes a lease for five years to B. upon condition, that if B. pays him 10*l.* within two years, that then he shall have a fee-simple in the lands, and make livery and seisin to B. this passes the freehold immediately, and B. has a fee conditional: because if the freehold was not to vest in B. till the condition performed, it would be difficult to determine in whom the freehold lay; for conditions may be inserted in such deeds as are perfected privately, which might prove greatly prejudicial to strangers. *Lit. sect.* 350. *Co. Lit.* 216. 217.

But in case of a lease for life, with such a condition, the freehold passes not before the condition performed, because the livery may presently work upon the freehold. But if a man grants an advowson, &c. (which lie in grant) for years, upon such condition, the grantee shall have no fee till the condition performed. *Co. Lit.* 217.

If A. leases to B. for years, upon condition, that if B. pays money to A. or his heirs, at a day, that B. shall have the fee, and before the day A. his attainted of treason and executed; now though the condition became impossible by the act and offence of A. yet B. shall not have a fee, because a *precedent* condition to increase an estate must be performed; and if it becomes impossible, no estate shall rise. *Co. Lit.* 210. Also in equity, with respect to conditions precedent and subsequent, the prevailing distinction seems to be, to relieve against the breach or non-performance, not so much whether the condition be *precedent* or *subsequent*, as whether a *compensation* can be made. 1 *Vern.* 79. 167. As if A. conveys lands to B. &c. and their heirs, upon trust, that if C. the son of A. within six months after the death of A. should secure to the trustees 500*l.* for the younger children of C. then after such security given, to convey to C. and his heirs, and until the time for giving such security, in trust for the eldest son of C. and in default of such security, to convey to such eldest son and his heirs, if C. dies before any such security given, yet this condition, though *precedent*, being only in nature of a penalty, the intent of the trust shall be regarded, which was to secure 500*l.* for the younger children. 1 *Chan. Ca.* 89.

If a feme covert, having power by will to devise lands, devises them to her executors, to pay 500*l.* out of them to her son; provided, that if the father gives not a sufficient release of certain goods to her executors, that then the devise of the

500*l.* should be void, and go to the executors; and after her death a release is tendered to the father, and he refuses, yet upon making the release after, the money shall be paid to the son; for it was said to be the standing rule of the court, *that a forfeiture should not bind, where a thing* may *be done after, or a* compensation *made for it;* as where the condition is to pay money, &c. and though it is generally binding, where there is a devise over, yet here, it being to go to the executors, it is no more than the law implies. 2 *Vent.* 252.

See more concerning Conditions under title *Bond.*—See also 2 *Com. Dig.* title *Condition.*—And 1 *Inst.* 201. 203. 206. 237. *in the notes.*

CONDUITS. For water in London, shall be made and repaired, and the Lord Mayor and Aldermen may inquire into defaults therein, &c. *Stat.* 35 *H.* 8. *c.* 10.—See further title *London.*

CONE AND KEY. A woman at the age of fourteen or fifteen years might take the charge of her house, and receive *cone and key: cone* or *colne* in the *Sax.* signifying *computus;* so that she was then held to be of competent years, when she was able to keep the *accounts* and *keys* of the house. *Bract. lib.* 2. *cap.* 37. And there is something to the same purpose in *Glanv. lib.* 7. *cap.* 9.

CONEY BURROWS. Places where conies or rabbits breed and haunt, &c. Commoners cannot lawfully dig up coney-burrows in the common. 2 *Wils.* 51.—See title *Common.*

CONFEDERACY, *confæderacio.*] Is when two or more combine together to do any damage or injury to another, or to do any unlawful act. And false *confederacy* between divers persons shall be punished, though nothing be put in execution: but this *confederacy*, punishable by law before it is executed, ought to have these incidents; *first*, it must be declared by some matter of prosecution, as by making of bonds, or promises the one to the other; *secondly*, it should be malicious, as for unjust revenge; *thirdly*, it ought to be false against an innocent person; and *lastly*, it is to be out of court voluntarily. *Termes de Ley.* Where a writ of conspiracy doth not lie, the *confederacy* is punishable: and inquiry shall be made of *conspirators* and *confederators*, who bind themselves together, &c. See *post*, title *Conspiracy.*

CONFESSION, *confessio.*] Is where a prisoner is indicted of treason or felony, and brought to the bar to be arraigned; and his indictment being read to him, the court demands what he can say thereto; then he either confesses the offence, and the indictment to be true, or pleads *Not guilty*, &c.

Confession may be made in two kinds, and to two several ends: the one is, that the criminal may confess the offence whereof he is indicted openly in the court, before the judge, and submit himself to the censure and judgment of the law; which confession is the most certain answer, and best satisfaction that may be given to the judge to condemn the offender; so that it proceeds freely of his own accord, without any threats or extremity used; for if the confession arise from any of these causes, it ought not to be recorded: as a woman indicted for the felonious taking of a thing from another, being thereof arraigned, confessed the felony, and said that she did it by commandment of her husband; the judges in pity would not record her confession, but caused her to plead *Not guilty* to the felony; whereupon the jury found that she did the fact by compulsion of her husband, against her will, for which cause she was discharged. 27 *Assis. pl.* 50.

The other kind of confession is, when the prisoner confesses the indictment to be true, and that he hath committed the offence whereof he is indicted, and then becomes an *approver*, or *accuser* of others, who are guilty of the same offence whereof he is indicted, or other offences with him; and then prays the judge to have a coroner assigned him, to whom he may make relation of those offences and the full circumstances thereof. See title *Accessory.*

There was also a third sort of confession, formerly made by an offender in felony, not in court before the judge, but before the coroner in a church, or other privileged place, upon which the offender, by the ancient law of the land, was to abjure the realm. 3 *Inst.* 129.—See title *Abjuration.*

Confession is likewise in civil cases, where the defendant confesses the plaintiff's action to be good: by which confession there may be a mitigation of a fine against the penalty of a statute; though not after verdict. *Finch.* 387. 2 *Keb.* 408.

There is also a confession indirectly implied, as well as directly expressed in criminal cases; as if the defendant, in a case not capital, doth not directly own himself guilty of the crime, but by submitting to a fine owns his guilt; whereupon the judge may accept of his submission to the King's mercy. *Lamb. lib.* 4. *c.* 9. By this indirect confession, the defendant shall not be barred to plead *Not guilty* to an action, &c. for the same fact: the entry of it is, that the defendant *puts himself on the King's mercy.* And of the direct confession, *that he acknowledges the indictment.* And this *last* confession carries with it so strong a presumption of guilt, that being entered on record, on indictment of trespass, it estops the defendant to plead *Not guilty* to an *action* brought afterwards against him for the same matter: but such entry of a confession of an indictment of a *capital crime*, it is said, will *not* estop a defendant to plead *Not guilty* to an *appeal*, it being in case of life. And where a person upon his arraignment actually confesses himself guilty, or unadvisedly discloses the special manner of the fact, supposing that it doth not amount to felony, where it doth; the judges upon probable circumstances, that such confession may proceed from fear, weakness, or ignorance, may refuse such a confession, and suffer the party to plead *Not guilty.* 2 *Hawk. P. C. c.* 31. § 2.

A *confession* may be received, and the *plea* of *Not guilty* be withdrawn, though recorded. *Kel.* 11. The confession of the defendant, whether taken upon an examination before justices of peace, in pursuance of the 1 & 2 *P. & M. c.* 13. or 2 & 3 *P. & M. c.* 10. upon an offender's being bailed or committed for felony; or taken by the Common Law, upon an examination before a Secretary of State, or other magistrate, for treason or other crimes, is allowed to be given in evidence against the party confessing; but not against others. Also two witnesses of a confession of high treason, upon an examination before a justice of peace, were sufficient to convict the person so confessing, within the meaning of 1 *Ed.* 6. *c.* 12. and 5 & 6 *Ed.* 6. *cap.* 11. which required two witnesses in high treason; unless the offender should willingly confess, &c. But the *stat.* 7 *W.* 3. *cap.* 3. requires two witnesses, except the party shall *willingly* without violence confess, &c. *in open court.* 2 *Hawk. P. C. c.* 46. § 3.—See title *Evidence.*

It has been held, that wherever a man's confession is made use of against him, it must all be taken together, and not by parcels. 2 *Hawk. P. C.* 46. § 5. And no confession shall, before final judgment, deprive the defendant, of the privilege of taking exceptions in arrest of judgment, to faults apparent in the record. *Ibid. c.* 32. § 4. A demurrer amounts to a *confession* of the indictment as laid, so far, that if the indictment be good, judgment and execution shall go against the prisoner. *Bro.* 86. *S. P. C.* 150. *H. P. C.* 246. And in criminal cases, not capital, if the defendant demur to an indictment, &c. whether in abatement or otherwise, the court will not give judgment against him to answer over, but final judgment. 2 *Hawk. c.* 32. § 7.—See title *Abatement.* Where a prisoner confesses the fact, the court has nothing more to do than to proceed to judgment against him. *Confessus in judicio pro judicato habetur.* 11 *Rep.* 30. 4 *Inst.* 65.—See further, 2 *Hawk. P. C. c.* 32. and this Dict. title *Evidence.*

CONFESSOR, Lat. *confessor, confessionarius.*] Hath relation to private confession of sins, in order to absolution: and the priest who received the auricular confession, had the title of confess*or*, though improperly; for he is rather the confess*ee*, being the person to whom the confession is made. This receiving the confession of a penitent, was in old *English* to shreve or shrive; whence comes the word beshrieved, or looking like a confessed or shrieved person, on whom was imposed some uneasy penance. The most solemn time of confessing was the day before *Lent*, which from thence is still called *Shrove-Tuesday. Cowel.*—See title *Papist.*

CONFIRMATION, *confirmatio*, from the verb *confirmare, firmum facere.*] A conveyance of an estate, or right *in esse*, that one hath in or to lands, &c. to another that hath the possession thereof, or some estate therein; whereby a voidable estate is made sure and unavoidable; or a particular estate is increased, or a possession made perfect. 1 *Inst.* 295. See *Shep. Touch.* 311. It is a strengthening of an estate formerly made, which is voidable, though not presently void: as for example; a bishop granteth his chancellorship by patent, for term of the patentee's life; this is no void grant, but voidable by the bishop's death, except it be strengthened by the confirmation of the dean and chapter.

*Confirmation*, is also defined to be the approbation or assent to an estate already created; which as far as is in the confirmer's power, makes it good and valid: so that the confirmation doth not regularly *create an estate*, but yet such words may be mingled in the confirmation as may create and enlarge an estate; but that is by force of such words as are foreign to the business of confirmation, and by their own force and power, tend to create the estate. *Gilb. Ten.* 75.

A *Confirmation* is of a nature nearly allied to a *release*; the words of making it are these, *Have given, granted, ratified, approved, and confirmed. Litt.* § 515. 531.

The words *dedi & concessi*, are as strong as the word *confirmavi*, for they amount to a grant of the right of the person in possession; and if he has any right, I can never after impeach his estate. *Gilb. Ten.* 79. See further what words shall enure as a confirmation in *Vin. Abr.* title *Confirmation* (X.).

*Madox* in *p.* 19. of the *Dissert.* annexed to the *Formul. Angl.* says, that most ancient Confirmations made after the conquest, often run like feoffments; and are distinguishable from them, chiefly by some words importing a former feoffment or grant.

In ancient times, when feoffees were frequently disseised of their lands upon some suggestion or other, charters of confirmation seem to have been in great request. For in the early times after the conquest, so many confirmations may be met with, successively made to the same persons, or their heirs or successors, of the same lands and possessions, that it looks as if they did not think themselves secure in their possessions against the king, or the great lords who were their feoffors, or in whose fees their lands lay, unless they had repeated confirmations, from them, their heirs or successors. And these Confirmations very anciently seem to have been some times made, either by *precept* or *writ* from the king, or other lords, to put the feoffees, or their heirs or successors into seisin, after they had been disseised, or to keep them in their seisin undisturbed, or else by charter of express Confirmation. *Shep. Touch. edit.* 1791. *p.* 314. *in n.* And on this subject of confirmation in general, see *Sheppard's* whole chapter.

Confirmation, *aut est* perficiens, crescens *aut* diminuens: *Perficiens*, as if feoffee upon condition make a feoffment, and the feoffor confirm the estate of the second feoffee: *Crescens*, that doth always enlarge the estate of a tenant; as tenant for years, to hold for life, &c. *Diminuens*, as when the lord of whom the land is holden, confirms the estate of his tenant, to hold by a less rent. 9 *Rep.* 142.

The lord may diminish the services of his tenant by confirmation; but not reserve new services, so long as the former estate in the tenantcy continues: and therefore if he confirm to the tenant, to yield him a hawk, &c. yearly, it is void. *Lit. sect.* 539. 1 *Co. Inst.* 296. Leases for years may be confirmed for part of the term, or part of the land, &c. But it is otherwise of an estate of freehold, which being entire, cannot be confirmed for part of the estate. 5 *Rep.* 31. There may be a confirmation implied by law, as well as express by deed; where the law by construction makes a confirmation of a grant made to another purpose: and a confirmation may enlarge an estate, from an estate held at will to term of years, or a greater estate; from an estate for years to an estate for life; from an estate for life to an estate in tail, or in fee; and from an estate in tail to an estate in fee-simple. 1 *Inst.* 305. 9 *Rep.* 142. *Dyer*, 263. But if the confirmation be made to *lessee* for life or years, of his *term* or *estate*, and *not* of the *land*, this doth *not* increase the estate, though if the lessor confirm the *land*, to have and to hold the *land* to the lessee and his heirs, this will enlarge the *estate*, and so of the rest. *Co. Lit.* 299. *Plowd.* 40.

In every good confirmation, there must be a precedent rightful or wrongful estate in him to whom made, or he must have the possession of the thing as a foundation for the confirmation to work upon; the confirmor must have such an estate and property in the land, that he may be thereby enabled to confirm the estate of the confirmee; the precedent estate must continue till the confirmation come, so that the estate to be increased comes into it; and it is required that both these estates be lawful. *Co. Lit.* 296. 1 *Rep.* 146. *Dyer* 109. 5 *Rep.* 15. If one have common of pasture in another's land, and he confirms the estate of the tenant of the land, nothing passes of the common, but it remains as it was before; so if a man have a rent out of the land, and he doth confirm the estate which the tenant hath in the land, the rent remaineth. *Lit. sect.* 537.

Tenant for life makes a lease for years to a man, and after leases the land to another person for years; and he in reversion confirms the last lease, and after that the first lease, this is not good: the second lessee hath an interest before by the confirmation of him in reversion. But in a like case, confirmation of the first lease, after the second was confirmed, was held good: for the lease takes no interest by the confirmation, but only to make it durable and effectual. *Moor*, *c.* 180. 1 *Inst.* 296. *Plowd.* 10.

If a disseisee confirm the land to the disseisor but for one hour, one week, a year, or for life, &c. it is a good confirmation of the estate for ever: and if he confirms the estate of the disseisor without any word of heirs, he hath a fee-simple; and if a disseisor make a gift in tail, and the disseisee doth confirm the estate of the donee, it shall enure to the whole estate; also if the disseisor enfeoffs A. and B. and the heirs of B. and the disseisee confirms the estate of B. for his life; this shall extend to his companion, and for the whole fee-simple. *Co. Lit.* 291. 227. 299.

But where the estate is divided, it is otherwise; as if there be an estate for life, the remainder over, there the confirmation may be of either of the estates; and if the lessee of a disseisor of a lease for twenty years, make a lease for ten years; the disseisee may confirm to one of them, and not to the other. 1 *Cro.* 472. 5 *Rep.* 81. If a disseisor or any other make a lease for years to begin at a day to come, a confirmation to the lessee before the lease begins will not be good; for there is no estate in him. *Co. Lit.* 296.

The tenant in tail of land hath a reversion in fee expectant; in this case, the confirmation of the estate-tail will not extend to the reversion. And if my disseisor make a lease for life, the remainder in fee, and I confirm the estate of the tenant for life; this shall not confirm the estate of him in remainder:

but if I confirm the remainder estate, without any confirmation to tenant for life, it shall enure to him also. *Co. Lit.* 297. 298. If lands are given to two men, and the heirs of their two bodies begotten, and the donor confirms their estate in the lands, to have and to hold to them two and their heirs; this shall be construed a joint estate for their lives, and after they shall have several inheritances. *Co. Lit.* 299. Tenant in tail, or for life, of land, lets it for years, if after he makes a confirmation of the land to the lessee for years, to hold to him and his heirs for ever, the lessee hath only an estate for the life of the tenant in tail, &c. and therein his lease for years is extinct. *Lit. sect.* 606.

A freehold for life, and term for years, it is said, cannot stand together of the same land, in the same person. 1 *Nels. Abr.* 480. If a feme lessee for years marries, and the lessor confirms the estate of husband and wife, to hold for their lives, by such a confirmation the term will be drowned; and the husband and wife are joint-tenants for their lives. *Co. Lit.* 300. But if the feme were lessee for life, then by the confirmation to husband and wife for their lives, the husband holdeth only in right of his wife for her life; but shall take a remainder for his life. *Ibid.* 299. Confirmation to lessee for life, and a stranger to hold for their *lives*, is void, for there is no privity: but it is otherwise, if for *years*. 2 *Danv. Abr.* 141. If *tenant for life* grant a rent-charge, &c. to one and his heirs, he in reversion is to confirm it, otherwise it is good only for the life of tenant for life. *Lit.* 529. A tenant for life, and remainder man in fee, join in a lease, this shall be taken to be the lease of tenant for life, during his life, and confirmation of him in remainder: though after the death of tenant for life, it is the lease of him in remainder, and confirmation of tenant for life. 6 *Rep.* 15. 1 *Nels. Abr.* 481.

If lessee for years, without impeachment for waste, accepts a confirmation of his estate for life; by this he hath lost the privilege annexed to his estate for years. 8 *Rep.* 76. Acceptance of rent in some cases makes a confirmation of a lease: As if a man leases for life, reserving rent upon a condition of re-entry; if after the condition is broken, by non-payment of the rent, the lessor distrains for the said rent, this act shall be a confirmation of the lease, so as he cannot enter. 2 *Danv.* 128. 129.

What a person may defeat by his entry, he may make good by his confirmation. *Co. Lit.* 300. But none can confirm, unless he hath a right at the time of the grant; he that hath but a right in reversion cannot enlarge the estate of a lessee. 2 *Danv.* 140. 141. And where a person hath but *interesse termini*, he hath no estate in him upon which a confirmation may enure. *Co. Lit.* 290.

As confirmation is to bind the right of him who makes it, but not alter the nature of the estate of him to whom made, it shall not discharge a condition. *Poph.* 51. If A. enfeoffs B. upon condition, and after A. confirms the estate of B. yet the condition remains: though if B. had enfeoffed C. so that the estate of C. had been only subject to the condition in another deed, and after A. had confirmed the estate of C. this would have extinguished the condition, which was annexed to the estate of B. 1 *Rep.* 147. A confirmation will take away a condition annexed by law: and by confirmation, a condition after broken in a deed of feoffment is extinguished. 1 *Co. Rep.* 146. Confirmations may make a defeasible estate good; but cannot work upon an estate that is void in law. *Co. Lit.* 295.

A confirmation of letters-patent, which are void as they are against law, is a void confirmation. 1 *Lil. Abr.* 295. If there be lord and tenant, and the tenant having issue, is attainted of felony, if the king pardons him, and the lord confirms his estate, and the tenant dies, his issue shall not inherit, but the lord shall have it against his own confirmation: for that could not enable him to take by descent, who by the attainder of his father was disabled. 9 *Rep.* 141.

Grants and leases of bishops not warranted by the *stat.* 32 *H.* 8. *c.* 28. must be confirmed by dean and chapter: and grants and leases of parsons, &c. by patron and ordinary. 1 *Inst.* 297. 300. 301. Bishops may grant leases of their church-lands for three lives, or twenty-one years, having the qualities required by 32 *H.* 8. *c.* 28. and concurrent leases for twenty-one years, with confirmation of dean and chapter. See 1 *El. cc.* 4. 19. If a prebend leases parcel of his prebendary, and the bishop, who is patron, confirms it: this shall not bind the succeeding bishop, without confirmation of dean and chapter, because the patronage is parcel of the possessions of the bishoprick; but it shall bind the present bishop, &c. 2 *Danv.* 139. If a parson grants a rent, the confirmation of the patron and bishop is sufficient without the dean and chapter, and shall be good against the succeeding bishop. *Ibid.* 140. The dean of Wells may pass his possessions, with the assent of the chapter, without any confirmation of the bishop. *Ibid.* 135. Leases of bishops are affirmed *ex assensu et consensu decani et totius capituli.* See further title *Leases.*

To the grants of a *Sole Corporation*, as Parson, Prebendary, Vicar, and the like, the Patron must give his consent: because such sole corporation has not the absolute fee: but a corporation *aggregate*, as Dean and Chapter, Master, Fellows and Scholars of a College, &c. or any sole corporation that has the absolute fee, as a bishop with consent of the dean and chapter, may by the Common Law make any grant of their possessions without their founder or patron. 1 *Inst.* 300 *b.* See further in what cases the confirmation of the Patron and Ordinary is necessary; and as to confirmation by dean and chapter of the grant of the bishop; *Vin. Abr.* title *Confirmation.* (G.) (H.) *Bac. Abr. Leases.* (G.)

A confirmation, as has been already said, is in nature of a release, and in some things is of greater force: and in this deed, it is good to recite the estate of the tenant, as also of him that is to confirm it; and to mention the consideration; the words *ratify* and *confirm*, are commonly made use of; but the words *give*, *grant*, *demise*, &c. by implication of law, may enure as a confirmation. 1 *Inst.* 295. *West. Symb.* 1. *p.* 457.

CONFISCATE, OR CONFISCATED. From the Lat. *confiscare*, and that from *fiscus*, which signifies metonymically the Emperor's treasure: and as the *Romans* say, such goods as are forfeited to the Emperor's treasury for any offence are *bona confiscata*, so we say of those that are forfeited to our King's Exchequer. And the *title* to have these goods is given to the King by the law, when they are *not claimed* by some other: as if a man be indicted for stealing the goods of another person, when they are in truth his own proper goods, and when the goods are brought into court against him, and he is asked what he says to the said goods, if he *disclaims* them he shall lose the goods, although that afterwards he be acquitted of the felony, and the king shall have them as *confiscated*; but it is otherwise if he do not disclaim them. It is the same where goods are found in the possession of a felon, if he *disavows* them, and afterwards is attainted for other goods, and not for them; for there the goods which he *disavows* are *confiscate* to the King; but had he been attainted for the same goods, they should have been said to be *forfeited* and not *confiscate.* So if an appeal of robbery be brought, and the plaintiff leaves out some of his goods, he shall not be received to enlarge his appeal; and forasmuch as there is none to have the goods so left out, the King shall have them as *confiscate*, according to the rule, *Quod non capit Christus, capit fiscus. Staund. P. C. lib.* 3. *cap.* 24.

Goods confiscated are generally such as are arrested and seized for the King's use, but *confiscare* and *forisfacere* are said to be *synonima*; and *bona confiscata* are *bona forisfacta.* 3 *Inst.* 227.—See title *Forfeiture.*

CONFORMITY to the church of England. See *stat.* 1 *Eliz. c.* 2. &c. and titles *Recusant*, *Nonconformist*, *Religion.*

CONFRAIRIE, *confraternitas.*] A fraternity, brotherhood, or society; as the *confraire de St. George*, or *les chevaliers de la bleu gartier*, the honourable society of the Knights of the Garter.

CONFRERES, *confratres.*] Brethren in a religious house; fellows of one and the same society. *Stat.* 32 *H.* 8. *c.* 24.

CONFUSION, *property* by—Where goods of two persons are so intermixed, that the several portions can no longer be distinguished, if the intermixture be by consent, it is supposed the proprietors have an interest in common, in proportion to their respective shares; but, if one wilfully intermixes his money, corn, or hay, with that of another man, without his approbation or knowledge, or cast gold in like manner into another's melting pot or crucible, our law does not allow any remedy in such case; but gives the entire property, without any account to him, whose original dominion (or property) is invaded, and endeavoured to be rendered uncertain, without his own consent. 2 *Com.* 405.

CONGEABLE, From the Fr. *congé*, leave or permission.] Signifies in our law as much as lawful or lawfully done, or done with permission: as entry congeable, &c. *Lit. Sect.* 420.

CONGE D'ACCORDER, Fr.] Leave to accord or agree, mentioned in the statute of *fines*, 8 *Ed.* 1. in these words.—When the original writ is delivered in the presence of the parties before justices, a *pleader* shall say this, Sir justice, *congé d'accorder;* and the justice shall say to him, What saith Sir R. and name one of the parties, &c.

CONGE D'ESLIRE, Fr. i. e. leave to choose.] The King's license or permission sent to a dean and chapter to proceed to the election of a bishop, when any bishoprick becomes vacant. See title *Bishop.*

CONGIUS. An ancient measure, containing about a gallon and a pint. *Charta Edmondi Regis, anno* 946.

CONINGERIA. A coney-borough, or warren of conies. *Inquis. anno.* 47 *H.* 3.

CONJUGAL RIGHTS, OR RITES. A suit for *restitution of conjugal rights*, is one of the species of matrimonial causes: and is brought when either the husband or wife is guilty of the injury of *subtraction*, or lives separate from the other without any sufficient reason; in which case the ecclesiastical jurisdiction will compel them to come together again, *if either party be weak enough to desire it, contrary to the inclination of the other.* 3 *Comm.* 94.—See titles *Baron* and *Feme.*

CONJUNCT FIERS. Is when several people are conjunctly infeft, or otherwise have a joint fee. *Scotch Dict.*

CONJURATIO. An oath; and *conjuratus*, the same with *conjurator*, viz. one who is bound by the same oath. *Conjurare* is where several affirm a thing by oath. *Mon. Angl. tom.* 1. *p.* 207.

CONJURATION, *conjuratio.*] Signifies a plot or compact made by persons combining by *oath*, to do any public harm: but was more especially used for the having (as was supposed) personal conference with the devil, or some evil spirit, to know any secret, or effect any purpose. The difference between *conjuration* and *witchcraft* was said to be, that a person using the one, endeavoured by prayers and invocations to compel the devil to say or do what he commanded him, the other dealt rather by friendly and voluntary conference, or agreement with the devil or familiar, to have his desires served, in lieu of blood or other gift offered. Both differed from *enchantment* or *sorcery;* because the latter were supposed to be personal conferences with the devil, and the former were but medicines and ceremonial forms of words usually called *charms*, without apparition. *Cowel.*

*Hawkins*, in his *Pleas of the Crown*, *lib.* 1. *c.* 3. says, that *conjurors* are those who, by force of certain magic words, endeavour to raise the devil, and oblige him to execute their commands. *Witches* are such who by way of conference bargain with an evil spirit, to do what they desire of him: and *Sorcerers* are those, who by the use of certain superstitious words, or by the means of images, &c. are said to produce strange effects, above the ordinary course of nature. All which were anciently punished in the same manner as *heretics* by the writ *de hæretico comburendo*, after a sentence in the ecclesiastical court: and they might be condemned to the pillory, &c, upon an indictment at Common Law. 3 *Inst.* 44. *H. P. C.* 38.

The *stats.* 33 *H.* 8. *c.* 8. and 1 *Jac.* 1. *c.* 12. against *Conjuration* and *Witchcraft* are repealed, by *stat.* 9 *Geo.* 2. *c.* 5. which enacts, that no prosecution shall be commenced on the same: but where persons pretend to exercise any kind of *witchcraft* or *conjuration*, &c. or undertake to tell fortunes, or from pretended skill in any crafty science, to discover where goods stolen or lost may be found; upon conviction, they shall be imprisoned a year, and stand in the pillory once in every quarter, in some market-town, and may be ordered to give security for their good behaviour. See 4 *Comm.* 60.

CONQUEST, *Conquæstus.*] The feodal term for *purchase.* As to *countries* granted by conquest, see title *Plantations.* And also title *King.*

CONSANGUINEO. A writ mentioned in *Reg. Orig. de avo, proavo et* consanguineo, &c. *f.* 226. See *Cosinage.*

CONSANGUINEUS FRATER. A brother by the father's side. 2 *Comm.* 232.

CONSANGUINITY, *consanguinitas.*] Is a kindred by blood or birth; as *affinity* is a kindred by marriage: and it is considerable in the *descent* of lands, who shall take it as next of blood, &c. and also in *administrations*, which shall be granted to the next of kin. See titles *Descent, Executor.*

CONSCIENCE, COURTS OF. These are courts for recovery of small debts, constituted by act of parliament, in London and Westminster, &c. and other trading and populous districts. See titles *Courts, Arrest, Process*, &c.

CONSECRATION. See titles *Bishops, Church.*

CONSENT. In all cases when any *thing executory* is created by *deed*, it may, by consent of all persons that were parties to the creation of it by their deed, be *defeated* and annulled, and therefore it was said, that *warranties, recognizances*, rents, charges, annuities, covenants, leases for years, uses at common law, &c. may, by a *defeasance* made with the mutual consent of all that were parties to the creation of them by deed, be annulled, discharged, and defeated. 1 *Rep.* 113. *Albany's Case.*

A consent *ex post facto* is not of any signification; for it cannot be had for things which cannot be otherwise; *per Vaughan*, Ch. J. *Mod.* 312. *Fry* v. *Porter.*

The consent of the *heir* makes good a *void devise. Chanc. Cases, Trin.* 23 *Car.* 2. *Lord Conbury* v. *Middleton.* 1 *C. C.* 208. Consent of remainder man for life, though but *verbal*, is binding, and decreed to confirm building leases accordingly; 2 *Chan. Cases.* 28. *Pasch.* 32 *Car.* 2. *Sidney* v. *The Earl of Leicester.* Consent *to a trial* of a] title to land *in another county than where the land lies*, will not help, it being an error, though such consent be of record: agreed *per cur.* 2 *Show.* 98. *pl.* 97. *Pasch.* 32 *Car.* 2. *B. R. Lord Clare* v. *Reach.*

A *burgess of a corporation consenting to be turned out* from his burgess's place, and the common council of the corporation removing him accordingly, does not amount to a resignation; and a peremptory *mandamus* was granted to restore him. *Holt* 450. *Mayor of Gloucester's case.*

CONSEQUENTIAL LOSSES OR DAMAGES. It is a *fundamental principle* in law and reason, that he who does the first wrong shall answer for all consequential damages. 12 *Mod.* 639. *Roswell* v. *Prior.* But this admits of limitation. Though a man does a lawful thing, yet if any damage do thereby befal another, he shall answer *if he could have avoided it;* and this holds *in all civil cases.* As if a man *lops*

*a tree*, and the boughs fall upon another *ipso invito*, yet an action lies. So if a man *shoots at butts*, and hurts another unawares. So if I have land through which a river runs to your mill, and I lop the sallows growing on the river side which accidentally *stop the water* so as your *mill is hindred*. So if I am building my own house, and *a piece of timber falls on my neighbour's house* and breaks part of it. So if a man assaults me, and *I lift up my staff to defend myself, and strike another* in lifting it up; but it is otherwise *in criminal cases*, for there *actus non facit reum nisi mens sit rea*. *Raym.* 422. 423. See title *Chance Medley*.

If I have a *pond*, I cannot so let it out that it shall drown my neighbour's land. Arg. *Het.* 119. cites. 6 *Ed.* 4. 6. If a stranger *drive my cattle upon your land, whereby they are destrained* by you, I shall recover against the stranger for this distress by you. *Lane* 67. cites 9 *Ed.* 4. 4. *A smith pricks the horse* of a servant being on his journey to pay money for his master to save the penalty of a bond, both the master and servant may have their several action on the case, for the several wrongs they have thereby sustained; *per Coke* Ch. J. 2 *Bulst.* 344.

Where one is *party to a fraud*, all which follows by reason of that fraud, shall be said as done by him. Arg. *Cro. J.* 469. An action lies *for threatening workmen* to maim and prosecute them, whereby the master loses the selling of his goods, the men not daring to go on with their work. *Cro. J.* 567. *Garret* v. *Taylor*. A. *breaks the fence* of B. by which cattle get into C.'s ground, C. shall have case against A. but not trespass. *Per Roll. Sty* 131. *Cowper* v. *St. John*. If A. *beats my horse by which he runs on* B. A. is the trespasser, and not B. 2 *Salk.* 631.

He that makes *a fire in his field* must see that it does no harm, and answer the damage if it does; but if a sudden storm riseth which he cannot stop, it is a matter of evidence, and he must shew it. 1 *Salk.* 13. *pl.* 4. *Turbervil* v. *Stamp*. If a man keeps a *beast of a savage nature*, as a lion, &c. it is at his peril to keep him up, and he is answerable for all the consequences of his getting loose; *per Raymond* Ch. J. *Gilb.* 187. *The King* v. *Huggins*. See title *Action*.

CONSERVATOR, Lat.] A protector, preserver, or maintainer; or a standing arbitrator, chosen and appointed as a guarantee to compose and adjust differences that should arise between two parties, &c. *Paroc. Antiq. p.* 513.

CONSERVATOR OF THE PEACE, *conservator vel custos pacis.*] Is he that hath an especial charge to see the king's peace kept: and of these conservators *Lambard* saith, that before the reign of Ed. III. who first created *Justices of the Peace*, there were divers persons that by the common law had interest in keeping the peace; some whereof had that charge by tenure, as holding lands of the king by this service, &c. And others as incident to their offices which they bore, and so included in the same, that they were nevertheless called by the name of their office only: also some had it simply, as of itself, and were therefore named *custodes pacis*, wardens or conservators of the peace. The Chamberlain of Chester is a conservator of the peace in that county, by virtue of his office. 4 *Inst.* 212. *Sheriffs* of counties at common law are conservators of the peace; and *constables* by the common law were conservators, but some say they were only subordinate to the conservators of the peace, as they are now to the justice.

The King's Majesty is, by his office and dignity royal, the principal conservator of the peace within all his dominions; and may give authority to any other to see the peace kept, and to punish such as break it: hence it is usually called the king's peace. The Lord Chancellor or Keeper, the Lord Treasurer, the Lord High Steward of England, the Lord Mareschal, and Lord High Constable of England, (when any such officers are in being,) and all the Justices of the court of King's Bench, (by virtue of their offices,) and the Master of the Rolls, (by prescription,) are general conservators of the peace throughout the whole kingdom, and may commit all breakers of it, or bind them in recognizances to keep it: the other judges are only so in their own courts. The coroner is also a conservator of the peace within his own county; as is also the sheriff; and both of them may take a recognizance or security for the peace. Constables, tythingmen, and the like, are also conservators of the peace within their own jurisdictions; and may apprehend all breakers of the peace, and commit them till they find sureties for their keeping it. 1 *Comm.* 350. See titles *Justices of Peace*, *Commitment*.

CONSERVATOR OF THE TRUCE AND SAFE-CONDUCTS, *conservator nauciarum et salvorum regis conductuum.*] Was an officer appointed by the king's letters patent, whose charge was to inquire of all offences done against the king's truce, and the safe-conducts upon the main sea, out of the liberties of the cinque ports, as the admirals customably were wont to do, and such other things as are declared in *stat.* 2 *Hen.* 5. *st.* 1. *c.* 6. Two men learned in the law were joined to conservators of the truce as associates; and masters of ships sworn not to attempt any thing against the truce, &c. And letters of request and of marque were to be granted when truce was broken at sea to make restitution. *Stat.* 4 *H.* 5. *c.* 7. See title *Truce*.

There was anciently a *Conservator of the privileges of the Hospitallers and Templars*. *West.* 2. *c.* 43. And the Corporation of the great *level of the fens* consists of a governor, six bailiffs, twenty *conservators*, and commonalty. *Stat.* 15 *Car.* 2. *c.* 17.

CONSIDERATIO CURIÆ. Is often mentioned in law pleadings, and where matters are determined by the court. *Ideo* consideratum *est per* curiam, *i. e.* Therefore it is considered and adjudged by the court; *consideratio curiæ* is the judgment of the court.

CONSIDERATION, *consideratio.*] The material cause, *quid* or *pro quo*, of any contract, without which it will not be effectual or binding. This consideration is either *expressed*; as when a man bargains to give so much for a thing bought; or to sell his land for 100*l.* or grants it in exchange for other lands; or where I promise that if one will marry my daughter or build me a house, &c. I will give him a certain sum of money; or one agrees for a certain sum to do a thing. Or it is *implied*, when the law itself enforces a consideration; as where a person comes to an inn, and there staying eats and drinks, and takes lodging for himself and horse, the law presumes he intends to pay for both, though there be no express contract for it; and therefore if he discharge not the house, the host may stay his horse; and so if a taylor makes a garment for another, and there is no express agreement what he shall have for it; he may keep the clothes till he is paid, or sue the party for the same. 5 *Rep.* 29. *Plowd.* 308. *Dyer* 30. 337.

Considerations may be considered either as relating to *contracts* generally or to *deeds* in particular; and further relating thereto. See titles *Assumpsit*, *Deed*.

As to *contracts*, a consideration may be defined to be the reason which moves the contracting party to enter into the contracts.—This consideration must be a thing awful in itself, or else the contract is void. A *good* consideration is that of blood or natural affection between near relations; the satisfaction accruing from which, the law esteems an equivalent for whatever benefit may move from one relation to another. 3 *Rep.* 83. 2 *Inst.* 271. 1 *Rep.* 176. This consideration may sometimes, however be set aside, and the contract become void, when it tends in its consequences to defraud creditors or other third persons of their just rights. But a contract for any *valuable* consideration, as for marriage, for mo-

ney, for work done, or for other reciprocal contracts can never be impeached at law: and if it be of a sufficient adequate value is never set aside in equity; for the person contracted with has then given an equivalent in recompence, and is therefore as much an owner, or a creditor as any other person. 2 *Com.* 444. *Noy's Max.* 87. *Hob.* 230. See titles *Fraud, Fraudulent Conveyance.*

These valuable considerations are divided by the Civilians into four species—*Do ut des—Facio ut facias—Facio ut des—Do ut facias*—the bare mention of which is here sufficient.

A consideration of some sort or other is so absolutely necessary to the forming of a *contract*, that a *nudum pactum* or bare agreement to do or pay any thing on one side without any compensation on the other is totally void in law: and a man cannot be compelled to perform it. *Dr. & St. d.* 2. *c.* 24. As if one man promises to *give* another 100*l.* here there is nothing contracted for or given on one side, and therefore there is nothing binding on the other. And however a man may or may not be bound to perform it in honour or conscience, which the municipal laws do not take upon them to decide, certainly those laws will not compel the execution of what he had no visible inducement to engage for, and therefore our law has adopted the maxim of the civil law *ex nudo pacto non oritur actio.* But any degree of reciprocity will prevent the pact from being nude: nay even if the promise be founded on a prior moral obligation (as a promise to pay a just debt, though barred by the statute of limitations) it is no longer *nudum pactum.* And as this rule was principally established to avoid the inconvenience that would arise from setting up mere verbal promises, for which no good reason could be assigned, it therefore does not hold in some cases where such promise is authentically proved by *written documents.* 2 *Comm.* 445, 6.—*Blackstone* instances voluntary *bonds* and *notes*—as to which latter, see *Fonblanque's* observations in *Treat. Eq.* 334. *n.*

*Deeds* also must be founded upon good and sufficient consideration, not upon an usurious contract. *Stat.* 13 *Eliz. c.* 8. Nor upon fraud or collusion either to deceive purchasers, *bonâ fide*, or just and lawful creditors. *Stats.* 13 *Eliz. c.* 5. 27 *Eliz. c.* 4.—Any of which bad considerations will vacate the deed and subject such persons as put the same in ure, to forfeitures, and often to imprisonments. A deed also, or other grant made without any consideration, is as it were of no effect; for it is construed to enure or to be effectual, only to the use of the grantor himself. *Perk.* § 533. The consideration of deeds also, like that of contracts, may be either a *good* or *valuable* one—Deeds made upon good consideration only, are considered as merely voluntary, and are frequently set aside in favour of creditors, and *bonâ fide* purchasers. 2 *Comm.* 296. See further title *Deeds.*

A consideration ought to be matter of profit and benefit to him to whom it is done; by reason of the charge or trouble of him who doth it. *Cro. Car.* 8. If a person hath disbursed several sums for another, *without his request*, and afterwards such other says, that in consideration he hath paid the said sums for him, he promises to pay them: this is no consideration, because it was executed *before.* But it will be otherwise, if the sums were paid *at the request* of the other. *Moor.* 220. *Cro. Eliz.* 282. A mere voluntary curtesy will not be a good consideration of a promise: but the value and proportion of the consideration is not material, to maintain an action; for a shilling or a penny is as much binding as 100*l.* Though in these cases, the jury will give damages proportionably to the loss. *Hob.* 5. 10 *Rep.* 76.

A consideration that is void in part, is void in the whole: and if two considerations be alledged, and one of them is found false by the jury, the action fails. *Hob.* 126. *Cro. Eliz.* 848. But if there be a double consideration, for the grounding of a promise, for the breach whereof an action is brought; though one of the considerations be not good, yet if the other be good, and the promise broken, the action will lie upon that breach: for one consideration is enough to support the promise. 1 *Lill.* 297. A consideration must be lawful, to ground an *assumpsit.* 2 *Lev.* 161. Where considerations are valuable, and consist of two or more parts, there the performance of every part ought to be shewn. *Cro. Eliz.* 579. In case a deed of feoffment be made of lands; or a fine and recovery be passed, and no consideration is expressed in the deed, &c. for the doing thereof, it shall be intended by the law, that it was made in trust, for the use of the feoffor or conusor; for it shall be presumed he would not part with his land without a consideration; and yet the deed shall be construed to operate something, and that which is most reasonable. 1 *Lill. Abr.* 299.

CONSIGN, is a word used by merchants, where goods are assigned, delivered over, or transmitted from beyond sea or elsewhere to a factor, &c.

Consignor, and Consignee, signify among merchants, the shipper of merchandize, and the person to whom they are addressed. Where the consignor of goods abroad advised the consignee by letter, that he had chartered a certain ship on his account, and inclosed him an invoice of the goods laden on board, which were therein expressed to be for account and risk of the consignee; and also a bill of lading in the usual form, expressing the delivery to be made to order, &c. he paying freight for the said goods according to charter-party, and the letter of advice also informed the consignee, that the consignor had drawn bills on him at three months for the value of the cargo; held, that the invoice and bill of lading sent to the consignee, and the delivery of the goods to the captain, vested the property in the consignee, subject only to be devested by the consignor's right to stop the goods in *transitû*, in case of the insolvency of the other. And the consignor's agent having obtained possession of the cargo under *another* bill of lading, and having refused to deliver it up unless the consignee would make immediate payment, which he declined doing, but offered his acceptances at three months, in the manner before stipulated: held that the consignee might maintain *Trover* against such agent without having tendered payment of the freight either to him or the captain, the defendant having possessed himself of the goods wrongfully. *Walley* v. *Montgomery*, *E.* 43 *Geo.* 3. *East.* 585. See further titles *Merchant, Factor, Transitu.*

CONSILIUM, *dies consilii.*] A time allowed for one accused to make his defence, and answer the charge of the accuser.—It is now used for a speedy day appointed to argue a *demurrer:* which the court grants after the demurrer joined, on reading the record of the cause, &c.

CONSIMILI CASU, writ of *entry* in. A writ of entry. This and the writ in *casu proviso* lay not at common law, but are given by statute *Gloc.* 6 *Ed.* 1. *c.* 7. and *Westm.* 2. 13 *Ed.* 1. *c.* 24. for the reversioner after alienation; but during the life of the tenant in dower, or other tenant for life. See *F. N. B.* 205, 206. 3 *Comm.* 183. *n.*

CONSISTOR. A magistrate so called: *testibus Rogere de Gant, Willielmo* consistore *Cestriæ*, &c. Blount.

CONSISTORY, *consistorium.*] Signifies as much as *prætorium*, or tribunal: it is commonly used for a council-house of ecclesiastical persons, or place of justice in the spiritual court; a session or assembly of prelates. And every archbishop and bishop of every diocese hath a consistory court, held before his chancellor, or commissary in his cathedral church, or other convenient place of his diocese, for ecclesiastical causes. 4 *Inst.* 338. The bishop's chancellor is the judge of this court, supposed to be skilled in the civil and canon law: and in places of the diocese, far remote from the bishop's *consistory*, the bishop appoints a commissary (*commissarius foraneus*) to judge in all causes within a certain dis-

trict, and a register to enter his decrees, &c. 2 *Rol. Abr.* 286. *Seld. Hist. of Tithes*, 413, 414. From the sentence of this consistory court an appeal lies by virtue of *stat.* 24 *H.* 8. *c.* 12. to the archbishop of each province respectively.

CONSOLIDATION, *consolidatio.*] Is used for the uniting of two benefices into one. *Stat.* 37 *H.* 8. *c.* 21. Which union is to be by the assent of the ordinary, patron, and incumbent, &c. and to be of small churches lying near together. Vide titles *Church*, *Union.* This word is taken from the civil law, where it signifies properly an uniting of the possession, occupancy, or profit of lands, &c. with the property. See also *Extinguishment*, *Insurance.*

CONSPIRACY, *conspiratio.*] This word was formerly used almost exclusively, for an agreement of two or more persons falsely to indict one, or to procure him to be indicted of felony; who after acquittal, shall have writ of *conspiracy.* See 33 *Edw.* 1. *stat.* 2. 7 *Hen.* 5. 18 *Hen.* 6. *c.* 12. See post title *Conspirator.* Now, it is no less commonly used for the unlawful combination of journeymen to raise their wages, or to refuse working, except on certain stipulated conditions; an offence particularly provided for by *stat.* 2 & 3 *E.* 6. *c.* 15. (revised, continued, and confirmed by *stat.* 22 & 23 *Car.* 2. *c.* 19. now expired:) which enacts among other things, that "if any artificer do conspire, that they shall not do their works but at a certain price, or shall not take upon them to finish that another hath begun, or shall do but a certain work in a day, or shall not work but at certain times, every person so conspiring, shall forfeit for the first offence 10*l.* or be imprisoned 20 days, for the second 20*l.* or be pilloried, and for the third 40*l.* or be pilloried, lose an ear and become infamous."—This *stat.* 2 & 3 *E.* 6. *c.* 15. appears to be yet in force, though not frequently resorted to for remedy in this case; the proceeding being usually by indictment for conspiracy.

By the Common Law there can be no doubt but that all confederates whatsoever, wrongfully to prejudice a third person, are highly criminal. 1 *Hawk. P. C. c.* 72. § 2.—See further *stat.* 5 *Eliz. c.* 4. particularly §§ 18, 19, 20. and this Dict. titles *Labourers*, *Servants.*

Journeymen confederating and refusing to work unless for certain wages, may be indicted for a conspiracy; notwithstanding the statutes which regulate their work and wages do not direct this mode of prosecution; for this offence consists in the conspiring and not in the refusal, and all conspiracies are illegal though the subject matter of them may be lawful. See the case of *The Tub-women* v. *The London Brewers*, 8 *Mod.* 11. 320.—So also a bare conspiracy to do a lawful act to an unlawful end is a crime; though no act be done in consequence thereof. 8 *Mod.* 321.—The fact of conspiring need not be proved on the trial, but may be collected by the jury from collateral circumstances. 1 *Black. Rep.* 392. *Stra.* 144. And if the parties concur in doing the act, although they were not previously acquainted with each other, it is conspiracy. Lord *Mansfield* in the case of the prisoners in the King's Bench. *Hil. T.* 26 *Geo.* 3.—1 *Hawk. P. C. c.* 72. § 2. *in n.*

Unlawful combinations of workmen were prohibited and punished by the act 39 *G.* 3. *c.* 81. which was repealed, and more effectual provision enacted by 39 and 40 *G.* 3. *c.* 106.

By this latter act all contracts (except those between masters and men) for obtaining advance of wages, altering the usual time of working, decreasing the quantity of work, &c. are declared illegal.—Workmen making such illegal contracts are punishable by imprisonment: and the like punishment is inflicted on workmen entering into combinations to procure advance of wages, or preventing other workmen from hiring themselves, or procuring them to quit their employ, &c.—All meetings and combinations for effecting such illegal purposes are punishable in like manner: and offenders giving evidence against each other are indemnified.



The same act provides for settling all disputes between masters and workmen by arbitration, with an appeal to the quarter sessions.

By 43 *G.* 3. *c.* 86. similar provisions are made for preventing combinations of workmen, artificers, journeymen, and labourers, in Ireland.

For the provisions of *stats.* 12 *Geo.* 1. *c.* 34. 22 *Geo.* 2. *c.* 27. 57 *Geo.* 3. *c.* 115. 122. and 58 *Geo.* 3. *c.* 51. see titles *Manufacturers*, *Servants.*

Writ of conspiracy lies for him that is indicted of a trespass, and acquitted, though it was not felony: also upon an indictment for a riot. 2 *Mod.* 306. 5 *Mod.* 405. Where a man is falsely indicted of any crime, which may prejudice his fame or reputation; and though it doth not import slander, if it endangers his liberty; or if the indictment be injurious to his property, &c. writ of conspiracy lieth. 3 *Salk.* 97. But though a conspiracy to charge falsely be indictable, yet the party ought to shew himself to be innocent; and the writ of conspiracy lies not without an acquittal. *Mod. Cas.* 137. 185. 186. Not only writ of conspiracy, which is a civil action at the suit of the party; but also action on the case in the nature of a writ of conspiracy, doth lie for a false and malicious accusation of any crime, whether capital or not capital, even of high treason; and this though the bill of indictment is found *ignoramus*, or it does not go so far as an indictment. And the same damages may be recovered in such action, as in a writ of conspiracy, where the party is lawfully acquitted by verdict. 1 *Rol. Abr.* 111. 112. 9 *Rep.* 56. See *Gilb. Ca.* 185. 10 *Mod.* 148. 214. *Salk.* 15. An action on the case is preferable, as being more in use, and the proceedings easier, and not attended with such niceties as the writ of conspiracy. See titles *Malicious Prosecution*, *Action.*

If one falsely and maliciously procure another to be arrested, and brought before a justice of peace to be examined concerning a felony, &c. on purpose to vex and disgrace him, and put him to charges and trouble, although he is not indicted for the same, yet he may have an *action on the case*; in which he need not aver that he was lawfully acquitted, as he ought to do in a writ of conspiracy: but he must aver that the accusation was *falsè et malitiosè*, which words are necessary in the declaration; and it must appear that there was no ground for it. And as an *action on the case* may be prosecuted, against one person, where the writ of conspiracy or indictment doth not lie but against two, this action is most commonly brought. 1 *Danv. Abr.* 208. 213. 2 *Inst.* 562. 638.

Conspirators may be indicted at the suit of the king; and at the Common Law, one may prefer an indictment against conspirators, who only conspire together, and nothing is executed: though the conspiracy ought to be declared by some act, or promise to stand by one another, &c. But a bare conspiracy will not maintain a writ of conspiracy, at the suit of the party, because he is not damaged by it; though it is a ground for an indictment. 9 *Rep.* 56. 2 *Rol. Abr.* 77. If the defendants can shew any foundation or probable cause of suspicion, they shall be discharged: and if a man hath good cause of suspicion that a person is guilty of felony, and causes him to be indicted, in prosecution of justice, action of conspiracy will not lie: but it is otherwise if the prosecutor imposes the crime of felony, where no felony was committed. 1 *Rol. Abr.* 115. 4 *Rep.* 438.

The *Conspiracy* is the gist of the offence, and though as before said nothing is done in prosecution of it, it is a complete and consummate offence of itself: and whether the conspiracy be to charge a temporal or ecclesiastical offence on an innocent person it is the same thing. *Ld. Rayn.* 1167. 1 *Salk.* 174. *Stra.* 193.

A conspiracy consists in *unlawfully* conspiring to injure a person by a false charge. 3 *Burr. Rep.* 1320.

Several persons may lawfully meet together and consult

to prosecute a guilty person; otherwise, if it be to charge one that is innocent, right or wrong, for that is indictable. 1 *Salk.* 174.

In conspiracies there is no occasion to prove the actual fact of conspiring, but it may be collected from all the collateral circumstances of the case. 1 *Bl. Rep.* 392.

It is an indictable offence to conspire to charge a person with being the father of a bastard child. 1 *Salk.* 174.

If a man and woman marry, the man assuming the name of another, and the woman marrying him by such false name, knowing it to be false, with a design thereby to do a future injury to a person whose name was assumed, it is a conspiracy. *Leach's Crown Law Cases*, 44.

An indictment will not lie for conspiracy to commit a civil trespass by several persons agreeing to go, and by going, into a preserve for game the property of another in order to snare hares, though alledged to be done by the defendants armed with offensive weapons, for the purpose of opposing resistance to any endeavours to apprehend or obstruct them. 13 *E. R.* 228.

After conviction of a conspiracy all the defendants must be present in court when a motion is made on their behalf in arrest of judgement. *Burr. Rep.* 929: 1 *Bl. Rep.* 209.

And so also upon a motion for a new trial. 11 *E. R.* 309; 3 *Maul. & Sel. Rep.* 2.

The quarter sessions have jurisdiction over conspiracies. *Burr. Rep.* 1320. 1 *Bl. Rep.* 368.

An action lies not against a justice of peace, who sends out his warrant upon a false accusation: but it lies if he makes it out without any accusation. 1 *Leon* 187. Conspiracies ought to be out of court; for if a prosecution be ordered in a course of justice, and witnesses appear against a party, &c. there shall be no punishment: and if persons acted only as jurors in a criminal matter, or judges in open court, there is no ground for prosecution. *S. P. C.* 173. 12 *Rep.* 24. If all the defendants but one are acquitted on indictment for conspiracy, that one must be acquitted also; because one person alone cannot be indicted for this crime: and husband and wife, being but one person, may not be indicted alone for a conspiracy. 2 *Rol. Abr.* 708. The acquittal of one person is the acquittal of another upon indictment of conspiracy. 3 *Mod.* 220. (*i. e.* where only two are indicted, and it is not laid or proved that they conspired with others, unknown). Though where one is found guilty, according to the opinion of the Lord Chief Justice Hale, if the other doth not come in upon process, or if he dies pending the suit, judgment shall be had against the other, 1 *Vent.* 234. See *Stra.* 193. 1227. Writ of conspiracy was brought against two persons, and one found not-guilty; the other shall not have judgment; but in *action on the case*, it had been good. *Cro. Eliz.* 701. And action on the case in the nature of a conspiracy may be brought against one only. 1 *Hawk. P. C.* c. 72. § 8. If the parties are found guilty of the conspiracy, upon an indictment of felony, at the king's suit; the judgment is, that they shall lose their *frank law* (which disables them to be put upon any jury, to be sworn as witnesses, or to appear in person in any of the king's courts), and that their lands, goods, and chattels be seized as forfeited, and their bodies committed to prison; which is called a *villainous judgment*. 2 *Inst.* 143. 222. *Crompt. Just.* 156. 1 *Hawk. P. C. c.* 72. § 9. There has been no instance of the villainous judgment since the reign of *Edw.* III. The usual mode of punishment at present is, by pillory, fine, imprisonment, and surety for good behaviour. *Burr.* 996. 1027. *Stra.* 196.—The quarter sessions have jurisdiction over this offence. *Finch*, 80. 8 *Mod.* 321. And on motion in arrest of judgment, the defendant must be personally present in court. *Stra.* 1227. *Burr.* 931.

The matter of the conspiracy ought to touch a man's life, where the villainous judgment is imposed. 1 *Hawk. P. C. c.* 72. For conspiring to charge a person with poisoning another, &c. one of the parties was fined 1000*l.* and some others had judgment of the pillory, and to be burnt in the cheek with the latters F. and C. to signify false conspirators. *Moor*, 816. As fine and imprisonment is the usual punishment at this day on indictment for *conspiracy*, so on writ of conspiracy, &c. the party shall be fined, and render damages. See further, 1 *Hawk. P. C. c.* 72. at large.

Conspirators, *conspiratores.*] By *stat.* 33 *E.* 1. *st.* 2. are defined to be those that do bind themselves by oath, covenant, or other alliance, that every of them shall aid the other falsely and maliciously to indict persons: or falsely to move or maintain pleas, &c. And such as retain men in the country, with liveries, or fees, to maintain their malicious enterprises, which extends as well to the takers as the givers; and stewards and bailiffs of great lords, who by their office or power undertake to bear and maintain quarrels, pleas, or debates, that concern other parties than such as relate to the estate of their lords or themselves. 2 *Inst.* 384. 562. And against conspirators, false informers, and imbracers of inquest, the king hath provided a writ in the Chancery; and the justices of either bench and justices of assise, shall, on every plaint, award inquest thereupon. *Stat.* 28 *E.* 1. *st.* 3. *c.* 10. From the description of conspirators in several of our old law books, conspiracy is taken generally, and confounded with *maintenance* and *champerty*; see those titles. Besides these, there are *conspirators* in *treason*; by plotting against the government, &c. See title *Treason*.

Conspiratione. The writ that lay against conspirators. *Reg. Orig.* 134. *F. N. B.* 114.

## CONSTABLE.

The *origin* of the *word* Constable, erroneously sought for in the Saxon language, is undoubtedly to be found in the *comes stabuli* of the Eastern Empire; who was at first, as his title imports, no more than superintendant of the imperial stables; or, in other words, the emperor's master of the horse; but having in process of time obtained the command of the army, his name (corrupted into *constabulus* and *constabularius*; see *Spelman*) began to signify a commander: and with this signification appears to have been introduced into England at the Norman Conquest; or perhaps sooner.

The Constable of England, or *Lord-High-Constable*, was anciently an officer of the highest dignity and importance in the realm. He was the leader of the king's armies; and had the cognizance of all contracts and other matters touching arms or war. 13 *R.* 2. *st.* 1 *c.* 2.—and see *Maddox's History of the Exchequer*, *p.* 27. He sate as judge with the Earl-Marshal, having precedence of him in the court of chivalry—and he is by some of our books also called Marshal.—See title *Marshal*.

This office, which appears to have been granted by William the Conqueror, to Walter Earl of Gloucester, or according to others to William Fitzosborne or Roger de Mortimer, became hereditary in two different families, as annexed to the earldom of Hereford: and in that right, after a lapse of near two centuries, was revived by judgment of law, in the person of Edward Stafford Duke of Buckingham; who being attainted of high treason, *an.* 13 *H.* 8. this office became forfeited to the crown. Since this period there has been no Lord High Constable, except *pro hac vice* at a coronation, or on other solemn occasions.

Constable of Castles, were keepers or governors of the castles of the king: or of great barons, and who were frequently hereditary or by feudal tenure; such were the Constable of the Tower, the Constable of London, or Baynard's Castle, the Constables of the castles of Dover, Windsor, Chester, Flint, &c. some of which offices, though not now hereditary, are remaining to this day. These are the con-

stables intended in *Magna Charta*, *c.* 17. 20; and who, in the *Stat.* of *Westm.* 1. (3 *E.* 1.) *c.* 15. are called Constables of Fees, and there considered as keepers of prisons; a constituent part indeed of all ancient castles. See 2 *Inst.* 31. The statute of 5 *H.* 4. *c.* 10. reciting the oppressions of these constables, and enacting that none be imprisoned but in the common gaol, seems to have put an end to a race of tyrants, who by their misconduct had rendered themselves odious to the people.

A *Constable of the Exchequer* is mentioned in the *Dialogus Scaccarii*, *l.* 1. *c.* 5—in the *stat. de Districtione Scaccarii*, 51 *H.* 3. *st.* 5—in *Fleta. l.* 2. *c.* 31—and in *Madox's History of that Court*, *p.* 274.

*The Constable of the Staple* is also mentioned in some old statutes. See 27 *E.* 3. *c.* 8. 15 *R.* 2. *c.* 9. 23 *H.* 8. *c.* 6.

THE CONSTABLE OF THE HUNDRED, or the *High*, *Chief* or *Head Constable* (as he is otherwise called) is next to be spoken of. By the *Stat.* of *Winton* or *Winchester*, 13 *Ed.* 1. (*c.* 6.) it is ordered that in every hundred or franchise there shall be *chosen* two constables to make the view of armour, and to present the defaults of armour, and of the suits of towns and of *highways*, &c.

*Lambard* (*on Constables*, *p.* 3.), *Coke* (4 *Inst.* 267), and *Hale* (2 *P. C.* 96), all agree in declaring that constables of the hundred were *first* introduced by this statute. (And see *Cro. Eliz.* 375). And though it has been asserted that they were officers and conservators of the peace at Common Law, and that the *stat.* of *Winton* only enlarged their authority, yet no evidence has hitherto been produced to that purpose. —See *Salk.* 175, 381. 11 *Mod.* 215. 2 *Ld. Raym.* 1193, 5. —The first mention made of the High Constable in any statute subsequent to that of *Winton*, is in *stat.* 3 *E.* 4. *c.* 1.

Nothing, however, can be more certain than that the Constable of the hundred, or High Constable, whether he be allowed an officer at the Common Law, or not, was instituted long before the *stat.* of *Winton*. This curious fact is ascertained by a writ or mandate of 36 *H.* 8. preserved in the *Adversaria* to *Watts's* edition of *Matthew Paris*, and from which *c.* 4 & 6 of the *stat.* of *Winton* are evidently taken; *though it has hitherto escaped the notice of every writer or speaker upon the subject.* By this writ it is provided, "that in every hundred there should be *constituted* a CHIEF CONSTABLE, at whose mandate all those of his hundred sworn to arms, should assemble and be observant to him, for the doing of those things which belong to the conservation of the king's peace." No mention of this officer, it is believed, can be any where found prior to the date of this instrument; which perhaps may no more determine the question as to his *original* creation than the *stat.* of *Winton*. Be this as it will, the discovery ought at least to teach those who are desirous of explaining the antiquities of our law, to look into matters of record, and to trust very little to opinion.

THE CONSTABLE OF THE VILL (or *Petty Constable*, as he is frequently called, to distinguish him from the officer last mentioned) is he who is generally understood by the term constable, when mentioned without any peculiar addition.

THIS CONSTABLE has been repeatedly acknowledged by the law, to be "one of the most ancient officers in the realm for the conservation of the peace," *Poph.* 13. 4 *Inst.* 265. It must be confessed, however, that no mention of him by this identical name, is any where found to occur anterior to the writ or mandate of King Henry III, already mentioned; whereby it is also provided, that in every village or township, there should be constituted a constable or two, according to the number of the inhabitants. But it is pretty certain that Lord Coke's idea is right, and that *This officer is actually owing to the institution of the frankpledge, usually attributed to King Alfred*, and was in fact originally the senior or chief pledge of the tithing or *decima*. See the *stats.* 2 *E.* 3. *c.* 3. 20 *H.* 6. *c.* 14. 28 *H.* 8. *c.* 10.

Thus it appears that the ordinance of Hen. III, far from instituting the office, merely enlarged the number of officers, placing them in towns and villages, instead of franchises; since it might frequently happen, that a manor of great extent, had only a single constable for several townships; a case exactly similar, indeed, sometimes occurring at this day, where a township, comprehending several hamlets, equally populous it may be with itself, has only one constable for the whole. [For a constablewick cannot be created at this day, unless by act of parliament. 1 *Mod.* 13.]

We find the *Constable* beginning to be familiarly known by that name, in the time of King Edward I; but not previously. In some articles of inquiry at the Eyre, perhaps, or Trailbaston, certainly in the time of Edward I, are *items* in which this officer is mentioned. *Coll. Madox. Mus. Brit.* iii. 285.—He seems also to be meant in the two chapters of the Eyre, as given in *Fleta*, *lib.* 1. *c.* 20. §§ 126. 133.

He is named in the *stat.* of 2 *E.* 3. *c.* 3. for the first time; as also in those of 4 *E.* 3. *c.* 10. 5 *E.* 3. *c.* 14. 25 *E.* 3. *st.* 1. *c.* 6. and 36 *E.* 3. *st.* 1. *c.* 2. and in several statutes now repealed or obsolete, in the reigns of *R.* 2. *H.* 4. and *H.* 6. 1 *H.* 7. *c.* 7. &c.

It seems highly probable that, at the Common Law, and before the mandate of Henry III, the constable of the hundred, and the constable of the manor, were officers of the same nature and authority, originating at the same time, and differing only as to the extent of their several districts; in short, that they bore to each other the same analogy as subsisted between the bailiff of the hundred and the bailiff of the manor. It follows that the constable of the hundred neither possessed nor could have exercised any more authority within the precinct of the latter, than the constable of one manor possessed or could have exercised in another; the manor being to all intents and purposes exempt from, and excluded out of the hundred.

*Lord Bacon* observes, that though the High Constable's authority hath the more ample circuit, "yet I do not find," says he, "that the petty constable is subordinate to the high constable, or to be ordered or commanded by him." Those cases wherein it has been adjudged, that the being subject to a particular leet, shall not excuse a man from serving the office of constable of the hundred, seem therefore to have been decided upon a wrong principle. See 3 *Keb.* 197, 230. 231. *Freem.* 348. 11 *Mod.* 215.

The powers and duties of this officer shall be considered under the following heads.

I. 1. *His Quality; and* 2. *Qualifications.*
II. 1. *His Election; and* 2. *Who are exempted.*
III. *His Power and Authority.*
IV. *His Duty.* [*These two are in many instances co-extensive, and are therefore carefully to be compared together*].
V. *His Protection, Indemnity, and Allowances; and lastly,*
VI. *His Responsibility and Punishment.*

But first it may be necessary to state a few particulars as to the HIGH CONSTABLE, or constable of the hundred or similar division; who is as much the officer of the justices of the peace as the constable of the vill. *Fort.* 128. He is elected at the leet or turn of the hundred, or by justices of the peace. 1 *Ro. Ab.* 535. *Bulst.* 174. 3 *Keb.* 197. And by *stat.* 29 *Geo.* 2. *c.* 25. § 8, 9. in Westminster a high constable is to be elected annually by the dean or high steward or his deputy at a court leet.—As to his *power*—he may hold petty or statute sessions (for hiring servants) according to ancient usage. *Stat.* 5 *Eliz. c.* 4. But it is doubtful whether he can arrest for breach, or take surety, of the peace. 1 *Salk.* 381. *Cro. Eliz.* 375. 376.—He is said to be an officer within the annual mutiny act, for billetting of soldiers; and liable to the

penalties thereby inflicted for mal-practice in so doing; and he may occasionally make a deputy, whose acts in his principal's absence, will be good. 1 *Blackst.* 350. 3 *Burr.* 1262. but see the act § 1.—Under *stats.* 4 *E.* 4. *c.* 1. 39 *Eliz. c.* 20. and 13 *Geo.* 1. *c.* 23. he may determine complaints of clothiers, and see after abuses mentioned in those acts.—His *Duty* is—To present those who harbour strangers for whom they will not answer. 13 *Ed.* 1. *c.* 6.—To deliver lists of persons qualified to serve on juries. 3 *Geo.* 2. *c.* 25. and see 3 & 4 *Ann. c.* 18.—On receiving notice of any robbery to make fresh suit and hue and cry after the felons, and to defend actions against the hundred by those robbed. 8 *Geo.* 2. *c.* 16. See title *Hue and Cry*, and *stat.* 13 *E.* 1. *c.* 6.—To collect the county rate, and pay it to the treasurer, or account, at the sessions, on pain of imprisonment. 12 *Geo.* 2. *c.* 29.—The *stat.* 17 *Geo.* 2. *c.* 5. as to his paying the allowance for vagrants is altered by *stat.* 26 *Geo.* 2. *c.* 34.—To enforce the laws against profane swearing. 19 *Geo.* 2. *c.* 21.—To give notice to the constables of the orders of the lieutenant or deputy lieutenant as to the militia. 26 *Geo.* 3. *c.* 107.—This officer is removeable by the justices of the peace, on good cause. *Bulst.* 174. 1 *Salk.* 150.—He shall be discharged from serving the office of collector of the poor's rate during his office. 2 *Jones*, 46.

I. 1. The Constable was ordained *to repress felons* and *to keep the peace*, of which he is a conservator by the Common Law. 10 *E.* 4. 18. *Cromp. Just.* 201. 4 *Inst.* 265.

His office is therefore, First, original or primitive as conservator of the peace; and Secondly, ministerial and relative to justices of the peace, coroners, sheriffs, &c. whose precepts he is to execute. 1 *Hale. P. C.* 88.

He is however an officer only for his own precinct, and cannot execute a warrant directed *to the constable of the vill, or to all constables*, generally, of that particular jurisdiction: for he is a constable no where else; nor is he *compellable* to do it, though the warrant be directed to him by name; but he may, if he will, and so indeed may any other person. 1 *Hale P. C.* 459. *Comb.* 446. *Carth.* 508. 1 *Salk* 176. 3 *Salk.* 99. 2 *Ld. Raym.* 1300. 12 *Mod.* 316. *Fost.* 312. *n.* 2 *Black. Rep.* 1135. 1 *H. Black.* 13.—See *stat.* 24 *Geo.* 2. *c.* 55. under which a constable may execute a warrant in any other county, &c. if indorsed by a justice of such other county, &c. and carry the offender before a justice of such other county, &c. and if the offender shall give bail, the constable is to deliver the recognizance, examination or confession of the offender, and all other proceedings relating thereto, to the clerk of assises, or clerk of the peace of the county &c. where the offence was committed, under the penalty of 10*l.* But if the offence shall not be bailable, or the offender shall not give bail, the *constable* shall carry the offender before a justice of the county where the offence was committed.

He is an officer of the court of Quarter-Sessions, over whom they have power. *Comb.* 204.

2. The Common Law requires, that every constable should be *idoneus homo*, *i. e.* apt and fit to execute the said office; and he is said in law to be *idoneus*, who has these three things, honesty, knowledge and ability: honesty to execute his office truly, without malice, affection or partiality; knowledge to know what he ought duly to do; and ability as well in estate as body, that he may intend and execute his office when need is, diligently; and not for impotence or poverty neglect it. 8 *Rep.* 41. *b.* And if one be elected constable who is not *idoneus*, he by the law may be discharged of his office, and another who is *idoneus* appointed in his place.

He must be an inhabitant of the place for which he is chosen. 12 *Mod.* 256.

He ought not to be the keeper of a publick house. 6 *Mod.* 42.—And this is made an express disqualification in Westminster, by *stat.* 29 *Geo.* 3. *c.* 25.



II. 1. The Constable is chosen by the Common Law, at the leet: or, where there is no leet, at the tourn; sometimes by the suitors and sometimes by the steward; and now in many towns and parishes by the parishioners; all according to ancient and particular usage. If he be present when chosen, he is to take the oath in court; if absent, he may be sworn before a (single) justice of the peace. But in the latter case he ought to have special notice of his election, and a time and place should be appointed for his taking the oath [well and truly to serve the office]. 4 *Inst.* 265. 2 *Salk.* 502. *Comb.* 416. 2 *Jones* 212. *Salk.* 175. *Ld. Raym.* 70, 71. 2 *Stra.* 1119. 1149. 5 *Mod.* 130, 1. 2 *Hawk. P. C. c.* 10. § 46.

Constables of London (which city is divided into twenty-six wards, and every ward into precincts, in each whereof is a constable) are *nominated* by the inhabitants of each precinct on St. Thomas's day, and confirmed, or otherwise, at the court of *wardmote*; and after they are confirmed, they are *sworn* into their offices at a court of Aldermen on the next Monday after Twelfth-day; their oath is long and particular, and goes to duties now seldom performed, but regulated by articles of the wardmote inquest, which directs the several matters to be observed by the constable; who is in the nature of a general superintendant of the morals of the inhabitants; and he ought to notice all new-comers, who, if of bad character, may be required to give security for their good behaviour, or be imprisoned; and see *Carth.* 129. 138.—Every constable may execute warrants through the whole city.

In case a constable die, or quit the precinct, two justices may make and swear a new one, till the lord of the manor shall hold a court leet, or till the next quarter sessions, who may either approve of the constable so made, or appoint another. Also, if he continue above a year in office, the quarter sessions may discharge him, and put another in his place until the lord shall hold a court. But justices of the peace, either in or out of the quarter sessions, cannot in any other case discharge a constable chosen in the leet. *Stat.* 13 & 14 *Car.* 2. *c.* 12. *Comb.* 328. *Stra.* 789. 1050. 1213. *Bulst.* 174. *Sty.* 362. *Barn.* 51.

A mandamus may be granted to the steward of a court-leet to swear a constable. *Comb.* 285.

A person may be indicted for not taking upon him the office of constable. *Stra.* 920. See 5 *Mod.* 96. for the form of the indictment.

In the leet or tourn where one is elected constable, and refuses to be sworn, he may, if present, be fined for the contempt; if absent, amerced or subjected to a penalty for non-acceptance of the office according to the order. 5 *Mod.* 130.

Though the justices of the peace have not originally the making of the constable, it is matter of the peace within their general jurisdiction, and they may examine it in their sessions. 2 *Jon.* 212. See 1 *Mod.* 13. And on just cause remove them. 4 *Inst.* 267. And by warrant compel them to appear and be sworn. 5 *Mod.* 128. *All.* 78.

An information in the nature of a *quo warranto* is grantable against one to show by what authority he exercises the office of constable. 2 *Stra.* 1213.

2. *Exemptions* from serving the office.—1. *Aged Persons*, incapacitated by weakness, should never be elected; and in Westminster those of sixty-three years old are expressly exempted by *stat.* 31 *Geo.* 2. *c.* 17. § 13.—2. *Aldermen of London. Doug.* 538. 1 *Jon.* 462. *Cra. Car.* 585.—3. *Apothecaries* practising in, or within seven miles of London, free of the Apothecaries' Company, or in the country having served seven years. *Stat.* 6 & 7 *W.* 3. *c.* 4.—4. *Attorneys* of the courts of K.B. and C.P. *Noy.* 112. *Mar.* 30. *Cro. Car.* 389. *Doug.* 538.—5. *Barbers*, see *post Surgeons.*—6. *Practising Barristers.* 2 *H. P. C.* 103. 1 *Mod.* 22.—7. *Dissenters* being teachers and preachers, but not others, by *stat.* 1 *W. & M.* *c.* 18. See *post.*—8. *Foreigners* naturalized, 5 *Burr.* 2790, who

may rather be said to be incapacitated.—9. *Militia*, serjeants or private men serving in. 26 *Geo.* 3. *c.* 107. § 130.—10. *Parliament*, servants to members of. 1 *Mod.* 13. but this seems doubtful.—11. *Physicians*, President and Fellows of the College in London by *stat.* 32 *H.* 8. *c.* 40. but no other physicians, nor they elsewhere. See 1 *Mod.* 22. *& contra* 1 *Sid.* 431. 2 *Keb.* 578. 2 *H. P. C.* 100.—12. *Prosecutors of Felons;* the original proprietor, or first assignee of a certificate (commonly called a Tyburn-ticket), if a parish or ward office; within the parish or ward in which the felony happened; to be only once used, by *stat.* 10 & 11 *W.* 3. *c.* 23. but this is no exemption from serving the office for a manor; nor, as it should seem, for a vill or township; nor where the office is to be executed out of the privileged district. 2 *Burr.* 1182. —13. *Surgeons*, free of the Surgeons' Company in London, examined, approved, and exercising the science; by *stats.* 5 *H.* 8. *c.* 6. 32 *H.* 8. *c.* 42. 18 *Geo.* 2. *c.* 15.: and by custom *all* surgeons. *Com. Rep.* 312. and it seems by the same statutes, *barbers* free of that company in London.—A college *barber* at Oxford. *Doug.* 531.—*But not* Masters of Arts. 5 *Vin.* 429.—Nor justices of peace in another county. *Stra.* 698. But see *ante Aldermen.*—Nor Officers of the Guards. 1 *Lev.* 233. 1 *Sid.* 272. 355. 2 *H. P. C.* 100.—Nor Officers or watchmen at the Custom House. 1 *Sid.* 272. —Not Tenants in ancient demesne. 1 *Vent.* 344.—Nor, a younger brother of the Trinity House. 1 *Term. Rep.* 679.

If however a gentleman of quality, or a physician, officer, &c. be chosen *constable*, where there are sufficient persons beside, and no special custom concerning it, it is said such persons may be relieved in B.R. 2 *Hawk. P. C.* 100. *c.* 10. § 41.

A *Constable* may make a Deputy; but the *constable* is answerable, and his deputy ought to be sworn, though it is not in all cases necessary. *Sid.* 355. and see 1 *Bur.* 129. 3 *Bur.* 1262. *Stra.* 942. *Cromp. J. P.* 201. *Bacon L. T.* 187. *Moore* 845. 3 *Bulst.* 78. 1 *Ro. Rep.* 274. 1 *Ro. Ab.* 591. 1 *Term Rep.* 682.—But if the Deputy is duly allowed and sworn, the principal is not answerable. *Wood b.* 1. *c.* 7.—*Dissenters* chosen to the office of *constables*, &c. scrupling to take the oaths, may execute the office by deputy, who shall comply with the law in this behalf. *Stat.* 1 *W. & M. c.* 18. *Constables* may appoint a deputy, or person to execute a warrant, when by reason of sickness, &c. they cannot do it themselves. A woman made *constable*, by virtue of a custom, that the inhabitants of a town shall serve by turns, on account of their estates or houses, may procure another to serve for her, and the custom is good. *Cro. Car.* 389. 2 *Term Rep.* 395. See 2 *Hawk. P. C. c.* 10. § 37.

III. The Constable hath as good authority in his place, as the Chief Justice of England hath in his. 1 *Ro. Rep.* 238.

But a Constable cannot act as such out of his particular district, even though a warrant is directed to A. constable of B; to C. and to all other officers of the peace in the county of D. 1 *H. Blackst.* 15. *n.*

It may save much trouble to the inquirer to class the objects of his power and authority, as well as those of his duty, in alphabetical order; a method in some measure formerly pursued in Law Dictionaries, but not with sufficient care and accuracy.

1. *Affray.*—If *He see one* making affray, or assaulting another, or breaking the peace, or hear or know one to menace, or threaten to kill, wound, maim, or beat another, the Constable may take and set him in the stocks, or commit him to prison (as he may persons about to make an affray, and commanded to disperse), till the offender find surety to keep the peace, or for his good behaviour. *Cromp. J. P.* 130, 1. 155. 201. *Dalt.* 33. *Lamb.* 135. 141.—But he may not set one who *hath broken* the peace in the stocks, if he can have him to the next gaol for the night. 22 *E.* 4. 35.—Neither may he commit a party *after* an affray to compel him to find surety of the peace, as he cannot take any man's oath that he is in fear of his life. But he may *upon complaint* arrest the party, and bring him before a justice of peace (which indeed is always the safest way), to find surety. *Cro. El.* 375. *Bro. Tit. Faux. Imp.* 6. 2 *Hale P. C.* 88. 90. If men be making affray in a house, and the doors are shut, or persons making affray, run into a house, the constable may enter to see the peace kept. And if man-slaughter, or bloodshed, is likely to ensue, and *entrance upon demand is refused*, he may break open the doors to keep the peace and prevent the danger. *Cromp. J. P.* 130 *b.* 2 *Hale P. C.* 95. 135. See *post*, 2.

*Aid of the subject*, requiring; see next division, *Arrest.*

*Alehouses.* See 3. and *post*, IV.

2. *Arrest of felons*, &c. Where a felony is committed, though out of his precinct, the constable may, *ex officio*, without a warrant, arrest the felon (if found within his precinct), and imprison him till he can be conveyed to a justice of peace, or to the common gaol. 2 *Hale P. C.* 90. 95. 120. —If the felon in any case resists or flies, whether after arrest or before, and cannot be taken, the Constable may kill him, and such killing is justifiable. 1 *Hale P. C.* 481. 9. 2 *Hale P. C.* 90.—Where a felony has been *actually committed*, the constable (or any person), upon probable grounds of suspicion, may lawfully (and it is the constable's duty to) apprehend the suspected person, and carry him before a magistrate. *Cromp. J. P.* 153 *b.* 201 *b.* 2 *Hale P. C.* 9. 11 *Mod.* 248. *Doug.* 345. *Ledwith* v. *Catchpole*, *Pasch.* 23 *Geo.* 3. *B. R. Hawk. P. C. c.* 11. § 15 *n.*—*Stat.* 22 *G.* 3. *c.* 58. empowers constables and watchmen to arrest persons suspected of conveying away stolen goods by night.—Probable grounds are very many, *e. g.* common fame; hue and cry levied; goods found on a person, &c. *Cromp. J. P.* 87. 154. *Ow.* 121. 12 *Rep.* 92. 2 *Hale P. C.* 81. 3 *Bulst.* 287.—In case of a felony committed, or in danger to be committed (as if one beat or wound another dangerously), the constable, either upon complaint, or hue and cry, may break open the doors to take the offender, if *upon demand and notice*, he will not yield himself, or *entrance be refused;* or if the constable act under a justice's warrant for treason or felony. And he may imprison the offender till the injured party is out of danger. 2 *Hale P. C.* 82. 90. 4. *Cromp. J. P.* 141. *Brownl.* 211. 1 *Bulst.* 146.—The Constable may officially imprison for a time to *prevent* felony; as if he see two with weapons drawn ready to fight: or if a man in a fury be purposed to kill, maim, or beat another. He may also arrest and imprison one for a felonious intent, as if a man bring a helpless infant into a field or elsewhere, and leave it to perish for want: and the constable see this himself. *Moore* 284. *Poph.* 13. Though no felony has actually been committed, constable and his assistants are justified in arresting on *a given charge* of felony. *Doug.* 359. 360. and in this case constable may discharge the person suspected. *Cro. El.* 202. 752. *Dalt.* 272. He may arrest persons coming before the king's justices with force and arms, or who bring force in affray of the peace, or go or ride armed in a warlike and unnecessary manner. *Stat.* 2 *E.* 3. *c.* 3.—And see the *stat.* 5 *E.* 3. *c.* 14. as to his arresting of *Roberdesmen*, *Wastours*, and *Drawlatches*.—He may take aid of his neighbours to arrest another, or in execution of any part of his duty at Common Law, and under several statutes, and they are compelled to assist him; upon affray or such like he may raise the people of the realm to cause the peace to be observed. *Cromp. J. P.* 141. 201 *b.* *Comb.* 309.—He may carry one that he has arrested for felony to the common gaol, and the gaoler is bound to receive him. 1 *Hale P. C.* 595.

As to what constable shall do with a prisoner when taken, if for an affray, see *Affray* above.—In other offences he may convey his prisoners to the sheriff, or his jailor of the county;

or to the jailor of the franchise in which they are taken, who are bound to receive them. *Stat.* 4 *E.* 3. *c.* 10. See *stats.* 5 *H.* 4. *c.* 10. 23 *H.* 8. *c.* 2. But the best way *in all cases* is, to take him to a justice of peace, to bail or discharge him; till when it is the duty of the constable to keep and imprison an offender. 2 *H. P. C.* 95. 120.—If a felon fly, constable ought to seize his goods, and keep them for the king's use, and send hue and cry after him. *Stat.* 27 *El. c.* 13. *Dalt.* 289. 340. *Cromp. J. P.* 201 *b.* and on notice of robbery, is to make hue and cry. *Stat.* 8 *Geo.* 2. *c.* 16.

*Armed going.* See *ante*, 2.

*Assault.* See *ante* 1, 2.

3. *Breaking open Doors.*—See this division *passim.*—Other occasions not yet mentioned which justify so doing, are—A *capias utlagatum*, or *capias pro fine.*—On *forcible entry* and detainer found by inquisition, or view of justices.—On *escape* from a lawful arrest.—On *warrant* to search for stolen goods *if found.* 2 *Hale P. C.* 151. 117.—It is best always, and generally requisite, first to signify the cause of the constable's coming, and to demand that the door should be opened. 2 *Hawk. P. C. c.* 14. *Fost.* 136. 320.

4. *Deserters.*—Constable may apprehend persons suspected to be such, and take them before a justice; under the annual mutiny acts; and he is allowed 20*s.* for each.

5. *Disorderly Houses and Persons.*—If there be disorderly drinking or noise at an unseasonable time of night, especially in inns, taverns, or ale-houses, the constable or his watch demanding entrance, and being refused, may break open the doors to see and suppress the disorder; as is constantly done in London and Middlesex. 2 *Hale P. C.* 95.—He or his watchmen (or indeed any men) may apprehend indecent night-walkers, and commit them till morning. 2 *Hale P. C.* 98.—And he may arrest and commit lewd persons frequenting bawdy-houses, to make them find security for their good behaviour. *Cromp. J. P.* 153 *b.* See title *Bawdy-houses*, and *stat.* 5 *E.* 3. *c.* 14.

*Felons.*—Arrest, imprisonment, and flight of. See *ante* 2.

*Hue and Cry.*—See *ante* 2. *ad finem*; and IV.

6. *Husbandry.*—He may grant testimonials under seal to servants in licensing them to change their masters. *Stat.* 5. *Eliz. c.* 4. And by the same statute, he is to cause all persons mete for labour, to serve by the day, in mowing, reaping, &c. or on refusal, set them in the stocks. By *stats.* 43 *Eliz. c.* 7. and 15 *Car.* 2. *c.* 2. persons unlawfully cutting corn growing, robbing orchards or gardens, breaking fences, pulling up fruit-trees, spoiling woods, &c. (not being felony), not satisfying the damages, shall be committed to the constable to be whipped.

*Imprisonment.*—See this division *passim.*

7. *Inn-keepers.*—The constable on complaint may compel them to receive guests. *Br. Act. sur le Case*, 76. *Cromp. J. P.* 201. See *stat.* 1 *Jac.* 1. *c.* 9.

8. *Insult*, to himself; He may imprison any one insulting, assaulting, or making affray on him, or opposing him, though only verbally, in execution of his office. 1 *Ro. Rep.* 238. *Cromp. J. P.* 131. *Clayt.* 10.

9. *Lunatics* or *Madmen.*—The constable may take and imprison; and he shall not be charged if they die there. *Ow.* 28. and see *stat.* 17 *Geo.* 2. *c.* 5. § 20. and this Dict. title *Lunatics.*

10. *Peace, Surety of.* See *ante* 1, 2.—The constable may take surety by obligation in his own name, but not otherwise, and may certify it at the sessions. 10 *E.* 4. *c.* 18. *Br. Peace, pl.* 2. *Sureties, pl.* 23. *Cromp. J. P.* 131. 4 *Inst.* 265. *Cro. El.* 375, 6.

11. *Plague*, in the time of.—Constable may command infected persons to keep in the house. *Stat.* 1 *Jac.* 1. *c.* 31. See title *Plague.*

12. *Warrants.*—Where constable has a warrant, he is tied up thereby, to act only as it directs. 11 *Mod.* 248.—If he arrests on a general warrant (before some justice), he may carry his prisoner to what justice he will. 5 *Rep.* 59. See *stat.* 24 *Geo.* 2. *c.* 55. as to indorsed warrants, by which offenders may be taken in any county; *ante* I. 1.

Though the constable is not named in 3 & 4 *W.* & *M. c.* 10. nor appointed to be the officer to execute the warrants, yet the justices may command him to execute them. 1 *Salk.* 381. And a constable need not return his warrant, but should keep it for his own justification.—See *stat.* 24 *Geo.* 1. *c.* 44. 1 *Salk.* 381. 2 *Ld. Raym.* 1196.

The *Constable* is the proper officer to a justice of peace, and bound to execute his lawful warrants; and therefore where a statute authorises a justice to convict a person of any crime, and to levy the penalty, &c. without saying to whom such warrant shall be directed, the *constable* is the officer to execute the warrant, and must obey it. 5 *Mod.* 130. 1 *Salk.* 381. *Constable* must at his peril take notice that his warrant is by one in the commission of the peace. 12 *Mod.* 347. and that the matter is within the justice's jurisdiction. 2 *Hawk. P. C. c.* 13. § 11.—And if guilty of misdemeanour in executing a lawful warrant, he becomes a trespasser. 12 *Mod.* 344.—But a warrant properly penned (even though the magistrate who issues it should exceed his jurisdiction), will by *stat.* 24 *Geo.* 2. *c.* 44. at all events indemnify the officer who executes it ministerially. 4 *Comm.* 288.

13. *Watch.*—Constable hath power *ex officio* to keep a watch for the purpose to raise or pursue hue and cry upon robberies committed, by the statute of *Winton*, *c.* 1.; to search for lodgers in suburbs of cities that are suspicious persons, which is to be done every week, or at least once in fifteen days, by the same statute *c.* 4.; for such as ride or go armed, by the statute of 2 *E.* 3. *c.* 3.; for night-walkers and persons suspicious, either by night or day, by the statute of 5 *E.* 3. *c.* 4. And it is in his power to hold such watches as often as he pleases, and the watchmen are his ministers and assistants, and are under the same protection with him, and may act as he doth, and regularly he ought to be in company with them in their walk and watch. 2 *Hale P. C.* 97.

A watchman hath a double protection of the law, *viz.* 1. As an assistant to the constable when he is present or in the watch. 2. Purely as a watchman set by order of law; and the law takes notice of his authority; and the killing of a watchman in the execution of his office is murder. 2 *Hale P. C. ubi sup.*—If an inhabitant refuse to watch in his turn, constable may set him in the stocks. 3 *Lev.* 208.—See *stat.* 14 *Geo.* 3. *c.* 90. for regulating the nightly watch and duty of constables in Westminster. 10 *Geo.* 2. *c.* 22. for London, and other acts only of very local importance, and which those who are to act under should diligently consult. See this Dict. title *Watchmen.*

By 52 *G.* 3. *c.* 17. a temporary act (last continued by 58 *G.* 3. *c.* 52.) the constables under the direction of justices of the peace are to assist in execution of that act, in places where disturbances prevail or are apprehended.

IV. The Constable's duty and office continue till his successor be sworn. 12 *Mod.* 256. Though he may for just cause be removed by the authority which elected him. *Bulst.* 174. 2 *Hawk. P. C. c.* 10. § 37. 38.

*Affray.*—See III. 1.

*Ale-houses.*—Constables are to enforce the penalties against the keepers of. See *ante* III. and this Dict. title *Ale-houses.* And *stats.* 1 *Jac.* 1. *c.* 9. and 3 *C.* 1. *c.* 4.—And by *stat.* 26 *G.* 2. *c.* 31. Constable is to give notice of the days appointed for licensing.

*Armed going.*—See *ante* III. 2. and this Dict. title *Arms.*

*Bawdy-houses.*—See III.

*Bridges.*—By *stat.* 22 *H.* 8. *c.* 5. Constable and two most able inhabitants in the parish are to make an assessment for

the repairs of *bridges*, to be allowed by Justices. See 1 *Hawk. P. C. c.* 77. § 7.

*Burglary.*—If Constable have notice that one is committed, it is his duty to pursue the felon immediately though in the night. *Cro. El.* 16.

*Customs.*—By several statutes, constables are to be assisting to all persons appointed for the collecting and management of the *customs;* and to persons having a warrant from the lord treasurer, &c. to make a search for goods that have not paid the customs. See *int. al. stats.* 12 *Car.* 2. *c.* 19. 23. and 13 & 14 *Car.* 2. *c.* 11.

*Distress*, for rent.—Constables are to assist in. See this Dict. title *Distress.*—He is to make distresses under justices' warrants. *Stat.* 27 *Geo.* 2. *c.* 20. under which constable may take his own *reasonable* charges.

*Drunkenness.*—To assist the justices in punishing; under *stat.* 4 *Jac.* 1. *c.* 5.

*Escape.*—See *post* VI.

*Felons.*—See *ante* III. 2. *Felons' goods.* Constable must keep goods found on the felon till trial, and then return them according to the directions of the court.

*Fires.*—Constables to assist at. See this Dict. title *Fires.*

*Fishing unlawful.*—Constable is to assist in enforcing acts against.

*Forcible entry.*—Constable is to give assistance to justices of the peace, in removing, or shall be committed and fined. 5 *Rep.* 2.

*Game acts.*—To enforce. See this Dict. title *Game.*

*Gunpowder.*—Under *stat.* 12 *Geo.* 3. *c.* 61. constable may by warrant search for gunpowder. See title *Gunpowder.*

*Hawkers and Pedlars.*—By *stat.* 8 & 9 *W.* 3. *c.* 25. constable is to assist in putting the laws in execution against *hawkers* and *pedlars*, that travel without licences, and by *stat.* 11 *Geo.* 2. *c.* 26. against hawkers of spirits.

*Highways.*—Constable is to be aiding and assisting in putting the acts in execution relating to; and to return lists of persons qualified for the office of surveyor, &c. but he is not bound to present them if out of repair. 1 *Vent.* 336. See this Dict. title *Highway.*

*Horses.*—Constable is to be assisting in driving off commons, forests, &c. *horses* and cattle; on pain of 40*s.* *Stat.* 32 *H.* 8. *c.* 13. but see *stats.* 8 *Eliz. c.* 8. and 21 *Jac.* 1. *c.* 28. —And in levying duties on *horses* under *stat.* 25 *Geo.* 3. *c.* 49.

*Hue and Cry.*—By *stats.* 13 *E.* 1. *st.* 2. *c.* 6. 27 *El. c.* 13. 8 *Geo.* 2. *c.* 16. to make *hue* and *cry* after offenders where a felony or robbery is committed; to call upon the parishioners to assist in the pursuit; and if the criminal be not found in the precinct of the first *constable*, he is to give notice to the next, and thus continue the pursuit from town to town, and county to county. And where offenders are not taken, constables shall levy the tax to satisfy an execution, on recovery against a hundred, and pay the same to the sheriffs, &c. and neglecting to make *hue* and *cry*, shall forfeit 5*l.* See this Dict. title *Hue and Cry.*

*Husbandry.*—See *ante* III.

*Innkeepers.*—See *ante* III.

*Juries.*—Under *stats.* 4 & 5 *W.* & *M. c.* 24. 7 & 8 *W.* 3. *c.* 32. 8 & 9 *W.* 3. *c.* 10. 3 & 4 *An. c.* 18. 3 *Geo.* 2 *c.* 25. *Constables* are to give in to the justices at Michaelmas sessions yearly, a list of persons qualified to serve on *juries.* These lists are to be made from the rates of each parish; and *constables wilfully* omitting persons qualified, or inserting wrong persons, shall forfeit 20*s.* See this Dict. title *Jury.*

*Labourers.*—See III.

*Land-tax Acts.*—To assist operations of.

*Lead.*—See *Thieves.*

*Lottery Offices* illegal, constable is to endeavour to suppress. *Stat.* 27 *Geo.* 3. *c.* 1.

*Malt.*—See this Dict. title *Malt.*

*Measures.*—By *stat.* 22 *Car.* 2. *c.* 8. constable is to search and examine if any persons use other *measures* than such as are Winchester measure, and agreeable to the standard; and to seize and break the same; and see *stat.* 31 *Geo.* 2. *c.* 17. for Westminster.

*Militia.*—Constable's duty as to. See the statutes relating to *The Militia.*

*Night Walkers.*—See III.

*Physicians*, College of.—By *stats.* 14 & 15 *H.* 8. *c.* 5. and 32 *H.* 8. *c.* 40. In the city of London, constable is to be assisting to them in putting their laws in execution.

*Plague.*—See *ante* III.

*Poor's Rate.*—Under *stat.* 43 *Eliz. c.* 2. § 12. the weekly rate for the relief of the poor is to be assessed, in case the parishioners disagree, by the churchwardens and constables, who are in either case to levy the rate; and by § 35, the churchwardens and constables of every parish are to collect the sums rated, and pay the same over to the High-Constable. And see *stat.* 12 *Geo.* 2. *c.* 29. and this Dict. title *Poor.*

*Postage.*—Under *stat.* 9. *An. c.* 10. to levy money due for postage of letters under 5*l.* § 30.

*Presentments.*—Constable is at the quarter-sessions to make presentment of all things against the *peace*, and belonging to his office. *Dalt. J. P.* 474. *Fitz. J. P.* 6. And they are usually summoned by the sheriff to attend the quarter-sessions and assizes to make presentments; which seems justified by no express law, though perhaps by usage.

*Riot.*—Constables are to suppress, and they may *ex officio* commit offenders, &c. See *stat.* 1. *Geo.* 1. *c.* 5. and this Dict. title *Riot.*

*Robbery.*—See *Hue and Cry.*

*Scavengers'* rates in London shall be made by constables and churchwardens under *stat.* 2 *W.* & *M. st.* 2. *c.* 8.

*Scolds.*—Under a presentment in the leet and the steward's warrant, constable and his assistant may put them in the cucking stool. *Moor*, 847.

*Servants.*—See III. Constables to assist in levying duty on. under *stat.* 25 *Geo.* 3. *c.* 43.

*Soldiers.*—Constables are to quarter *soldiers* in inns, alehouses, victualling houses, &c. Not to receive any reward to excuse quartering them. To give in lists to the justices, of the houses and persons obliged to quarter *soldiers*, and to provide carriages for troops on their march. See the annual statutes concerning *Soldiers*, and *ante* III.

*Statutes*, or Acts of Parliament; constables are called upon to assist in the execution of these, on almost innumerable occasions.

*Sunday.*—Constable is to enforce acts 1 *C.* 1. *c.* 1. and 29 *C.* 2. *c.* 7. against the profanation of. See this Dict. title *Holidays.*

*Swearing.*—By *stat.* 19 *Geo.* 2. *c.* 21. constable is to levy the penalty for profane *swearing:* which is 1*s.* for a servant, labourer, &c. 2*s.* for others under the degree of a gentleman; and 5*s.* for a gentleman; and as the crime is repeated, the penalty is to be doubled.

*Thieves petty*, of lead, iron copper, &c. Constable, watchmen, and beadles, are to apprehend. *Stat.* 29 *Geo.* 2. *c.* 30.

*Turnpikes.*—Constables to assist in enforcing the act 13 *G.* 3. *c.* 84.

*Vagrants.*—Constables to assist in enforcing the laws against. See this Dict. title *Vagrants.*

*Warrants of Justices.*—It is part, and a great part of constable's duty to execute these, which are issued under an amazing variety of acts of parliament; in all which cases constable's office is chiefly ministerial. See *ante* III.

*Watch.*—See *ante* III.

*Weavers*, Kidderminster.—Constables to assist, by *stats.* 22 & 23 *C.* 2. *c.* 8.

*Weights.*—Under *stats.* 8 *H.* 8. *c.* 5. and 16 *C.* 1. *c.* 19. constables, being head officers of places, shall have in their custody sealed weights, &c. under penalties: persons buying

or selling by false *weights* or measures, forfeit 5*s*. leviable by constables.

*Wreck*.—Under *stat*. 12 *An. st*. 2. *c*. 18. constables may call together assistance to save ships from *wreck;* and see this Dict. title *Wreck*.

V. If a Constable doth not his duty, he may be indicted and fined by the justices of peace; on the other hand he is protected by law, in the execution of his duty.

It has been already mentioned that he shall have aid of the county to pacify affrays.

By *stat*. 7 *Jac*. 1. *cap*. 5. if any *action* is brought against a constable, for any thing done *by virtue of his office*, he, and also all others who in his aid, or by his command, shall do any thing concerning his office, may plead the *general issue*, and give the special matter in evidence, and if he recovers he shall have *double costs*. But this must be certified on the record by the judge. 2 *Vent*. 45. *Doug*. 294.—And see *stat*. 19 *G*. 2. *c*. 21. against profane swearing, which gives treble costs.

By *stat*. 24 *Geo*. 2. *c*. 44. no *action* shall be brought against any constable, or other officer, or any person acting by his order, and in his aid, for any thing done in obedience to any warrant of a justice of peace, until *demand* of the perusal and copy of such warrant, and the same hath been refused or neglected by the space of six days; and in case after such demand, and compliance therewith, any action shall be brought against such constable, &c. without making the justice a defendant; then on producing and proving such warrant, the jury shall give a verdict for the defendant, notwithstanding any defect of jurisdiction in such justice: and if such action be brought jointly against such justice, and also against such constable, &c. then on proof of such warrant, the jury shall find for such constable, &c. and if the verdict shall be given against the justice, the plaintiff shall recover his costs against him to be taxed so as to include costs plaintiff shall be liable to pay to such defendant, &c. No action shall be brought against any constable, &c. unless commenced within six calendar months after the act committed.—This statute extends only to actions of tort. See *Buller's N. P*. 24.

Where defendants, (constables, &c.) in order to levy a poor-rate under magistrates' warrant, broke and entered the house; held that they might be sued in trespass without a previous demand of the perusal and copy of the warrant. 2 *Maule & Selw. Rep*. 259.

Where a constable having a magistrate's warrant of distress to levy a *church-rate* under *stat*. 53 *Geo*. 3. *c*. 127. broke the door of and entered plaintiff's dwelling-house; the court of K. B. held that although he thereby exceeded his authority, yet no action could be sustained, after the three months limited by that act. *Theobald* v. *Crichmore*, *Hil*. 58 *Geo*. 3. *Term Rep. K. B*.

The charges of sending malefactors to jail were at Common Law to be borne by the vill, in which they were apprehended. 1 *Hale*, *P. C*. 96. But now under *stats*. 3 *Jac*. 1. *c*. 10. and 27 *Geo*. 2. *c*. 3. where a malefactor has not sufficient property in the county where he is taken, on application by the constable or officer conveying him, a justice of peace may on oath examine into and ascertain the reasonable expences to be allowed; and by warrant without fee, order the treasurer of the county to pay the same; except in Middlesex, where such expences are to be paid by the overseers of the place where the offender was taken.

By 41 *G*. 3. (*U. K*.) *c*. 73. when special constables are appointed (in England) to execute warrants in cases of felony, two justices may order proper allowances for their expences, &c. whether allowed, or disallowed, by the sessions. In like manner, allowances may be made to high-constables for extraordinary expences in the execution of their duty, in cases of *Riot*, *Felony*, &c.

If in the execution of his office, and acting within his own district, after competent notice that he is constable, he or any that come to his assistance be killed, it is murder: although the party killing do not know his person. 1 *Hale*, *P. C*. 9. 459. 460. 1. 2 *Ld. Raym*. 1300. But see *Leach's* Cases in *Crown Law*, 211.

If two men are combating, and the constable come to part them and is hurt, he shall have action of trespass; and if he hurt them, they shall not have action against him. And so of those who aid him; every man who is assisting to the constable in the execution of his office having the same protection that the law gives to the constable. *Cromp. J. P*. 130. 2 *Hale*, *P. C*. 97.

If he be removed without just cause the court of King's Bench will by rule of court order him to be restored to his place. *Bulst*. 174.

A justice of peace's warrant is a sufficient justification of a constable in a matter within the jurisdiction of such justice. *Stra*. 711. See *ante* III. 12.

By *stat*. 18 *Geo*. 3. *c*. 19. every constable is every three months, and within fourteen days after he goes out of office, to deliver to the overseers of the poor an account entered in a book, kept for the purpose, and signed by him, of all sums by him expended and received on account of the parish, &c. which overseers are within fourteen days to lay the same before the inhabitants, and, if approved, are to pay the money due out of the poor rates; but, if disallowed, are to deliver the book back to the constable, who may produce it before a justice of peace, giving reasonable notice to the overseers; which justice is to examine the account, determine objections, settle the sum due, and enter it in, and sign the account: and the overseers are to pay such sum out of the poor's rate: but may appeal (giving notice) to the quarter sessions.

VI. A Constable arresting one possessed of money who dies, is chargeable with the money. And so where he takes from a felon money of which he had robbed another, even though he should be afterwards robbed of it himself. *Ow*. 121.

Neglecting a duty incumbent on him, either by Common Law, or by statute, he is for his default indictable. 1 *Salk*. 381. 2 *Ro. Rep*. 78.

If he will not return his warrant, or certify what he has done under it, he may be fined. 6 *Mod*. 83. 1 *Salk*. 381. But see 5 *Mod*. 96. *Gib*. 192.

If he wilfully lets a felon escape out of the stocks, and go at large, it is felony. 1 *Hale*, *P. C*. 596. And it seems generally agreed, that all voluntary escapes in the officer, amount to the same crime as the offender was guilty of, whether treason or felony. 2 *Hawk. P. C. c*. 19. § 22. *et seq*.

It is a misdemeanour in him to discharge *an offender* brought to the watch-house by a watchman in the night. 2 *Burr*. 867. But see III. 2.

He is liable to various pecuniary and sometimes personal punishments, on neglecting the duty imposed on him by several statutes.

### The Constable's Oath.

*YOU shall swear, that you will well and truly serve our Sovereign Lord the King in the office of Constable for the township of C. within this manor,* [*hundred or county*] *for the year now next ensuing, or until you shall be thereof discharged by due course of law: you shall see the King's peace kept, and keep all such watch and ward as are usually accustomed and ought to be kept: and you shall well and truly do and execute all other things belonging to the said office according to the best of your knowledge.* So help you God.

FORM OF AN OBLIGATION TO BE TAKEN BY A CONSTABLE FOR KEEPING THE PEACE.

*KNOW ALL MEN by these presents, That* I *A. B. of C. in the county of D. labourer, am held and firmly bound unto E. F. yeoman, constable of the township* [*manor, &c.*] *of C. aforesaid, in the sum of forty pounds to be paid to the said E. F. or his certain attorney, executors, administrators or assigns; for which payment to be well and faithfully made, I bind myself, my heirs, executors, and administrators, firmly by these presents, sealed with my seal. Dated this —— of ——, in the 30th year of the reign of our Sovereign Lord George the Third, by the Grace of God of Great Britain, France and Ireland, King, Defender of the faith, and so forth, and in the year of our Lord* 1790.

*The Condition of the above written obligation is such, that if the above bounden A. B. shall* [*personally appear at the next general quarter sessions of the peace, to be holden in and for the county of D. to do and receive what shall be there and then enjoined him by the court, and in the mean time shall*] *keep the peace* [*and be of good behaviour*] *toward the King and all his liege people, and especially toward G. R. of C. in the said county, yeoman, then the said obligation to be void, or else to remain in full force and virtue.*

*Signed, sealed and delivered in the presence of* }

OATH OF THE APPRAISERS OF GOODS DISTRAINED FOR RENT; TO BE ADMINISTERED BY THE CONSTABLE.

*YOU shall swear that you will faithfully appraise and value the goods now taken in distress, and mentioned in the inventory to you shewn, as between buyer and seller, according to the best of your skill and understanding.* So help you God.

APPOINTMENT OF A DEPUTY.

*I, A. B. Constable of C. in the county of D. do hereby make, substitute, and appoint E. F. of the same place, yeoman, my true and lawful deputy in the office aforesaid, as long as I shall hold the same;* or thus, *during the continuance of my will and pleasure,* [or for any particular purpose] *dated, &c.*

For a command or PROCLAMATION for RIOTERS to disperse, see title *Riot.*

See more fully *Ritson's* Office of Constable, from whence the preceding information on this subject has been principally extracted.

CONSTAT, *Lat.*] The name of a certificate, which the clerk of the pipe, and auditors of the exchequer make at the request of any person who intends to plead or move in that court, for the discharge of any thing: and the effect of it, is the certifying what *constat* (appears) upon *record*, touching the matter in question. See *stats. 3 & 4 Ed. 6. c. 4. 13 Eliz. c. 6.* A *Constat* is held to be superior to an ordinary certificate, because it contains nothing but what is evident on record. An Exemplification under the great seal, of the inrolment of any letters patent is called a *Constat. Co. Lit. 225.*

CONSTRUCTIVE TREASON. See title *Treason.*

CONSUETUDINARIUS. A ritual or book, containing the rites and forms of divine offices, or the customs of abbeys and monasteries: it is mentioned in *Brampton.*

CONSUETUDINIBUS ET SERVICIIS. Is a writ of right close, which lies against the tenant that deforceth his lord of the rent or service due to him. *Reg Orig. 159. F. N. B. 151.* When the writ is brought by the party in the *right* only, he shall count of the seisin of his ancestor, and the writ be in the *debet;* but when he counts of his own *seisin*, then the writ is in the *debet et solet*, &c. And if the party say in the writ *ut in redditibus et arreragiis*, these words prove that the demandant himself was seised of the services; and then if he count in such writ of seisin of his *ancestors*, and not of his *own seisin*, the writ shall abate: so that if he will bring a writ of customs and services of the seisin of his ancestors, he ought to leave these words *ut in redditibus*, &c. out of the writ. Where a person brings a writ of customs and services against any tenant, and by count demands homage, the writ ought to make special mention thereof; as *ut in homagio*, &c. or the writ shall abate. *New Nat. Brev. 330. F. N. B. 151.* If this writ be brought against a tenant for life, where the remainder is over in fee, there the tenant may pray in aid of him in the remainder, &c.

CONSUL, *Lat.*] In our law books signifies an earl. *Bract. l. 1. c. 8.* tells us, that as *comes* is derived from *comitatu*, so *consul* is derived from *consulendo:* and in the laws of *Edward the Confessor*, mention is made of *vicecomites* and *viceconsules. Blount. Consuls* among the ancient Romans were chief officers, of which two were yearly chosen, to govern the city of Rome. Those who now pass under the name of *Consuls* residing in England sent from foreign nations, and in foreign ports sent from England, are merchants, or persons of eminence and knowledge, appointed to take care of the affairs and interests of merchants. See *Lex Mercat.*

A resident merchant of London, who is appointed and acts as *Consul* to a foreign prince, is not exempted from arrest upon mesne process. *Viveash* v. *Becker, Term Rep. K. B. Mich. 55 Geo. 3. 284.* See title *Arrest.*

CONSULTA ECCLESIA. A church full, or provided for. *Cowel.*

CONSULTATION, *consultatio.*] A writ whereby a cause having been removed by Prohibition from the Ecclesiastical court, to the King's court, is returned thither again; for if the judges of the King's court, upon comparing the libel with the suggestion of the party, find the suggestion false, or not proved, and therefore the cause to be wrongfully called from the Ecclesiastical court, then upon this *consultation* or deliberation they decree it to be returned; whereupon the writ in this case obtained is called a *Consultation. Reg. Orig. 44.* &c. Statute of *Writ of Consultations, 24 Ed. 1.*

This writ is in nature of a *procedendo;* but properly a *consultation* ought not to be granted, but in case where a man cannot recover at the Common Law, in the King's courts. *New. Nat. Br. 119.* Causes of which the Ecclesiastical or Spiritual courts have jurisdiction, are of administrations, admissions of clerks, adultery, appeals in ecclesiastical causes, apostacy, general bastardy, blasphemy, solicitation of chastity, dilapidations and church repairs, celebration of divine service, divorces, fornication, heresy, incest, institution of clerks, marriage rites, oblations, obventions, ordinations, commutation of penance, pensions, procurations, schism, simony, tithes, probate of wills, &c. and where a suit is in the Ecclesiastical court, for any of these causes or the like, and not mixed with any temporal thing, if a suggestion is made for a prohibition, a *consultation* shall be awarded. *5 Rep. 9.*

To move for a prohibition in another court, after motion in the *Chancery*, &c. on the same libel which is granted, is merely vexatious, for which a *consultation* shall be had. *Cro. Eliz. 277:* Where a *consultation* is granted upon the right of the thing in question, there a new prohibition shall never be granted on the same libel; but where granted upon any default of the prohibition, in form, &c. there a prohibition may be granted upon the same libel again. *1 Nels. Abr. 485.* See title *Prohibition.*

CONTEMPT, *contemptus.*] A disobedience to the rules, orders, or process of a Court, which hath power to punish such offence; and one may be imprisoned for a *contempt* done in court; but not for a contempt out of court, or a private abuse. *Cro. Eliz. 689.* But for contempt out of court, an attachment may be granted. Attachment also lies against

one for *contempt* to the court, to bring in the offender to answer on interrogatories, &c. and if he cannot acquit himself, he shall be fined. 1 *Lill.* 305. If a sheriff, being required to return a writ directed to him, doth not return the writ, it is a *contempt:* and this word is used for a kind of misdesmeanor, by doing what one is forbidden; or not doing what he is commanded. 12 *Rep.* 36. And as this is sometimes a greater, and sometimes a lesser offence; so it is punished with greater or less punishment, by fine, and sometimes imprisonment. *Dyer*, 128. 177. 1 *Bulst.* 85.

If a defendant in Chancery, on service of a *subpœna*, does not appear within the time limited by the rules of the court, and plead, demur, or answer, to the bill against him, he is then said to be *in contempt:* and the respective processes of contempt are in successive order awarded against him. These are *attachment; attachment with proclamations; a commission of rebellion;* and finally *a sequestration.* 3 *Comm.* 443.

An attachment of *contempt* may issue against a bishop, or other peer: but for not returning a *fieri facias de bonis ecclesiasticis*, it is proper to move against the chancellor, commissary, or official. *Rex* v. *Bishop of St. Asaph.* 1 *Wils.* 332.

It is a contempt to institute a suit fictitiously, though the demand is real, either to hurt any person, or to get the opinion of the court. *Coxe* v. *Phillips*, *Hardw.* 237. 239.—See further title *Attachment;* and 4 *Comm.* 283.

*Contempts against the King's prerogative* are by refusing to assist him for the good of the public; either in his councils, by advice, if called upon; or in his wars, by personal service, for defence of the realm, against a rebellion or invasion. 1 *Hawk. P. C. c.* 22.

Under this class may be ranked the neglecting to join the *posse comitatus*, or power of the county, being thereunto required by the sheriff or justices according to the *stat.* 2 *Hen.* 5. *c.* 8. (see title *Riots;*) which is a duty incumbent upon all that are 15 years of age, under the degree of nobility, and able to travel. *Lamb. Eliz.* 315.

Contempts against the prerogative may also be by preferring the interests of a foreign potentate to those of our own; or doing or receiving any thing that may create an undue influence, in favour of such extrinsic power; as by taking a *pension* from any *foreign prince* without the consent of the King. 3 *Inst.* 114.—Or by disobeying the king's lawful commands; whether by writs issuing out of his courts of justice, or by a summons to attend his privy council; or by letters from the king to a subject, commanding him to return from beyond the sea: (for disobedience to which his lands shall be seized till he doth return, and himself afterwards punished); or by his writ of *ne exeat regno* or proclamation commanding the subject to stay at home.

Disobedience to any of these commands is a high mis-prision and contempt; and so, lastly, is disobedience to any act of parliament, where no particular penalty is assigned; for then it is punishable, like the rest of these contempts, by fine and imprisonment, at the discretion of the King's courts of justice. 4 *Comm.* 122. See also 1 *Hawk. P. C. cc.* 22. 23. 24. And this Dict. titles *Oaths*, *King*.

CONTENEMENT, *contenementum.*] Is said to signify a man's countenance or credit, which he hath together with, and by reason of, his freehold: in which sense, it is used in *stat.* of 1 *Ed.* 3. and other statutes: and *Spelman*, in his *Glossary*, says, contenementum *est æstimatio et conditionis forma, qua quis in repub. subsistit.* But *contenement* is more properly that, which is necessary for the support and maintenance of men, agreeable to their several qualities, or states of life. See *Magna Charta*, *c.* 14. and *Glanvil. lib.* 9. *c.* 8. and this Dict. title *Distress*.

CONTINGENT LEGACY. See title *Legacy*.

CONTINGENT REMAINDER. Contingent or *executory* remainders (whereby no present interest passes) are where the estate in remainder is limited to take effect, either to a dubious and uncertain *person;* or upon a dubious and uncertain *event;* so that the particular estate may chance to be determined, and the remainder never take effect. 3 *Rep.* 20. 2 *Comm.* 169. And see 10 *Rep.* 85. See this Dict. titles *Estate*, *Limitation*, *Remainder;* and also title *Executory Devise*.

CONTINGENT USE. Is a use limited in a conveyance of land, which may or may not happen to vest, according to the *contingency* expressed in the limitation of such *use:* a *use* in *contingency* is such which by possibility may happen in possession, reversion, or remainder. 1 *Rep.* 121.

CONTINUAL CLAIM. See title *Claim*.

CONTINUANCE. Is the insuring of a cause in court, by an entry upon the records there for that purpose. There is a *continuance* of the *assize*, &c. And *continuance* of a *writ* or *action* is from one term to another, in case where the sheriff hath not returned a former writ, issued out in the said action. *Kitch.* 262. *Continuances* and essoins are amendable upon the roll, at any time before judgment: they are the acts of the court, and at Common Law they may amend their own acts before judgment, though in another term; but their judgments are only amendable in the same term wherein they are given. 3 *Lev.* 431. Upon an Original, a term or two or three terms may be mesne between the teste and the return; and this shall be a good *continuance;* for the defendant is not at any prejudice by it, and the plaintiff may give a day to the defendant beyond the common day, if he will.

But a *continuance* by *capias* ought to be made from term to term, and there cannot be any mesne term, because the defendant ought not to stay so long in prison. 2 *Danv. Abr.* 150. If a man recover upon demurrer, or by default, &c. and a writ of inquiry of damages is awarded, there ought to be *continnances* between the first and second judgment, otherwise it will be a discontinuance; for the first is but an award, and not complete, till the second judgment, upon the return of the writ of inquiry of damages. *Ibid.* 153. If the plaintiff be nonsuit, by which the defendant is to recover costs; if the plaintiff will not enter his *continuances*, on purpose to save the costs, the defendant shall be suffered to enter them. *Cro. Jac.* 316. 317. The course of the Court of King's Bench is to enter no *continuance* upon the roll, till after issue or demurrer, and then to enter the *continuance* of all upon the back, before judgment: and if it is not entered, it is error. *Trin.* 16 *Jac. B. R.* Vide titles *Discontinuance*, *Process*.

CONTINUANDO. A word used in a special declaration of trespass, when the plaintiff would recover damages for several trespasses in the same action: and to avoid multiplicity of suits, a man may in one action of trespass recover damages for many trespasses, laying the first to be done with a *continuando* to the whole time, in which the rest of the trespasses were done; which is in this form, *Continuando* (*by continuing* the trespass aforesaid, &c. from the day aforesaid, &c.) until such a day, including the last trespass. *Termes de Ley*.

In trespass with a *continuando* of divers things, though of some of those things there could be no *continuando*, yet it shall be good for those things for which the *continuando* could be, and not for the others; but if the *continuando* had been particularly of such things whereof a *continuando* could not be, then it had been nought. 3 *Lev.* 94. Every day's trespass is said to be a several trespass; though a *continuando* may not be of men's continuing a trespass day and night, for some time together; for mankind must take some rest: where cattle do trespass upon ground, they are continually trespassing night and day, and therefore the *continuando* in that case is good. 1 *Lill. Abr.* 307. Trespass for breaking an house with a *continuando* is good; and until a re-entry is made, the continuation of the possession is a continuing of the trespass. *Lutw.* 1312. See title *Trespass*.

CONTRABAND GOODS. From *contra*, and the Ital. *bando*, an edict or proclamation.] Are those which are prohibited by act of parliament, or the king's proclamation to be imported into, or exported out of this into any other nation. See titles *Navigation Acts*, *Customs*.

CONTRACAUSATOR. A criminal, or one prosecuted for a crime: this word is mentioned in *Leg. H.* 1. *cap.* 61.

CONTRACT, *contractus*.] A covenant or agreement between two or more persons, with a lawful consideration or cause, *West. Symb. part* 1. As if a man sells his horse or other thing to another, for a sum of money; or covenants in consideration of 20*l.* to make him a lease of a farm, &c. these are good *contracts*, because there is a *quid pro quo*, or one thing for another: but if a person make promise to me, that I shall have 20*s.* and that he will be debtor to me therefore, and after I demand the 20*s.* and he will not give it me, yet I shall never have any action to recover this 20*s.* because this promise was no *contract*, but a bare promise, or *nudum pactum*; though if any thing were given for the 20*s.* if it were but to the value of a penny, then it had been a good *contract*. See title *Consideration*.

Every *contract* doth imply in itself an *assumpsit* in law, to perform the same; for a *contract* would be to no purpose, if there were no means to enforce the performance thereof. 1 *Lill. Abr.* 308. Where an action is brought upon a *contract*, and the plaintiff mistakes the *sum agreed upon*, he will fail in his action: but if he brings his action on the *promise* in *law*, which arises from the debt, there, although he mistakes the sum, he shall recover. *Aleyn*, 29. See titles *Action*, *Assumpsit*.

There is a diversity where a *day of payment* is limited on a *contract*, and where not; for where it is limited, the *contract* is good presently, and an action lies upon it, without payment: but in the other not. If a man buys 20 yards of cloth, &c. the *contract* is void, if he do not pay the money presently; but if day of payment be given, there the one may have an action for the money, and the other trover for the cloth. *Dyer*, 30. 293. Where a seller says to a buyer, he will sell his horse for so much, and the buyer says he will give it; if he presently tell out the money it is a *contract*; but if he do not, it is no *contract*. *Noy's Max.* 87. *Hob.* 41. The property of any thing sold is in the buyer immediately by the *contract*; though regularly it must be delivered to the buyer, before the seller can bring his action for the money. *Noy*, 88. If one contract to buy a horse or other thing of me, and no money is paid, or earnest given, nor day set for payment thereof, nor the thing delivered; in these cases, no action will lie for the money, or the thing sold, but it may be sold to another. *Plowd.* 128. 309.

All *contracts* are to be certain, perfect, and complete: for an agreement to give so much for a thing as it shall be reasonably worth, is void for incertainty; so a promise to pay money in a short time, &c. or to give so much, if he likes the thing when he sees it. *Dyer*, 91. 1 *Bulst.* 92. But if I *contract* with another to give him 10*l.* for such a thing, if I like it on seeing the same; this bargain is said to be perfect at my pleasure; though I may not take the thing before I have paid the money; if I do, the seller may have trespass against me; and if he sell it to another, I may bring an action on the case against him. *Noy*, 104. If a *contract* be to have for cattle sold 10*l.* if the buyer do a certain thing, or else to have 20*l.* it is a good *contract* and certain enough. And if I agree with a person to give him so much for his horse, as J. S. shall judge him worth, when he hath judged it, the *contract* is compleat, and an action will lie on it: and the buyer shall have a reasonable time to demand the judgment of J. S. But if he dies before the judgment is given, the *contract* is determined. *Perk. sect.* 112. 114. *Shep. Abr.* 294.

In *contracts*, the *time* is to be regarded, *in* and *from* which the *contract* is made; the words shall be taken in the common and usual sense, as they are taken in that place where spoken; and the law doth not so much look upon the *form of words*, as on the *substance and mind* of the parties therein. 5 *Rep.* 83. 1 *Bulst.* 175. A *contract* for goods may be made as well by word of mouth, as by deed in writing; and where it is in writing only, not sealed and delivered, it is all one as by word. But if the *contract* be by writing sealed and delivered, and so turned into a deed, then it is of another nature; and in this case generally the action on the verbal *contract* is gone, and some other action lies for breach thereof. *Plowd.* 130, 309. *Dyer*, 90.

*Contracts*, not to be performed in a year, are to be in writing, signed by the party, &c. or no action may be brought on them; but if no day is set, or the time is uncertain, they may be good without it. *Stat.* 29 *Car.* 2. *c.* 3. And by the same statute, no *contract* for the sale of goods for 10*l.* or upwards, shall be good, unless the buyer receive part of the goods sold; or give something in earnest to bind the *contract*; or some note thereof be made in writing, signed by the person charged with the *contract*, &c. See titles *Frauds*, *Agreement* III. IV.

If two persons come to a draper, and one says, Let this man have so much cloth, and I will pay you; there the sale is to the undertaker only, though the delivery is to another by his appointment; but if a *contract* be made with A. B. and the vendor scruples to let the goods go without money, and C. D. comes to him, and desires him to let A. B. have the goods, and undertakes that *he* shall pay him for them, that will be a promise *within* the statute 29 *Car.* 2. *c.* 3. and ought to be in writing. *Mod. Cas.* 249.

A *contract* made and entered into upon good consideration, may for good considerations be dissolved. See *Agreement* and *Sale*. As to *Usurious Contracts*, see title *Usury*.

CONTRAFACTION, *contrafactio*.] A counterfeiting. Contrafactio *sigilli regis*, a counterfeiting the King's seal.—*Blount*.

CONTRA FORMAM COLLATIONIS. A writ that lay where a man had given lands in perpetual alms, to any late houses of religion, as to an abbot and convent, or to the warden or master of any hospital and his convent, to find certain poor men with necessaries, and do divine service, &c. If they aliened the land, to the disherison of the house and church, then the donor or his heirs should bring this writ to recover the lands. It was had against the abbot or his successor; not against the alience, though he were tenant of the land: and was founded upon the statute of *Westm.* 2. *c.* 1. *Reg. Orig.* 238. *F. N. B.* 210.

CONTRA FORMAM FEOFFAMENTI. A writ that lay for the heir of a tenant, enfeoffed of certain lands or tenements, by charter of feoffment from a lord to make certain services and suits to his court, who was afterwards distrained for more services than were mentioned in the charter. *Reg. Orig.* 176. *Old. Nat. Br.* 162.

CONTRA FORMAM STATUTI, *contrary to the form of the statute in such case made and provided*.] The usual conclusion of every indictment, &c. laid on an offence created by statute.

*If one statute be relative to another, as* where the *former making the offence, the latter adds a penalty*, the indictment ought to conclude *contra formam statutorum*. 2 *Hale's Pl. C.* 173. *cap.* 24.

Where there are *several statutes*, and it does not appear on which the information is founded, the concluding *contra formam statuti* is ill. *Cro. Jac.* 145. *pl.* 19. *Broughton* v. *Moor*, cited as adjudged in *Talbot et al.* Where *one act makes the offence*, and *another gives the penalty*, an information must be *contra formam statutorum*; in the case of *Talbot and Sheldon*, indicted for recusancy *contra formam statuti*, 23 *Eliz. c.* 1. and the judgment reversed because the penalty was demanded: for the

10 *Eliz.* made the offence, and the 23d gave the penalty: but, if the information had been for the offence only, it had been good: *per Coke. Ow.* 135. *Trin.* 9 *Jac.* See 5 *Vin. Abr.* 552. 556.—See further titles *Statutes, Indictment.*

CONTRAMANDATIO PLACITI. A respiting or giving a defendant further time to answer; or a *countermand* of what was formerly ordered. *Leg. H.* 1. *c.* 59.

CONTRAMANDATUM. A lawful excuse which the defendant in a suit by attorney alledgeth for himself, to shew that the plaintiff hath no cause of complaint. *Blount.*

CONTRAPOSITIO. A plea or answer. *Leg. Hen.* 1. *c.* 34.

CONTRARIENTS. In the reign of King Edward II. Thomas Earl of Lancaster taking part with the Barons against the King, it was not thought fit, in respect of their great power, to call them rebels or traitors, but *contrarients;* and hence we have a record of those times, called *Rotulum Contrarientium.*

CONTRATENERE. To with-hold. *Si quis decimas* contrateneat. *Leg. Alfredi apud Brompton, c.* 9.

CONTRAVENTION. Is the action founded on the breach of Law-burrows. *Scotch Dict.*

CONTRIBULES, *contribunales.*] Kindred or cousins.—*Lamb. p.* 75.

CONTRIBUTION, *contributio.*] Is where every one pays his share, or *contributes* his part to any thing. One *parcener* shall have *contribution* against another; one *heir* have *contribution* against another *heir*, in equal degree; and one *purchaser* shall have *contribution* against another. Also *conusors* in a statute shall be equally charged, and not one of them solely extended. 3 *Rep.* 12. 13. &c. On a statute or recognisance, there is a *contribution* and stay till the full age of the heir, &c. and this doth extend to the lessee for life or years, of the conusor, who has part of the land liable, and the heir within age the residue; for the land of every one of them ought to be charged equally, because the whole is liable to the judgment; and this cannot be, if during the nonage, the burthen shall fall upon one only. *Jenk. Cent.* 36. If lands are *mortgaged*, and then devised to one person for life, with remainder to another; *both devisees* shall make *contribution* to payment of the mortgage-money. *Chan. Cas.* 224. 271.—See title *Mortgage.*

Where goods are cast into the sea, for the safeguard of a ship, or other goods, &c. abroad in a tempest: there is a *contribution* among merchants, towards the loss of the owners. See title *Insurance.* And where a *robbery* is committed on the highway, and damages are recovered against one or a few persons in an action against the *hundred*, the rest of the inhabitants shall make *contribution* to the same. 27 *Eliz. c.* 13.—See title *Robbery.*

CONTRIBUTIONE FACIENDA. A writ that lieth where there are tenants in common, that are bound to do one thing, and one is put to the whole burden: as where they jointly hold a mill *pro indiviso*, and take the profits equally, and the mill falling into decay, one of them will not repair the mill: now the other shall have a writ to compel him to *contribute* to the reparations. And if there be three coparceners of land, that owe suit to the lord's court, and the eldest performs the whole; then may she have this writ to compel the other to make their contribution. So where one suit is required for land, and that land being sold to divers persons, suit is demanded of them all, or some of them by distress, as entirely as if all the land were still in one. *Reg. Orig.* 175. *F. N. B.* 162.

CONTROLLER, Fr. *contrerolleur*, Lat. *contrarotulator.*] An Overseer or officer relating to public accounts, &c. And we have divers officers of this name; as *Controller* of the *King's Household;* of the *Navy;* of the *Customs;* of the *Excise;* of the *Mint, &c.* And in our courts, there is the controller of the *Hamper*, of the *Pipe*, and of the *Pell*, &c. The office of *Controller of the Household*, is to control the accounts of the Green Cloth; and he sits with the Lord Steward and other officers in the countinghouse, for daily taking the accounts of all expences of the household. The *Controller of the Navy* controls the payment of wages; examines and audits accounts; and inquires into rates of stores for shipping, &c. *Controllers of the Customs and Excise*, their office is to control the accounts of those revenues. And the *Controller of the Mint*, controls the payment of wages, and accounts relating to the same. *Controller of the Hamper* is an officer in the *Chancery* attending the Lord Chancellor daily in term-time, and upon seal-days; whose office is to take all things sealed from the Clerk of the *Hamper*, inclosed in bags of leather, and to note the just number and effect of all things so received, and enter the same in a book, with all the duties appertaining to his Majesty, and other officers for the same. The *Controller of the Pipe* is an officer of the Exchequer, who writes out summons twice every year to the sheriffs, to levy the farms and debts of the Pipe; and keeps a controlment of the Pipes, &c. *Controller of the Pell* is also an officer of the Exchequer; of which sort there are two, who are the Chamberlain's clerks, that do or should keep a controlment of the Pell, of receipts and goings out; and this officer was originally such as took notes of other officers' accounts or receipts, to the intent to discover if they dealt amiss, and was ordained for the Prince's better security. *Fleta, lib.* 1. *cap.* 18. *Stat.* 12 *Ed.* 3. *cap.* 3. This last seems to be the original use and design of all *Controllers.*

CONTROVER, *controveur.*] One that of his own head devises or invents false news. 2 *Inst.* 227.

CONTROVERTED ELECTION. See *Parliament* VI. (B.) 3.

CONVENABLE, Fr.] Agreeable. *Stat.* 27 *Ed.* 3. *c.* 21. See *Covenable.*

CONVENIENT, *convenicns.*] Of the use of this word, *Sir Edw. Coke* in his Institute says,—*Non solum quod licet sed quod est* conveniens *est considerandum, nihil quod est* inconveniens *est licitum.* 1 *Inst.* 66.

CONVENT, *conventus.*] Signifies the fraternity of an *abbey* or *priory;* as *societas* doth the number of fellows in a college. *Bract. lib.* 2. *c.* 35.—See title *Monastery, Mortmain.*

CONVENTICLE, *conventiculum.*] A private assembly or meeting for the exercise of religion; first used as a term of disgrace for the meetings of Wickliffe in this nation, above two hundred years since; and now applied to the illegal meetings of the Nonconformists: it is mentioned in the *statutes* 2 *Hen.* 4. *c.* 15. 1. *H.* 6. *c.* 3. and 16 *Car.* 2. *c.* 4. which statute was made to prevent and suppress *conventicles:* and by *stat.* 22 *Car.* 2. *cap.* 1. it is enacted, that if any persons of the age of sixteen years, subjects of this kingdom, shall be present at any *conventicle* where there are five or more assembled, they shall be fined 5*s.* for the first offence, and 10*s.* for the second; and persons preaching incur a penalty of 20*l.* Also suffering a meeting to be held in a house, &c. is liable to 20*l.* penalty. Justices of peace have power to enter such houses, and seize persons assembled, &c. And if they neglect their duty, they shall forfeit 100*l.* And if any constable, &c. know of such meetings, and do not inform a justice of peace, or chief-magistrate, he shall forfeit 5*l.* But the *Stat.* 1 *W. & M. st.* 1. *c.* 18. ordains that protestant dissenters shall be exempted from penalties; though if they meet in a house, with the doors locked, barred, or bolted, such dissenters shall have no benefit from that statute. By *stat.* 52 *Geo.* 3. 155. the act 22 *Car.* 2. *c.* 1, was finally repealed. By *stat.* 10 *An. c.* 2. Officers of the government, &c. present at any *conventicle*, at which there shall be ten persons, if the Royal family be not prayed for in express words, shall forfeit 40*l.* and be disabled. See titles *Nonconformist, Religion.*

CONVENTIO. An agreement or covenant: as *A. B. queritur, &c. de* C. D. &c. *pro eo quod non teneat* conventionem, &c. There is a strange *record* of the *court* of the manor of *Hatfield, in Com. Ebor.* held *anno* 11 *Ed.* 3. relative to a con-

*vention* to sell *the Devil*, and on earnest given, and non-delivery, action brought; which on hearing was adjourned *in infernum*.

CONVENTIONE. A writ for the breach of any covenant in writing, whether real or personal: a *Writ of Covenant*. *Reg. Orig.* 115. *F. N. B.* 145.

CONVENTION. A parliament assembled, but in which no act is passed, or bill signed. *Dict.*

The term *Convention*, is rather applied to the meeting of the Lords and Commons, without the assent of, or being called together by, the King; and which can only be justified *ex necessitate rei*.

Of this nature was the *Convention-Parliament*, which restored King Charles II. and which met above a month before his return: the Lords by their own authority, and the Commons in pursuance of writs issued in the name of the keepers of the liberty of England by authority of parliament. And if this Convention had not so met, it was morally impossible that the kingdom should have been settled in peace.

In a similar manner, at the time of the Revolution. *A. D.* 1688, the Lords and Commons by their own authority, and upon the summons of the Prince of Orange, (afterward William III.) met in a *Convention*, and therein disposed of the Crown and Kingdom. And it is declared by *stat.* 1 *W. & M. st.* 1. *c.* 1. that this *Convention* was really the two houses of parliament, notwithstanding the want of writs or other defects of form.

If we may be allowed to suppose a possible case, that the whole Royal line should at any time fail and become extinct, which would indisputably vacate the throne; in this situation it seems reasonable to presume that the body of the nation, consisting of Lords and Commons, would have a right to meet and settle the government: otherwise there must be no government at all. But whenever the throne is full, no national meeting, nor any meeting pretending to be such, can be legal, but the *parliament* assembled by command of the King. See title *Parliament*, and 1 *Comm.* 151, 2.

The Constitution of Great Britain having placed the representation of the nation, and the expression of the national will, in the parliament, no other meeting or *Convention* even of every individual in the kingdom, would be a competent organ to express that will; and meetings of such a nature tending merely to sedition, and to delude the people into an imaginary assertion of rights, which they had before delegated to their representatives in parliament, could only tend to introduce Anarchy and Confusion; and to overturn every settled principle of government. An act of parliament was passed in Ireland, in the year 1793, to prevent any such meetings or *Conventions*: and a few ignorant individuals, who in the same year had dared to assemble under that title in Scotland, were quickly dispersed, and their leaders convicted of seditious practices; for which they were sentenced to transportation. See further titles *Parliament*, *Treason*, *Seditious Assemblies*.

CONVENTUALS. Religious men united together in a *convent* or religious house. *Cowel.*

CONVENTUAL CHURCH. A church that consists of regular clerks, professing some order of religion: or of Dean and Chapter, or other societies of Spiritual men.

CONVERSION. Is where a person finding or having the goods of another in his possession, *converts* them to his own use, without the consent of the owner, and for which the proprietor may maintain an action of *Trover* and *Conversion* against him.—And refusal to restore goods, is, *primâ facie*, sufficient *evidence* of a conversion, though it does not amount to a conversion. 10 *Rep.* 56. 3 *Comm.* 152. See title *Trover*.

CONVERSOS. The Jews here in England were formerly called *Conversos*, because they were converted to the *Christian* religion. King Hen. III. built an house for them in London, and allowed them a competent provision or subsistence for their lives; and this house was called *Domus Conversorum*. But by reason of the vast expences of the wars, and the increase of those *converts*, they became a burden to the Crown; so that they were placed in abbeys and monasteries for their support and maintenance. And the Jews being afterwards banished, King Ed. III. in the 51st year of his reign, gave this house which had been used for the converted Jews, for the keeping of the Rolls; and it is said to be the same which was till lately enjoyed by the Master of the Rolls. *Blount. Harg. Co. Lit.* 291 *b*.

CONVEYANCE. A deed which passes or conveys land from one man to another. *Conveyance* by *feoffment*, and *livery*, was the general *conveyance* at Common Law; and if there was a tenant in possession, so that livery could not be made, then was the reversion granted, and the tenant always attorned; also upon the same reason a *lease* and *release* was held to be a good *conveyance* to pass an estate; but the lessee was to be in actual possession, before the release. But the lease is now considered as operating so as to give the possession, which it does in point of law.

By the *Common Law*, when an estate did not pass by feoffment, the vendor made a lease for years, and the lessee actually entered; and the lessor granted the reversion to another, and the lessee attorned: afterwards, when an inheritance was to be granted, then likewise was a lease for years usually made, and the lessee entered (as before), and then the lessor released to him: but after the *statute of uses*, it became an opinion, that if *a lease for years* was made upon a valuable consideration, a *release* might operate upon it without an actual entry of the lessee; because the statute did execute the lease: and raised an use presently to the lessee: and serjeant Moor was the first who practised this way. 2 *Mod.* 251. 252.

The most common *Conveyances* now in use are *deeds of gift*, *bargain and sale*, *lease and release*, *fines and recoveries*, *settlements to uses*, *&c.*

The following further observations on conveyances at Common Law and those which derive their effect from the Statute of Uses, are abridged from the long and learned note on 1 *Inst.* 271 *b.*; to which the curious enquirer is referred for a more particular investigation of the subject. See also this Dict. titles *Deed*, *Estate*, *Lease and Release*, *Limitation*, *Trusts*, *Uses*.

FEOFFMENTS and GRANTS were the two chief modes used in the Common Law for transferring property. The most comprehensive definition which can be given of a FEOFFMENT seems to be, a conveyance of *corporeal* hereditaments, by delivery of the possession, upon, or within view of, the hereditaments conveyed. This delivery was thus made, that the lord and the other tenants might be witnesses to it. No charter of feoffment was necessary; it only served as an authentication of the transaction; and when it was used, the lands were supposed to be transferred, not by the charter, but by the livery which it authenticated. Soon after the Conquest, or perhaps towards the end of the Saxon government, all estates were called *fees*; the original and proper import of the word feoffment is, the grant of a fee. It came afterwards to signify a grant with livery of seisin of a free inheritance to a man and his heirs: more respect being had to the perpetuity, than to the feudal tenure, of the estate granted. In early times, after the Conquest, charters of Feoffment were various in point of form. In the time of Ed. I. they began to be drawn up in a more uniform stile. The more antient of them generally run with the words *dedi*, *concessi* or *donavi*. It was not till a later period that *feoffavi* came into use. The more antient feoffments were also usually made in consideration of, or for the homage and service of the feoffee, and to hold of the feoffor and his heirs. But after the *stat. quiaemptores*, (18 *E.* 1. *st.* 1.) feoffments were always made to hold to the chief lords of the fee, without the words *pro homagio et servitio*. See further, 1 *Inst.* 6 *a*: 271 *b*.

The proper limitation of a feoffment is to a man and his heirs; but feoffments were often made of conditional fees, (or of estates tail as they are now called,) and of life-estates; to which may be added, feoffments of estates given in frank-marriage and frankalmoigne. To make the feoffment complete, the feoffor used to give the feoffee seisin of the lands: this is what the feudists call Investiture. It was often made by symbolical tradition, but it was always made upon or within view of the lands. When the King made a feoffment he issued his writ to the sheriff, or some other person to deliver seisin: other great men did the same; and this gave rise to powers of attorney. See *Mad. Form. pref.*

A GRANT in the original signification of the word, is a conveyance or transfer of an *incorporeal* hereditament. As livery of seisin could not be had of these, the transfer of them was always made by writing, in order to produce that notoriety, which in the transfer of corporeal hereditaments was produced by delivery of the possession. But in other respects a feoffment and a grant did not materially differ.

Such was the original distinction between a *feoffment* and a *grant;* but from this real difference in their *subject matter* only, a difference was supposed to exist in their *operation*. A *feoffment* visibly operated on the *possession*; a *grant* could only operate on the *right* of the party conveying. Now as possession and freehold were synonymous terms, no persons being considered to have the possession of the lands but he who had at least an estate of freehold in them, a *conveyance* which was considered as transferring the possession, must necessarily be considered as transferring an estate of freehold; or, to speak more accurately, as transferring the whole fee. But this reasoning could not apply to grants; their essential quality being that of transferring things which did not lie in possession; they therefore could only transfer the right; that is, could only transfer that estate which the party had a right to convey. It is in this sense the expressions are to be understood, that a feoffment is a *tortious* and a grant a *rightful* conveyance. See title *Disseisin*.

This appears to have been the outline of conveyances at Common Law. The introduction of uses produced a great revolution in this respect. Uses at the Common Law, were, in most respects what trusts are now. When a feoffment was made to uses, the legal estate was in the feoffee. He filled the possession, did the feudal duties, and was in the eye of the law the tenant of the fee. The person to whose use he was seised, called the *cestuy que use*, had the beneficial property of the lands: had a right to the profits; and a right to call upon the feoffee to convey the estate to him, and to defend it against strangers. This right at first depended on the conscience of the feoffee; if he with-held the profits from the *cestuy que use*, or refused to convey the estate as he directed, the feoffee was without remedy. To redress this grievance the writ of *subpœna* was devised, or rather adopted from the Common Law courts, by the court of Chancery, to oblige the feoffee to attend in court and disclose the trust; and then the court compelled him to execute it.

Thus uses were established: they were not considered as issuing out of, or annexed to the land, as a rent or condition, or a right of common; but as a *trust* reposed in the feoffee, that he should dispose of the lands at the discretion of the *cestuy que use*, permit him to receive the rents, and in all other respects have the beneficial property of the lands. To all other persons except the *cestuy que use*, the feoffee was as much the real owner of the fee as if he did not hold it to the use of another: *his* wife was entitled to dower; *his* infant heir was in wardship to the lord; and upon *his* attainder the estate was forfeited.

To remedy these inconveniences, the *stat.* 27 *H.* 8. *c.* 10. was passed: by which the possession was devested out of the persons seised to the use, and transferred to the *cestuy que use*. For by that statute it is enacted "that when any person shall be seised of any lands to the use, confidence or trust of any other person or persons, by reason of any bargain, sale, feoffment, fine, recovery, contract, agreement, will, or otherwise: in such case the persons having the use, confidence or trust, should from thenceforth be deemed and adjudged in lawful seisin, estate and possession of and in the lands, in the same quality, manner and form as they had before in the use."—There seems to be little doubt but that the intention of the legislature in passing this act, was utterly to annihilate the existence of *uses* considered as distinct from the possession. But they have been preserved under the appellation of *trusts*. The courts hesitated much before they allowed them under this new name. And at length secret modes of transferring the possession itself, have been discovered, and have totally superseded that notorious and publick mode of transferring property, which the Common Law required, and the statute intended to restore; and many modifications or limitations of real property have been allowed, which the Common Law did not admit. See title *Lease and Release*.

A son did *give* and *grant* lands to his mother, and her heirs; though this was a defective *conveyance* at Common Law, yet it was adjudged good by way of *use*, to support the intention of the donor, and therefore, by these words, an *use* did arise to the mother by way of *covenant to stand seised*. 2 *Lev.* 225. A feoffment without *livery and seisin*, will not enure as a grant; but where made in consideration of a marriage, &c. it has been adjudged, that it did enure as *a covenant to stand seised* to *uses*. 2 *Lev.* 213.

Tenant in fee, in consideration of marriage, *covenanted*, *granted*, and *agreed* all that messuage to the use of himself for life, then to his wife for life, for her jointure, then to their first son in tail male, &c. Now by these words it appeared, that the husband intended some benefit for his wife, wherefore the court supplied other words to make the *conveyance* sensible. 1 *Lutw.* 782. 1 *Inst.* 271 *b. n.*

A *conveyance* cannot be fraudulent in part, and good as to the rest: for if it be fraudulent and void in part, it is void in all, and it cannot be divided. 1 *Lil. Abr.* 311. Fraudulent *conveyances* to deceive creditors, defraud purchasers, &c. are void, by *stats.* 13 *Eliz. cap.* 5. 27 *Eliz. cap.* 4.—See title *Fraud*.

## CONVICT AND CONVICTION.

CONVICT, *convictus.*] He that is found guilty of an offence by verdict of a jury. *Staund. P. C.* 186. *Crompton* saith, that *conviction* is either when a man is outlawed, or appeareth and confesseth, or is found guilty by the inquest: and when a statute excludes from clergy persons found guilty of felony, &c. it extends to those who are *convicted* by confession. *Cromp. Just.* 9. The law implies that there must be a *conviction*, before punishment, though it is not so mentioned in a statute: and where any statute makes a second offence felony, or subject to a heavier punishment than the first, it is always implied that such offence ought to be committed after a *conviction* for the first. 1 *Hawk. P. C. c.* 10. § 9. *c.* 41. § 3.

Judgment amounts to *conviction*; though it doth not follow that every one who is *convict*, is adjudged. A *conviction* at the King's suit may be pleaded to a suit by an informer, on a penal statute: because while in force it makes the party liable to the forfeiture, and no one ought to be punished twice for the same offence: but *conviction* may not be pleaded to a new suit by the king. 1 *Hawk. P. C. c.* 10. A person *convicted* or attainted of one felony, may be prosecuted for another, to bring accessaries to punishment, &c. *Fitz. Coron.* 379.

Persons *convicted* of felony by verdict, &c. are not to be admitted to *bail*, unless there be some special motive for granting it; as where a man is not the same person, &c. for bail

ought to be before trial, when it stands indifferent whether the party be guilty, or not. 2 *Hawk. P. C. c.* 15. § 45. 80. See title *Bail.—Conviction* of felony, and other crimes, disables a man to be a juror, witness, &c. In our books *conviction* and attainder are often confounded. See title *Attainder.*

SUMMARY PROCEEDINGS are directed by several acts of parliament for the *conviction* of offenders, and the inflicting of certain penalties imposed by those acts. In these there is no intervention of a jury, but the party accused is acquitted or condemned by the suffrage of such person only as the statute has appointed for his judge.

Of this summary nature are all trials for offences and frauds contrary to the laws of the *Excise*, and other branches of the *Revenue:* which are to be inquired into and determined by the commissioners of the respective departments, or by justices of peace in the country. And experience has shewn that such convictions are absolutely necessary for the due collection of the public money; and are in fact, a species of mercy to the delinquents, who would be ruined by the expence and delay of frequent prosecutions by action or indictment.

Another branch of summary proceedings, is that before *justices of the peace*, in order to inflict divers petty pecuniary mulcts, and corporal penalties, denounced by act of parliament, for many disorderly offences; such as common swearing, drunkenness, vagrancy, idleness, and a vast variety of others subjected to their jurisdiction. See title *Justice of Peace*, and the titles of the various offences throughout this Dict. These offences used formerly to be punished by the verdict of a jury in the court leets, and sheriff's tourn, the King's ancient courts of law; and which were formerly much revered and respected, but are now fallen very much into disuse and contempt.

The process of these summary *convictions* is extremely speedy. Though the courts of Common Law have thrown one check upon them, by making it necessary to *summon* the party accused before he is condemned; which is now held an indispensable requisite, and is highly consonant to the general principles of justice. See *Stra.* 261. 678. *Salk.* 181. 2 *Ld. Raym.* 1405.—After this summons, the magistrate may go on to examine one or more witnesses, as the statute may require, upon oath; and then make his *conviction* of the offender in writing: upon which he usually issues his warrant, either to apprehend the offender, in case corporal punishment is to be inflicted on him; or else to levy the penalty incurred by distress and sale of his goods, according to the directions of the several statutes which create the offence, or inflict the punishment; and which usually chalk out the method by which offenders are to be convicted in such particular cases.

The magistrates ought to state in the *conviction* the whole of the evidence for and against the defendant. 8 *T. R.* 220. And not merely the legal effect of such evidence in the words of a statute, though the latter form is valid; but the magistrate subjects himself to an information if he endeavour to shelter himself from detection by mis-stating such legal result, when the evidence would not warrant it. 9 *E. R.* 358.

Where power of *conviction* is by statute given to a magistrate he is the sole judge of the weight of the evidence given before him, and the court of K. B. will not examine whether or not he has drawn a right conclusion from the evidence. 8 *T. R.* 588.

The witnesses must be sworn and examined in the defendant's presence. It is not sufficient to read over the deposition of a witness in the defendant's presence. 1 *T. R.* 125.

A summary *conviction* for any offence created by statute must negative every exception contained in the clause creating the offence. 8 *T. R.* 542.

A *conviction* must contain an adjudication whether the punishment be or be not fixed by the statute. 7 *T. R.* 288.

*Outlawry* is a *conviction* within the meaning of *stat.* 14 *G.* 2. *c.* 6. § 1. against sheep stealing. 4 *T. R.* 521.

When a penalty is to be sued for within a certain time after the offence committed, it must appear upon the face of the *conviction* that the prosecutor was within time. 7 *E. R.* 146.

In a *conviction* on the *stat.* 5 *An. c.* 14. for killing game, the *evidence* need not, but the *conviction* must, negative all the qualifications mentioned in the act, 22, 23 *Car.* 2. § 25.—1 *T. R.* 125. 1 *E. R.* 643. See title *Game.*

See further this Dictionary title *Justices of Peace.—Burn's Justice*, title *Conviction;* and 4 *Comm. c.* 20. as to the policy of extending this summary mode of proceeding.

CONVICT RECUSANT. According to the statutes. See titles *Recusant, Papist.*

CONVIVIUM. Signifies the same thing among the laity, as *procuratio* doth with the clergy, *viz.* When the tenant by reason of his tenure is bound to provide meat and drink for his lord once or oftener in the year. *Blount.*

CONVOCATION, *convocatio.*] The assembly of the representatives of the Clergy, to consult of ecclesiastical matters in time of parliament, as there are two houses of parliament, so there are two houses of *convocation:* the one called the *Higher* or *Upper House*, where the archbishops and all the bishops sit severally by themselves: and the other, the *Lower House of Convocation*, where all the rest of the clergy sit, *i. e.* All deans and archdeacons, one proctor for every chapter, and two proctors for all the clergy of each diocese, making in the whole number *one hundred and sixty-six* persons. Each *convocation* house hath a prolocutor, chosen from among themselves, and that of the lower house is presented to the bishops, &c.

The Archbishop of Canterbury is the President of the *Convocation*, and prorogues and dissolves it by mandate from the King. The *convocation* exercises jurisdiction in making of canons, with the King's assent: for by the *stat.* 25 *H.* 8. *c.* 19. the *convocation* is not only to be assembled by the King's writ: but the canons are to have the royal assent: they have the examining and censuring of heretical and schismatical books and persons, &c. But appeal lies to the King in chancery, or to his delegates. 4 *Inst.* 322. 2 *Rol. Abr.* 225. But in case the King himself be a party, the appeal lies by *stat.* 24 *H.* 8. *c.* 12. to all the bishops assembled in the Upper House of Convocation. See 3 *Comm.* 67.

Mr. Christian, in his note on 1 *Comm.* 280. remarks that from the statement there given, the student would perhaps be apt to suppose that there is only one convocation at a time. But the King before the meeting of every new parliament, directs his writ to each archbishop to summon a convocation in his peculiar province.

*Godolphin* says, that the convocation of the province of York, constantly corresponds, debates, and concludes the same matters with the provincial synod of Canterbury. *God.* 99. But they are certainly distinct and independent of each other; and when they used to tax the clergy, the different convocations sometimes granted different subsidies. In 22 *Hen.* 8. the convocation of Canterbury had granted the King 100,000*l.* in consideration of which an act of parliament was passed, granting a free pardon to the clergy for all spiritual offences: but with a proviso, that it should not extend to the province of York, unless its convocation would grant a subsidy in proportion; or unless its clergy would bind themselves individually to contribute as bountifully This statute is recited at large in *Gib. Cod.* 77.

All Deans and Archdeacons (as has been already observed) are members of the convocation of their province; each chapter sends one proctor or representative, and the parochial clergy in each *diocese* of Canterbury, two proctors;

but on account of the small number of dioceses in the province of York, each *archdeaconry* elects two proctors. In York the convocation consists only of one house: but in Canterbury there are two houses, of which the twenty-two bishops form the Upper House; "wherein the Archbishop presides with regal state," (says *Blackstone*, 1 *Comm.* 279); and before the reformation, abbots, priors, and other mitred prelates sat with the bishops. The Lower House of Convocation in the province of Canterbury, consists of twenty-two Deans, fifty-three Archdeacons, twenty-four Proctors for the Chapters, and forty-four Proctors for the Parochial Clergy. *Total* 144.

By *stat.* 8 *H.* 6. *c.* 1. the clergy in their attendance on the Convocation, have the same privilege in freedom from arrest as the members of the House of Commons, in their attendance on Parliament.

CONVOY. See *Insurance*, I. 3.

CONUSANCE OF PLEAS. A privilege that a city or town hath to hold pleas. See *Cognisance*.

CONUSANT, Fr. *connoissant.*] Knowing or understanding: as if the son be *conusant*, and agreed to the feoffment, &c. *Co. Lit.* 159.

COOPERS. Shall make their vessels of seasonable wood, and mark them with their own marks, on pain of 3*s.* 4*d.* forfeiture; and the contents of vessels are appointed to be observed under like penalty, as the beer barrel shall contain thirty-six gallons, a kilderkin eighteen, a firkin nine, &c. The wardens of the Cooper's company in London, with an officer of the mayor, are to search all vessels for ale, beer, and soap to be sold there; and to mark them that are right, and they may burn those that be not so: and if any *cooper*, &c. diminish a vessel by taking out the head, or a stave thereof, it shall be burnt and the offender forfeit 3*s.* 4*d.*—*Stat.* 23 *H.* 8. *c.* 4.

COOPERTIO. The head or branches of a tree cut down; though *Coopertio Arborum* is rather the bark of timber trees felled, and the chumps and broken wood. *Cowel.*

COOPERTURA. A thicket or covert of wood. *Chart. de Foresta, cap.* 12.

COPARCENERS, *participes.*] Otherwise called *Parceners*, are such as have equal portion in the inheritance of an ancestor, and by *law* are the issue female, which, in default of heirs male, come in equality to the lands of their ancestors. *Bract. lib.* 2. *cap.* 30. They are to make partition of the lands; which ought to be made by *coparceners* of full age, &c. And if the estate of a *coparcener* be in part evicted, the partition shall be avoided in the whole. *Lit.* 243. 1 *Inst.* 173. 1 *Rep.* 87. The Crown of England is not subject to *coparcenary*; and there is no *coparcenary* in dignities, &c. *Co. Lit.* 27. *Stat.* 25 *H.* 8. *c.* 22.—See titles *Descent*, *Parceners*.

COPARTNERSHIP. See titles *Partners* and *Partnership*.

COPE. A custom or tribute due to the King, or lord of the soil, out of the *lead mines* in some part of Derbyshire; of which *Manlove* saith:

*Egress and regress to the King's highway,*
*The miners have: and* lot *and* cope *they pay:*
*The thirteenth dish of ore within their mine,*
*To the lord for* lot, *they pay at measuring time;*
*Six-pence a load for* cope *the lord demands,*
*And that is paid to the* berghmaster's *hands*, &c.

See also Sir *John Pettus's Fodinæ Regales*, where he treats on this subject. This word, by *Domesday Book*, as Mr. *Hagar* hath interpreted it, signifies a hill: and *Cope* is taken for the supreme cover, as the *cope of heaven*. Also it is used for the roof and covering of a house; the upper garment of a priest, &c.

COPIA LIBELLI DELIBERANDA. A writ that lay where a man could not get the *copy of a libel* at the hand of a judge ecclesiastical, to have the same delivered to him. *Reg. Orig.* 51.

COPPA. A cop or cock of grass, hay or corn divided into titheable portions; as the tenth cock, &c. This word in strictness, denotes the gathering or laying up the corn in *copes*, or heaps, as the method is for barley or oats, &c. not bound up, that it may be the more fairly and justly tithed; and in Kent they still retain the word, a *cop* or *cap* of *hay*, straw, &c. *Thorn in Chron.*

COPPER AND COPPER ORE. Copper plates and copper fully wrought, to what duties liable. 4 *&* 5 *W. & M. c.* 5. *§* 2 All copper may be exported paying the lawful duties and customs, 5 *W. & M. c.* 17.—See 41 *G.* 3. (*U. K.*) *c.* 68. and 43 *G.* 3. *c.* 153. *§* 11. regulating the exportation of copper: by the latter act the exportation of copper applicable to naval purposes may be prohibited by proclamation during the then existing war. See further title *Navigation Acts.*

COPPER-PLATE ENGRAVINGS.—See title *Literary Property*, &c.

COPY, *copia.*] In a legal sense the transcript of an original writing; as the *copy* of a *patent*, of a *charter*, deed, &c. A clause out of a patent, taken from the chapel of the Rolls, cannot be given in evidence; but there must be a true copy of the whole charter examined: it is the same of a record. And if upon a trial, some part of an office copy is given in evidence to prove a deed, which deed is to prove the party's title to the land in question, that gives it in evidence; if that part of the office copy given in evidence, be not so much of it as doth any ways concern the land in question, the court will not admit of it; for the court will have a copy of the whole given, or no part of it shall be admitted. 1 *Lil. Abr.* 312. 313. Where a deed is inrolled certifying an attested copy is proof of the inrolment; and such copy may be given in evidence. 3 *Lev.* 387. A common deed cannot be proved by a copy or counterpart, when the original may be procured. 10 *Rep.* 92. And a copy of a will of lands, or the probate, is not sufficient; but the will must be shewn as evidence. 2 *Rol. Abr.* 74. Copies of court rolls admitted as evidence. See at large title *Evidence.*

## COPYHOLD.

Tenura *per copiam rotuli curiæ.*] A tenure for which the tenant hath nothing to shew but the *copy* of the *rolls*, made by the steward of the lord's *court*; on such tenant's being admitted to any parcel of land or tenement belonging to the manor. 4 *Rep.* 25. It is called *base tenure*, because, held at the will of the lord, and *Fitzherbert* says, it was anciently *tenure in villenage*, and that *copyhold* is but a new name. See this Dict. title *Tenures*, III. 13. Some *Copyholds* are held by the *verge* in *ancient demesne*: and though they are by *copy*, yet are they a kind of freehold; for if a tenant of such *copyhold* commit felony; the King hath the year, day, and waste, as in the case of freeholders: some other *copyholds* are such as the tenants hold by common tenure, called *mere copyhold*, whose land, upon felony committed, escheats to the lord of the manor. *Kitch.* 81. But *copyhold* land cannot be made at this day; for the pillars of a *copyhold* estate are, That it hath been demised *time out of mind* by copy of court-roll; and that the tenements are parcel of, or within, the manor. 1 *Inst.* 58. 4 *Rep* 24.

A copyhold cannot be created by operation of law: and therefore where wastes are severed from the manor, by a grant of the latter, with the exception of the former, though the copyholders continue to have a right of common in the wastes by immemorial usage: yet if afterwards a grant of the soil of those wastes be made to trustees for the use of the copyholders in free socage, the lands when inclosed, will be freehold, and not copyhold. 2 *Term Rep.* 415. 705.

# COPYHOLD.

A *copyhold* tenant had originally in judgment of law but an estate at will; yet custom so established his estate that by the custom of the manor it was descendible, and his heirs inherited it; and therefore the estate of the *copyholder* is not merely *at the will of the lord*, but *at the will of the lord, according to the custom of the manor;* so that the custom of the manor is the life of *copyhold* estates; for without a custom, or if *copyholders* break their custom, they are subject to the will of the lord; and as a *copyhold* is created by custom, so it is guided by custom. 4 *Rep.* 21. A *copyholder*, so long as he doth his services, and doth not break the custom of the manor, cannot be ejected by the lord: if he be, he shall have trespass against him: but if a *copyholder* refuses to perform his services, it is a breach of the custom, and forfeiture of his estate.

It appears that estates held by copy of *court roll*, but not at the will of the lord, have been deemed freehold by *Lord Coke* (See 1 *Inst.* 59 *b*), and others; and in order to distinguish them from the ordinary kind, have been denominated *customary freeholds.* In consequence of the prevalence of this notion, a considerable number of such tenants claimed a right of voting as *freeholders* at the election of knights of the Shire.—This gave occasion to a short treatise on this subject, in which the origin of lands held in this peculiar way is traced, and it is proved that though these tenures in some respects *resemble* freeholds, they are in truth nothing more than a superior kind of copyhold. Soon after the publication of this treatise, the *stat.* 31 *Geo.* 2. *c.* 14. was past, declaring that no person holding by copy of court-roll should be entitled to vote at the election of Knights of the Shire.

The freehold, of an estate parcel of a manor, and demiseable only by leave of the lord, passing by surrender and admittance to hold to the tenant and his heirs of the lord by the accustomed rent, &c. is in the lord and not in the tenant, though not holden at the will of the lord. 7 *E. R.* 298.

One may hold the *prima tonsura*, or fore crop of land as copyhold, and another may have the soil, and every other *beneficial enjoyment* of it as freehold. 7 *E. R.* 200.

In some manors where the custom hath been to permit the heir to succeed the ancestor in his tenure, the estates are styled *Copyholds of Inheritance:* in others, where the lords have been more vigilant to maintain their rights, they remain copyholds for life only. For the custom of the manor has in both cases so far superseded the will of the lord, that provided the services be performed, or stipulated for by fealty, he cannot in the first instance refuse to admit the heir of his tenant upon his death; nor in the second can he remove his present tenant so long as he lives, though he holds nominally by the precarious tenure of his lord's will. 2 *Comm.* 97. 147. And see title *Ancient Demesne.*

If the lord refuses to admit he shall be compelled in *Chancery.* 2 *Cro.* 368.—And if the lord refuse to admit a surrenderee, on account of a disagreement about the fine to be paid, the court of B. R. will grant a *mandamus* to compel the lord to admit without examining the right to the fine. 2 *Term Rep.* 484.—But that court will not grant a *mandamus* to admit a copyholder by descent; because without admittance he has a complete title against all the world but the lord. 2 *Term Rep.* 198.

One who has a *primâ facie* title to a copyhold is entitled to inspect the court rolls and take copies of them, so far as relates to the copyhold claimed, though no cause be depending for it at the time. 10 *E. R.* 235.

*Copyholds* descend according to the rules and maxims of the Common Law (unless in particular manors, where there are contrary customs, of great antiquity); 1 *T. R.* 474.: but such customary inheritances shall not be assets, to charge the heir in action of debt, &c. 4 *Rep.* 22. *Kitch.* Though a lease for one year of *copyhold* lands, which is warranted by the Common Law, shall be assets in the hand of an executor. 1 *Vent.* 163. *Copyholders* hold their estates free from charges of dower, being created by custom, which is paramont to title of dower. 4 *Rep.* 21. *Copyhold* inheritances have no collateral qualities, which do not concern the descent; as to make them assets; or whereof a wife may be endowed; a husband be tenant by the curtesy, &c. But by particular custom, there may be dower and tenancy by the curtesy. *Cro. Eliz.* 361. There may be an *estate-tail* in *copyhold* lands by custom, with the co-operation of the *stat. W.* 2. And as a *copyhold* may be entailed by custom, so by custom the tail may be cut off by surrender. 1 *Inst.* 60.

Where by special custom a descent of copyholds may be, contrary to the rules of the Common Law, such custom shall be interpreted strictly: thus, where there is a custom within a manor, that lands shall descend to the *eldest sister*, where there is neither a son nor a daughter; this shall not extend to an *eldest niece:* but in default of such son, daughter and sister, the lands must descend according to the rules of the Common Law. 1 *Term Rep.* 466. See 12 *E. R.* 62.

Evidence of reputation of the custom of a manor that, in default of sons, the eldest daughter, and in default also of daughters the eldest sister, and in case of the death of all the descendants of the eldest daughter or sister, the descendants of the other daughters or sisters respectively, of the person last seised, should take, is proper to be left to the Jury of the existence of such a custom, as applied to a great nephew (the grandson of an elder sister) of the person last seised: although the instances in which it was proved to have been put in use extended no further than those of eldest daughter and eldest sister, and the son of an eldest sister. *Doe, d. Foster*, v. *Sisson.* 50 *Geo.* 3. 12. *E. R.* 62.—The existence of such custom in adjacent manors seems to be no evidence of the custom in the particular manor, *ib.*

Copyhold descending by custom to all the children equally of the tenant last seised, one of the parceners may maintain ejectment on his single demise for his own share. *Roe, d. Raper*, v. *Lansdale.* 50 *G.* 3. 10. *East Rep.* 39.

A *copyhold* may be barred by a recovery, by special custom; and a surrender may bar the issue by custom. A fine and recovery at Common Law will not destroy a *copyhold* estate; because Common Law assurances do not work upon the assurance of the *Copyhold:* though *copyhold* lands are within the *stat.* 4 *H.* 7. *c.* 24. of fines and proclamations, and five years non-claim, and shall be barred. 1 *Rol. Abr.* 506. See title *Fines.*

A *plaint* may be made in the court of the manor, in the nature of a *real* action, and a recovery shall be had in that *plaint* against tenant in tail, and such a *recovery* shall be a *discontinuance* to the estate-tail. 1 *Brownl.* 121. And the suffering a recovery by a *copyholder* tenant for life in the lord's court is no forfeiture, unless there is a particular custom for it. 1 *Nels. Abr.* 507. *Copyholders* may entail *copyhold* lands, and *bar* the *entails* and *remainders*, by *committing a forfeiture*, as making lease without licence, &c. and then the lord is to make three proclamations, and seize the *copyhold*, after which the lands are granted to the *copyholder*, and his heirs, &c. This is the manner in some places, but it must be warranted by custom. 2 *Danv. Abr.* 191. *Sid.* 314.

*Customs* ought to be time out of memory, to be reasonable, &c. And a custom in deprivation or bar of a *copyhold* estate, shall be taken strictly; but when for making and maintaining, it shall be construed favourably. *Comp. Cop. sect.* 33. *Cro. El.* 879. An unreasonable custom, as for a lord to exact exorbitant fines; for a *copyholder* for life to cut down and fell timber-trees, &c. is void. A *copyholder* for life pleaded a custom, that every *copyholder* for life might, in the presence of two other *copyholders*, appoint who should have his *copy-*

*hold* after his death, and that the two *copyholders* might assess a fine, so as not to be less than had been usually paid; and it was adjudged a good custom. 4 *Leon.* 238. But a custom to compel a lord to make a grant, is said to be against law; though it may be good to admit a tenant. *Moor*, 788.

If there be a custom within a manor for a lord to grant parcels of the waste by copy of court roll, the land granted by that mode is well described as copyhold, though the date of the grant be modern. 3 *Bos. and Pul.* 346.

The lord of a manor has no right to enter on a *copyhold* of inheritance, and cut timber for his own use leaving sufficient for Botes and Estovers, unless there be a custom in the manor for his so doing. *Whitechurch* v. *Holworthy. Term Rep. K. B. Mic.* 56 *Geo.* 3. 340.

By the custom of some manors, where *copyhold* lands are granted to two or more persons for lives, the person first named in the copy may surrender all the lands. 1 *Nels. Abr.* 497. There are customs *ratione loci*, different from other places: but though a custom may be applied to a particular place, yet it is against the nature of a custom of a manor to apply it to one particular tenant. 1 *Nels.* 504. 1 *Lutw.* 126.

A single instance of a surrender in fee, by tenant in special tail of a *copyhold* estate, held evidence of a custom within the manor to bar entails by surrender, though the surrenderer had not been dead 20 years, and though one instance was proved of a recovery suffered by tenant in tail to bar the entail. 2 *Maul. and Selw. Rep.* 92.

A custom that all the customary tenants of a manor *having gardens, parcel* of their customary tenements respectively, have immemorially by themselves, their tenants and occupiers, dug, taken, and carried away from a waste within the manor, to be used upon their said customary tenements, *for the purpose of making and repairing grass plats in the gardens parcels of the same respectively, for the* IMPROVEMENT *thereof, such turf covered with grass fit for the pasture of cattle as hath been fit, and proper to be so used* at *all* times of the year, *as often and in such quantity as occasion hath required;* is bad in law as being indefinite and uncertain and destructive of the common: and so is a similar custom for taking and applying such turf *for the purpose of making and repairing the banks and mounds in of and for the hedges and fences* of such customary tenements. 7 *East. Rep.* 121.

There are usually *custom-rolls* of manors, exhibited on oath by the tenants; setting forth the bounds of the manor, the royalties of the lord, services of the *copyhold* tenants, the tenures granted, whether for life, &c. concerning admittances, surrenders, and the rights of the *copyholders*, as to taking timber for repairs, fire-bote, &c. Common belonging to the tenants, payment of rent, suing in the court of the manor, taking heriots, &c. All which customs are to be observed. *Comp. Court. Keep.* 21.

When an act of parliament altereth the service, customs, tenure, and interest of land, in prejudice of the lord or tenant, there the general words of such an act shall not extend to *copyholds.* 3 *Rep.* 7.—*Copyholds* are not within the *stat.* 27 *H.* 8. *c.* 10. of *jointures;* nor *stat.* 32 *H.* 8. *c.* 28. of *leases, Copyholds* being in their nature demisable only by *copy:* they are not within the statute of *uses;* nor are *copyholds* extendible in *execution:* but *copyholds* are within the statute of *limitation of actions;* and the statutes against *bankrupts.* The lord shall have the custody of the lands of *ideots*, &c. And a *copyholder* is not within the act 12 *Car.* 2. *c.* 24. to dispose of the *custody* and *guardianship* of the heir; for if there be a custom for it, it belongs to the lord of the manor. 3 *Lev.* 395. 1 *Nels. Abr.* 492. 522.

*Copyholders* shall neither *implead* nor be *impleaded* for their tenements by writ, but by plaint in the lord's court held within the manor: and if on such plaint, erroneous judgment be given, no writ of false judgment lies, but petition to the lord in nature of a writ of false judgment, wherein errors are to be assigned, and remedy given according to law. *Co. Lit.* 60.

Where a man holds *copyhold* lands in trust to surrender to another, &c. if he refuses to surrender to the other accordingly, he may be compelled by bill exhibited in the lord's court, who, as chancellor, has power to do right. 1 *Leon.* 2. A *copyholder* may have a formedon in descender in the lord's court. *Lessee* of a *copyholder* for life for one year, shall maintain an ejectment. 4 *Rep.* 26. *Moor*, 679. It is every day's practice to bring ejectments, to recover the possession of copyholds; for defendant by the rule, obliging himself to confess lease, entry, and ouster, the *title* only can come in question on the trial. But the lessor of plaintiff, before be brings his ejectment should be admitted. See title *Ejectment.*

A manor is lost when there are no customary tenants or *copyholders;* and if a *copyhold* comes into the hands of the lord in fee, and the lord leases it for one year, or half a year, or for any certain time, it can never be granted by copy after: but if the lord alters the manor, &c. his alienee may re-grant land by copy. If the lord keeps the *copyhold* for a long time in his hand, it is no impediment but that he may after grant it again by copy. 2 *Danv. Abr.* 176. 177. A *copyholder* in fee accepts of a lease, grant, or confirmation of the same land from the lord, this determines his *copyhold* estate. 2 *Cro.* 16. *Cro. Jac.* 253. If a *copyholder* bargains and sells his *copyhold* to a lessee for years, &c. of the manor, his *copyhold* is *extinguished.* 2 *Danv.* 205. A *copyholder* may grant his estate to his lord, by bargain and sale, release, &c. for between lord and tenant the conveyance need not be according to custom. 1 *Nels.* 504. A *copyholder* in other cases cannot alien by deed; though he that hath a right only to a *copyhold* may *release* it by deed. And if a *copyhold* surrenders upon condition, he may afterwards *release* the condition by deed. 2 *Danv.* 205. *Cro. Jac.* 36. Also one joint *copyholder* may *release* to another, which will be good without any admittance, &c. *Ibid.*

A *Copyholder* cannot convey or transfer his *copyhold* estate to another, otherwise than by surrender; which is the yielding up of the land by the tenant to the lord: according to the custom of the manor, to the use of him that is to have the estate: or it is in order, to a new grant, and further estate on the same.

As to *copyhold grants;* which are made either in fee, or for three lives, &c. the *lord of the manor* that hath a lawful estate therein, whether he be tenant for life or years, tenant by statute merchant, &c. or at will, is *dominus pro tempore*, and may grant lands, herbage of lands, a fair, mill, tithes, &c. and any thing that concerns lands, by *copy of court*-roll, according to custom; and such grants shall bind those in remainder: the rents and services reserved by them shall be annexed to the manor, and attend the owner thereof after their particular estates are ended. 4 *Rep.* 23. 11 *Rep.* 18. And if a lord of the manor for the time being, lessee for life, years, &c. take a surrender, and before admittance he dieth, or the years or interest determine, though the next lord comes in above the lease for life or years, or other particular interest, yet he shall be compelled to make admittance according to the surrender. *Co. Lit.* 59. But a lord at will, of a *copyhold* manor, cannot licence a *copyhold* tenant to make a lease for years; though he may grant a *copyhold* for life according to the custom: if a lord for life gives licence to a tenant to make a lease for years, this lease shall continue no longer than the life of the lord. 2 *Danv. Abr.* 202.

If he that is lord of the manor for the time being admits one to a *copyhold*, he dispenses with all precedent forfeitures; not only as to himself, but also as to him in reversion; for such grant and admittance amount to an entry for the for-

feiture, and a new grant; but a lord by tort cannot by such admittance purge the forfeiture as to the rightful lord. 1 *Lev.* 26. Grants by copy of court-roll by infants, &c. will be binding: and if a guardian in socage grants a *copyhold* in reversion, according to the custom of the manor, this shall be a good grant. 2 *Rol. Abr.* 41. If baron and feme seised of a manor in right of the feme grant a *copyhold*, this shall bind the feme notwithstanding her coverture. 4 *Rep.* 23. An executor may make grants of *copyhold* estates, according to the custom of the manor, where a devise is made that the executor shall grant copies for payment of debts. 2 *Danv.* 178.

A manor may be held by copy of court-roll, and the lord of such manor may grant copies; and such customary manor may pass by surrender and admittance, &c. A customary manor may be holden of another manor, and such customary lord may grant copies and hold courts: but a *copyholder*, lord of such a manor, cannot hold a court baron to have forfeitures, and hold pleas in a writ of right, &c. 1 *Nels. Abr.* 524.

All grants of *copyhold* estates are to be according to the custom of the manor; and rents and services customary must be reserved; for what acts of the lord in granting *copyholds* are not confirmed by custom, but only strengthened by the power and interest and the lord, have no longer duration than the lord's estate continueth. *Comp. Court Keeper*, 421. If by the custom, a *copyhold* may be granted for three lives, and the lord grants it to one for life, remainder to such woman as he shall marry, and to the first son of his body; both these remainders are void: and a remainder limited upon a void estate in the creation, will be likewise void. But if by custom it is demisable in fee, a surrender may be to the use of one for life, remainder in tail, remainder in fee. 2 *Danv. Abr.* 203. *Cro. Eliz.* 373. It is held, where by the custom of a manor the lord can grant a *copyhold* for three lives, he may grant it for an estate coming within the intent of the custom; as to A. B, and his assigns, to hold to him and his assigns for the lives of three others, and of the longer liver of them successively, &c. 2 *Ld. Raym.* 994. 1000.

The lord of a manor may himself grant a *copyhold* estate at any place out of the manor; but the steward cannot grant a *copyhold* at a court held out of the manor. 4 *Rep.* 26. Though the steward may take surrenders out of the manor, as well as the lord. 2 *Danv. Abr.* 181. A steward is in place of the lord, and without a command to the contrary may grant lands by copy, &c. But if a lord command a steward that he shall not grant such a copy, if he grants it, it is void: and if the steward diminishes the ancient rents and services, the grant will be void. *Cro. Eliz.* 699.

Things of necessity done by a steward, who is but in reputed authority, are good if they come in by presentment of the jury; as the admittance of an heir upon presentment, &c. Though acts voluntary, as grants of *copyhold*, &c. are not good by such stewards. *Cro. Eliz.* 699. If an under-steward hold a court without any disturbance of the lord of the manor, though he hath no patent nor deputation to hold it, yet it is good; because the tenants are not to examine what authority he hath, nor is he bound to give them an account of it. *Moor*, 110. A deputy steward may authorise another to do a particular act; but cannot make a deputy to act in general. 2 *Salk.* 95.

In *admittances*, in court upon *voluntary* grants, the lord is *proprietor:* in admittances upon *surrender*, the lord is *not proprietor* of the lands but only a necessary *instrument* of *conveyance;* and in admittances by *descent* the lord is a mere *instrument*, not being necessary to strengthen the heir's title, but only to give the lord his fine. 4 *Rep.* 21, 22. The heir of a *copyholder* may enter, and bring trespass, before admittance, being in by descent; and he may surrender before admittance; but he is not compleat tenant to be sworn of the homage, or to maintain a plaint in the lord's court. And if the heir do not come in and be admitted, on the death of his ancestor, where the same is presented and proclamation made, he may forfeit his estate. *Cro. El.* 90. 4 *Rep.* 22. 27.

On surrender of a *copyhold*, the surrenderor or person making the same, continues tenant till the admittance of the surrenderee; and the surrenderee may not enter upon the lands, or surrender before admittance, for he hath no estate till then; though it is otherwise of the *heir* by *descent*, who is in by course of law, and the custom casts the possession upon him. *Comp. Court Keep.* 436. A surrender is not of any effect until admittance, and yet the surrenderee cannot be defrauded of the benefit of the surrender; for the surrenderor cannot pass away the land to another or make it subject to any other incumbrances; and if the lord refuse the surrenderee admittance, he is compellable in *Chancery. Comp. Cop. sect.* 39. A grantee hath no interest vested in him till he is admitted; but admittance of a copyholder for life is an admittance of him in remainder, for they are but one estate; and the remainder-man may, after the death of tenant for life, surrender without admittance. 3 *Lev.* 308. *Cro. El.* 504.

The title to *copyhold* lands relates back to the time of the surrender, as against all persons except the lord: so that the surrenderee may recover in ejectment against the surrenderor on a demise laid between the times of surrender and admittance. 1 *Term. Rep. K. B.* 600.

Every admittance upon a descent or surrender may be pleaded as a grant; and a person may alledge the admittance of his ancestor as a grant; and shew the descent to him, and that he entered, &c. But he cannot plead that his father was seised in fee, &c. and that he died seised, and the land descended to him. 2 *Danv.* 208. Admittance on surrenders must, in all respects, agree with the surrender; the lord having only a customary power to admit *secundum formam et effectum sursum-reddditionis.* 4 *Rep.* 26. If any are admitted otherwise, they shall be seized according to the surrender: yet where a voluntary surrender is general, without saying to whose use, a subsequent admittance may explain it. 2 *Danv.* 187. 204.

In voluntary admittances, if the lord admits any one contrary to custom, it shall not bind his heir or successor. If a copyholder surrender to the use of another, and after the lord, having knowledge of it, accepts the rent of such other out of court, this is an admittance in law: and any act, implying the consent of the lord to the surrender, shall be adjudged a good admittance. 1 *Nels. Abr.* 493. If the steward accept a fine of a copyholder, it amounts to an admittance. 2 *Danv.* 189. But delivering a copy is no admittance.

An enclosure made from the waste 12 or 13 years before, and seen by the steward of the same lord from time to time without objection made, may be presumed by the Jury to have been made by the licence of the lord, and ejectment cannot be brought against the tenant without previous notice to throw up the land. 11 *E. R.* 56.

Where a *widow's estate* is created by custom, that shall be an admittance in law: and her estate arising out of that of her husband's, his admittance is the admittance of her. *Hut.* 18. And she who hath a widow's estate by the custom of the manor, upon the death of her husband, need not pay a fine to the lord for the estate; for this is only a branch of the husband's. *Hob.* 181. When a custom is, that the wife of every copyholder for life shall have her free bench, after the death of the baron, the law casts the estate upon the wife, so that she shall have it before admittance, &c. 2 *Danv.* 184. But if a wife is entitled to her free bench by custom, and a copyholder in fee surrenders to the use of another, and then dies; it has been adjudged, that the surrenderee should have the land, and not the wife; because the wife's title doth not commence till after the death of her husband; but the plain-

tiff's title begins with the surrender, and the admittance relates to that. 1 *Inst.* 59. 1 *Salk.* 185.

The widow's title commenced not by the marriage; if it did, then the husband could do nothing in his lifetime to prejudice it: but it is plain he may alien or extinguish his right, so as to bind the estate of the widow: the free bench grows out of the estate of the husband; and it is his dying seised which gives the widow a title, and as the husband has a defeasible estate, so the wife may have her free-bench defeated. 4 *Mod. Rep.* 452. 453.

Entries on the rolls of a manor of admissions of tenants in remainder, after the determination of the estate of the last tenant's widow, who held *during his chaste viduity*, are evidence of a custom for the widow to hold on that condition, so as to maintain ejectment against her for a forfeiture on proof of her incontinence, although there was no instance in fact stated on the rolls or known of such a forfeiture having been enforced. 10 *East's Rep.* 520.

A copyholder may *surrender* in court, by letter of attorney: and out of court, by special custom. 9 *Rep.* 75. 76. A copyholder being in Ireland, the steward of a manor here made a commission to one to receive a surrender from him there, and it was held good. 2 *Danv.* 181.

The intent of *surrenders* is, that the lord may not be a stranger to his tenant, and the alteration of the estate. As a copyholder cannot transfer his estate to a stranger by any other conveyance than surrender: so if one would exchange a copyhold with another, both must surrender to each other's use, and the lord admit accordingly. *Comp. Cop. s.* 39.

With respect to the devising of copyholds, the law formerly was, that no such devise could be made without a surrender to the use of the party's will; and that the lands did not then pass by the will but by the surrender, the will being considered only as declaratory of the uses of the surrender. Many evils were found to result in the cases of *creditors, wives, and children*, from this necessity of a surrender to a will, and the courts of equity were astute in finding reasons for supplying the surrender, with due precaution in favour of the claims of the several parties. See 3 *P. Wms.* 98 *in n.*

All these questions are now set at rest by a statute passed for that purpose, 55 *Geo.* 3. *c.* 192. by which it is enacted, That in all cases where, by the custom of any manor in England, [or Ireland, though instances of copyhold are rare there,] any copyhold tenant of such manor may by will dispose of or charge land, surrendered to the use of the will, every disposition or charge of any such copyhold, made by the will of any person who shall hereafter die, shall be as valid and effectual, although *no surrender* shall have been made to the use of the will, as if such surrender had been actually made. On admissions under testamentary dispositions, the steward is allowed to charge his fees, as in cases of a surrender to the use of the will. § 2. The act shall not affect the validity of Devises. § 3.

In the case of copyholds devised to charitable uses, the want of surrender in such cases is made good, not by the discretion of the court, but by the strong and general words of *stat.* 43 *Eliz. c.* 4. *Attorney General* v. *Burdett*, 2 *Vern.* 755. *Duke's Char. Uses*, 84. *Attorney General* v. *Andrews*, 1 *Ves.* 225.

*A cestui que trust* may devise an interest in land, &c. without surrender; and if copyhold lands are in mortgage, the mortgagor can dispose of the equity of redemption by will, without any surrender made; because he hath at that time no estate in the land, whereof to make a surrender. *Præced. Canc.* 320. 322. One jointenant may surrender his part in the lands to the use of his will, &c. And where there are two jointenants of a copyhold in fee, if one of them make a surrender to the use of his will, and die, and the devisee is admitted, the surrender and admittance shall bind the survivor. 2 *Cro.* 100.

A surrender of copyhold lands to the use of a will only operates on the estate which the surrenderor had at the time of the surrender; and therefore if a copyholder, having an estate *pour autre vie*, surrender all his estate in possession, remainder or expectancy, to the use of his will, and afterwards take the fee by descent and then dispose of the fee by will, the fee will not pass by it. 6 *Term Rep.* 63.

Devisees of contingent remainders in a copyhold, not being in the seisin, cannot make a surrender of their interest, nor will such a surrender operate by estoppel against the parties or their heirs. 11 *E. R.* 185.

A surrender may not be to commence *in futuro*; as after the death of the surrenderor, &c. *March*, 177. A copyholder cannot surrender an estate absolutely to another, and leave a particular estate in himself: though he may surrender to uses, &c. A copyholder surrendered to the use of his wife and younger son, without mentioning what estate; and adjudged, that they had an estate for life. 4 *Rep.* 29. If a man having bought a copyhold to himself, his wife and daughter, and their heirs, afterwards surrenders it to another and his heirs, for securing a sum of money: after his death, the surrenderee shall not be entitled to the land, it being an advancement for the wife and daughter. 2 *Vern.* 120.

A feme covert may receive a copyhold estate, by surrender from her husband, because she comes not in immediately by him, but by the admittance of the lord, according to the surrender. 4 *Rep.* 29 *b.* A feme covert is to be secretly examined by the steward, on her surrendering her estate. *Co. Lit.* 59. An infant surrendered his copyhold, and afterwards entered at full age, and it was held lawful, though the surrenderee was admitted. *Moor*, 597.

By the general custom of copyhold estates, copyholders may surrender in court, and need not alledge any particular custom to warrant it: but where they surrender out of court, into the hands of the lord by customary tenants, &c. custom must be pleaded. 9 *Rep.* 75. 1 *Rol. Abr.* 500. Surrenders out of court are to be *presented* at the next court: for it is not an effectual surrender till presented in court. Where a copyholder in fee surrenders out of court, and dies before it is presented, yet the surrender, being presented at the next court, will stand good, and *cestui que use* shall be admitted: so if *cestui que use* dies before it is presented, his heir shall be admitted. But if the surrender be not presented at the next court, it is void. *Co. Lit.* 62. 2 *Danv.* 188. If the tenants by whose hands the surrender was made shall die, and this upon proof is presented in court, it is well enough. 4 *Rep.* 29.

Tenants refusing to make presentment are compellable in the lord's court. And by surrender of copyhold lands to the use of a mortgagee, the lands are bound in equity, though the surrender be not presented at the next court. 2 *Salk.* 449. When a copyholder surrenders upon condition, and this is presented absolutely, the presentment is void: but where a conditional surrender is presented, and the steward omits entering the condition, on proof thereof the condition shall not be avoided; but the rolls shall be amended. 4 *Rep.* 25. A copyholder may surrender to the use of another, reserving rent with a condition of re-entry for non-payment, and in default of payment may re-enter. *Ibid.* 21.

If a copyholder of inheritance takes a lease for years of his copyhold estate, it is a surrender in law of his copyhold. Where there is a tenant for life, and remainder in fee, he in remainder may surrender his estate, if there be no custom to the contrary. 3 *Leon.* 329. If a surrender is made with remainders over, case lies, for him in remainder, against a copyholder for life, who commits waste, &c. 3 *Lev.* 128. A surrenderee of a reversion of a copyhold is an assignee within the equity of the *stat.* 32 *H.* 8. *c.* 34. to bring action of debt or covenant against lessee, &c. 1 *Salk.* 185. A copyholder in fee surrenders to the use of one for life, with remainder to another

for life, remainder to another in fee; as the particular estates and remainders make but one estate, there is but one fine due to the lord. 2 *Danv.* 191.

The *fruits* and *appendages* of a copyhold tenure, that it hath in common with free tenures are *Fealty*, *Services*, (as well in rents as otherwise,) *Reliefs* and *Escheats*. The two latter belong only to copyholds of inheritance: the former to those for life also. But besides these, Copyholds have also *Heriots*, *Wardship* and *Fines*. Heriots are incident to both species of copyhold, but wardship and fines to those of inheritance only. Wardship in copyhold estates partakes both of that in chivalry and that in socage. Like that in chivalry the lord is the legal guardian, who usually assigns some relation of the infant tenant to act in his stead; and he, like guardian in socage, is accountable to his ward for the profits. Of fines, some are in the nature of *primer seisins* due on the death of each tenant: others are mere fines for the alienation of the lands. In some manors only one of these sorts can be demanded; in some both, and in others neither. They are sometimes arbitrary and at the will of the lord, sometimes fixed by custom: but even when arbitrary, the courts of law, in favour of the liberty of copyholders, have tied them down to be *reasonable* in their extent: otherwise they might amount to a disherison of the estate. No fine therefore is allowed to be taken upon descents or alienations (unless in particular circumstances) of more than two years' improved value of the estate. 2 *Ch. Rep.* 134. See 2 *Comm.* 97.

*Fines* are paid to the lord on admittances: and may be due on every change of the estate by lord or tenant. The lord may have an action of debt for his fine: or may distrain by custom. 4 *Rep.* 27. 13 *Rep.* 2.

A Covenant made by a copyholder with a stranger to assign and surrender his copyhold to him, which covenant is afterwards presented by the homagee, does not give the lord any right to a fine before admission. 2 *T. R.* 484. The lord may recover from a copyholder the fine assessed by him on admittance, not exceeding two years' value of the tenement, although there be no entry of the assessment of such fine on the court rolls, but only a demand of such a sum for a fine, after the value of the tenement had been found by the homagee. 6 *E. R.* 56.

An *heriot* is a duty to the lord, rendered at the death of the tenant, or on a surrender and alienation of an estate: and is the best beast or goods, found in the possession of the tenant deceased, or otherwise, according to custom. And for heriots, reliefs, &c. the lord may distrain, or bring action of debt.—*Plowd.* 96.

It seems that a custom for the homage to assess a compensation in lieu of heriot, to be paid by an in-coming copyholder on surrender or alienation, is not good. 1 *Bos. & Pul.* 282. See title *Heriot.*

*Relief* is a sum of money which every copyholder in fee, or freeholder of a manor, pays to the lord, on the death of his ancestor; and is generally a year's profits of his land. See titles *Tenure*, *Relief.*

*Services* signify any duty whatsoever accruing unto the lord from tenants; and are not only annual and accidental; but corporal, as homage, fealty, &c. *Comp. Court. Keep.* 7. 8. 9. &c.

*Copyholds escheat*, and are *forfeited* in many cases; *escheat* of a *copyhold* estate, is either where the lands fall into the hands of the lord for want of an heir to inherit them; or where the copyholder commits felony, &c. But before the lord can enter on an estate escheated, the *homage jury ought to present it.*—*Forfeitures* proceeding from treasons, felonies, alienation by deed, &c. a *presentment* of them must be also made in court, that the lord may have notice of them. A copyholder refusing to do suit of court, being sufficiently warned, is a forfeiture of his estate; unless he be prevented by sickness, inundations of water, &c. If the lord demandeth his rent, and the copyholder being present, denies to pay it at the time required, this is a forfeiture; but if the tenant be not upon the ground when demanded, the lord must continue his demand upon the land; so that by continual denial in law, it may amount to a denial in fact: though it is said there must be a demand from the person of the copyholder, and a wilful denial, to make a forfeiture.

If a Copyholder do not perform the services due to his lord; or if he sue a replevin against the lord, upon the lord's lawful distress for his rent or services, these are forfeitures. If the lord upon admittance of a copyholder, the fine by the custom of the manor being certain, demandeth his fine, and the copyholder denieth to pay it upon demand, this is a forfeiture.

Upon the descent of any copyhold of inheritance, the heir by the general custom is tied, upon three solemn proclamations, made at each of three several courts, to come in and be admitted to his copyhold; or if he faileth therein, this failure worketh a forfeiture.

The proclamations need not enumerate the *particular* estate of which the tenant died seized. 3 *T. R.* 162. Nor is it necessary they should be proved by *vivâ voce* testimony. The entry in the court rolls is sufficient. *Ibid.* A person claiming to be admitted as heir need not tender himself to be admitted at the lord's court, if the steward upon application to him out of court has refused to admit him. 2 *Maul. & Selw. Rep.* 87.

A lord of a manor cannot seize a copyhold estate as forfeited *pro defectu tenentis* without a custom: therefore when on the death of a copyholder of inheritance, the lord, after three proclamations for the heir to come in, seized the estate into his hands and afterwards granted it in fee to another, the court considered it as an absolute seizure, and consequently irregular, there being no custom to warrant it, and being irregular as an absolute seizure it could not afterwards be set up by the lord as a *seizure quousque.* 3 *T. R.* 162.

A forfeiture of a copyhold estate can only be taken advantage of by him who is lord at the time of the forfeiture, except in those cases where the act of forfeiture destroys the estate. 3 *T. R.* 162.

An ideot, lunatick, &c. though able to take copyholds, they yet are unable to forfeit them: and in respect to others, forfeitures may be mitigated by custom, and the copyholder only amerced. By *stat.* 9 *Geo.* 1. *c.* 29. on default of infants and feme coverts appearing to be admitted tenants to copyhold lands, the lord or his steward may name a person to be guardian or attorney for them, and by such guardian, &c. admit them: and if the usual fine thereon be not paid in three months, being demanded in writing, the lord may enter on the copyhold, receive the rents, &c. till the fine is paid with all charges. And by this statute no infant or feme covert shall forfeit any copyhold lands for their neglect to come to court to be admitted, or refusal to pay any fine.

The general custom of copyholds allows a copyholder to make a lease for one year of his copyhold estate and no more, without incurring a forfeiture: but a copyholder may make a lease for one year, and covenant with the lessee, that, after the end of that year, he shall have the same for another year, and so from year to year during the space of seven years, &c. and be no forfeiture. *Cro. Jac.* 300. For this does not amount to a lease, but is only a covenant, subjecting the covenantor to an action for damages. Though a copyholder may not make a lease to hold for one year, and so from year to year during his life, excepting one day yearly, &c. which will be a forfeiture, being a mere evasion. But a licence to lease may be had. A woman who was a copyholder in fee married, her husband made a lease for years, not warranted by the custom, which was a forfeiture; the husband died; and adjudged that the lord shall not take advantage of this forfeiture after his death, but the wife shall enjoy the estate. *Cro. Car.* 7. And see 4 *Rep.* 21 *to* 25. *&c.*

Livery upon any conveyance of a copyhold estate amounts to a forfeiture. And yet if a copyholder for life surrender to another in fee, this is no forfeiture; for it passeth by the surrender to the lord, and not by livery.

If copyholder for life cut down timber-trees, it is a forfeiture of his copyhold; though such copyholder may take house-bote, hedge-bote, and plough-bote, upon his copyhold, of common right, as a thing incident to the grant; if he be not restrained by custom, to take them by the assignment of the lord or his bailiff. Where a copyholder for life fells timber trees, the lord may take them, and the estate is forfeited; but if under lessee for years of a copyholder cut down timber, this shall not be a forfeiture of the copyhold estate, but the lord is put to his action on the case against the lessee. 1 *Bulst.* 150. *Style*, 233. A copyhold granted to two for their lives successively, where the custom of the manor is, that they shall not fell trees; if the first copyholder for life cut down trees, &c. it is not only a forfeiture of his own estate for life, but of him in remainder. *Moor*, 49.

In other cases, a copyholder for life, committing waste, shall not forfeit the estate of him in remainder. *Cro. Eliz.* 880. If copyholder for life, where the remainder is over for life, commits a forfeiture by waste, &c. he in remainder shall not enter, but the lord. 2 *Danv.* 198. A copyholder committing waste voluntary, or permissive, this is a forfeiture: voluntary, as if he pull down any house, though built by himself; lop trees, and fell them, plough up meadows whereby the ground is made worse, &c. Permissive, if he suffer the roof of the house to let in rain, or the house to fall; or if he permit his meadow-ground to be surrounded with water, so that it becomes marshy, or his arable land to be thus surrounded, and become unprofitable, &c. these and the like are forfeitures. See 2 *Danv. Abr.* 192. 193. 196. *&c.* 1 *Nels. Abr.* 509. 510. *&c.*

If a feme copyholder for life takes husband, who commits waste and dies, the estate of the feme is forfeited: though not if a stranger commit the waste, without the assent of the husband. 4 *Rep.* 37. *Sed qu.* the difference between copyholder for life and copyholder in fee, in this respect; unless waste is distinguished from other forfeitures?

Most forfeitures are caused by acts contrary to the tenure: but a succeeding lord of a manor, shall not have any advantage of a forfeiture, by waste done by a copyholder in the time of his predecessor. 2 *Sid.* 8. And if a present lord doth any thing whereby he acknowledges the person to be his tenant after forfeiture, this acknowledgement is a confirmation of his estate. *Coke's Cop. c.* 1.

The lord may enter for waste committed by a copyholder for life, though there be an intermediate estate in remainder between the estate of copyholder for life and the lord's reversion. 2 *Maul. & Selw. Rep.* 68.

The court of Chancery will sometimes relieve against a forfeiture for waste, and compel the lord to re-admit, on receiving satisfaction for the injury he has sustained. Such relief is particularly given where the waste is committed through ignorance, or where the waste is merely permissive, and there has not been an obstinate perseverance in neglecting to repair after notice. 1 *C. C.* 95. *Pre. Ch.* 568. Another instance in which relief against forfeiture for waste is said to be proper, is where the lessee of a copyholder commits waste without his direction or privity. *Toth.* 237. But in this latter case it may be doubted whether the waste is a forfeiture. See *Mo.* 49.

Also, When the estate is forfeited for non-payment of rent, a fine, or such things, where a value may be set on them, and compensation made the lord on any laches of time, the tenant may be relieved: for there the land is but in nature of a security for those sums. *Preced. Chan.* 569. 572.

In case of making a lease for years, without licence, and not warranted by custom, found to be forfeiture at law, equity has nothing to do with it, to give any remedy; it is like to a feoffment made, or fine levied by particular tenants, against which there can be no relief. *Ibid.* 574. Where copyhold lands are purchased in fee, in trust for an alien, the lands are not seizable by the King: nor is the trust forfeited to him; for if the lands were forfeited as purchased for such alien, then the lord of the manor would lose his fines and services, &c. *Hard.* 436.

By *stat.* 10 *Geo.* 2. *c.* 26. Copyhold estates of poor prisoners may be assigned to creditors, and the assignees admitted by the lord, on paying the usual fine due on a surrender, &c.; and see *stat.* 1 *Geo.* 3. *c.* 17. § 14. as to *Insolvents.*

By *stat.* 31 *Geo.* 2. *c.* 14. § 1. already mentioned, copyholders are not to vote for Knights of the Shire.—The admission of infants and feme coverts entitled by descent, or surrender to the use of a will, is regulated by *stat.* 9 *Geo.* 1. *c.* 29.—And the *stat.* 5 *Geo.* 3. *c.* 46. (explained by 6 *Geo.* 3. *c.* 49.) compels the steward to receive the stamp duty on admission, &c. at the same time he receives the fees of court.

See further as to Copyholds in general, *Watkins's Treatise on Copyholds.*

COPY-RIGHT. The exclusive right of printing and publishing *copies* of any literary performance; extended also to music, engravings, &c. See title *Literary Property.*

CORAAGE, *Coraagium.*] A kind of extraordinary imposition, growing upon some unusual occasion, and seems to be of certain measures of corn: for *corus tritici* is a measure of wheat. See *Bract. lib.* 2. *c.* 16. *Numb.* 6. *Numb.* 8. *Blount.*

CORACLE. A small boat used by fishermen on some parts of the river Severn, made of an oval form, of split sallow twigs interwoven, and on that part next the water covered with leather, in which one man, being seated in the middle, will row himself swiftly with one hand, while with the other he manages his net or fish-tackle; and coming off the water, he will take the light vessel on his back, and carry it home. This boat is of the same nature as the Indian *canoes:* though not of the same form, or employed to the like use. But *quere* if not long out of use?

CORAM NON JUDICE. Is when a cause is brought and determined in a court whereof the judges have not any jurisdiction: then it is said to be *coram non judice*, and void. 2 *Cro.* 351.

CORBEL STONES. Are stones wherein images stand: the old English *corbel* was properly a niche in the wall of a church, or other structure, in which an image was placed for ornament or superstition: and the *corbel* stones were the smooth polished stones, laid for the front and outside of the *corbels* or niches. The niches remain on the outside of very many churches and steeples in England, though the little statues and reliques are most of them broken down. *Paroch. Antiq.* 575.

CORD OF WOOD. Is a quantity of wood eight feet long, four feet broad, and four feet high, ordained by the statute.

CORDAGE, Fr.] Is a general appellation for all stuff to make ropes, and for all kind of ropes belonging to the rigging of a ship; it is mentioned in 15 *Car.* 2. *c.* 13. and see *stat.* 25 *Geo.* 3. *c.* 56. against frauds in the manufacture of cordage for shipping. See *Sail Cloth.*

CORDINER. See *Cordwainer.*

CORDUBANARIUS. A *Cordwainer;* A shoemaker, *Cowel.* from the Fr. *Cordouannier*, a shoemaker; we call him vulgarly a *Cordwainer;* and so this word is used in divers statutes; as 3 *H.* 8. *c.* 10. 5 *H.* 8. *c.* 7. 27 *H.* 8. *c.* 14. 5 & 6 *Ed.* 6. *c.* 13. 1 *Jac.* 1. *c.* 22. &c. By which last statutes the masters and wardens of the *Cordwainers'* Company in London, &c. are to appoint searchers and triers of leather; and leather is not to be sold before searched and sealed, &c.

CORETES. From the Brit. *Cored*, pools, ponds, &c.—*Et cum suis piscibus et* coretibus *anguillarum et cum toto territorio suo.* Du Fresne.

CORIUM FORISFACERE. Was where a person was condemned to be whipped; which was anciently the punishment of a servant. *Corium perdere*, the same: and *corium redimere* is to compound for a whipping.

CORN. As to the general provisions relative to the importation and exportation of *Corn*, see title *Navigation-Acts*.—And as to the exportation of Corn to enemies in time of war, see *stat.* 33 *Geo.* 3. *c.* 27. and tit. *Treason*.

No *corn* was formerly to be exported, without the King's licence: except for the victualling of ships, and in some special cases, from some ports only: and none might by *stat.* 5 *Eliz. c.* 12. buy *corn* to sell again without licence from justices. But now *corn*, as wheat, barley, oats, &c. may be exported to states in amity when they exceed not certain prices, regulated by many statutes; and the exporters of it shall pay no duty or custom, but be entitled to bounty money or a certain allowance for exportation.

By *stat.* 11 *Geo.* 2. *c.* 22. if any person use violence on another person to hinder him from buying or carrying *corn* to any sea-port town to be transported, &c. he shall be imprisoned by two justices, for not more than exceeding three months, and be publicly whipped, &c. and committing a second offence, or destroying granaries, or *corn* in any boat or vessel, to be adjudged a felon, and transported for seven years: and the hundred to make good the damage, if not above 100*l.* as in cases of robbery; where an offender is not apprehended and convicted within twelve months; but notice must be given to the constable in two days.—*Stat.* 24 *Geo.* 2. *c.* 56. ordains the bounty on ground corn to be regulated by weight; and *stat.* 26 *Geo.* 2. *c.* 15. appoints interest to be paid on debentures for the bounty of corn exported. A corn market established at Westminster, by *stat.* 31 *Geo.* 2. *c.* 25. § 1. Forms of the certificates of prices of grain, to regulate the price of bread are settled by *stat.* 31 *Geo.* 2. *c.* 29. See title *Bread*.

The principal acts now in force to regulate the returns of the prices of grain are *stats.* 31 *Geo.* 3. *c.* 30. 33 *Geo* 3. *c.* 65. by the former of which several statutes (*viz.* 1 *Jac.* 2. *c.* 19. 1 *W. & M. c.* 12. 5 *Geo.* 2. *c.* 12. 10 *Geo.* 3. *c.* 39. 13 *Geo.* 3. *c.* 43; 21 *Geo.* 3. *c.* 50. *and* 29 *Geo.* 3. *c.* 58.) are all repealed; as also every provision in any other act for regulating the importation of wheat, &c. except such as relate to the making of *malt* for exportation and the exportation thereof.—So much of *stat.* 15 *Car.* 2. *c.* 7. as prohibits the buying of corn to sell again, and the laying it up in granaries is also repealed.

By the *statutes* 31 *Geo.* 3. *c.* 30. 33 *Geo.* 3. *c.* 65. bounties are granted on exportation at certain prices, and the exportation prohibited when at higher prices.—The quantity of corn to be exported is settled; (as to which see also 34 *Geo.* 3. *c.* 71. 53 *Geo.* 3. *c.* 38.)—The maritime counties of England are divided into districts.—The exportation of corn to be regulated in London, Kent, Essex, and Sussex by the prices at the Corn Exchange, the proprietors of which are to appoint an Inspector of corn returns, to whom weekly returns are to be made by the factors: and he is to make up weekly accounts, and transmit the average price to the receiver of the returns, to be transmitted to the officers of the customs and inserted in the London Gazette.—The exportation in other districts, and in Scotland, to be regulated by the prices at different appointed places, for which mayors, justices, &c. are to elect inspectors.—Declarations are to be truly made by factors of the corn sold by them.—Orders of council may be made to regulate importation or exportation from time to time. Such orders to be laid before parliament.—See also *stat.* 32 *Geo.* 3. *c.* 50. and 33 *Geo.* 3. *c.* 3. as to the exportation of wheat, and as to trans-shipping of corn brought coastwise. By 44 *Geo.* 3. *c.* 109. 45 *Geo.* 3. *c.* 86. the mode of ascertaining the average price, to regulate the importation and exportation of corn to and from Great Britain, is further provided for.—By the latter act such average is to result from the prices in the twelve maritime districts of England and Wales.—See also 46 *Geo.* 3. *c.* 11: 55 *Geo.* 3. *c.* 26. § 5.

By several acts made from time to time with a view to relieve the public against the scarcity or dearness of corn, the exportation and importation of corn and provisions are allowed to be prohibited and regulated by order of the King (or lord lieutenant of Ireland) and council. See 35 *Geo.* 3. *c.* 4. 36 *Geo.* 3. *c.* 3. 37 *Geo.* 3. *c.* 7. 39 *Geo.* 3. *c.* 87. (continued by various subsequent acts): 39, 40 *Geo.* 3. *c.* 9. and *c.* 58. 41 *Geo.* 3. (G. B.) *c.* 2. *c.* 5. 41 *Geo.* 3. (U. K.) *c.* 36. (for Ireland, continued by several subsequent acts.)—By others of these temporary acts Bounties are given on the importation of corn, flour, &c.—See 36 *Geo.* 3. *c.* 21. *c.* 56. 37 *Geo.* 3. *c.* 7. *c.* 83. 38 *Geo.* 3. *c.* 10. 39, 40 *Geo.* 3. *c.* 29. *c.* 35. *c.* 53. 41 *Geo.* 3. (G.B.) *c.* 10. 41 *Geo.* 3. (U.K.) *c.* 13. 45 *Geo.* 3. *c.* 86. 46 *Geo.* 3. *c.* 11.—By some other temporary acts corn is prohibited to be used in distilleries. 35 *Geo.* 3. *c.* 11. *c.* 119. 36 *Geo.* 3 *c.* 20. 39, 40 *Geo.* 3. *c.* 8. 41 *Geo.* 3. (G. B.) *c.* 3. 41 *Geo.* 3. (U. K.) *c.* 16. 52 *Geo.* 3. *cc.* 3. 47. 118. 53 *Geo.* 3. *c.* 7.—or in making starch, 39, 40 *Geo.* 3. *c.* 25. 41 *Geo.* 3. (G. B.) *c.* 3.—or in making malt, 41 *Geo.* 3. (U. K.) *c.* 16. (in Ireland).—And in like manner the manufacture of flour and bread has been occasionally regulated. See 41 *Geo.* 3. (G. B.) *c.* 16. 48 *Geo.* 3. (U. K.) *c.* 1. 2.—(And see title *Bread*.)

By *stat.* 54 *Geo.* 3. *c.* 69. to permit the *Exportation of Corn*, grain, meal, malt, and flour from any part of the United Kingdom, without payment of duty or receiving of bounty, all duties and bounties on the exportation of corn are repealed; and it is enacted, that it shall be lawful for any person to export at all times from any port of the United Kingdom, any corn, &c. without the payment of any duty of customs thereon; and that no person shall be entitled to any bounty upon or in respect of the exportation of any corn, &c.

By *stat.* 55 *Geo.* 3. *c.* 26. to amend the laws in force for regulating the *Importation of Corn*, it is enacted that all foreign corn, meal or flour, importable by law, may, at all times, be allowed to be imported into the United Kingdom, and warehoused without payment of any duty, and taken out of warehouse for exportation, without duty, § 1.—That such corn may be taken out of warehouse for home consumption, without duty, whenever foreign corn is admissible into the kingdom, § 2.—Foreign corn, meal, or flour may be admitted into the United Kingdom, free of duty, whenever the prices of British corn are at or above the following rates per quarter, viz. wheat 80*s.*; rye, peas, and beans, 53*s.*; barley, beer or bigg, 40*s.*; oats, 27*s.* § 3.—When British corn is below those prices, no corn shall be imported, or taken out of warehouse, for home consumption, § 4.—Corn, &c. the growth of the *British North American Colonies* may be imported duty-free, for home consumption, whenever British corn is at or under the following prices: wheat, 67*s.*; rye, &c. 44*s*; barley, &c. 33*s.*; oats, 22*s.* per quarter, § 6—9.—See also 57 *G.* 3. *c.* 85. (a temporary act) permitting the importation of corn, &c. in any ship, from any country, under the regulations as to price, &c. in 55 *Geo.* 3. *c.* 26.

To preserve the markets of corn uninterrupted, it is enacted by 36 *Geo.* 3. *c.* 9. that persons hindering the buying of corn, or seizing it in its progress from place to place shall be punished by imprisonment in the house of correction, § 1.—Persons convicted of such offence a second time, and persons destroying store-houses or carrying Corn away therefrom unlawfully, are punishable by seven years' transportation, § 2.—The hundred is made liable to damages (not exceeding 100*l.*) in case the offender is not convicted within twelve months, § 3—5.

The intercourse of corn between Great Britain and Ireland has been regulated by various acts since the Union. See 42 *Geo.* 3. *c.* 35. 43 *Geo.* 3. *c.* 14.; continued by various

acts, till 36 *Geo.* 3. *c.* 97.; by which last act the free interchange of every species of grain (the product of either country, 47 *Geo.* 3. *c.* 7.) is permitted between the two countries without respect to the prices, and without any duties or bounties.

With respect to the exportation of certain quantities of corn annually to Guernsey, Jersey, &c. see 36 *Geo.* 3. *c.* 21. 38 *Geo.* 3, *c.* 29. 43 *Geo.* 3 *c.* 105. (made perpetual by 45 *Geo.* 3. *c.* 68. § 4.)—46 *Geo.* 3. *c.* 98. § 4.

CORNAGE, *Cornagium*, from the Lat. *Cornu*, a horn.] A kind of tenure in grand serjeanty; the service of which was to blow a horn when any invasion of the Scots was perceived: and by this tenure many persons held their lands Northward, about the wall commonly called the *Picts Wall*. *Cambd. Britan.* 609. This old service of *horn-blowing* was afterwards paid in money, and the sheriffs accounted for it under the title of *Cornagium*.—*Sir Edward Coke* in his first Institute, *page* 107. says *cornage* is also called in the old books *Horngeld*; but they seem to differ much. See *Hornegeld*.

CORNARE. To blow in the horn.—*Matt. Paris*, *p.* 181.

CORN-RENTS. By *stat.* 18 *El. s.* 6. on college leases, one third of the old rent shall be reserved in wheat or malt, &c. the invention of Lord Treasurer Burleigh, and Sir Thomas Smith, who observed the value of money to sink much, and the price of provisions to rise greatly, on our communication with the Indies: and therefore devised this method for upholding the revenues of the colleges. 2 *Comm.* 322.

CORNWALL. A royal dutchy belonging to the Prince of Wales, abounding with mines, and having *Stannary* courts, &c. It yields a great revenue to the Prince. How leases are to be made of lands in the dutchy of Cornwall, for three lives, or thirty-one years, under the ancient rents, &c. See *stat.* 13 *Car.* 2. *c.* 4. and 12 *Ann. c.* 22. 24 *Geo.* 2. *c.* 50. and 1 *Geo.* 3. *c.* 11. Assizes for Cornwall not confined to Launceston. 1 *Geo.* 1. *c.* 45. Leases by Prince of Wales of lands in Cornwall, where good. 10 *Geo.* 2. *c.* 29. § 9. 10. 11. 33 *Geo.* 3. *c.* 78. 50 *Geo.* 3. *c.* 6. What leases and grants by the king shall be good. 33 *Geo.* 2. *c.* 10. See title *King*.

CORODY, *Corodium.*] Signifies a sum of money or allowance of meat, drink, and clothing due to the king from an abbey, or other house of religion, whereof he was founder, towards the sustentation of such a one of his servants as he thought fit to bestow it upon. The difference between a *corody* and a pension seems to be, that a *corody* was allowed towards the maintenance of any of the king's servants in an abbey: a *pension* is given to one of the king's chaplains, for his better maintenance, till he may be provided of a benefice. And as to both these, see *Fitz. Nat. Br. fol.* 250. where are set down all the *Corodies* and pensions that our abbeys when they were standing, were obliged to pay to the king.

*Corody* is ancient in our laws: and it is mentioned in *Staundf. Prærog.* 44. And by the *stat.* of *Westm.* 2. *c.* 25. it is ordained, that an assize shall lie for a *corody*. It is also apparent by *stat.* 34 & 35 *H.* 8. *c.* 26. that *corodies* belonged sometimes to bishops, and noblemen, from monasteries: and in the *New Terms of Law*, it is said that a *corody* may be due to a common person, by grant from one to another; or of common right to him that is a founder of a religious house, not holden in *Frankalmoigne*; for that tenure was a discharge of all *corodies* in itself: by this book it likewise appears, that a *corody* is either certain or uncertain, and may not be only for life or years, but in fee. *Termes de Ley.* 2 *Inst.* 630. See the *Monasticon Anglicanum* for the form of a grant of corody.

CORODIO HABENDO. A writ to exact a *corody* of an abbey or religious house. *Reg. Orig.* 264.

CORONA MALA, OR MALA CORONA. The clergy who abused their character, were formerly so called. *Blount.*

CORONARE FILIUM. To make one's son a priest. Anciently lords of manors, whose tenants held by *villenage*, did prohibit them *coronare filios*, lest such lords should lose a villein by their entering into holy orders: for ordination changed their condition, and gave them liberty, to the prejudice of the lord, who could before claim them as his *natives* or *born servants*.—*Homo Coronatus* was one who had received the first *tonsure*, as preparatory to superior orders; and the *tonsure* was in form of a *corona*, or crown of thorns. *Cowel.*

CORONER, CORONATOR, *à Corona.*] An ancient officer at the Common law. Mention is made of him in King Athelstan's charter to Beverley. *Anno* 905.

He is called Coroner, *Coronator*—because he hath principally to do with pleas of the crown, or such wherein the king is more immediately concerned. 2 *Inst.* 31. 4 *Inst.* 271. And in this light the Lord Chief Justice of the King's Bench is the principal Coroner in the kingdom, and may (if he pleases) exercise the jurisdiction of a coroner in any part of the realm. 4 *Rep.* 57. But there are also particular coroners for every county of England; usually four, but sometimes six, and sometimes fewer. *F. N. B.* 163. This office is of equal antiquity with that of sheriff, and was ordained together with him to keep the peace, when the earls gave up the wardship of the county. *Mirror*, *c.* 1. § 3.

I. *His election and removal.*
II. 1. *His Power and Duty*; 2. *His Fees for the Execution of his Duty*; *and* 3. *His Punishment for the Breach of it.*

I. HE IS STILL CHOSEN by all the freeholders in the county-court; as by the policy of our ancient laws, the sheriff and conservators of the peace, and all other officers were who were concerned in matters that affected the liberty of the people. 2 *Inst.* 558. And as Verderors of the forests still are, whose business it is to stand between the prerogative and the subject in the execution of the forest laws. For this purpose there is a writ at common law *de coronatore eligendo*, *F. N. B.* 163. in which it is expressly commanded the sheriff, "*quod talem eligi faciat, qui melius et sciat, et velit, et possit, officio illi intendere.*" See *post.* And in order to effect this the more surely, it was enacted by *stat. Westm.* 1. 3 *Ed.* 1. *c.* 10. that none but lawful and discreet *knights* should be chosen; and there was an instance in the 5 Ed. III. of a man being removed from this office because he was only a merchant. 2 *Inst.* 32. But it seems it is now sufficient if a man hath lands enough to be made a knight; (which by the *statutum de militibus*, 1 *Ed.* II. were lands to the amount of 20*l. per annum*;) whether he be really knighted or not. *F. N. B.* 163, 4. For the Coroner ought to have an estate sufficient to maintain the dignity of his office, and answer any fines that may be set upon him for his misbehaviour. *Ibid.* And if he hath not enough to answer, his fine shall be levied on the county, as the punishment for electing an insufficient officer. *Mirror*, *c.* 1. § 3. 2 *Inst.* 175. Now indeed, through the culpable neglect of gentlemen of property, this office has been suffered to fall into disrepute, and get into low and indigent hands; so that although formerly no coroners would condescend to be paid for serving their country, and they were by the aforesaid *stat. Westm.* 1. expressly forbidden to take a reward, under pain of great forfeiture to the king; yet for many years past they have only desired to be chosen for the sake of their perquisites: being allowed fees for their attendance. See *post*, II. 2.

By *stat.* 28 *Ed.* 3. *c.* 6. it is enacted, "That all coroners of the counties shall be chosen in the full counties of the most mete and lawful people that shall be found in the same countids, to execute the said office: saved always to the King and other lords, who ought to make such coroners, their seignories and franchises."

The oaths of allegiance, supremacy, and abjuration, are to be taken, and then the oaths of office: when the coroner is elected, and sworn into his office, he is to remember the qualification-acts, and in due time, to take the sacrament and oaths of abjuration. *Impey's Sheriff.*

Some doubts and difficulties which existed as to the election of Coroners, (in England and Wales,) are obviated by *stat.* 58 *Geo.* 3. *c.* 95. by which it is enacted, that the sheriff shall hold his county-court for the election of coroners, at the usual place of election, at the county-court next after receipt of the writ *de coronatore eligendo*, (or within fourteen days after, if the court falls within six days of delivery of the writ,) giving ten days' notice. That if the election is not determined on view, a poll shall be taken, which shall be determined within ten days. That the voters (if required) shall swear they are *bonâ fide* freeholders (but the amount of the freehold is not specified). That mortgagors or *cestui que trusts* shall vote, (unless the mortagee or trustee be in actual possession, who may then vote.) That freeholds shall not be split by conveyance for creating votes: and that the expences of the poll shall be defrayed by the candidates.

The Coroner is chosen for life: but may be removed, by either being made sheriff, or chosen verderor, which are offices incompatible with the other: or by the King's writ *de coronatore exonerando*, for a cause to be therein assigned: as that he is engaged in other business, is incapacitated by years, or sickness, hath not a sufficient estate in the county, or lives in an inconvenient part of it. *F. N. B.* 163, 4. See *post.* And by *stat.* 25 *Geo.* 2. *c.* 29. extortion, neglect or misbehaviour, are also made causes of removal. See *post*, II. 3.

There are Special Coroners, within divers liberties, as well as the ordinary officers in every county: as the *Coroner of the Verge*, which is a certain compass about the King's court; who is likewise called *Coroner of the King's Household.*—Cromp. Juris. 102.

The King's coroner shall execute his office within the verge. *Stat.* 32 *H.* 8. *c.* 10. *sect.* 7. Some corporations and colleges are licensed by charter to appoint their coroners within their own precincts. 4 *Inst.* 271. For what arises on the high sea, we read of coroners appointed by the King or his admiral. 2 *Hale's Hist. P. C.* 53. See *post*, *Coroner of the King's Household.*

It is said Coroners are of three kinds. 1. By virtue of an office. 2. By charter or commission. 3. By election.

1. The Chief Justice of K. B.—2. The Lord Mayor of London is by charter 18 E. IV. Coroner of London. See *post.* —The Bishop of Ely also hath power to make coroners, by a charter of Hen. VII.: and there are Coroners of particular lords of franchises and liberties who by charter have power to create their own coroners, or to be coroners themselves, especially in the jurisdiction of the Admiralty, as well as that of the verge above referred to.—3. The general coroners of counties.—See 1 *Hale*, 52. 4 *Rep.* 57. 1 *Com.* 384.

The Coroner of Portsmouth has jurisdiction on board a man of war lying in Portsmouth harbour; for though the Admiralty have a coroner of their own, he never takes inquisitions of *felo de se. Stra.* 1097. *Andr.* 231.

II. The Office of Coroners especially concerns the pleas of the crown; and they are conservators of the peace in the county where generally elected. Their authority is *judicial* and *ministerial. Judicial* where one comes to a violent death, and to take and enter appeals of murder, pronounce judgment upon outlawries, &c. And to inquire of lands and goods, and escapes of murderers, treasure-trove, wreck of the sea, deodands, &c. The *ministerial* power is where the Coroners execute the King's writs, on exception to the sheriff, as by his being party to a suit, kin to either of the parties, on default of the sheriff, &c. 4 *Inst.* 271. 1 *Plowd.* 73. And the *authority* of coroners does not determine by the demise of the King. 2 *Inst.* 174.

Where Coroners are empowered to act as judges, as in taking an inquisition of death, or receiving an appeal of felony, &c. the act of one of them is of the same force as if they had all joined; but after one of them has proceeded to act, the act of another of them will be void: And where they are authorised to act only *ministerially*, in the execution of a process directed to them upon the incapacity of the sheriff, their acts are void, if they do not all join. 2 *Hawk. P. C. c.* 9. § 45. *Hob.* 70.

So that Coroners as *ministers* must all join; but as *judges*, they may divide. But two coroners ought to be judges in redisseisin; and though one serves to pronounce an outlawry, the entry ought to be in the name of all of them: And so of all processes directed to the coroners. *Staundf.* 53. *Jenk. Cent.* 85.

If the sheriff is either plaintiff or defendant, or one of the cognisees, the writ must be directed to the coroner. *Cro. Car.* 300. But the coroner is not the officer of B. R. but where the sheriff is improper; not where there is no sheriff; for if the sheriff die, the coroner cannot execute a writ. In case of two coroners, if one is challenged, the other may execute the writ, &c. yet both make but one officer: It is the same with two sheriffs of a city, &c. 1 *Salk.* 144. A *venire facias* shall go to the coroner, where the sheriff is a party, or the defendant is a servant to the sheriff, &c. But it ought to be on a principal challenge to the favour. *Moor*, 470.

On defaults of sheriffs, coroners are to impanel juries, and return issues on juries not appearing, &c. As the sheriff in his torn might enquire of all felonies by the common law, saving the death of a man; so the coroner can inquire of no felony but the death of a person and that *super visum corporis.* 4 *Inst.* 271. But in Northumberland the coroner by custom may inquire of other felonies. 35 *H.* 6. 27. But without custom no coroner is authorised to take any other inquisition than on death. 2 *Hale*, 65. See *Leach's Hawk. P. C.* ii. *c.* 9. § 35 *n.* By *Magna Charta*, *cap.* 17. no sheriff &c. or coroner shall hold pleas of the crown: But by *stat. West.* 1. 3 *Ed.* 1. *c.* 10. it is enacted, that the coroners shall lawfully attach and present pleas of the crown; and that sheriffs shall have counter-rolls with the coroners, as well of appeals, as of inquests, &c.

Coroners, before the *stat. Magna Charta*, might not only receive accusations against offenders, but might try them: But since that statute, they cannot proceed so far; and appeals before them are removable into B. R. &c. by *certiorari*, directed to the coroners and sheriffs, &c. Though process may be awarded by the sheriff and coroner, or the coroner only, in the county-court on appeals, till the exigent, &c. 2 *Hawk. P. C. c.* 9. § 41.

By the *stat. de officio coronatoris*, 4 *Ed.* 1. *st.* 2. the Coroner is to go to the place where any person is slain or suddenly dead, and shall by his warrant to the bailiffs, constables, &c. summon a jury out of the four or five neighbouring towns, to make inquiry upon view of the body; and the coroner and jury are to inquire into the manner of killing, and all circumstances that occasioned the party's death; who were present, whether the dead person was known, where he lay the night before, &c. Examine the body if there be any signs of strangling about the neck, or of cords about the members, &c. Also all wounds ought to be viewed and inquiry made with what weapons, &c. And the coroner may send his warrant for witnesses, and take their examination in writing: and if any appear guilty of the murder, he shall inquire what goods and lands he hath: and then the dead body is to be buried. A *coroner* may likewise commit the person to prison who is by his inquisition found guilty of the murder; and the witnesses are to be bound by recognisance to appear at the next assises, &c.

When the jury have brought in their verdict, the coroner is to inroll and return the inquisition, whether it be brought in

murder, manslaughter, &c. to the justices of the next gaol-delivery of the county, or certify it into B. R. where the murderers shall be proceeded against. 2 *Rol. Abr.* 32. Upon an inquisition taken before the coroner, he must put into writing the effect of the evidence given to the jury before him; and bind them to appear, &c. which is to be certified to the court with the inquisition: and neglecting it the coroner shall be fined. 1 & 2 *P. M. c.* 13. 1 *Lil. Abr.* 317.

The word *Murdravit* is not necessary in a coroner's inquisition: though it is in an indictment for killing another person. 1 *Salk.* 377. It is not necessary that the inquisition be taken in the place where the body was viewed. 2 *Hawk. P. C. c.* 9. § 25. But a coroner has no authority to take an inquisition of death, without a view of the body; and if the inquest be taken by him without such view, it is void. 2 *Lev.* 140.

The coroner may in convenient time take up a dead body that hath been buried, in order to view it; but if it be buried so long that he can discover nothing from the viewing it, or if there be danger of infection, the inquest ought not to be taken by the coroner, but by justices of peace, by the testimony of witnesses; for none can take it *on view*, but the coroner. *Bro. Coron.* 167. 173. If the body is buried, the town shall be amerced: as it shall be if the body is suffered to lie so long that it stinks. 2 *Danv. Abr.* 209. &c. Where the body hath lain for some time, that it cannot be judged how it came by its death, that must be recorded; that at the coming of the justices of assise, the town where, &c. may be amerced on sight of the coroner's rolls.

A coroner may find any nuisance by which the death of a man happens: and the township shall be amerced on such finding. 1 *Nels. Abr.* 536. If one is slain in the day, and the murderer escapes, the town where done shall be amerced, and the coroner is to enquire thereof on view of the body. *Stat.* 3 *Hen.* 7. *c.* 1. A coroner may take an indictment upon view of the body; as also an appeal, within a year after the death of one slain. *Wood's Inst.* 491. But a coroner *super visum corporis*, cannot make an inquisition of an accessary after the murder; though he may of accessaries before the fact. *Moor*, 29.

Coroners ought to sit and inquire on the body of every prisoner that dies in prison: They have no jurisdiction within the verge of the King's courts; nor of offences, committed at sea, or between high and low water mark when the tide is in; though they have in arms and creeks of the sea. 3 *Inst.* 134. See *ante* I. *ad finem.*

Where a coroner's inquest is quashed, he must make a new one *super visum corporis:* And a coroner may attend and amend his inquisition in matters of form: But if he misbehaves himself, and a *melius inquirendum* is granted upon it, that inquisition must be taken by the sheriffs or commissioners, upon affidavits, and not *super visum corporis;* because none but a coroner can take inquisition *super visum*, &c. and he is not to be trusted again. 1 *Salk.* 190. 2 *Danv. Abr.* 210.

A coroner's inquisition being final, the coroner ought to hear counsel and evidence on both sides. 2 *Sid.* 90. 101. The coroner must admit evidence, as well against the King's interest, as for it; but it hath been held, that if a person be killed by another, and it is certainly known that he did it, the coroner's jury are to hear the evidence only for the King, and inquire whether the killing were by malice or without malice, &c. *Per Hale*, Ch. Just. Where a coroner would not admit of evidence against the King, to prove a *felo de se* to be *non compos mentis*, his inquisition was set aside: and a new inquisition taken whereby it was found that the party was *non compos.* 2 *Hale's Hist. P. C.* 60. If there be an inquisition of manslaughter or murder, and also an indictment by the grand jury against one, and he is arraigned, and found Not Guilty on the indictment; here it is necessary to quash the coroner's inquisition, or to arraign the party upon it, and acquit him on that also: For otherwise it stands as a record against him, whereon he may possibly be outlawed. 2 *Hale*, 65. And where a person found guilty by the coroner's inquest, pleads, and is acquitted by the petit jury; they must give in who it was that killed the man, which serves as an indictment against that other person; and if they cannot tell who, they may mention some fictitious name. *Ibid.*

The court of K. B. granted a criminal information for publishing in a newspaper, a statement of the evidence given before a coroner's jury, accompanied with comments; although the statement was correct, and it was not found that the party had any malicious motive in the publication. *R.* v *Fleet, Hil.* 58 *Geo.* 3. *Term Rep. K. B.* 379.

2. By the *stat.* 3 *Ed.* 1. *cap.* 10. Coroners shall demand or take nothing for doing their offices: And by the antient law of England, none having any office concerning the administration of justice, could take any fee for doing his office; and therefore this statute was only in affirmance of the Common Law. By *stat.* 3 *Hen.* 7. *cap.* 1. upon an inquisition taken on view of the body, the coroner shall have 13*s.* 4*d.* fee of the goods of the murderer; and if he be gone, then out of the amercement of the town for the escape. Though *stat.* 1 *H.* 8. *c.* 7. enacts, that where a person is slain by misadventure, the coroner is to take no fee, on pain of 40*s.* Justices of assise and of peace have power to inquire of and punish extortions of coroners, and also their defaults. *Stat. Ibid.*

By the *stat* 25 *Geo.* 2. *c.* 29. for every inquisition, not taken upon the view of a body dying in gaol, which shall be taken by any coroner in any township or place contributory to the rates directed by *stat.* 12 *Geo.* 2. *c.* 29. the sum of 20*s.* and for every mile which he shall travel from the place of his abode, the further sum of 9*d.* shall be paid him out of the money arising by the said rates. And for every inquisition taken upon the view of a body dying in gaol, so much money not exceeding 20*s.* shall be paid him as the justices at the sessions shall think fit to allow, out of the money arising from the said rates. Provided that over and above the recompence by the statute appointed, the coroner who shall take an inquisition upon the view of a body slain or murdered, shall have the fee of 13*s.* 4*d.* payable by *stat.* 3 *Hen.* 7. *c.* 1. out of the goods of the slayer or murderer, or out of the amerciaments upon the township, if the slayer or murderer escape. Coroners taking further fees guilty of extortion.

Provided that no Coroner of the King's household, and of the verge of the King's palaces, nor any coroner of the Admiralty, nor of the County Palatine of Durham, nor of the city of London and borough of Southwark, or of any of the franchises belonging to the said city, nor any coroner of any city, borough, town, liberty or franchise not contributory to the rates directed by *stat.* 12 *Geo.* 2. *c.* 29. or within which such rates have not been usually assessed, shall be entitled to any fee, recompence or benefit given by this act.

Under this act a coroner is not entitled to any compensation for the miles travelled in *returning from taking* an Inquisition. *R. v. Oxfordshire Just. M.* 599. 3 *T. R. K. B.* 203.

The Coroners of franchises that do not contribute to the county rates, are not entitled to the fees given by the *stat.* 25 *G.* 2. *c.* 29. nor to any fees to be paid by the county. 7 *East's Rep.* 52. A *mandamus* to the Justices in session, to allow an item of charge in the coroner's account, refused, because the Justices were of opinion that under the circumstances there was no ground to suppose that the deceased had died any other than a natural though a sudden death, and therefore that the inquisition had not been duly taken: and the court of K. B. seeing no reason for interfering with that judgement. 11 *East's Rep.* 229.

By *stat.* 50 *Geo.* 3. *c.* 30. to regulate the fees payable to coroners in *Ireland* on attending inquisitions, grand juries are authorised to present five guineas for each inquest held, provided the account do not exceed forty guineas at each assise.

3. If a Coroner be remiss in coming to do his office, when he is sent for, &c. he shall be amerced by virtue of the above mentioned statute *De coronatoribus. S. P. C.* 51. *Salk.* 377. *H. P. C.* 170.

If a Coroner hath been guilty of any corrupt practice, bribery, &c. in taking the inquisition, a *melius inquirendum* may be awarded for taking a new one by special commissioners, &c. Coroners concealing felonies, &c. are to be fined, and suffer one year's imprisonment. 3 *Ed.* 1. *cap.* 9. Also for mismanagement in the coroner, the filing of the inquisition may be stopped. 1 *Mod.* 82. A coroner's inquisition is not traversable: If it be found before the coroner *super visum corporis*, that one was *felo de se*, the executors or administrators of the deceased, it is said, cannot traverse it. 3 *Inst.* 55. But it has been held that the inquest being moved into B. R. by *certiorari*, may be there traversed by the executor or administrator of the deceased. 2 *Hawk. P. C. c.* 9. § 51. And it hath been adjudged, that the inquisition of *felo de se* is traversable; though *fugam fecit* is not. 2 *Leo.* 152.

If a Coroner be convicted of extortion, wilful neglect of duty or misdemeanor in his office, the court before whom he shall be so convicted, may adjudge that he shall be removed from his office. See *stat.* 25 *Geo.* 2. *c.* 29.

For further matter on this subject, see 2 *Hawk. P. C. c.* 9. throughout.

Coroner of the King's Household. Hath an exempt jurisdiction within the verge, which the Coroner of the County cannot intermeddle with; as the *Coroner of the King's House* may not intermeddle within the county out of the verge. 2 *Hawk. P. C. c.* 9. § 15.—If an inquisition be found before the coroner of the county, and the coroner of the verge, where the homicide was committed in the county, and it is so entered and certified, it will be error. 4 *Rep.* 45. But if murder be committed within the verge, and the King removes, before any indictment taken by the *Coroner of the King's Household;* the coroner of the county, and the *Coroner of the King's House* shall inquire of the same: And according to *Sir Edw. Coke*, the coroner of the county might inquire thereof at the Common law. 2 *Hawk. P. C. c.* 9. § 15. 2 *Inst.* 550. If the same person be coroner of the county, and also of the *King's House*, an indictment of death taken before him as coroner, both of the *King's House*, and of the county, is good. 4 *Rep.* 46. 2 *Inst.* 134.

By the *stat.* 33 *H.* 8. *c.* 12. §§ 1. 3. *it is ordained, That all inquisitions made upon the view of persons slain within any of the King's palaces or houses, or any other house or houses wherein his Majesty shall happen to be abiding in his royal person, shall be taken by the* Coroner *for the time being* of the King's Household, *without any assisting of another coroner of any shire within this realm; by the oaths of twelve or more of the yeoman officers* of the King's Household, *returned by the two Clerks Controllers, the Clerks of the Checks, and the Clerks Marshal, or one of them, of the said Household, to whom the said* Coroner of the Household *shall direct his precept; and the said* Coroner *shall certify under his seal, and the seals of such persons as shall be sworn before him, all such inquisitions before the Master or Lord Steward* of the Household; *who hath the appointment of such coroner, &c.*

Coroner of London. By the charter of King Ed. IV. the mayor and commonalty of London may grant the office of coroner to whom they please; and no other coroner but he that belongs to the city, shall have any power there: Also the Lord Mayor, &c. may chuse two coroners in Southwark. When any one is killed, or comes to an untimely death in London, the coroner upon notice shall attend where the body is, and forthwith cause the beadles of the ward to summon a jury to make the necessary inquiry, how such person came by his death: And after inquisition taken, he shall give a certificate to the church-warden, clerk or sexton of the parish, to the intent the corpse may be buried: The coroner's fees here formerly amounted to 25*s.* now to above double that sum; unless the friends of the deceased are poor, and then he shall execute his office for nothing. *Cit. Lib.* 46. 47. The Coroners in London and Middlesex, and in other *cities*, &c. may bail felons and prisoners, in such manner as hath been heretofore accustomed. *Stat.* 1 & 2 *P. & M. c.* 13. *s.* 6. 1 *Lil. Abr.* 327.

What anciently belonged to Coroners, you may read at large in *Bracton, lib.* 3. *tract.* 2. *cap.* 5. 6. 7. & 8. *Britton cap.* 1. and *Fleta, lib.* 1. *c.* 18.

Coronatore Eligendo. A writ which lies on the death or discharge of any *Coroner*, directed to the Sheriff out of the Chancery, to call together the freeholders of the county, for the choice of a new coroner; and to certify into the Chancery, both the election and the name of the party elected, and also to give him his oath, &c. *Reg. Orig.* 177. *F. N. B.* 163. See title *Coroner.*

Coronatore Exonerando. A writ for the discharge of a coroner, for negligence, or insufficiency in the discharge of his duty: and where coroners are so far engaged in any other public business, that they cannot attend the office; or if they are disabled by old age or disease, to execute it; or have not sufficient lands, &c. they may be discharged by this writ. 2 *Inst.* 32. 2 *Hawk. P. C. c.* 9. § 12. But if any such writ be grounded on an untrue suggestion, the coroner may procure a commission from the Chancery to inquire thereof; and if the suggestion be disproved, the King may make a *supersedeas* to the sheriff, that he do not remove the coroner; or if he have removed him that he suffer him to execute the office. *Reg. Orig.* 177. 178. *F. N. B.* 164. See title *Coroner.* As also the coroner's is an office of freehold, the court of Chancery, with whom the power of granting this writ resides, will not suffer it to issue, unless on affidavit, that the defendant has been served with notice of the petition for it. 3 *Atk.* 184. And on an election of a new coroner by a majority of the freeholders, the power and authority of the old one is *ipso facto* extinguished. See title *Coroner.*

CORONE, *Fr.*] All matters of the *crown* were heretofore reduced to this law head or title; they are the things that concern treason, felony, and divers other offences, by the Common law, and by statute. *Shep. Epit.* 367.

CORPORAL OATH. And how it is administered. See title *Oath.*

## CORPORATION.

Corporatio.] A Body Politic or Incorporate; so called as the persons composing it are made into a *body*, and of capacity to take and grant, &c. Or, it is an assembly and joining together of many into one fellowship and brotherhood, whereof one is head and chief, and the rest are the body; and this head and body knit together, make the *Corporation*: also it is constituted of several members, like unto the natural body, and framed, by *fiction* of law, to endure in perpetual succession.

With respect to *Corporations*, or communities of old, the forming of cities into communities, *corporations*, or bodies politic, and granting them the privilege of municipal jurisdiction, contributed more than any other cause to introduce regular government, police and arts, and to diffuse them over Europe. Louis the Gross, in France, to counterbalance his potent vassals, conferred new privileges on the towns situated within his domaine, called *Charters of community*, and formed the inhabitants into *corporations* or bodies politic, to be governed by a council and magistrates of their own nomination. About the same period the great cities in Germany began to acquire like immunities; and the practice quickly spread over Europe, and was adopted in Spain, England, Scotland, and all the other feudal kingdoms. *Robertson's Hist. Emp. C. V.* 1 *v.* 32. 34. &c.

# CORPORATION, I.

Of *Corporations* some are *sole*, some aggregate: *sole*, when in one single person, as the King, a Bishop, Dean, &c. *Aggregate*, which is the most usual, consisting of many persons, as Mayor and Commonalty, Dean and Chapter, &c. Likewise *corporations* are *spiritual* or *temporal*; spiritual, of Bishops, Deans, Archdeacons, Parsons, Vicars, &c. *Temporal*, of Mayors, Commonalty, Bailiffs and Burgesses, &c. Some *Corporations* are of a *mixt nature*, composed of spiritual and temporal persons, such as heads of colleges and hospitals, &c. All *corporations* are said to be *Ecclesiastical* or *Lay*.

Lay Corporations are of two sorts, *civil* and *eleemosynary*. The civil are such as are erected for a variety of temporal purposes. The King, for instance, is made a corporation to prevent in general the possibility of an *interregnum*, or vacancy of the throne, and to preserve the possessions of the Crown entire; for immediately upon the demise of one king, his successor is in full possession of the regal rights and dignity. Other lay corporations are erected for the good government of a town or particular district, as a mayor and commonalty, bailiff and burgesses, or the like: some for the advancement and regulation of manufactures and commerce; as the trading companies of London, and other towns: and some for the better carrying on of divers special purposes; as churchwardens, for conservation of the goods of the parish; the college of Physicians and company of Surgeons in London, for the improvement of the medical science; the Royal Society, for the advancement of natural knowledge; and the Society of Antiquaries for promoting the study of antiquities. And among these general corporate bodies, the Universities of Oxford and Cambridge must be ranked. 3 *Burr.* 1650.

The eleemosynary sort are, such as are constituted for the perpetual distribution of the free alms, or bounty, of the founder of them to such persons as he has directed. Of this kind are all hospitals for the maintenance of the poor, sick, and impotent: and all colleges, both *in* our Universities, and *out* of them. Such as at Westminster, Eaton, Winchester, &c. which colleges are founded for two purposes; 1. For the promotion of piety and learning, by proper regulations and ordinances. 2. For imparting assistance to the members of those bodies, in order to enable them to prosecute their devotion and studies with greater ease and assiduity. And all these eleemosynary corporations are, strictly speaking, *lay*, and not ecclesiastical, even though composed of ecclesiastical persons, and although they in some things partake of the nature, privileges, and restrictions of ecclesiastical bodies. 1 *Ld. Raym.* 6. They are, in fact, lay corporations, because they are not subject to the jurisdiction of the ecclesiastical courts, or to the visitations of the Ordinary or Diocesan in their spiritual characters. 1 *Comm.* 471.

I. *How Corporations are created.*
II. *Their Interest and Jurisdiction.*
III. *How far their Acts are binding.*
IV. *How they are visited.*
V. *How they are dissolved.*

I. Bodies Politic or incorporate may commence and be established three manner of ways, *viz.* by *prescription*, by *letters patent*, or by *act of parliament*; but most commonly begin by patent or charter. 1 *Inst.* 250. 3 *Inst.* 202. 3 *Rep.* 73.

In making aggregate *corporations*, there must be, 1. Lawful authority. 2. Proper persons to be incorporated. 3. A name of incorporation. 4. A place, without which no *corporation* can be made. 5. Words sufficient in law to make a *corporation*. 10 *Rep.* 29. 123. 3 *Rep.* 73. The words *incorpora*, *funda*, &c. are not of necessity to be used in making *corporations*; but other words equivalent are sufficient; and of ancient time, the inhabitants of a town were incorporated, when the King granted to them to have *Guildam Mercatoriam*. 2 *Danv. Abr.* 214. He that gave the first possessions to the *corporation*, is the founder. The parishioners or townsmen of a parish or town; and tenants of a manor, are to some purposes a *corporation*. *Co. Lit.* 95. 342.

If the King grants lands to the inhabitants of B. *their heirs and successors*, rendering a rent, for any thing touching these lands, this is a *corporation*; though not to other purposes: but if the King grants lands to the inhabitants of B. and they be not incorporated before, if no rent be reserved to the King, the grant is void. 2 *Danv.* 214. If the King grants to the men of Islington to be discharged of toll, this is a good *corporation* to this intent: but not to purchase, &c. And by special words the King may make a limited *corporation*, or a *corporation* for a special purpose, *Ibid.*

London is a *Corporation* by prescription: but though a *corporation* may be by prescription, it shall be intended that it did originally derive its authority by grant from the King; for the King is the head of the commonwealth, and all the commonwealth, in respect of him, is but one *corporation*; and all other *corporations* are but limbs of the greater body. 1 *Lil. Abr.* 330. A mayor and commonalty or *corporation*, cannot make another *corporation*, or commonalty. 1 *Sid.* 290. The city of London cannot make a *corporation*, because that can only be created by the crown; but London or any other *corporation*, may make a *fraternity*. 1 *Salk.* 193.

The parliament, by its absolute and transcendent authority, may perform this, or any other act whatsoever: and actually did perform it to a great extent, by *stat.* 39 *Eliz. c.* 5. which incorporated all hospitals and houses of correction founded by charitable persons, without farther trouble: and the same has been done in other cases of charitable foundations. But otherwise it has not formerly been usual thus to intrench upon the prerogative of the Crown; and the King may prevent it when he pleases. And, in the particular instance before mentioned, it was done, as Sir *Edward Coke* observes, 2 *Inst.* 722. to avoid the charges of incorporation and licences of mortmain in small benefactions; which in his days were grown so great, that they discouraged many men from undertaking these pious and charitable works.

Where the words of a charter are doubtful they may be explained by contemporaneous usage. 3 *T. R.* 271. 288, *n.*

The constitution of a corporation, as settled by act of parliament, cannot be varied by the acceptance of any charter inconsistent with it. 6 *T. R.* 268.

The King (it is said) may grant to a subject the power of erecting corporations (*Bro. Abr.* tit. *Prerog.* 53. *Viner*, *Prerog.* 88. *pl.* 16. though the contrary was formerly held. *Year Book.* 2 *Hen.* 7. 13.); that is, he may permit the subject to name the persons and powers of the corporation at his pleasure; but it is really the King that erects, and the subject is but the instrument; for though none but the King can make a corporation, yet *qui facit per alium, facit per se.* 10 *Rep.* 33. In this manner the Chancellor of the University of Oxford, has power by charter to erect corporations; and has actually often exerted it, in the erection of several matriculated companies, now subsisting, of tradesmen subservient to the students.

When a corporation is erected, a name must be given to it; and by that name alone it must sue and be sued, and do all legal acts: though a very minute variation therein is not material. 10 *Rep.* 122. Such name is the very being of its constitution; and, though it is the will of the King that erects the corporation, yet the name is the knot of its combination, without which it could not perform its corporate functions. *Gilb. Hist. C. P.* 182. The name of incorporation, says Sir Edward Coke, is as a proper name, or name of baptism; and therefore when a private founder gives his college or hospital a name, he does it only as a godfather; and by that same name the King baptises the corporation. 10 *Rep.* 28.

And it may change its name, as corporations frequently do in new charters, and will still retain its former rights and privileges. 4 *Co.* 87.

No persons shall bear office in any *corporation*, &c. but such as have received the sacrament of the church, and taken the oaths. *Stat.* 13 *Car.* 2. *st.* 2. *c.* 1. But see the *stat.* 5 *Geo.* 1. *c.* 6. confirming officers in *corporations*. See titles *By Laws*, *Oaths*, *Nonconformists*.

What persons are capable of being elected members of a *corporation*. See *Hardw.* 23.

II. When a *corporation* is duly created, all incidents, as to purchase and grant, sue and be sued, &c. are tacitly annexed to it; and although no power to make laws, statutes or ordinances, is given by a special clause to a *corporation*, it is included by law in the very act of incorporating. *Co. Lit.* 264. A new charter doth not merge or extinguish any of the ancient privileges of the old charter. And if an ancient *corporation* is incorporated by a new name, yet their new body shall enjoy all the privileges that the old *corporation* had. *Raym.* 439. 4 *Rep.* 37.

There are usually granted in charters to *corporations*, divers franchises; as felons' goods, waifs, estrays, treasure-trove, deodands, courts, and cognisance of pleas, fairs, markets, assise of bread and beer, &c. 4 *Rep.* 65. Actions arising in *corporations* may be tried in the *corporation* courts; but if they try actions which arise not within their jurisdictions, and encroach upon the Common Law, they shall be punished for it. *Lutw.* 1571. 1572. Actions triable there, must, in general, mean, those actions wherein the corporation is not interested.

There may be a *corporation* without a head: but where there is a head, all acts ought to be by and to the head; nor can they sue without such head; and if he dies, nothing can be done in the vacancy. 10 *Rep.* 30. 32. *Co. Lit.* 264. If land be given to a mayor and commonalty for their lives, they have an estate by intendment not determinable: so it is, if a feoffment be made of land to a dean and chapter, without mention of successors.

In a case of *Sole Corporation*, as bishop, dean, parson, &c. no *chattel*, either in action or possession, shall go in succession; but the executors or administrators of the bishop, parson, &c. shall have them: but it is otherwise of a *corporation aggregate*, as a dean and chapter, mayor and commonalty, and the like: for they in the judgment of law never die. But the case of the Chamberlain of London differs from all these; his successor, in his own name, may have execution of a recognisance acknowledged to his predecessor for *orphanage* money; and the reason is, because the *corporation* of the chamberlain is by custom, which hath enabled the successor to take and have such recognizances, obligations, &c. that are made to his predecessor. *Terms de Ley.*

Though a *Sole Corporation* cannot generally take in succession *goods* and *chattels*, &c. yet it may take a *fee simple* in succession, by the word Successors. *Co. Lit.* 8, 9. 46. *Aggregate corporations* may take not only goods and chattels, but lands in fee-simple, without the word Successors, for the reason before-mentioned. 4 *Inst.* 249. Succession in a body politic, is an inheritance in a body private. If a lease for years be made to a bishop and his successors, it is said his executors shall have it *in auter droit*; for regularly no chattel can go in succession in case of a sole *corporation*, no more than if a lease be made to a man and his heirs, it can go to his heirs. *Co. Lit.* 46.

Grants of *corporations* are to be by deed, under their common seal, and are good without delivery; for the common seal gives perfection to *corporation* deeds. *Dav.* 44.

But though the affixing of the common seal to the deed of conveyance of a corporation be sufficient to pass the estate without a formal delivery, if done with that intent, yet it has no such effect if the order for affixing the seal be accompanied by a direction to their clerk, to retain the conveyance till accounts were adjusted with the purchaser. 9 *East's Rep.* 360.

An obligation sealed with the common seal of a *corporation*, if the mayor signs it, he is suable, if the *corporation* be dissolved: but if two of the members sign it, the particular persons are not bound by it. 2 *Lev.* 137. *Raym.* 152. A release of a mayor for any sum of money due to the *corporation*, made in his own name, is not good in law; the *corporation* must join and do it by their common seal. *Termes de Ley.*

A *Corporation* which hath a head, may make a personal command without writing; but a *corporation* aggregate without a head cannot. *Lutw.* 1497. A *corporation* aggregate may employ any one in ordinary services, without deed; though not to appear for them, in any act which concerns their interest or title. 1 *Ventr.* 47. 48. Such a *corporation* may appoint a bailiff to take a distress, without deed or warrant. 1 *Salk.* 191. But cannot without deed command a bailiff to enter into lands for a condition broken; for such command without deed is void. *Cro.* 815.

Though a *corporation* cannot do an act *in pais* without their common seal, they may do an act upon record; and the reason is, because they are estopped by the record to say it is not their act. 1 *Salk.* 192. A promise to a *corporation* is good without deed. 2 *Lev.* 252. The head of a *corporation* aggregate may not be charged with the act of his predecessor if it be not by common seal, or for such things as come to the use of the whole body or society. 1 *And.* 23. 196.

A *Corporation* may do an act in that capacity, to one of themselves in his natural capacity; and any member in his natural capacity may perform an act to the *corporation* in his politic capacity; and so they may sue one another, in their distinct capacities. 1 *Shep. Abr.* 436. Trespass for an assault and battery, &c. will not lie against a *corporation*; but it must be brought against the persons that do the trespass by their proper names: though if the beasts of the *corporation* trespass on a man in his ground, action of trespass lies against them for this. Process of outlawry will not lie against a *corporation*; nor *capias* or exigent, but distress. 22 *Ass.* 67. 39 *Ed.* 3. 13. 21 *Ed.* 4.

A *Corporation* cannot sue, or appear in person, but by attorney: they cannot commit treason or felony, or be excommunicate, &c. They may not be executors, or administrators, be jointenants, trustees, &c. Nor shall the members of a *corporation* be regularly witnesses for the *corporation*. 10 *Rep.* 32. 11 *Rep.* 98. *Co. Lit.* 134. But they may be disfranchised, and then be witnesses; though not surrender by consent. Yet in some cases the judges now admit their testimony without disfranchisement where the *interest* is *remote*. Attachment doth not lie against a *corporation*. *Raym.* 152.

Trover lies against a corporation, and if it be essential to the conversion of the property, that they should have authorised it under their seal, such authority will be presumed after verdict; but it does not seem necessary that the act of detention done by their servants within the scope of their employment should be authorised under their seal. *Yarborough* v. *Bank of England.* 16 *East's Rep.* 6.

A charter granting jurisdiction to Borough Magistrates over a district not within the borough, does not exclude the county Justices, without express words. 3 *T. R.* 279.

*Corporations* may have power not only to infranchise freemen but to disfranchise a member, and deprive him of his freedom; if he doth any act to the prejudice of the body or contrary to his oath, &c. Though for conspiring to do any thing contrary to his duty, or for words of contempt against the chief officers, he may not be disfranchised; but he may be committed till he find sureties for his good behaviour. 11 *Rep.* 98. 5 *Mod.* 257. A *corporation* cannot disfranchise

for breach of a bye-law. 1 *Lil.* 331. And one wrongfully disfranchised may be restored, and have his remedy by *mandamus*, &c. in B. R. An alderman or freeman of a corporation cannot be removed from his freedom or place without good cause and a custom to remove them *ad libitum* is void, because, the party hath a freehold therein. *Cro. Jac.* 510.

A bye-law made by a *corporation* may be good in part, and bad in part, where the two parts are entire and distinct from each other. 8 *Term Rep.* 356.

A *corporation* created by letters patent, with a power of making bye-laws, cannot make any laws to incur a forfeiture. Nor can they if created by act of parliament, unless such a power is given. 1 *Term Rep.* 118.

A bye-law made by a company in a *corporation* to restrain the number of apprentices to be taken by any of the members is void. 7 *Term Rep.* 543.

A bye-law made by a company carrying on trade in partnership, to prevent any one of the members carrying on a separate trade on his own account is good. 8 *Term Rep.* 352.

A power granted by charter to a company exercising a particular trade in a certain place to make bye-laws for the government of *all persons* exercising that trade in that place, enables it to make bye-laws binding as well on persons so exercising the trade, *who are not members of the company*, as on those who are. 1 *H. Blackst.* 370.

A person may be bound to the good behaviour for words spoke against mayors, &c. but he may not be indicted for it: and if justices of a *corporation* deny to do right, it is a forfeiture of their exemption from the inquiry of the justices of the county. *Mod. Cas.* 125. 164. Head officers of *corporations* are to redress abuses of merchant-strangers, &c. or the franchise shall be seized, *stat.* 9 *Eliz.* 3. § 1. and have authority in many cases by statute; for which see title *Mayors*.

No strangers shall sell by retail any woollen or linen cloth, or mercery wares, in *corporate towns* except at fairs, on pain of forfeiture, &c. But such persons may sell wares by wholesale, and cloth of their own making by retail. 1 & 2 *P. & M. cap.* 7. Bodies politic and ecclesiastical may make leases for three lives, or twenty-one years, under the restrictions in the acts 1 *Eliz. c.* 19. 13 *Eliz. c.* 20.—See title *Leases*. If land is given in fee to a dean and chapter, or to a mayor and commonalty, &c. and after, such body politic or incorporate is dissolved, the donor shall have the land again, and not the lord by escheat. *Co. Lit.* 31.

The *Corporation* of the city of London is to answer for all particular misdemeanors, which are committed in any of the courts of justice within the city; and for all other general misdemeanors committed within the city; so it is conceived of all other *corporations*. 1 *Lil. Abr.* 329. If a common officer of a town doth any thing for their common use, it is reasonable the corporate town should be answerable for it. 1 *Leon.* 215.

The *stat.* 32 *Geo.* 3. *c.* 58. § 4. does not bind an officer of a *corporation*, having custody of the records, to permit any member of the corporation to inspect the order for the admission and swearing in of the freemen, &c. of the corporation; and therefore where the town-clerk offered to permit an inspection of the entries made upon stamps, of the admission and swearing in of burgesses, but refused an inspection of the common council book, in which it was usual to enter the order for the admission and swearing in of the burgesses, the court of K. B. held that he did not thereby incur a penalty. *Davies* v. *Humphreys*, *Mich.* 55 *Geo.* 3. *Term Rep. K. B.* 223.

III. A *Corporation* is properly an investing the people of the place with the local government thereof, and therefore their laws shall be binding to strangers: but a *Fraternity* is some people of a place united together in respect of a mystery and business into a company, and their laws and ordinances cannot bind strangers, for they have not a local power. *Salk.* 193.

No masters and wardens, &c. of any mystery, or other *corporation*, shall make any bye-laws or ordinances in diminution of the King's prerogative, or against the common profit of the people; except the same be approved by the Lord Chancellor, or Chief Justices, &c. on pain of 40*l.* And such bodies coporate shall not make any acts or ordinances for the restraining persons to sue in the King's courts for remedy, &c. under the like penalty. *Stat.* 19 *Hen.* 7. *c.* 7. Ordinances made by *corporations*, to be observed on pain of imprisonment, or of forfeiture of goods, &c. are contrary to *Magna Charta*. 2 *Inst.* 47. 54.

But penalties may be inflicted by bye-laws, which may be recovered by distress or action of debt: and a custom for the Lord Mayor and Aldermen of London to commit a citizen for not accepting of the livery, &c. was held a good custom, being for the good government of the city. 5 *Mod.* 320.

*Corporations* may not, by bond, or otherwise, restrain any apprentice, &c. from keeping shop in the *corporation*, under the penalty of 40*l.* *Stat* 28 *H.* 8. *c.* 5.—See title *Bye-laws*.

In acts done by *corporations*, the consent of the major part shall be binding. *Stat.* 33 *H.* 8. *c.* 27.

This act clearly vacates all private statutes, both prior and subsequent to its date, which require the concurrence of more than a majority to give validity to any grant or election. *Blackstone* (1 *Comm.* 478.) is of opinion, that it has not affected the negative given by the statutes to the head of any society; but it seems that this opinion may be questioned; especially in cases where, in the first instance, he gives his vote with the members of the society. It is the usual language of college statutes to direct that many acts shall be done by *guardianus et major pars sociorum*, or *magister*, or *præpositus et major pars*; and it has been determined by the Court of King's Bench (*Cowp.* 377.) and by the visitor of Clare Hall, Cambridge, and also by the visitors of Dublin college, that this expression does not confer upon the warden, master, or provost, any negative; but that his vote must be counted with the rest, and he is concluded by a majority of votes against him.

IV. *Corporations* being composed of individuals, subject to human frailties, are liable, as well as private persons, to deviate from the end of their institution. And for that reason the law has provided proper persons to *visit*, inquire into, and correct all irregularities that arise in such corporations, either sole or aggregate, and whether ecclesiastical, civil, or eleemosynary. With regard to all ecclesiastical corporations, the Ordinary is their visitor, so constituted by the canon law, and from thence derived to us. The Pope formerly, and now the King, as supreme Ordinary, is the visitor of the archbishop or metropolitan; the metropolitan has the charge and coercion of all his suffragan bishops; and the bishops in their several dioceses are, in ecclesiastical matters, the visitors of all deans and chapters, of all parsons and vicars, and of all other spiritual corporations. With respect to all *lay* corporations, the founder, his heirs, or assigns, are the visitors, whether the foundation be civil or eleemosynary; for in a lay incorporation, the Ordinary neither can, nor ought to visit. 10 *Rep.* 31.

The founder of all corporations in the strictest and original sense is the King alone, for he only can incorporate a society; and in civil incorporations, such as mayor and commonalty, &c. where there are no possessions or endowments given to the body, there is no other founder but the king: but in eleemosynary foundations, such as colleges and hospitals, where there is an endowment of lands, the law distinguishes and makes two species of foundation; the one *fundatio incipiens*, or the incorporation, in which sense the

King is the general founder of all colleges and hospitals; the other *fundatio perficiens*, or the dotation of it, in which sense the first gift of the revenues is the foundation, and he who gives them is in law the founder: and it is in this last sense that we generally call a man the founder of a college or hospital. 10 *Rep.* 33. But here the King has his prerogative: for, if the King and a private man join in endowing an eleemosynary foundation, the King alone shall be the founder of it. And in general the King being the sole founder of all civil corporations, and the endower the *perficient* founder of all eleemosynary ones, the right of visitation of the former results, according to the rule laid down, to the King; and of the latter to the patron or endower.

The King being thus constituted by law visitor of all civil corporations, the law has also appointed the place, wherein he shall exercise this jurisdiction: which is the court of King's Bench; where, and where only, all misbehaviours of this kind of corporations are inquired into and redressed, and all their controversies decided. However, though the court of King's Bench, upon a proper complaint and application, can prevent and punish injustice in civil corporations, as in every other part of their jurisdiction; it is not the *language of the profession*, to call that part of their authority a visitatorial power. 1 *Comm.* 481. *n.*

As to eleemosynary corporations, by the dotation, the founder and his heirs are of common right the legal visitors; but, if the founder has appointed and assigned any other person to be visitor, then his assignee so appointed is invested with all the founder's power, in exclusion of his heir. Eleemosynary corporations are chiefly hospitals, or colleges in the Universities; these were all of them considered by the popish clergy, as of mere ecclesiastical jurisdiction: however the law of the land judged otherwise; and, with regard to hospitals, it has long been held, (*Y. B.* 8 *Ed.* 3. 28. 8 *Ass.* 29.) that if the hospital be spiritual, the bishop shall visit; but if lay, the patron. This right of lay patrons was indeed abridged by *stat.* 2 *Hen.* 5. *c.* 1. which ordained, that the ordinary should visit *all* hospitals founded by subjects; though the King's right was reserved to visit by his commissioners such as were of royal foundation. But the subject's right was in part restored by *stat.* 14 *Eliz. c.* 5. which directs the bishop to visit such hospitals only, where no visitor is appointed by the founder thereof: and all hospitals founded by virtue of the *stat.* 39 *Eliz. c.* 5. are to be visited by such persons as shall be nominated by the respective founders. But still, if the founder appoints nobody, the bishop of the diocese must visit. 2 *Inst.* 575.

*Colleges* in the Universities (whatever the common law may now, or might formerly judge) were certainly considered by the popish clergy, under whose direction they were, as *ecclesiastical*, or at least as *clerical* corporations; and therefore the right of visitation was claimed by the ordinary of the diocese. This is evident, because in many of our most ancient colleges, where the founder had a mind to subject them to a visitor of his own nomination, he obtained for that purpose a papal bull, to exempt them from the jurisdiction of the ordinary; several of which are still preserved in the archives of the respective societies. And in some of our colleges, where no special visitor is appointed, the bishop of that diocese, in which Oxford was formerly comprised, has immemorially exercised visitatorial authority; (that is, the Bishop of Lincoln, from whose diocese that of Oxford was taken;) which can be ascribed to nothing else, but his supposed title as Ordinary to visit this, among other ecclesiastical foundations.

But, whatever might be formerly the opinion of the Clergy, it is now held as established Common Law, that colleges are lay corporations, though sometimes totally composed of ecclesiastical persons; and that the right of visitation does not arise from any principles of the canon law, but of necessity was created by the common law. *Ld. Raym.* 8. And yet the power and jurisdiction of visitors in colleges was left so much in the dark at common law, that the whole doctrine was very unsettled till the famous case of *Philips* v. *Bury*: (*Lord Raym.* 5. 4 *Mod.* 106.) In this the main question was, whether the sentence of the Bishop of Exeter, who (as visitor) had deprived Doctor Bury, the Rector of Exeter college, could be examined and redressed by the Court of King's Bench. And the three puisne judges were of opinion, that it might be reviewed, for that the visitor's jurisdiction could not exclude the common law; and accordingly judgment was given in that court. But Lord Chief Justice Holt was of a contrary opinion; and held that by the common law, the office of visitor is to judge according to the statutes of the college and to expel and deprive upon just occasions, and to hear all appeals of course: and that from him, and him only, the party grieved ought to have redress: the Founder having reposed in him so entire a confidence that he will administer justice impartially, that his determinations are final, and examinable in no other court whatever. And, upon this a writ of error being brought into the House of Lords, they concurred in Sir John Holt's opinion, and reversed the judgment of the Court of King's Bench. To which leading case all subsequent determinations have been conformable. But, where the visitor is under a temporary disability, there the Court of King's Bench will interpose, to prevent a defect of justice. *Stra.* 797. Also it is said, (2 *Lutw.* 1566.) that if a founder of an eleemosynary foundation appoints a visitor, and limits his jurisdiction by rules and statutes, if the visitor in his sentence exceeds those rules, an action lies against him; but it is otherwise, where he mistakes in a thing within his power.

No particular form of words is necessary for the appointment of a visitor. *Sit visitator*, or *visitationem commendamus*, will create a general visitor, and confer all the authority incidental to the office; (1 *Burr.* 199;) but this general power may be restrained and qualified, or the visitor may be directed by the statutes to do particular acts, in which instance he has no discretion as visitor; as where the statutes direct the visitor to appoint one of two persons, nominated by the fellows, to be the Master of a college, the Court of King's Bench will examine the nomination of the fellows, and, if correct, will compel the visitor to appoint one of the two. 2 *Term Rep.* 290. New ingrafted fellowships, if no statutes are given by the founders of them, must follow the original foundation, and are subject to the same discipline and judicature. 1 *Burr.* 203. It is the duty of the visitor, in every instance, to effectuate the intention of the founder, as far as he can collect it from the statutes, and the nature of the institution; and in the exercise of this jurisdiction, he is free from all control. Lord *Mansfield* has declared, that the visitatorial power, if properly exercised, without expence or delay, is useful and convenient to colleges; and it is now settled and established, that the jurisdiction of a visitor is summary, and without appeal from it. 1 *Burr.* 200.—See 1 *Comm.* 479. &c.

V. A *Corporation* may be dissolved, for it is created upon a trust; and if that be broken it is forfeited. 4 *Mod.* 58.

*Corporations* are dissolved by forfeiture of their charter, misuser, &c. upon the writ *quo warranto* brought: by surrender, or by act of parliament: and if they neglect to choose officers, or make false elections, &c. it is a forfeiture of the *corporation*. 4 *Rep.* 77.

Corporations may be dissolved in several ways, which dissolution is the civil death of the corporation: and in this case their lands and tenements shall revert to the person, or his heirs, who granted them to the corporation; for the law doth annex a condition to every such grant, that if the corporation be dissolved, the grantor shall have the lands again, because

the cause of the grant faileth. *Co. Lit.* 13. The grant is indeed only during the life of the corporation, which *may* endure for ever: but, when that life is determined by the dissolution of the body politic, the grantor takes it back by reversion, as in the case of every other grant for life. The debts of a corporation, either to or from it, are totally extinguished by its dissolution; so that the members thereof cannot recover, or be charged with them, in their natural capacities. 1 *Lev.* 237.

A Corporation may be dissolved, 1. By act of parliament; which is boundless in its operations. 2. By the natural death of all its members, in case of an aggregate corporation. 3. By surrender of its franchises into the hands of the King, which is a kind of suicide. 4. By forfeiture of its charter, through negligence or abuse of its franchise: in which case the law judges that the body politic has broken the condition upon which it was incorporated, and therefore the incorporation is void. And the regular course is to bring an information in nature of a writ of *quo warranto*, to inquire *by what warrant* the members now exercise their corporative power, having forfeited it by such and such proceedings: The exertion of this act of law, for the purposes of the State, in the reign of King Charles and King James the Second, particularly by seizing the charter of the City of London, gave great and just offence, though perhaps, in strictness of law, the proceedings in most of them were sufficiently regular: but the judgment against that of London was reversed by act of parliament, *stat. 2 W. & M. c.* 8. after the revolution. And by the same *stat.* it is enacted, that the franchises of the City of London shall never more be forfeited for any cause whatsoever. And because by the Common Law corporations were dissolved, in case the mayor or head officer was not duly elected on the day appointed in the charter, or established by prescription, it is now provided by *stat.* 11 *Geo.* 1. *c.* 4. that no *corporation* shall be dissolved, for any default to choose a mayor, &c. but the electors are still to proceed to election; and if no election be made, the court of King's Bench shall issue a *mandamus* requiring the electors to choose such mayor, &c.

The Proclamation of Jac. II. in the 4th year of his reign, for restoring corporations to their ancient charters, &c. operates (when accepted) as a grant of revival to such of the old corporations as had surrendered their corporate franchises to Car. II. (but which surrenders were not enrolled) who had granted new charters; and overturns such new charters. 3 *T. R.* 139.

When an integral part of a corporation is gone, and the corporation has no power to restore it or to do any corporate act, the corporation is so far dissolved, that the Crown may grant a new charter. 3 *T. R.* 199.

By *stat.* 2 *An. c.* 20. where persons intrude into the office of mayor, &c. of a *corporation*, a *quo warranto* shall be brought against the usurpers, who shall be ousted, and fined: and none are to execute an office in a *corporation* for more than a year. See further on this subject *Kyd's Treatise on the Law of Corporations*;—and see also particularly this Dict. titles *Mortmain*, *Mandamus*, *Quo warranto*.

To prevent improper conduct in *trading corporations* in *elections*, and in disposing of the joint stock, it is by *stat.* 7 *Geo.* 3. *c.* 48. enacted, that no member of such corporations shall be admitted to vote in the general courts, until he shall have been six months in possession of the stock necessary to qualify him: unless it comes to him by bequest, marriage, succession, or settlement.—And by the same statute, only one half yearly dividend is to be made by one general court, five months at least from the preceding declaration of a dividend; and questions for increasing the dividend are to be decided by ballot. See title *East India Company*.

To facilitate the proceedings in cases of *mandamus* and *quo warranto*, and to prevent any undue advantage on either side, the *stat.* 12 *Geo.* 3. *c.* 21. provides that where any person shall be entitled to be admitted a freeman, &c. of any *corporation*, *&c.* and shall apply to the proper officer to be admitted, and shall give notice of his intention to move the court of King's Bench for a *mandamus*, in case of refusal, the officer shall pay all the costs of the application.—And the same statute enacts, that the proper officer shall, on the demand of two freemen, permit them and their agents to inspect the entries of admission of freemen, and to take copies and extracts; under penalty of 100*l.*

CORPOREAL INHERITANCE. In houses, lands, &c. See title *Inheritance*.

CORPSE, *stealing of.* If any one in taking up a dead body, steals the shroud, or other apparel, it will be felony. 3 *Inst.* 110. 12 *Rep.* 113. 1 *Hal. P. C.* 515. But stealing the corpse itself, only, is not felony, but it is punishable as a misdemeanour by indictment at Common Law. 2 *Comm.* 236.

CORPUS CHRISTI DAY. A feast instituted in the year 1264, in honour of the blessed *sacrament*: to which also a *college* in Oxford is dedicated. It is mentioned in the *stat.* 32 *Hen.* 8. *cap.* 21.

CORPUS CUM CAUSA. A writ issuing out of the *Chancery*, to remove both the *body* and record, touching the cause of any man lying in execution upon a judgment for debt, into the King's Bench, &c. there to lie till he have satisfied the judgment. *F. N. B.* 251. See title *Habeas Corpus*.

CORRECTOR OF THE STAPLE. A clerk belonging to the *staple*, to write and record the bargains of merchants there made. See *stat.* 27 *Ed.* 3. *stat.* 2. *cc.* 22. 23.

CORREDIUM, CONREDIUM. The same with *corrodium*. See *Corody*.

CORRUPTION OF BLOOD, *corruptio sanguinis.*] An infection growing to the state of a man, and to his issue; and is where a person is attainted of *treason* or *felony*, by means whereof his blood is said to be corrupted, and neither his children, nor any of his blood, can be heirs to him or any other ancestor: also if he is of the nobility, or a gentleman, he and all his posterity by the attainder are rendered base and ignoble: but by pardon of the King, the children born afterwards may inherit the land of their ancestor, purchased at the time of the pardon or after; but so cannot they who were born before the pardon. *Termes de Ley.*

If a man that hath land in right of his wife hath issue, and his blood is corrupt by attainder of felony, and the King pardons him; in this case, if the wife dies before him, he shall not be tenant by the curtesy, for the *corruption of the blood* of that issue: though it is otherwise, if he hath issue after the pardon; for then he should be tenant by the curtesy, although the issue which he had before the pardon be not inheritable. 13 *H.* 7. 17.

A son attainted of treason or felony in the life of his ancestor, obtains the King's pardon before the death of his ancestor, he shall not be heir to the said ancestor, but the land shall rather escheat to the lord of the fee by the *corruption of blood*. 36 *Ass. Pl.* 32 *H.* 8.

If the father of a person attainted die seised of an estate of inheritance, during his life, no younger brother can be heir; for the elder brother, though attainted, is still a brother, and no other can be heir to his father, while he is alive; but if he die before the father, the younger brother shall be heir. 2 *Hawk. P. C. c.* 49. § 49. See further *Co. Lit.* 8. 391. *Dyer*, 482. 3 *Inst.* 211.

*Corruption of blood* from an attainder is so high that it cannot be absolutely salved but by *act* of *parliament*: for the King's pardon doth not restore the blood so as to make the person attainted capable either of inheriting others or being inherited himself by any one born before the pardon. 1 *Inst.* 391, 392. 2 *Hawk.* ——. A statute which saves the *corruption of blood*, impliedly saves the descent of the land to the heir; and it prevents the *corruption of blood* so far: also it

saves the wife's dower, &c. But nevertheless the land shall be forfeited for the life of the offender. 3 *Inst.* 47. 1 *Hawk. P. C. c.* 41. § 5. By *stat.* 54 *Geo.* 3. *c.* 145. it is enacted that no future attainder for felony, except in cases of high treason, petit treason, or murder, or of abetting, procuring or counselling the same, shall extend to the disinheriting of any heir, nor to prejudice of the right or title of any person, other than the right or title of the offender during his natural life only: and that it shall be lawful to every person to whom the right or interest of any lands, tenements, or hereditaments, after the death of any such offender, should or might have appertained if no such attainder had been, to enter into the same. See further titles *Attainder*, *Forfeiture*, *Escheat*, *Tenure*, *&c.*

CORSELET, *Fr.* in Lat. *corpusculum.*] A little body. The name of an ancient armour used to cover the body or trunk of a man: wherewith *pikemen* commonly set in the front and flanks of the battle were formerly armed, for the better resistance of the assaults of the enemy, and the surer guard of the soldiers placed behind; who were more slightly armed for their speedier advancing to and retreating from the attack. 4 & 5 *P. & M. c.* 2.

CORSEPRESENT, from the Fr. *corps present.*] A mortuary: and the reason why it was thus termed seems to be, that where a mortuary became due on the death of any man, the best or second best beast was, according to custom, offered or *presented* to the priest, and carried with the *corps*. See *stat.* 21 *H.* 8. *c.* 6. and this Dict. title *Mortuary.*

CORSNED BREAD, *panis conjuratus.*] *Ordeal bread.* It was a kind of superstitious trial used among the Saxons, to purge themselves of any accusation, by taking a piece of barley bread, and eating it with solemn oaths and execrations, that it might prove *poison*, or their last morsel, if what they asserted or denied were not punctually true. These pieces of bread were first execrated by the priest, and then offered to the suspected person, to be swallowed by way of purgation: for they believed a person, if guilty, could not swallow a morsel so accursed; or if he did, it would choak him.

The form was thus: *We beseech thee, O Lord, that he who is guilty of this theft, when the exorcised bread is offered to him in order to discover the truth, that his jaws may be shut, his throat so narrow that he may not swallow, and that he may cast it out of his mouth, and not eat it.* Du Cange. The old form, or *exorcismus panis hordeaci vel casei ad probationem veri*, is extant in *Lindenbrogius, page* 107. And in the laws of king Canute, cap. 6. *Si quis altari ministrantium accusetur, et amicis destitutus sit, cum sacramentales non habeat, vadat ad judicium, quod Anglicè dicitur* corsned, *et fiat sicut Deus velit, nisi super sanctum corpus Domini permittatur ut se purget.*; from which it is conjectured, that *corsned bread* was originally the very sacramental bread, consecrated and devoted by the priest, and received with solemn adjuration and devout expectance that it would prove mortal to those who dared to swallow it with a lie in their mouths; till at length the bishops and clergy were afraid to prostitute the communion bread to such rash and conceited uses; when to indulge the people in their superstitious fancies, and idle customs, they allowed them to practise the same judicial rite, in eating some other morsels of bread, blest or curst to the like uses.

It is recorded of the perfidious Godwin, Earl of Kent, in the time of King Edward the Confessor, that on his abjuring the murder of the King's brother, by this way of trial, as a just judgment of his solemn perjury, the bread stuck in his throat, and choaked him. *Ingulph.* This, with other barbarous ways of purgation, was by degrees abolished: though we have still some remembrance of this superstitious custom in our usual phrases of abjuration; as, *I will take the sacrament upon it:—May this bread be my poison;*—or, *May this bit be my last, &c.* See title *Ordeal.*

CORTIS, *curtis.*] A court or yard before a house. *Blount.*

CORTULARIUM, *curtilagium.*] A yard adjoining to a country farm. *Cartul. Glaston. MS. f.* 42.

CORUS. A certain corn-measure heaped up, from the Hebr. *cora*, a *hill*: eight bushels of wheat in a heap, making a quarter, are of the shape of a little hill; and probably a *corus* of wheat was eight bushels; *Decem* coros *tritici, sive decem quarteria.* Bract. lib. 2. c. 6.

COSDUNA. Custom or tribute. *Mon. Angl. tom.* 1. *p.* 562.

COSENAGE or COSINAGE, Fr. *cousinage,*] i.e. kindred. cousinship. Is used for a writ that lies where the *tresail*, that is, the father of the *besail*, or great grandfather, being seised of lands and tenements in fee at his death, and a stranger enters upon the heir and abates; then shall his heir have his writ of *cosinage. Brit. c.* 89. *F. N. B.* 221. See title *Assise of Mort. d'Ancestor.*

COSENING. Is an offence where any thing is done deceitfully, whether belonging to contracts or not, which cannot be properly termed by any special name. *West. Symb. p.* 2. *sect.* 68. See title *Cheats.*

COSHERING. As there were many privileges inherent by right and custom, allowed in the *feudal* laws; so were there several grievous exactions imposed by the lords on their tenants, by a sort of prerogative or senioral authority, as to lie and feast themselves and their followers at their tenants' houses, &c. which was called *coshering. Spelm. of Parliaments, M. S.*

COSMUS. From the Greek, κοσμος.] Clean. *Blount.*

COSTARD. An apple: whence *costard-monger*, i. e. seller of apples. *Cartular. Abbat. Reading, MS. fol.* 916.

COSTERA. Coast, sea-coast. *Memor. in Scaccar. Pasch.* 24 *Ed.* 1.

## COSTS.

EXPENSÆ LITIS.] In the prosecution and defence of actions, the parties are necessarily put to certain expences, or as they are commonly called *Costs*; consisting of money paid to the King and Government for fines and stamp duties: to the officers of the courts; and to the counsel and attornies for their fees, &c.

These costs may be considered either as between *attorney* and *client*; being what are payable in every case to the attorney, by his client, whether he ultimately succeed or not; or as between *party* and *party*, being those only which are allowed, in some particular cases, to the party succeeding against his adversary. As between party and party, they are *interlocutory* or *final*: the former are given on various interlocutory motions and proceedings in the course of the suit.—The latter (to which the term of costs is most generally applied, and the rules respecting which are of the most consequence) are not allowed till the conclusion of the suit.

Much of the following abstract of the law relating hereto is taken from *Tidd's Law of Costs;* a short and comprehensive abridgement; to which, and the various other productions on the subject, the practitioner must necessarily have frequent recourse in nice and particular cases.

It will be sufficient for the present purpose, to arrange the information on this subject in the following manner.

I. *In what general cases Costs are given to the Plaintiff.*
II. *In what, to the Defendant.*
III. *Of double and treble Costs.*
IV. *Costs by particular statutes.*
V. *Of taxing and recovering Costs.*

I. No costs were recoverable by the plaintiff or defendant at Common Law. 2 *Inst.* 288. *Hardr.* 152. But by the *stat.* of *Gloucester* (6 *Edw.* 1.) *c.* 1. § 2. it is provided, "that the demandant may recover against the tenant the costs of his

*writ* purchased; (which, by a liberal interpretation, has been construed to extend to the *whole* costs of his suit, 2 *Inst.* 288;) together with the damages given by that statute, *and that this act shall hold place in all cases where a man recovers damages.*" This was the origin of costs *de incremento. Gilb. Eq. Rep.* 195. And hence the plaintiff has, generally speaking, a right to costs, in all cases where he was entitled to damages, antecedent to, or by the provisions of the *stat. of Gloucester*; (10 *Co.* 116 *a.*) as in *assumpsit*, covenant, debt on contract, case, trespass, replevin, ejectment, &c.; or where, by a subsequent statute, *double* or *treble* damages are given, in a case where *single* damages were before recoverable; (10 *Co.* 116. *a.* 2 *Inst.* 289. *Comp.*) 368. as upon *stat.* 2 *Hen.* 4. *c.* 11. for suing in the Admiralty court; (10 *Co.* 116 *a. b. Dyer*, 159 *b. Carth.* 297.) upon *stat.* 8 *Hen.* 6. *c.* 9. for a forcible entry; (10 *Co.* 115 *b. Co. Lit.* 257 *b.* 2 *Inst.* 289. *Cro. El.* 582.) or upon *stat.* 2 & 3 *W. & M. sess.* 1. *c.* 5. for rescuing a distress for rent. (*Carth.* 321. 1 *Salk.* 205. 1 *Ld. Raym.* 19. *Skin.* 555. *Holt.* 172. S. C.) And he hath also a right to costs, in all cases where a certain *penalty* is given by statute to the party aggrieved; (*Cro. Car.* 560. 1 *Rol. Abr.* 574. *Skin.* 363. *Carth.* 230. 1 *Salk.* 206. 1 *Ld. Raym.* 172. *Say. Costs*, 11. *H. Black.* 10.) for otherwise the remedy might prove inadequate.

But the *stat.* of *Gloucester* did not extend to cases where *no* damages were recoverable at Common Law, as in *scire facias, prohibition*, (*Comb.* 20.) &c.; nor where *double* or *treble* damages were given by a subsequent statute, in a new case where *single* damages were not before recoverable; as in *waste* against tenant for life or years; (2 *Hen.* 4. 17. 9 *Hen.* 6. 66 *b.* 10 *Co.* 116 *b.* 2 *Inst.* 289.) upon the *stat.* of *Gloucester*, (6 *Ed.* 1. *c.* 5.);—for not setting out tithes, (*Moor*, 915. *Noy*, 136. *Hurdr.* 152.) upon *stat.* 2 & 3 *Ed.* 6. *c.* 13.);—or for driving a distress out of the hundred, (2 *Inst.* 289. *Dyer*, 177.; but see *Cro. Car.* 560. 1 *Roll. Abr.* 574.) upon *stat.* 1 & 2 *P. & M. c.* 12. Nor does this statute extend to *popular* actions, where the whole or part of a penalty is given by statute to a common informer; (1 *Roll. Abr.* 574. 1 *Vent.* 133. *Carth.* 231. 1 *Salk.* 206. 1 *Ld. Raym.* 172. *Cas. Pr. C. B.* 87. *Barnes*, 124. S. C. *Comp.* 366. 1 *H. Black.* 10. *Bull. N. P.* 333.); as upon *stat.* 5 *Eliz. c.* 4. § 31. for exercising a trade, without having served an apprenticeship; or upon the *stat.* of *Usury.* 12 *Ann. stat.* 2. *c.* 16. In these and such like cases, therefore, the plaintiff is not entitled to costs, unless they are expressly given him by the statute; but wherever they are so given, he is of course entitled to them.

Where *single* damages are given by a statute subsequent to the *stat.* of *Gloucester*, in a new case wherein no damages were previously recoverable, it has been doubted whether the plaintiff shall recover costs, if they are not mentioned in the statute. The rule in *Pilford's* case is, that he shall not; (10 *Co.* 116 *a*;) and accordingly it is holden, that he is not entitled to costs in *quare impedit*; (2 *Hen.* 4. 17. 27 *Hen.* 6. 10. 10 *Co.* 116 *a.* 2 *Inst.* 289. 362. *Barnes*, 140. and see *Cro. Car.* 360. *Carth.* 231. *Comp.* 367, 8.) wherein damages are given by the *stat.* of *Westm.* 2. (13 *Edw.* 1.) *c.* 5. § 3. But the rule in *Pilford's* case is contradicted by Lord Coke himself, (2 *Inst.* 289.) who says, that "this clause (respecting the *st.* of *Gloucester's* holding place, in all cases where a man recovers damages,) doth extend to give costs, where damages are given to any demandant or plaintiff in any action by any statute made *after* this parliament." And the rule has been since narrowed, by several modern decisions; from whence it may be collected, that the plaintiff is entitled to costs, in all cases where single damages are given by statute to the party grieved, although costs are not particularly mentioned in the statute. 2 *Wils.* 91. *Barnes*, 151. S. C. 3 *Bur.* 1723. 1 *Term. Rep.* 71. But see the opinion of *Aston*, Just. *cont.* *Comp.* 367, 8.

Wherever an action is given to the party grieved by an act since the *stat.* of *Gloucester*, he is entitled to costs if he succeed, though he had no remedy before such act. 7 *Term Rep.* 268.

In several of the foregoing cases, wherein costs were not recoverable by the plaintiff at Common Law, they are expressly given him by *stat.* 8 & 9 *W.* 3. *c.* 11. by which it is enacted that, "in all actions of *waste*, and actions of debt upon the statute for not setting forth *tithes*, wherein the single value or damage found by the jury shall not exceed the sum of twenty nobles; and in all suits upon any writ or writs of *scire facias*, and suits upon *prohibitions*, the plaintiff obtaining judgment, or any award of execution, after plea pleaded or demurrer joined therein, shall likewise recover his costs of suit; and if the plaintiff shall become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs, and have execution for the same by *capias ad satisfaciendum, fieri facias*, or *elegit.*"

This statute does not extend to a *scire facias*, to repeal a patent, prosecuted in the name of the King. 7 *Term Rep.* 367.

The plaintiff's general right to costs being thus settled and established, upon the footing of the *stat.* of *Gloucester*, has been since altered, restrained and modified by several subsequent statutes.

To prevent trifling and malicious actions for *words*, for *assault* and battery, and for *trespass*, it is enacted by *stats.* 43 *Eliz. c.* 6. 21 *Jac.* 1. *c.* 16. 22 & 23 *C.* 2. *c.* 9. § 136. that where the jury who try any of these actions, shall give less damages than 40*s.* the plaintiff shall be allowed no more costs than damages: unless the judge before whom the cause is tried, shall certify under his hand, on the back of the record, that an *actual battery* (and not an assault only) was proved; or that in trespass the *freehold* or *title* of the land came chiefly in question. Also by *stats.* 4 & 5 *W. & M. c.* 23. 8 & 9 *W.* 3. *c.* 11. if the trespass were committed in hunting or sporting by an inferior tradesman, or if it appear to be wilfully and maliciously committed, the plaintiff shall have full costs; though his damages, as assessed by the jury, amount to less than 40*s.*

If in an action on the case for an injury done to the plaintiff's right of common by digging turves there, the judge certify under the *stat.* of *Eliz.* that the damages did not amount to 40*s.* the plaintiff shall have no more costs: for the interest or title of the land does not necessarily come in question in this action; and did not in fact in this case, where the action was brought against another commoner for a mere wrongful act. 8 *East's Rep.* 294.

Where to trespass at A. and throwing down, burning, and totally destroying the plaintiff's *hedge there then erected*, &c. whereby &c. the defendant pleads the general issue, and justifies as to the throwing down the hedge, because it was erected on a common over which he prescribes for right of common, and issue is taken on such right, which is found for him, and a verdict for the plaintiff, for 20*s.* damages on the general issue; the facts stated in the special plea, and found, cannot be taken into consideration to shew that the title to the freehold could not come in question on the declaration; and as on the declaration the freehold might have come in issue, and the judge did not certify, the plaintiff is entitled to no more costs than damages. *Stead* v. *Gamble*, 7 *East*, 325.

The *stat.* 43 *Geo.* 3. *c.* 46. § 4. enacts that in all actions brought in England or Ireland, *upon any judgment recovered*, the plaintiff in such action shall not recover or be entitled to any costs of suit, unless the court, in which action on the judgment shall be brought, or some judge of the same court, shall otherwise order.—But this statute does not extend to an action brought to recover the costs of a judgment of Nonsuit. 14 *East's Rep.* 243.

If there be a certificate against any more costs than damages upon the *stat.* 43 *Eliz. c.* 6. § 2. the plaintiff shall not have the costs of the double pleas, on which all the issues were found for him; although the judge has not certified under the *stat.* 4 *Ann. c.* 16. § 5. that the defendant had probable cause to plead the several special matters; that section only applying to cases where one at least of the special pleas is found for the defendant, which would entitle him to the general costs. *Richmond* v. *Johnson*, 7 *East*, 583.

The Legislature has also been obliged to interfere still further, to guard against trifling and vexatious actions by means of what are commonly called the *Court of Conscience Acts.* Such are *stats.* 3 *Jac.* 1. *c.* 15. § 4. 14 *Geo.* 2. *c.* 10. Which provide that if an action be brought for less than 40*s.* against a defendant living in London, and liable to the jurisdiction of the Court of Requests there, the plaintiff shall not recover any costs, but shall pay them to the defendant.

The London Court of Requests has jurisdiction by the *stat.* 39 & 40 *Geo.* 3. *c.* civ. over a contract for the retention of tythes by the tenant, the value of which was under 5*l.* and therefore if the vicar sue in the superior court for the same, and recover less than 5*l.* upon a count in assumpsit for a *quantum valebant*, the defendant may enter a suggestion on the roll, stating, that he was a freeman and inhabitant of the city of London, trading there at the time he was served with the writ, for the purpose of ousting the plaintiff of his costs under the twelfth section of the act. *Sandby* v. *Miller*, 5 *East*, 194.

Several other acts of parliament have been also made, establishing Courts of Conscience in various districts, in and about the metropolis; as in the town and borough of Southwark, &c. by *stat.* 22 *Geo.* 2. *c.* 47; in the city and liberty of Westminster, and part of the Duchy of Lancaster, by *stat.* 23 *Geo.* 2. *c.* 27. (explained and amended by *stat.* 24 *Geo.* 2. *c.* 42.); and in the Tower-hamlets, by *stat.* 23 *Geo.* 2. *c.* 30. And by *stat.* 23 *Geo.* 2. *c.* 33. the county court of Middlesex was put on a different footing, for the more easy and speedy recovery of small debts. See titles *County Courts*, *Courts of conscience.*

When it was proved that a debt originally *above*, was reduced *below* 40*s.* by part payment before the action brought, held that the defendant was entitled to costs under the statutes establishing Courts of Conscience, in Southwark and London. 8 *E. R.* 28. 347. *See* 14 *E. R.* 344. *S. P.* and also 8 *E. R.* 239. 1 *W. P. T.* 60.

In general where the act is not *pleaded*, the proper mode to obtain the Costs, is for the defendant to apply to the court by affidavit, for leave to enter a suggestion on the roll, of the facts necessary to entitle him to the benefit of the act suited to his case; which suggestion may be traversed or demurred to.

These statutes might perhaps have been with equal propriety classed under the 2d division of this title; but are introduced here, as forming an exception to the general title of a plaintiff to Costs in the cases already instanced.

The *principal* statute, made for restraining the plaintiff's right to costs, is *stat.* 22 & 23 *Car.* 2. *c.* 9. (extended to Wales and the Counties Palatine, by *stat.* 12 & 12 *W.* 3. *c.* 9.); by which it is enacted, that "in all actions of *trespass*, *assault*, *and battery*, and *other personal actions*, wherein the judge, at the trial of the cause, shall not find and certify under his hand, upon the back of the record, that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in question; the plaintiff, in case the jury shall find the damages to be under the value of forty shillings, shall not recover or obtain more costs of suit, than the damages so found shall amount unto." It seems to have been the intention of this statute, that the plaintiff shall have no more costs than damages, in any personal action whatsoever, if the damages be under forty shillings, except in cases of battery or freehold; and not even in these, without a certificate. And this construction was adopted, in some of the first cases that arose upon the statute. 3 *Keb.* 121. 247. But a different construction soon prevailed; and it is now settled, that the statute is confined to actions of assault and battery; and actions for *local* trespasses, wherein it is possible for the judge to certify, that the freehold or title of the land was chiefly in question. *T. Raym.* 487. *T. Jon.* 232. 2 *Show.* 258. S. C. 3 *Mod.* 39. 1 *Salk.* 208. 1 *Str.* 577. *Gilb. Eq. Rep.* 195. *Barnes*, 131. 3 *Wils.* 322. S. C. 1 *H. Black.* 294. Therefore it does not extend to actions of *debt*, *covenant*, *assumpsit*, *trover*, (3 *Keb.* 31. 1 *Salk.* 208.) or the like: or to actions for a mere *assault*; (3 *T. R.* 391.) or for *criminal conversation*; (3 *Wils.* 319.) or *battery* of the plaintiff's servant, (3 *Keb.* 184. 1 *Salk.* 208. 1 *Stra.* 192.) *per quod consortium vel servitium amisit.*—In all these cases, though the damages be under 40*s.* the plaintiff is entitled to full costs without a certificate.

The certificate required by this statute need not, it seems, be granted at the trial of the cause. 11 *Mod.* 198. And where the defendant lets judgment go by default, (*Bull. N. P.* 329.) or *justifies* the assault and battery, or pleads in such a manner, as to bring the freehold or title of the land in question, on the face of the record, or a *view* is granted, (1 *Ld. Raym.* 76. 2 *Salk.* 665.) a certificate is holden to be unnecessary; but it is necessary, where, to a plea of a right of way, there is a replication of *extra viam*. *Cochran* v. *Harrison*, *T.* 22 *Geo.* 3. But where, in an action for an assault and battery, the defendant justifies the assault only, (3 *T. R.* 391.) or an assault only is certified by the judge, (2 *Lev.* 102.) the plaintiff, recovering less than forty shillings, is not entitled to more costs than damages; though, in the latter case, to entitle him to full costs, the judge may certify, on *stat.* 8 & 9. *W.* 3. *c.* 11. that the assault was wilful and malicious. 3 *Wils.* 326.

None of the statutes, made for restraining the plaintiff's right to costs, extend to actions brought in an *inferior* court, and removed by the defendant into a *superior* one: (2 *Lev.* 124. 4 *Mod.* 378, 9. 1 *Ld. Raym.* 395.) and it has been holden, that *stat.* 21 *Jac.* 1. *c.* 16. and *stat.* 22 & 23 *Car.* 2. *c.* 9. only restrain the *Court* from awarding more costs than damages; but the *jury*, not being restrained thereby, may give what costs they please.

It often happens that there are several *counts* or *pleas*, the issue upon which are some of them found for the plaintiff, and some for the defendant. In this case, in the court of C. P. where the declaration consists of several counts, and the plaintiff succeeds upon any one of them, he is entitled to the costs of the whole declaration, though the defendant succeed upon the other counts. *Bull. N. P.* 335. 2 *Black. Rep.* 800. 1199. But it is otherwise in the court of K. B. for there neither party is allowed costs as to those counts the issues upon which are found for the defendant. *Say. Costs*, 212. *Doug.* 8vo. 677. But see 1 *Wils.* 331. But if there be two distinct causes of action, in two separate counts, and as to one the defendant suffers judgment to go by default, and as to the other takes issue, and obtains a verdict, he is entitled to judgment for his costs on the latter count, notwithstanding the plaintiff is entitled to judgment and costs on the first count. 3 *Term Rep.* 654.

As to the certificate on the *stat.* 4 *An. c.* 16. allowing *double pleas*, (see title *Pleading*,) and costs thereon, where the judge refuses to grant the certificate, the court have not a discretionary power, whether they will allow the defendant *any* costs at all; but are bound by the statute to allow him *some* costs, though the *quantum* is left to their discretion. *Barnes*, 140. 2 *Term Rep.* 394, 5. The intention of the

legislature was, that if there be several matters pleaded, some of which are found for the plaintiff, he shall be entitled to the costs of those, notwithstanding other matters are found for the defendant, which entitle him to judgment upon the whole record; unless the judge before whom the cause was tried, shall certify, that the defendant had a probable cause to plead the matters which are found against him.

II. It has already been observed, that no costs were recoverable by a defendant at common law: and the reason seems to be, that if the plaintiff failed in his suit, he was amerced to the King *pro falso clamore*, which was thought to be a sufficient punishment, without subjecting him to the payment of costs. The first instance of costs being given to a defendant was in a writ of right of *ward* by the statute of *Marlberge*. (52 *Hen.* 3. *c.* 6.) Afterwards, costs were given to the defendant in *error* by *stat.* 3 *Hen.* 7. *c.* 10. and in *replevin*, by *stat.* 7 *Hen.* 8. *c.* 4. and *stat.* 21 *Hen.* 8. *c.* 19, &c. But in one of these cases, the defendant is to be considered as an actor; and in the other of them, the provision is virtually for the benefit of the plaintiff in the original action. *Say. Costs*, 70.

In *error* brought by the defendant *before* execution, (*Cro. Jac.* 636.) or by the plaintiff upon a judgment for the defendant, if the judgment be affirmed, the writ of error discontinued, or the plaintiff in error nonsuited, the defendant in error is entitled to costs, by *stat.* 3 *Hen.* 7. *c.* 10. and 8 & 9 *W.* 3. *c.* 11. § 2. upon the former of which statutes it has been holden, that costs are recoverable in error, for the delay of execution, although none were recoverable in the original action. *Dyer*, 77. *Cro. Eliz.* 617. 659. 5 *Co.* 101. S. C. *Cro. Car.* 145. 1 *Str.* 262. 2 *Str.* 1084.: but see *Cro. Car.* 425. 1 *Lev.* 146. 1 *Vent.* 38. 166. 4 *Mod.* 245. *Carth.* 261. S. C. *semb. contra.*

An avowant in replevin for rent in arrear, for whom verdict and judgment are given below, which are affirmed on a writ of error, is not entitled to his costs on *stat.* 8 & 9 *W.* 3. which is confined to judgments for defendants on demurrer. 10 *E. R.* 2.

A writ of error having been quashed because brought by a feme covert without her husband, the defendant in error is entitled to costs under the *stat.* 4 *An. c.* 16. § 25. 8 *T. R.* 302.

By *stat.* 13 *Car.* 2. *stat.* 2. *c.* 2. § 10. if the judgment be affirmed after verdict, the plaintiff shall pay to the defendant in error his *double* costs. And by *stat.* 4 *An. c.* 16. § 25. for preventing vexation, from suing out defective writs of error, it is enacted that "upon the quashing of any writ of error, for variance from the original record, or other defect, the defendant shall recover against the plaintiff in error his costs, as he should have had, if the judgment had been affirmed, and to be recovered in the same manner:" 2 *Str.* 834. *Cas. temp. Hardw.* 137. But none of the statutes before mentioned give costs, upon the *reversal* of a judgment. (1 *Stra.* 617.)

Where the plaintiff recovered a verdict at the trial, and had judgment in C. B. and upon a bill of exceptions returned into B. R. judgment was reversed, and the plaintiff took nothing by his writ, the defendant cannot have costs. *Bell* v. *Potts*, 5 *East*, 49.

When, upon setting aside a verdict for plaintiff, the costs are directed to abide the event, and then the plaintiff discontinues the action, the defendant is not entitled to the costs of the action. *Howarth* v. *Samuel*, *Term Rep. K. B. E.* 58 *G.* 3.

In *replevin*, or second deliverance, the defendant, making avowry, cognizance, or justification, for rents, customs, or services, or for damage feasant, is entitled to costs, by *stat.* 7 *Hen.* 8. *c.* 4. and *stat.* 21 *Hen.* 8. *c.* 19. § 3. if the avowry, cognizance or justification be found for him, or the plaintiff be nonsuit or otherwise barred: which statutes extend to avowries, &c. made by an *executor* (2 *R. Rep.* 437.); or for an *estray* (*Cro. Eliz.* 330.); and, as it should seem, for an *amercement* by a court leet (*Cro. Jac.* 520. *sed vide Cro. E.* 300.); but not to pleas of *prisel en auter lieu*, upon which the writ is abated, (*Com. Rep.* 122.) or to pleas of *property* in the thing distrained. *Hard.* 153. By *stat* 17 *Car.* 2. *c.* 7. § 2. the defendant obtaining judgment thereon, for the arrearages of rent, or value of the goods distrained, is also entitled to his *full* costs of suit. And by *stat.* 11 *Geo.* 2. *c.* 19. § 22. if the defendant avow, or make cognizance, according to that statute, upon a *distress* for rent, relief, heriot, or other service, and the plaintiff be nonsuit, discontinue his action, or have judgment against him, the defendant shall recover *double* costs of suit. But this latter statute does not extend to a *seizure* for a heriot *custom*.

At length costs were given to defendants by the *stat.* 23 *Hen.* 8. *c.* 15. § 1. "in *trespass* upon *stat.* 5 *Rich.* 2. *debt*, *covenant*, *detinue*, *account*, *trespass*, *on the case*, or upon any statute for an offence or wrong *personal*, immediately supposed to be done to the plaintiff," in cases of nonsuit, or verdict for the defendant.

The *stat.* 13 *Car.* 2. *st.* 2. *c.* 2. § 10. giving *double costs* to the *defendant* in error, if judgment be affirmed after verdict, is confined to cases where the judgment so affirmed is for the *plaintiff below*, and not where the *defendant below* obtained judgment upon a special verdict. *Baring* v. *Christie*, 5 *East*, 545.

No costs are allowed on the *stat.* 3 *Hen.* 7. *c.* 10. where a writ of error is nonprossed before the transcript of the record by the clerk of the errors of B. R. 7 *East*, 3. 110.

*The King*, and any person suing to his use, (*stat.* 24 *H.* 8. *c.* 8.) shall neither pay nor receive costs; for besides that he is not included under the general words of the statutes, as it is his prerogative not to pay them to a subject, so it is beneath his dignity to receive them. And it seems reasonable to suppose that the Queen consort has the same privilege: for in actions brought by her, she was not at the common law obliged to find pledges of prosecution, nor could be amerced in case there was judgment against her. *F. N. B.* 101. 1 *Inst.* 133. And on this principle of the King not paying or receiving costs, no costs are due on a *certiorari* removing summary proceedings; unless a recognizance be entered into at the time of removing the proceedings. 1 *Term Rep.* 82.

*Paupers* (that is such as will swear themselves not worth five pounds) are by *stat.* 11 *H.* 7. *c.* 12. to have original writs and subpœnas gratis, and counsel and attorney assigned them without fee; and are excused from paying costs when plaintiffs, by the *stat.* 23 *H.* 8. *c.* 15. § 2. but shall suffer other punishments at the discretion of the judges. And it was formerly usual on such paupers being nonsuited to give them their election either to be whipped or pay the costs; though that practice is now disused. 1 *Sid.* 261. 7 *Mod.* 114. *Salk.* 506. And in cases of misconduct, or in certain other circumstances, they may be dispaupered; that is, deprived of their privilege of suing as paupers. It seems however agreed that a pauper may recover costs, though he pays none: for the counsel and clerks are bound to give their labour to him, but not to his antagonists. 1 *Eq. Ab.* 125.

*Executors* and *Administrators* are not particularly excepted out of *stat.* 23 *Hen.* 8. *c.* 16.; yet, as that statute only relates to contracts made with, or wrongs done to the plaintiff, (2 *Stra.* 1107.) it has been uniformly holden, (*Cro. Eliz.* 503. *Cro. Jac.* 229. 2 *Bulst.* 261. 1 *Salk.* 207. 313. 3 *Burr.* 1586. *Say. Costs*, 97.) that they are not liable to costs, upon a nonsuit or verdict, where they necessarily sue in their representative character, and cannot bring the action in their own right: as upon a *contract* entered into with the testator or intestate, (*T. Jon.* 47. 2 *Ld. Raym.* 1414. 1 *Str.* 682. S. C. *Cas. Pr. C. B.* 157. *Pr. Reg.* 118. S. C. *Barnes*, 141.) or for a *wrong* done in his life-time. (*Barnes*, 119.) But where the cause of action arises after the death of the testator or intestate, and the plaintiff may sue thereon in his own right,

he shall not be excused from the payment of costs, though he bring the action as executor or administrator; as upon a *contract*, (6 *Mod.* 91. 181. 1 *Salk.* 207. S. C. 1 *Ld. Raym.* 436. 1 *Str.* 682. *Barnes*, 119. 2 *Str* .1106. 4 *T. R.* 277. 5 *T. R.* 234.) express or implied: or in *trover* (*Com. Rep.* 162. *Cas. Pr. C. B.* 61. *Barnes*, 132. *Cas. temp. Hardw.* 204. But see 3 *Lev.* 60. *semb. contra*,) for a conversion, after the death of the testator or intestate. 7 *T. R.* 358. An executor or administrator is liable to costs, upon a judgment of *non pros.* (*Cas. Pr. C. B.* 14. 157, 8. 3 *Bur.* 1585. 6 *T. R.* 654.)

But they are not liable to costs on judgment, as in case of a nonsuit under 15 *G. 2. c.* 17. 2 *H. B.* 277. But where an executor adds some count as executor, stating a cause of action for which he might declare in his own right, if he is nonsuited, he shall be liable to costs. 2 *W. P. T.* 116. And where he has *knowingly* brought a wrong action, or otherwise been guilty of a *wilful* default, he shall pay costs upon a discontinuance, (*Cas. Pr. C. B.* 79. 3 *Bur.* 1451. 1 *Blac. Rep.* 451. S. C.) or for not proceeding to trial according to notice; (*Cas. Pr. C. B.* 158. 3 *Bur.* 1585.) but otherwise he is not liable to costs, in either of these cases. (2 *Str.* 871. *Barnes*, 133. 4 *Bur.* 1927.) Nor, where he merely sues *en auter droit*, is he liable to costs, upon a judgment as in case of a nonsuit. 4 *Bur.* 1928.

Executors and administrators are liable to *costs in error* in cases where they would be liable in the original action. 1 *H. B.* 566.

No costs can be awarded on prohibition against executors, against whom judgment was obtained on demurrer, upon a question whether they were entitled to a *general* or *limited* probate. 3 *E. R.* 202.

Where plaintiff sued as executor, and was nonsuited, upon evidence at the trial that the supposed testator was still alive, the court refused to allow costs to the defendant, it appearing by affidavits on both sides to be still at least doubtful whether the supposed testator were living or not. *Zachariah* v. *Page*, *Term Rep. K. B. Hil.* 58 *Geo.* 3.

Where an executrix pleaded, 1st. *Non-assumpsit;* and, 3d. *Plene administravit;* and issues on the first pleas were found for plaintiff, and on the last for the defendant; it was holden that the last plea being a complete answer to the action, the defendant was entitled to the general costs of the trial. *Edwards* v. *Bethel*, *Term Rep. K. B. H.* 58 *Geo.* 3.

The *stat.* 23 *H.* 8. *c.* 15. only relates to cases where the plaintiff is nonsuited, or has a verdict against him. But by *stat.* 8 *Eliz. c.* 2. "upon process issuing out of the court of King's Bench, if the plaintiff do not declare in three days after bail put in, or if after declaration he do not prosecute his suit with effect, but willingly suffer the same to be delayed or discontinued, or he be nonsuited therein, the judges, by their discretions, shall award to the defendant his costs, damages, and charges in that behalf sustained."

The plaintiff, it has been observed, is not entitled to costs in a *popular* action, for the whole or part of a penalty given by statute to a common informer, unless they are expressly given him by the statute. Nor was the *defendant* entitled to costs in such an action, until they were given by the *stat.* 18 *Eliz. c.* 5. § 3. made perpetual by *stat.* 27 *Eliz. c.* 10.

There being still many cases in which the defendant was not aided by the provisions of the before mentioned statutes, the *stat.* 4 *Jac.* 1. *c.* 3. gives the defendant costs on a nonsuit or verdict in all cases where the plaintiff would have been entitled to them if he had obtained judgment.

When a defendant removes proceedings by a *sc. fa. ro.* from a county court into one of the superior courts, and signs judgment of *non pros.* in default of plaintiff's appearing, he is entitled to costs under this stat. 1 *T. R.* 372.

The *stats.* 13 *C.* 2. *st.* 2. *c.* 2. § 3. 8 & 9 *W.* 3. *c.* 11. § 2. give costs to a defendant also in cases of *non pros.* and *demurrer:* and the latter *stat.* § 1. gives costs to one of several defendants in *trespass, assault, false imprisonment,* or *ejectment* acquitted; though the other defendants are convicted.

Though the defendant had judgment on demurrer in *quare impedit*, the court of C. P. held that he was not entitled to costs under § 2. of the last mentioned statute. 1 *H. B.* 590.

When a *feigned* issue is ordered by a court of *law*, whether it be in a civil or criminal proceeding, the costs always follow the verdict, and must be paid to the party obtaining it. 1 *Lill. P. R.* 344. *Barnes*, 130. 1 *Wils.* 261. 331. *Say. Rep.* 24. 1 *Wils.* 324. But when a feigned issue is ordered by a court of *equity*, the costs do not follow the verdict, as a matter of course; but the finding of the jury is returned back to the court which ordered it, and the costs there are in the discretion of the court. Where the issue is ordered by a court of law, on a rule for an information, (*Say. Rep.* 229. 1 *Bur.* 603.) or motion for an attachment, (*Say. Rep.* 253.) the costs of the original rule, or motion, do not in general follow the verdict, but only the costs of the feigned issue; which costs are to be reckoned, from the time when the feigned issue was first ordered and agreed to. 1 *Burr.* 604. Yet, where it was ordered, by the consent rule, that the costs should abide the event of the issue, the court directed the *whole* costs to be paid under it. 2 *Burr.* 1021.

If the plaintiff enter a *noli prosequi*, the defendant is entitled to costs under 8 *Eliz. c.* 2. § 2. 3 *T. R.* 511.

Where a plaintiff is put to declare in prohibition, and is nonsuited at the assizes, the defendant is only entitled to his single costs, under the *stat.* 8, 9 *W.* 3. *c.* 11. § 3. and not to double costs under 2, 3 *Ed.* 6. *c.* 13. § 4. 15 *E. R.* 574.

III. Where the plaintiff recovers *single* damages, he is only entitled to *single* costs; unless more be expressly given him by statute. But if *double* or *treble* damages be given by statute, in a case, wherein *single* damages were before recoverable, the plaintiff is entitled to *double* or *treble* costs, although the statute be silent respecting them; (*Say. Costs*, 228.) as in an action upon *stat.* 2 *H.* 4. *c.* 11. &c. In some cases, *double* and *treble* costs are expressly given to the plaintiff; as upon the game laws, by *stat.* 2 *Geo.* 3. *c.* 19. § 5. And wherever a plaintiff is entitled to *double* or *treble* costs, the costs given by the court *de incrementento* are to be doubled or trebled as well as those given by the jury. 2 *Leon.* 52. *Cro. Eliz.* 582. 3 *Lev.* 351. *Carth.* 297. 321. 2 *Str.* 1048. But see 1 *Term Rep.* 252. But double or treble costs are not to be understood to mean, according to their literal import, twice or thrice the amount of single costs. Where a statute gives *double* costs, they are calculated thus: 1. The common costs; and then *half* the common costs. If *treble* costs, 1. The common costs; 2. Half of these; and then half of the latter.

Double or treble costs are also in some cases expressly given to the defendant; as in actions against parish officers, by *stat.* 43 *Eliz. c.* 2. § 19.—against justices of the peace, constables, &c. by *stat.* 7 *Jac.* 1. *c.* 5.—for distresses for rents and services, by *stat.* 11 *Geo.* 2. *c.* 19. § 21, 2.—and against officers of the excise or customs, by *stats.* 23 *G.* 3. *c.* 70. § 34. 24 *Geo.* 3. *sess.* 2. *c.* 47. § 35. In these, and such like cases, where it does not appear, on the face of the record, that the defendant is entitled to the benefit of the act, (as where he pleads the general issue,) and there is no particular mode appointed for recovery of the costs, the proper mode, after a nonsuit or verdict for the defendant, is to apply to the court, upon an affidavit of the facts, for leave to enter a suggestion on the roll. 1 *Str.* 49. 50. *Cas. Pr. C. B.* 16. *Cas. temp. Hardw.* 125. *Id.* 138. 2 *Str.* 1021. S. C. *Say. Rep.* 214. 3 *Wils.* 442. *Cas. temp. Hardw.* 125. But where a particular mode is appointed by statute, for the recovery of double or treble costs, as by the *certificate* of the judge who tried the cause, on *stat.* 7 *Jac.* 1. *c.* 5. there that particular mode must

be observed: (2 *Vent.* 45. *Doug.* 8vo. 307, 8. but see *Doug.* 8vo. 308. *n.*) so that if the judge certify, there is no need of a suggestion; and if he do not, it is useless, except where judgment goes by default. *Cas. temp. Hardw.* 138, 9.

IV. A party grieved by having his house set on fire is entitled to costs on *stat.* 9 *Geo.* 1. *c.* 22. against the hundred, though the costs together with the damages may exceed 200*l.* 1 *T. R.* 71.

A party grieved who recovers damages against the sheriff for not taking bail under *stat.* 23 *H.* 6. *c.* 9. is entitled to costs. 9 *T. R.* 355.

A justice of the peace who has prosecuted a gaoler to conviction for suffering a prisoner to escape, committed by him on a charge of felony, is not entitled to the costs of the conviction under *stat.* 5, 6 *W. & M. c.* 11. § 3. 2 *T. R.* 47.

If a judge on the trial of an indictment for not repairing a road certify that the defence was frivolous, without also awarding costs in express terms under 13 *Geo.* 3. *c.* 78. the prosecutor is entitled to costs. 6 *T. R.* 344.

Justices of peace may give costs in all cases of convictions, by *stat.* 18 *Geo.* 3. *c.* 19. 5 *T. R.* 356.

The prosecutor of a *quo warranto* information against a constable of Birmingham is not entitled to costs under *stat.* 9 *An. c.* 20. 5 *T. R.* 375.

Costs are due to the plaintiff who recovers treble damages in an action on 29 *Eliz. c.* 4. against the sheriff for taking more than the fee allowed by that statute on levying under an execution. 7 *T. R.* 267.

Persons dwelling near a steam engine which created a nuisance, and prosecuting an indictment for it, are parties grieved entitled to their costs under 5 *W. & M. c.* 11. § 3. upon removal of the indictment by *certiorari* into K. B. by the defendants, and their conviction there. 16 *E. R.* 194.

The prosecutor of an indictment for obstructing an highway must shew himself to be the *party grieved* in order to obtain costs. 1 *Maul. & Selw. Rep.* 268.

To entitle an officer defendant to double costs under the *stat.* 7 *Jac.* 1. *c.* 5. there must be a certificate of the judge that the defendant was such an officer, and that the action was brought against him for something done by him in the execution of the office. 7 *T. R.* 443.

The above stat. and 21 *Jac.* 1. *c.* 12. § 3. giving double costs to parish officers sued, &c. extend not to actions against them for non-feasance, as for not paying over money, &c. 3 *E. R.* 92.

When in an action against officers of excise for seizing goods, they do not tender amends before action brought, but pay money into court, and afterwards gain a verdict, they are entitled only to single costs under the *stat.* 23 *G.* 3. *c.* 70. § 31. 1 *H. B.* 344.

In trespass against the owner of a house adjoining to the plaintiff's in the metropolis, for taking down his party wall and building on it, the defendant shewing at the trial that he was authorised in doing the thing complained of by the building act 14 *Geo.* 3. *c.* 78. is entitled to treble costs upon a nonsuit. 9 *E. R.* 322.

A person sued on *stat.* 25 *Geo.* 3. *c.* 50. for shooting without a certificate is not entitled to treble costs on obtaining a verdict. 1 *T. R.* 252.

The statute 11 *Geo.* 2. *c.* 19. § 22. gives double costs against a plaintiff in replevin, only in three cases, viz. where he is nonsuit; discontinues his action; or has judgment given against him.—And therefore, where in replevin, the cause not being then at issue, the parties agreed by bond to submit the question to arbitration, the costs to abide the event, the arbitrator afterwards awarded in favour of the defendant, it was held that he is not entitled to double costs under the statute. *Gurney* v. *Buller*, *Term Rep. K. B. T.* 58 *Geo.* 3.

V. Costs are taxed, as between party and party, by the *Master* in the King's Bench, or by one of the *Prothonotaries* in the Common Pleas, upon a bill made out by the attorney for the party entitled; or frequently, without a bill, upon a view of the proceedings: and if there have been any *extra* expences, which do not appear on the face of the proceedings, there should be an affidavit made of such expences, to warrant the allowance of them; which is called an affidavit of *increased* costs. *Imp. K. B.* 348. It is usual among fair practisers, to give notice to the opposite attorney, of the time when the costs are intended to be taxed. *Id.* 349. But in order to enforce it, there must be a rule to be present at taxing costs: which rule is obtained from the clerk of the rules in the King's Bench, or one of the secondaries in the Common Pleas, and should be duly served; after which, if the costs are taxed without notice, the taxation is irregular, and the attorney liable to an attachment.

Where a party obtains leave by consent to examine witnesses abroad on depositions, he is not entitled to be allowed the expence of taking the depositions in the taxation of costs, though he succeed. 8 *E. R.* 393.

The means of recovering costs, as between party and party, are by *action* or *execution*, upon a judgment obtained for them; or by *attachment*, upon a rule of court. Thus in *ejectment*, where there is a verdict and judgment against the tenant, an action may be brought, or execution taken out thereon, for the costs. *Run. Eject.* 140. 141. But where the plaintiff is nonsuited, for not confessing lease entry and ouster, the lessor of the plaintiff must proceed by attachment, upon the consent rule. *Id. ibid.* 1 *Salk.* 259. *Barnes*, 182. And so where the nominal plaintiff is nonsuited upon the merits, or has a verdict and judgment against him, the only remedy is by attachment against the lessor of the plaintiff. *Run. Ej.* 142, 3. See title *Attachment*.

Besides the ordinary method of proceeding, there are certain auxiliary means for the recovery of costs, as between party and party. These means are by moving to stay the proceedings, until security be given for the payment of costs; or until the costs are paid of a former action for the same cause; or by deducting the costs of one action, from those of another. As examples of these means, it may be mentioned, that in *ejectment*, (1 *Str.* 681.) and actions *qui tam*, (*Id.* 697. 705. *Barnes*, 126.) where the plaintiff, or his lessor, is *unknown* to the defendant, and in case the plaintiff is a foreigner residing abroad, (1 *Term Rep.* 267. 362. 491.) the defendant may call for an account of his residence, or place of abode, from the opposite attorney; and if he refuse to give it, or give in a fictitious account of a person who cannot be found, the court will stay the proceedings, until security be given for the payment of costs.

The court of K. B. stated that in the following three instances only they would oblige the plaintiff to give security for costs. 1. When an *infant* sues. 2. When the plaintiff resides abroad. 3. When there has been a former ejectment. 1 *T. R.* 490.

The court of C. P. would not compel security for costs in error, because the plaintiff in error was a lunatic. 2 *B. & P.* 437. Nor from a plaintiff in a *qui tam* action, though it appeared he was insolvent. 2 *K. B.* 27.

After the defendant has agreed to take short notice of trial, the court will not compel the plaintiff, though a foreigner and resident abroad, to give security for costs. 2 *K. B.* 595.

If a foreigner sue two defendants, and only one of them puts in bail, that one may require the plaintiff to give security for costs. 6 *T. R.* 496.

Where a foreign seaman had brought an action for his wages against a foreigner, the court refused to compel the plaintiff to give security for costs on account of his being on a voyage on board an English ship. 2 *H. B.* 383. See also 1 *B. & P.* 96. 2 *B. & P.* 236. 2 *W. P. T.* 253.

The Court of K. B. required an uncertificated bankrupt, who brought trover for goods to give security for costs. 7 *T. R.* 296. But see 2 *W. P. T.* 61.

An application to make the plaintiff, who resided abroad, give security for the Costs, was refused after notice of trial given, as the defendant might have applied earlier after knowledge of the fact of the plaintiff's residence, and before so much of the Costs were incurred. *Walters* v. *Frythall*, 5 *East*, 338.

The court will compel security for costs where plaintiff resides abroad, without a previous application to his attorney: but they will not order a stay of proceedings, unless such application has been made. *Baillie* v. *Bernales*, *Hil.* 58 *Geo.* 3. *Term Rep. K. B.*

Where the plaintiff, after issue joined, had been convicted of felony, and received sentence of transportation, the court compelled him or his attorney to give security for costs retrospective and prospective. *Harvey* v. *Jacob*, *M.* 58 *G.* 3. *Term Rep. K. B.*

The practice of deducting or setting off the Costs in one action against those in another, however agreeable to natural justice, does not seem to have obtained till lately in the court of K. B. 2 *Stra.* 891. 1203. *Bull. N. P.* 336. 4 *Term Rep.* 124. But in C. P. it has been frequently allowed; and that not only where the parties have been the same, but also where they have been in some measure different. *Barnes*, 145. 2 *Black. Rep.* 826. *Bull. N. P.* 336.

The lien of the plaintiff's attorney upon the debt and costs recovered in the cause, after affirmance upon a writ of error, must be satisfied before the defendants are entitled to set them off against a judgment recovered by them in another cause against the plaintiff. 1 *Maul. & Selw. Rep.* 240.

As between *Attorney and Client*, the former may maintain an action against the latter for the recovery of his costs. *Cro. Car.* 159. 160.—But by the *stat.* 3. *Jac.* 1. *c.* 7. § 1. attornies and solicitors must deliver a bill to their clients before bringing an action: and by *stat.* 2 *Geo.* 2. *c.* 23. § 23. (explained by *stat.* 12 *Geo.* 2. *c.* 13. and made perpetual by *stat.* 30 *Geo.* 2. *c.* 19. § 75.) no attorney nor solicitor shall commence any action, till the expiration of one month after the delivery of his bill; which is directed by the acts to be in a common legible hand, in English, except law-terms, and subscribed with the attorney's hand.

The said *stat.* 2 *G.* 2. *c.* 23. also directs the mode of taxation of attornies' bills by the officers of the several courts; and directs that if the bill taxed be less by a sixth part than the bill delivered, the attorney shall pay the costs of taxation: but if it shall not be less, the costs shall be in the discretion of the court.

If the whole bill be for *conveyancing*, or for business done at the quarter *sessions*, &c. it cannot be taxed. But where an attorney had delivered two separate bills, one of which was for fees and disbursements in causes, and the other for making conveyances, a rule was made for taxing *both*. And so, where it was moved, that the Master might be directed to tax those articles in an attorney's bill, which related to conveyancing and parliamentary business, the rest being for management of causes in the court of King's Bench, *Lord Mansfield* said, there was no doubt but the master might tax the whole. *Barnes*, *C. B.* 141, 2. 4 *Term Rep.* 124. *Say. Rep.* 233. *Say. Costs*, 310.

It is not necessary for the *executor* or *administrator* of an attorney, to deliver a bill of costs, for business done by his testator or intestate, before the commencement of an action; (*Cas. Pr. C. B.* 58.) the *stat.* 2 *Geo.* 2. *c.* 23. § 23. being confined to actions brought by the attorney himself, and not extending to his personal representatives. And, in the court of Common Pleas, they will not suffer such a bill to be taxed; (*Barnes*, 119. 122.) but in the court of King's Bench it is otherwise; (2 *Stra.* 1056. *Say. Costs*, 324, 5. *Imp. K. B.* 482.;) for there, the bill may be referred to be taxed, on the defendant's undertaking to pay what is due.

If an attorney refuse to deliver a bill to his client, the latter may compel him, by taking out a summons before a judge; and if the attorney, on being served therewith, do not attend, an order will be made for delivering it, within a reasonable time. If he still neglect to deliver it, the order should be made a rule of court; and on serving the same, and making affidavit thereof, the court on motion will grant an attachment. *Doug.* 8vo. 199. in. *n. Imp. K. B.* 479. The bill being delivered, the client may apply for a judge's summons, to shew cause why it should not be referred to the proper officer to be taxed; upon which an order will be made, the client undertaking to pay what shall appear to be due upon such taxation. *Imp. K. B.* 479. 480. If the attorney do not attend, an order will be made of course. But the client cannot have a summons for delivery of the bill, and taxing it, together. *Id.* 480. *Barnes. C. B.* 126.

Costs in Equity, are allowed for failing to make an answer to a bill exhibited; or making an insufficient answer: and if a first answer be certified by a master to be insufficient, the defendant is to pay 40*s. Costs*; 3*l.* for a second insufficient answer; 4*l.* for a third, &c. But if the answer be reported good, the plaintiff shall pay the defendant 40*s. Costs.* An answer is not to be filed, (till when, it is not reputed an answer,) until *Costs* for contempt in not answering are paid. By *stat.* 4 & 5 *An. c.* 16. if a plaintiff in Chancery dismisses his own bill, or the defendant dismisses the same for want of prosecution, Costs are allowed to the defendant.

In other cases it seems that the matter of Costs to be given to either party is not in equity held to be a point of right, but merely discretionary, under *stat.* 17 *R.* 2. *c.* 6. according to the circumstances of the case. Yet the *stat.* 15 *H.* 6. *c.* 14. which requires surety to satisfy the party grieved his damages, on granting the subpœna, seems expressly to direct that, as well damages as costs shall be given to the defendant, if wrongfully vexed in this court.

In case of a great fraud, a person may be obliged to pay such *Costs* as shall be ascertained by the injured party's oath.—2 *Vern.* 123.

COT. In the old Saxon signifies *cottage*, and so is still used in many parts of England.

COTARIUS. A cottager: the *cotarii*, or cottagers, are mentioned in *Domesday*.

COTE AND COT. The names of places which begin or end with these words or syllables have the signification of a little house or *cottage*: there are likewise *dove cotes*, which are small houses or places for the keeping of *doves* or pigeons. See title *Pigeon House*.

COTELLUS, COTERIA. A small cottage, house, or homestall. *Cowel.*

COTERELLUS. *Cotarius* and *coterellus*, according to *Spelman* and *Du Fresne*, are servile tenants: but in *Domesday* and other ancient MSS. there appears a distinction as well in their tenure and quality, as in their name. For the *cotarius* held a free socage tenure, and paid a stated firm or rent in provisions or money, with some occasional customary services; whereas the *coterellus* seems to have held in mere villenage, and his person, issue and goods, were disposable at the pleasure of the lord. *Paroch. Antiq.* 310.

COTESWOLD. Is used for sheep-cotes and sheep feeding on hills: from the *Sax. cote* and *wold*, a place where there is no wood.

COTGARE. A kind of refuse wool, so clung or clotted together, that it cannot be pulled asunder. By *stat.* 13 *R.* 2. *cap.* 9. it is provided, that neither denizen nor foreigner shall make any other refuse of wools but *cotgare* and *villein*.

COTLAND AND COTSETHLAND. Land held by a cottager, whether in socage or villenage.—*Paroch. Antiq.* 532.

COTSETHLA, COTSETLE. The little seat or mansion belonging to a small farm. *Cartular. Malmsbur. MS.*

COTSETHUS. A cottage holder, who, by servile tenure, was bound to work for the lord. *Cowel.*—*Cotsets* are the meanest sort of men, now termed *cottagers*. And *cotseti* are those who live in cottages. *Leg. Hen.* 1. *c.* 30.

COTTAGE, *cotagium.*] A little house for habitation, without lands belonging to it.

By the *stat.* 31 *Eliz. c.* 7. cottages were prohibited to be erected without laying at least four acres of land to the same: and divers other restrictions were thereby injoined. But this was repealed by *stat.* 15 *Geo.* 3. *c.* 32. setting forth that the said *stat.* of 31 *Eliz.* had laid the industrious poor under great difficulties to procure habitations, and tended very much to lessen population; and in divers other respects was inconvenient to the labouring part of the nation in general.

COTTON LIBRARY. For better settling and preserving the *Library* kept in the house at Westminster, called *Cotton-house*, in the name and family of the *Cottons* for the benefit of the Public, a statute was made 12 *W.* 3. *c.* 7. See *stats.* 5 *Ann. c.* 30. 26 *Geo.* 2. *c.* 22.

COTTONS. Not within 27 *Hen.* 8. concerning the true making of cloth. 27 *H.* 8. *c.* 12. *sect.* 3. See titles *Callico*, *Manufacturers*, *Navigation Acts.*—Stealing cotton out of places used for whitening or dying it, felony without clergy. *Stat.* 18 *Geo.* 3. *c.* 27.

COTUCA. Coat armour. *Walsing.* 114.

COTUCHANS. Boors or husbandmen, of which mention is made in *Domesday.*

COUCHER, OR COURCHER. A factor that continues abroad in some place or country for traffic; as formerly in Gascoign, for buying of wines. *Stat.* 37 *Ed.* 3. *c.* 16. This word is also used for the general book wherein any corporation, &c. register their particular acts. 3 & 4 *Ed.* 6. *c.* 10.

COVENABLE, Fr. *convenable*, Lat. *rationabilis.*] What is convenient or suitable.—*Every of the same three sorts of goods, &c. shall be good and* covenable, *as in old time hath been used.* Stat. 31 Ed. 3. cap. 2. *Covenably* indowed, that is, indowed as is fitting. *St.* 4 *H.* 8. *c.* 12. See *Plowd.* 472.

## COVENANT.

Conventio.] The agreement or consent of two or more by deed in writing, sealed and delivered; whereby either, or one of the parties doth promise to the other that something is done already or shall be done afterwards: he that makes the covenant is called the *covenantor*: and he to whom it is made, the *covenantee.* See *Shep. Touchst.* 160. and on the whole of this subject at length.

I. *The several Kinds of Covenants, and by what Words they are created.*
II. *What Covenants are good and binding, and by whom they may be made.*
III. *Who shall take Advantage of Covenants, and who are bound by them.*
IV. *What shall be a Performance, and what a Breach of Covenant.—And of Penalties for Non-performance.*

I. A *Covenant* is generally either in fact or in law; in *fact* is that which is expressly agreed between the parties, and inserted in the deed; and in *law*, is that *covenant* which the law intends and implies, though it be not expressed in words; as if a lessor demise and grant to his lessee a house or lands, &c. for a certain term, the law will intend a *covenant* on the lessor's part, that the lessee shall, during the term, *quietly enjoy* the same against all incumbrances. 1 *Inst.* 384.

There is also a *Covenant real*, and *Covenant personal*: a *covenant real* is that whereby a man ties himself to pass a thing real, as lands or tenements; or to levy a fine of lands, &c. And *covenant personal*, is where the same is annexed to the person and merely personal; as if a person *covenants* with another by deed to build him a house, or to serve him, &c. *F. N. B.* 145. *5 Rep.* 10.

*Covenants* are likewise *inherent*, that tend to the support of the land or thing granted; or are *collateral* to it; and are *affirmative*, where somewhat is to be performed; or *negative*; *executed*, of what is already done, or *executory*: a *covenant* being to bind a man to do something *in future*, is for the most part *executory.* 1 *Vent.* 176. *Dyer*, 112. 271.

A covenant to settle or convey particular lands, will not at law create a lien upon the lands; but in equity such a covenant, if for a valuable consideration, will be deemed a specific lien on the lands, and decreed against all persons claiming under the covenantor, except purchasers for valuable consideration, and without notice of such covenant. *Finch* v. *Earl of Winchelsea*, 1 *P. Wms.* 282. *Freemoult* v. *Dedire*, 1 *P. Wms.* 429. *Coventry* v. *Coventry*; best reported at the end of *Francis's Maxims*; for Equity considers that as done which, being distinctly agreed to be done, ought to have been done. *Grounds and Rudiments of Law and Equity, p.* 75.

A general covenant to settle lands of a certain value, without mentioning any lands in particular, will not create a specific lien on any of the lands of the covenantor, and therefore cannot be specifically decreed in equity. *Freemoult* v. *Dedire*, 1 *P. Wms.* 430. But if the covenantor expressly declares the settlement to be in execution of his power, though the particular lands to be charged be not specified, equity will ascertain them. *Coventry* v. *Coventry*, *Francis's Maxims. Gilb. Rep.* 160.

It is held in all cases where words that begin any sentence are *conditional*, and give another remedy, they shall not be construed a *covenant*; and yet if words of *condition* and covenant are coupled together in the same sentence, as *Provided always, and it is covenanted*, &c. in that case they may be adjudged both a *condition* and *covenant. March*, 103.

The law does not seem to have appropriated any set form of words, as absolutely necessary to be made use of in creating a *covenant*; and therefore it seems that any words will be effectual for that purpose, which shew the party's concurrence to the performance of a future act; as if lessee for years covenants to repair, &c. *Provided always, and it is agreed, that the lessor shall find great timber*, &c. this makes a *covenant* on the part of the lessor to find great timber, by the word *agreed*; and it shall not be a qualification of the *covenant* of the lessee. 1 *New Abr.* 527.—See 1 *Burr.* 290.

"The dependence or independence of covenants, is to be collected from the evident sense and meaning of the parties; and however transposed they may be in a deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance." *Per Lord Mansfield*, *Jones* v. *Berkley*, *Dougl.* 665.—See also *Hotham* v. *The East India Company*, 1 *Term Rep.* 638. Where the participle *doing*, *performing*, *paying*, *repairing*, is prefixed to a covenant, it is clearly a mutual covenant, and not a condition precedent. *Boone* v. *Eyre*, 2 *Black. Rep.* 1312. *Allen* v. *Babington*, *Sid.* 280. *Atkinson* v. *Morrice*, 12 *Mod.* 503. But where the covenant goes to the whole consideration on both sides, there it is a condition precedent. *Duke of St. Alban's* v. *Shore*, 1 *H. Black. Rep.* 270.

If one makes a lease for years, reserving a rent, action of *covenant* lies for non-payment of the rent; for the *reddendum* of the rent is an agreement for payment of it, which will make a *covenant.* 2 *Danv.* 230. A lease is made to two, and one seals the deed, but the other doth not; if he accepts the estate and occupies the land, he is bound to perform the *covenants* for payment of the rent, reparations, and the like. 1 *Shep. Abr.* 458.

If one man *covenants* to pay another 20*l.* at a day; although he may have action of debt for the 20*l.* yet it is said he may have *covenant* at his election. 2 *Danv.* 229.

It is agreed that A. B. shall pay to C. D. 100*l.* for lands in E.; this is a mutual *covenant*, whereon action of *covenant* may be brought if C. D. will not convey. 1 *Sid.* 423. But where there are mutual *covenants*, and the one not to be performed before a precedent *covenant*, in such case one *covenant* is not suable till the other is performed: though if the *covenants* are distinct and mutual, several actions may be brought by and against the parties. 1 *Lil. Abr.* 350. 2 *Mod.* 74. In a covenant to pay another so much money, he making him an estate in such land, &c. it has been adjudged, that if he tender the *covenantor* a feoffment, and offer to make livery, he may have action of *covenant* for the money, as if he had made a title. 3 *Salk.* 107.

Where a man *covenants* that he hath *power to grant*, and that the grantee shall *quietly enjoy* notwithstanding any claiming under him; these are distinct *covenants*, for one goes to the *title*, and the other to the *possession*. 1 *Mod.* 101.

There is this difference however between a *covenant* and *condition*; a *condition* gives entry, and *covenant* gives an action only. *Owen*, 54. A person cannot have action of *covenant* upon a verbal agreement, for it cannot be grounded without *writing*, except by special custom. *F. N. B.* 145.

II. All *covenants* between persons must be to do what is *lawful*, or they will not be binding; and if the thing to be done be *impossible*, the *covenant* is void. *Dyer*, 112. But where the thing is lawful at the time of the *covenant* made, and afterwards the matter agreed to be done is prohibited by act of parliament, yet such *covenant* will be binding. 3 *Mod.* 39. And if a man *covenants* to do a thing *before a certain time*; and it becomes *impossible* by the act of God, this shall not excuse him, inasmuch as he hath bound himself precisely to do it. 2 *Danv. Abr.* 84.

Though a covenant to stand seised of lands to be after-purchased be void at law, unless there be some new act to be done; yet it seems, that a covenant to settle lands of such a value, will charge after-purchased lands, though the covenantor had none at the time of executing the covenant. *Took* v. *Hastings*, 2 *Vern.* 97.

If a person *covenants* expressly to repair a house, and it is burnt down by lightning, or any other accident, yet he ought to repair it; for it was in his power to have provided against it by his contract. *Alleyn*, 26. 27. 1 *Lil. Abr.* 149. But he is not so bound by *covenant* in law. Where houses are blown down by tempest, the law excuses the lessee in an action of waste; though in a covenant to repair and uphold, it will not. 1 *Plowd.* 29.

A lessee of a house who covenants generally to repair is bound to repair if it is burnt by an accidental fire. 6 *T. R.* 650.

On a covenant to build a bridge in a substantial manner, and to keep it in repair for a certain time, the party is bound to rebuild the bridge though broken down by an extraordinary flood. 6 *T. R.* 750.

If a lessee for years, rendering rent, *covenants* for him and his assigns to repair the house, and after the lessee assigns over the term, and the lessor accepts the rent from the assignee, and then the *covenant* is broken; notwithstanding acceptance of rent from the assignee, action of covenant lies against the first lessee, on his express *covenant* to repair: and this personal *covenant* cannot be transferred by the acceptance of the rent. 2 *Danv. Abr.* 240. See title *Assignment*, and *post*, III.

Action of *covenant* also lies on *covenant* for payment of rent against such lessee; but not action of *debt* after acceptance. 3 *Rep.* 24. In *covenant* upon a demise, rendering rent, the defendant cannot say, that part of it was to be allowed; for this is a *covenant* against a *covenant*. *Comb.* 21.

An infant within age may bind himself apprentice: but neither at Common Law nor by statute may be bound by *covenant* for his apprenticeship, so as to make him liable to an action of *covenant*, if he depart, &c. But by the custom of London he may bind himself by his *covenant* at fourteen years old. 1 *Cro.* 129. *Winch.* 63.

A covenant by a tenant to yield up in repair, at the expiration of his lease, all buildings which should be erected during the term upon the demised premises, includes buildings erected and used by the tenant for the purpose of trade and manufacture, if they be let into the soil or otherwise fixed to the freehold, but not where they rest merely upon blocks or pattens. 1 *W. P. T.* 19.

III. There may be an agreement and *covenant*, only to be performed by the parties themselves; and there are some *covenants* which none but the party and his *heirs* may take advantage of, being such as concern the *inheritance*, and descend to the heir, as knit to the estate: *covenants* in *gross* go to the executors, &c. 1 *Rol. Abr.* 520. 2 *Danv.* 235. Not only parties to deeds, but their executors and administrators, shall take advantage of *inherent covenants*, though not named; and every *assignee* of the land may have the benefit of such *covenants*: likewise *executors* and *assigns* are bound by them, although not named, as a *covenant* to repair, &c. 5 *Rep.* 16. 17. 1 *Cro.* 552. If a man *covenants* with another to do any thing, his *heir* shall not be bound, *unless* he be *expressly named*: and yet where a lessee *covenants* to repair, the *heir* shall have the benefit of the *covenant*, though not named, *because it runs with the land*. 2 *Lev.* 92. 5 *Rep.* 8.

The *executors* and *administrators* of the *covenantor* will be bound by the covenant, though not named, unless the covenant be of such a nature as not to allow of its being performed by any other person but the Covenantor. See *Dyer*, 14: *pl.* 69. 1 *Roll. Abr.* 519. *l.* 35. *Hyde* v. *Dean & Canons of Windsor*, *Cro. Eliz.* 553.

One who covenants *for himself, his heirs*, &c. and under his *own hand and seal* for the act of another, shall be personally bound by his covenant, though he describe himself in the deed as covenanting *for and on the part and behalf of such other person*. *Appleton* v. *Binks*, 5 *East*, 148.

Where the Assignees of a bankrupt advertised the lease of certain premises, of which the bankrupt was lessee, for sale by auction (without stating themselves to be the owners or possessed thereof), and no bidder offering, they never took possession in fact of the premises, held that this was no more than an experiment to ascertain the value, whether the lease was beneficial or not to the creditors, and did not amount to an assent on the part of the assignees to take the term; nor support an averment in a declaration in covenant against them by the landlord, that all the estate, right, title, interest, &c. of the bankrupt in the premises came *to the defendants by assignment thereof*. *Turner* v. *Richardson* and another, assignees of *Barber*, 7 *East*, 335.

All persons to whom the land descended were by the Common Law entitled to the benefit of covenants which run with the land; but grantees of the reversion were not. The *stat.* 32 *Hen.* 8. *c.* 34. therefore enacted, "That all grantees, &c. of reversions, should have the like advantages against the lessees, their executors, &c. by entry for non-payment of the rent, or for doing waste, or other forfeiture; and the same remedy by action only, for not performing other conditions, covenants, or agreements contained in the leases, against the lessees, as the lessors or grantors had." The statute also gives the lessees the same remedy against the grantees of the reversion, which they might have had against their grantors. It must not, however, be understood from the general words of the statute, that the grantee of the reversion can take benefit of every forfeiture by force of a condition,

*Lord Coke* conceiving the operation of the statute to be confined to such conditions as are either incident to the reversion, as rent; or for the benefit of the State, as for not doing of waste, for keeping the houses in repair, for making of fences, or such like; and not for the payment of any sum in gross, delivery of corn, wood, or the like. See *Co. Lit.* 215. where a variety of resolutions upon this statute are stated, and the authorities referred to. See also 6 *Vin. Ab. Covenant*, [K. 3.] *p.* 397. *Webb* v. *Russell*, 3 *T. R.* 393.—See further *Bac. Abr. Covenant*, [E. 6.] *Vin. Ab. Covenant*, [K. 3.]

The liability of the assignee does not extend to covenants broken before the assignment; as a covenant to build within a certain time, which was past before the assignment. *Grescott* v. *Green*, 1 *Salk.* 199. *St. Saviour's Southwark* v. *Smith*, 3 *Burr.* 1271. 1 *Black. R.* 351. Nor is the assignee to be affected by any covenant broken after he has assigned over. *Boulton* v. *Canon*, 1 *Freem.* 336.

Upon a covenant to repair and keep in repair during the continuance of the term, an action may be maintained for breaches before the term has expired. *Luxmore* v. *Robson*, *Term Rep. K. B. E.* 58 *G.* 3.

A collateral covenant to be done upon the land, as to build *de novo*, shall bind the assignee by express words; in this case, the assignees are bound by the terms of the covenant, for unless named, they would not be bound by law; "for the covenant concerns a thing which was not *in esse*, at the time of the demise made; but to be newly built after, and therefore shall bind the covenantor, his executors, and administrators, and not the assignee; for the law will not annex the covenant to a thing which hath no being." *Spencer's case*, 5 *Co.* 16 *b.* But as the law would sustain such a covenant against the covenantor and his assigns, if expressly included in the covenant, and give damages for its non-performance, it should seem to follow, that the covenantee would be entitled in equity to a decree for the specific performance of such covenant to build; and of this opinion Lord Hardwicke appears to have been, in the case of the *City of London* v. *Nash*, 3 *Atk.* 515. 1 *Vez.* 12. But in the case of *Lucas* v. *Commerford*, 3 *Bro. C. R.* 166. *Lord Thurlow*, C. held, "That there could not be a decree to rebuild in pursuance of a covenant, for that he could no more undertake the conduct of a rebuilding than of a repair."

In a lease of ground with liberty to make a watercourse, and erect a mill, the lessee covenanted for himself, &c. and his *assigns*, not to have persons to work in the mill who were settled in other parishes, without a certificate. The court held that this covenant did not run with the land, or bind the assignee of the lessee. 10 *E. R.* 130.

At law the *Assignee* is liable only for the rent actually incurred, or covenants broken during his possession. *Boulton* v. *Canon*, 1 *Frem.* 336. If therefore he assign the very day before the rent becomes due, the lessor cannot maintain his action for it. *Tovey* v. *Pitcher*, *Carth.* 177. 4 *Mod.* 71. 3 *Co.* 22. 1 *Salk.* 81. 1 *Freem.* 326. Nor will the circumstance of such assignment being *per fraudem*, as to a beggar alter the case. *Leroux* v. *Nash*, *Str.* 1221. *Buller's N. P.* 159. But see *Knight* v. *Freeman*, 1 *Vent.* 329. 331. *T. Raym.* 303. *T. Jones*, 109. in which the validity of such assignment was denied. But whatever may be the rule of law upon this point, it seems to be now settled, that courts of equity will compel an assignee of a term to account for the rent the whole time he enjoyed the land. *Treacle* v. *Coke*, 1 *Vern.* 105. Whether equity will, in order to secure the future rents, under any circumstances, restrain an assignee from assigning to a beggar or insolvent person, was considered but not determined, in the case of *Philpot* v. *Hoare*, 2 *Atk.* 219. If the assignee offer to give up the possession to the lessor on reasonable terms, and the lessor refuse to accept such surrender, it were clearly too much for a court of equity, in restriction of a legal right, to prevent the assignment. *Vaillant* v. *Dodomede*, 2 *Atk.* 546. But supposing the lessor to be willing to accept of a surrender of the term, and the assignee wantonly to insist on his legal right to assign, when and to whom he pleased, it seems that, under certain circumstances, a court of equity might, without impropriety, interpose to prevent the abuse of such right: and this Lord Harwicke appears to admit, in *Vaillant* v. *Dodomede*; for having stated the legal right and the propriety of courts of equity in general, following the rule of law, he observes, "but it is true in some sort of assignments, made by tenants, the court has interposed;" nor does the difficulty reported to have occurred to Lord Hardwicke, in *Philpot* v *Hoare*, appear, upon examination, to have been entitled to much attention. His Lordship is reported to have said, "As to the accruing rents, it is a point of more difficulty; for the covenant in this lease not to assign, does not run with the land to the assignee, because assignees are not bound by name in the covenant." Whence it might be inferred, that if assigns had been expressly included in the covenant, his Lordship would have considered them bound by the covenant. But whether assignees be bound or not by a covenant, does not, (except in the case of a collateral covenant to be done upon the land,) depend upon their being named in the covenant; for if the covenant run with the land, assignees are bound, whether named or not; and if the covenant do not run with the land, but is a personal contract, or respect something to be done purely collateral to, and not on the land, they are not bound, though they be expressly named. See *Spencer's case*, 5 *Co.* 16 *b.* 17 *a.* Therefore, whether the assignee was named or not, was immaterial to the question, Whether the assignee was bound by the covenant not to assign without consent of the lessor? Nor does it appear as having been necessary in order to determine whether a court of equity should restrain an assignment to a beggar, previously to determine, whether the assignee was bound by the covenant not to assign; for supposing the assignee to be bound at law by the covenant, equity may restrain the wanton and fraudulent breach of a covenant; and supposing him not to be bound, yet he may be affected in conscience upon the same principle that the assignee of a merely personal covenant may be affected in conscience, though not bound at law. See *City of London* v. *Richmond*, 2 *Vern.* 421. *Treat. of Equity*, 350 *in n.*

An action of covenant lies against the assignee of a lessee of an estate, for a part of the rent, as in such case the action is brought on a real contract in respect of the land, and not on a personal contract, and in case of eviction the rent may be apportioned as in debt or replevin. *Aliter* in covenant against the lessee himself, who is liable on his personal contract. 2 *E. R.* 575.

The devisee of the equity of redemption, (the legal fee being in a mortgagee,) is not liable in covenant, as assignee of all the estate, right, title, and interest of the original covenantor. 3 *E. R.* 487.

A covenant in a lease that the lessee, his executors, and administrators, shall constantly reside upon the demised premises during the demise, is binding upon the *assignee* of the lessee, though he be not named, being *quodam modo* annexed and appurtenant to the thing demised. 2 *H. B.* 133.

The grantee of a reversion may bring action of *covenant* against a lessee, as well in the country where the demise was made, as in the county where the lands lie. *Carthew*, 183. A person *covenants* with another, to pay him money at a time to come, and doth not say to his executors, &c. if the *covenantee* die before the day, yet his executors or administrators shall have the money. *Dyer*, 112. 127. And in *every case* where the *testator* is bound by a *covenant*, the *executor* shall be bound by it; if it be not determined by his death. 48 *Ed.* 3. 2. 2 *Danv.* 232.

If A. seised of land in fee, conveys it to B. and *covenants* with B. his heirs and assigns, to make any other assurance upon request: and after B. conveys it to C. who conveys it to D. and then D. requires A. to make another assurance, according to the *covenant*: if he refuses, D. shall have an action of *covenant* against him, as assignee to B. 2 *Danv.* 236. A lessor made a lease of an house for years, excepting two rooms and free passage to them; the lessee assigned the term, and the lessor brought *covenant* against the assignee for disturbing him in his passage to those rooms; and adjudged, that the action lies: for the *covenant* as to the passage, goes with the tenement, and binds the assignee. 1 *Salk.* 196. If a man who leases for years, ousts the lessee, he shall have *covenant* against him. 48 *Ed.* 3. 2.—See 2 *Danv.* 234. A man grants a watercourse, and afterwards stops it; for this voluntary misfeasance, *covenant* lies. 1 *Saund.* 322. Though where the *use* of a thing is demised, and it runs to decay, so that the lessee cannot have the benefit of it, for this non-feasance no action of *covenant* lieth: nor may *covenant* be brought for a thing which was not *in esse* at the making of the lease. 2 *Danv.* 233.

If a person *covenants* that he hath good right to grant, &c. and he hath no right, it is a breach of *covenant*, for which action of *covenant* lies. 2 *Bul.* 12.

A *covenant* for the lessee to enjoy against all men: this extends not to *tortious acts* and entries, &c. for which the lessee hath his proper remedy against the aggressors. *Vaugh.* 111. 120.

Where there is a *covenant* to save harmless against a *certain person*, there the *covenantor* must save the *covenantee* harmless against the entry of that person, be it by wrong or rightful title: but if it be to save harmless against *all persons*, the entry and eviction must be by *lawful title*. *Cro. Eliz.* 213. Where the *covenant* is to do a thing, and no time appointed for performance, it must be done in convenient time. 2 *And.* 73. *Dyer*, 57. 150. *Hob.* 28.

But a *covenant* must wait upon and join with the *grant*; so that if it be to make such assurance as shall be reasonably devised, it must be of an assurance that differs not from the bargain: and when the estate to which a *covenant* is annexed is at an end, the *covenant* is gone. *Hob.* 276. 1 *Leon.* 179. In an indenture, the word *covenant* is the word both of lessor and lessee; and therefore if the lessee *covenants* to pay the rent, this is a reservation. Though when there is a *covenant* for a lessee to repair, and he makes an *under-lease* to one who is in possession, the under-lessee is not liable to that *covenant*, in law or equity. 1 *Rol. Rep.* 80. 1 *Vern.* 87.

If a lessor *covenant* with the lessee that he shall have housebote, &c. by assignment of his bailiff, this is a good *covenant*: and yet it doth not restrain the power that the lessee hath by law to take those things without assignment: but if a lessee *covenants*, that he will not cut any timber, without the leave or assignment of the lessor; by this he will be restrained.—*Dyer*, 19. 115.

Covenant lies by devisee of lands in fee, upon a covenant, made by defendant to the testator, to whom defendant conveyed the lands in fee, that the defendant was lawfully seised, &c. For such covenant runs with the land, and though broken in the life time of the testator, is a continuing breach in the life time of the devisee: and it is sufficient to alledge for damage, that thereby the lands are of less value to the devisee, and that he is prevented from selling them so advantageously as he otherwise might do. *Kingdom* v. *Noble*, *E.* 55 *G.* 3. *T. R. K. B.* 53.

Covenant lies by the heir, upon a covenant made to the ancestor and his heirs, to whom lands are conveyed in fee by husband and wife, that he and his wife will make further assurance upon request of the ancestor and his heirs: and the heir may well assign for breach that his ancestor requested the husband that he and his wife would levy a fine to pass the estate of the wife legally to him and his heirs, which they refused to do before their decease, *per quod* after the death of the ancestor, the devisee of the wife ejected the heir. *Jones* v. *King*, *T. R. K. B.* *T.* 55 *G.* 3.

IV. The most frequent use of a covenant, is to bind a man to do something *in futuro*, and therefore it is for the most part executory; and if the covenantor do not perform it, the covenantee may thereupon for his relief have an action or writ of covenant, against the covenantor, so often as there is any breach of the covenant. *Shep. Touchst.* 161. *et seq.*

Not any duty or cause of action arises on a *covenant* till it is broken: and as to breaches of covenant, if a person by his own act disables himself to perform a covenant, it is a breach thereof. 5 *Rep.* 21. Though there can be no covenant or breach, where a lease, &c. is void. *Yelv.* 18. 19. But here, although when a covenant concerns the *interest* of the lease, as where it is for paying rent, it is void, if the lease be so: yet where covenants are *collateral* to the lease and interest, though that be void, the covenants may be good. *Owen*, 136. And if a covenant to do a thing is performed in substance, and according to the intent, it is good, though it differs from the words; and on the other hand, although the covenantor performs the letter of his covenant, if he does not act to defeat the intent and use of it, he is guilty of a *breach*. *Mod. Ent. Eng.*

In covenant that a person shall hold land free from all incumbrances, and be kept indemnified from arrears of rent; there, till an action is brought, or distress made, he is not damnified; and a suit in chancery is no breach in such case; but where a jointure, or dower is recovered, it is. *Skin.* 397. *Moor*, 859. *Palm.* 339. When the intention of the parties can be collected out of a deed, for the doing or not doing of the thing, covenant shall be had thereupon. *Chanc. Rep.* 294. A covenant, being one part of a deed, is subject to the general rules of exposition of all parts of the deed: and in a covenant the last words, that are general, shall be expounded by the first words, which are special and particular. *Vent.* 218. Also a latter covenant cannot be pleaded in bar to a former.

When a covenant is to *two* persons *jointly*, one of them may not bring action of covenant, or plead alone, but both must join. 1 *Nels.* 558. If a man is bound to perform all the covenants in an indenture, and they are all in the *affirmative*, he may plead performance generally. *Co. Lit.* 303. Covenants in the *negative* must be pleaded specially. *Ibid.* 330. When *some* covenants are in the *negative*, and some in the *affirmative*, the defendant is to plead *specially* to the *negative* covenants, that he had not done the thing, and *performance* generally as to the affirmative: (*sed qu.* and *vide post*:) and where the *negative* covenants are *against law*, and the *affirmative agreeable to law*, *performance* generally may be pleaded. *Moor*, 856. If any of the covenants are in the *disjunctive*, so that it is in the election of the covenantor to perform the one or the other, the performance ought to be *specially pleaded*, that it may appear *what part* hath been performed. *Cro. Eliz.* 23. 1 *Nels.* 573. And commonly where an act is to be done, according to a covenant, he who pleads performance ought to do it specially. 1 *Leon.* 136.

In debt upon bond for performance of covenants, one whereof for peaceable enjoyment, and free from all incumbrances, and another for further assurance, &c. the defendant should plead specially, that the house was free from incumbrances at the time of the conveyance made, and not charged at any time since, and that no farther assurance had been required, or such an assurance which he had executed, &c. yet where a defendant pleaded generally, in this case it was held good. 1 *Lutw.* 603.

The plaintiff, in equity, if he has not performed his part of the agreement, must not only shew that he was in no default, in not having performed it, but must also alledge that he is still ready to perform it: whereas, at law, if the covenants be not precedent, but distinct and independent, the plaintiff need not alledge a performance of his covenants, to entitle him to

recover against the defendant for the breach of his. *Pordage* v. *Cole*, 1 *Sand.* 320. *Nichols* v. *Raynbred*, *Hob.* 88. But see *Calonel* v. *Briggs*, 1 *Salk.* 112. *Goodison* v. *Nunn*, 4 *Term Rep.* 761.

Where the covenants are mutual and distinct, the defendant cannot plead a breach by the plaintiff, in bar of the plaintiff's action for a breach by the defendant: for the damage may be unequal, and therefore each party must recover against the other, the damages he sustained. *Cole* v. *Shallett*, 3 *Lev.* 41. *Thompson* v. *Noel*, 1 *Lev.* 16. *Howlett* v. *Strictland*, *Cowp.* 56. But see *Calonel* v. *Briggs*, 1 *Salk.* 122. *Goodison* v. *Nunn*, 4 *Term Rep.* 761.

When a *breach* is assigned, it must not be general, but must be particular; as in action of covenant for not repairing of houses, the *breach* ought to be assigned particularly, what is the want of reparation. *Cro. Jac.* 369.

But on mutual *promise* for one to do an act, and in consideration thereof another to do some act, as to sell goods, &c. for so much money, a general *breach* that the defendant hath not performed his part, is well assigned. 3 *Lev.* 319.

*Breaches* assigned ought to be according to the very words of the condition or covenant; when they may be well enough, though too general. 1 *Lutw.* 326.

Where a thing is to be done by a person of his assigns, the *breach* is to be, that it was not done either by the one or the other. 5 *Mod.* 133. If a person is to tender a conveyance, &c. to another, his heirs or assigns, *breach* assigned that the defendant did not tender a conveyance to the plaintiff, without the words, "his heirs or assigns," is good; but if the tender be to be made *by* another man, his heirs, &c. and not *to* him, it is otherwise. 1 *Salk.* 139.

When a lessee for years is to leave all the timber on the land, which was growing there at the time of the lease, and he cut down any trees, though he leaves the timber on the land at the end of his lease, this is a *breach* of covenant; for in contracts the intention of the parties is chiefly to be considered. *Raym.* 464. If several *breaches* are assigned, and the defendant demurs upon the whole declaration, the plaintiff shall have judgment for all that are well assigned, for they are as several actions. *Cro. Jac.* 557.

A lessor possessed of considerable freehold and leasehold property lying together, covenanted in a lease of parcel, that if he, his heirs or assigns, should, during the term, have any advantageous offer for the disposing of a certain adjoining freehold parcel, he, the lessor, his heirs or assigns, should not dispose of the same without previously making an offer of that parcel to the lessee, his executors, administrators, or assigns, at five per cent. less than that offer. The lessor sold his entire property, including the demised land and the adjoining parcel, for an entire consideration in one entire contract, without offering the parcel to the covenanter. Held that this was no breach of the covenant. *Collinson v. Lettsom*, 6 *W. P. T.* 224.

Covenants are generally taken most strongly against the covenantor, and for the covenantee. *Plowd.* 287. But it is a rule in law, that where one thing may have several intendments, it shall be construed in the most favourable manner for the covenantor. 1 *Lut.* 490. The common use of covenants is for assuring of land; quiet enjoyment free from incumbrances; for payment of rent reserved; and concerning repairs, &c. And in deeds of covenant, sometimes a clause for performance, with a penalty, is inserted in the body of the deed: at other times and more frequently, bonds for performance, with a sufficient penalty, are given separate; which last being sued, the jury must find the penalty; but on covenant, only the damages. *Wood's Inst.* 250. *Vide* the *stat.* 8 & 9 *W.* 3. *c.* 11. And *vide ante* and *post*, and tit. *Bond.*

Covenant for non-payment of rent, was referred to the master as to the rent, and on payment thereof process to stay as to *that*, but there being another breach as to not repairing, the plaintiff might proceed for *that*. *Anon. Wils. Rep. Par.* 1. *p.* 75. In an action of covenant, it is not necessary to aver that the plaintiff performed his covenants. *Joddrell* v. *Cowell*, *Rep. temp. Hardw.* 343, 4.

By *stat.* 8 & 9 *W.* 3. *c.* 11. in actions on bonds, for performance of covenants, plaintiff may assign as many breaches as he pleases, and the jury on the trial of the action, or on a writ of inquiry, may assess damages: on defendant's paying damages, execution may be stayed, but judgment shall remain to answer any farther breach, and plaintiff may have a *scire facias* against the defendant. See title *Bond*, VI.

"Where a penalty is intended, merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed, and the penalty only as accessional, and therefore only to secure the damage really incurred." *Per Thurlow*, C. *Sloman* v. *Walter*, 1 *Bro. Rep.* 418. And upon this construction of a penalty, courts of equity will interpose, to restrain proceedings at law, to recover the penalty. But the principles of equal justice require, that courts of equity should enforce the specific performance of the act agreed to be done, or restrain from the doing of that, which was agreed should not be done. And upon this principle, wherever the primary object of the agreement be the securing of the specific subject of the covenant, the party covenanting is not entitled to elect whether he will perform his covenant, or pay the penalty. See *Hobson* v. *Trevor*, 2 *P. Wms.* 191. *Parks* v. *Wilson*, 10 *Mod.* 517. *Chilliner* v. *Chilliner*, 2 *Vez.* 528. But if the covenant be to do, or not to do, some particular act, or doing it or neglecting to do it, to pay a certain sum, by way of liquidated damages, courts of equity will not relieve against the payment of such damages. *East India Company* v. *Blake*, *Finch's Rep.* 117. *Ponsonby* v. *Adams*, 2 *Bro. P. C.* 431. *Rolfe* v. *Peterson*, 2 *Bro. P. C.* 436. (8vo. *ed.*) *Lowe* v. *Peers*, 4 *Burr.* 2228.—See also *Small* v. *Lord Fitzwilliam*, *Pre. Ch.* 102. And as courts of equity will not relieve against stipulated damages, they will not, in general, interpose to enforce the performance of the covenant, or to restrain its violation. Therefore, where the lessee covenanted not to plough certain land, or if he did to pay 20*s. per acre*, *per ann.* the court refused to restrain the lessee from ploughing. *Woodward* v. *Gyles*, 2 *Vern.* 119. But there are some circumstances which will induce the court to interfere, though stipulated damages be reserved; as where the *lessee* had covenanted not to plough *ancient* meadow, or if he did, to pay an increase of rent, the court upon his threatening to plough, appears to have granted an injunction. *Webb* v. *Clarke*, 8*th* of *May*, 1782. —See also *Dulwich College* v. *Davis*, *M.* 1787.

A covenant in a conveyance of lands in America, during the time of the rebellion in that country, that the grantor had a legal title, and that the grantee might peaceably enjoy without the let interruption, &c. of the grantor and his heirs, *or of any other person whomsoever*, is not broken by the States of America seizing the lands as forfeited, for an act done previous to the conveyance. 3 *T. R.* 564.

It is held an action of *covenant* may be laid in London, for non-payment of rent on a lease of lands in any other place. 1 *Sid.* 401. And if, in this action, a sum be miscast, either too little, or too much, it is amendable; and not like to the action of debt, which if alledged less than it is, without shewing the rest to be satisfied, it is ill. 3 *Keb.* 39. 2 *Cro.* 247. In action of covenant, the plaintiff must have recourse to the deeds or writings, and the circumstances of time, place, &c. and take notice what particular covenant in the deed it is best to insist upon, to lay a breach right, &c. The words of covenanting are, *covenant*, *grant*, *promise*, and *agree*, &c. but there needs no great exactness in words to make a covenant. See tit. *Bonds*, *Leases*, *Agreements*, *Conveyances*, &c. and *ante* 1.

What shall be a *real* and what a *personal* covenant. See *Vin. Abr. Covenant*, (G. 2.) *Bac. Abr. Covenant*, (E.) *Com. Dig. Covenant*, (A. 2.) *Gilb. Law of Covenants*, 105.—As to *collateral* Covenants, 4 *Burr.* 2446. 2 *Wils.* 27. 1 *Vez.* 56.—As to *affirmative and negative* Covenants, *Vin. Abr. Covenant*, (D. a.) 1 *Wood*, 356.—By what words an *express* Covenant may be created, *Vin. Abr. Covenant*, (C.) *Gilb. c.* 2.—As to Covenants created by implication of law, and action thereon, *Vin. Abr. Covenant*, (G.) *Com. Dig. Covenant*, (A.) *Garranty*, (A.) *Bac. Abr. Covenant*, (B.)

How a Covenant shall be expounded with regard to the context, or to synonymous or other words, see *Com. Dig. Covenant*, (D.) *Vin. Abr. Covenant*, (L. 4.)—As to covenants for quiet enjoyment, *Shep. Touchst.* 170. *Vaugh.* 118. *Dy.* 328. *a.* *Gilb.* 117. *Vin Abr. Condition*, (U. a. *pl.* 6, 7.) *Ib. Covenant*, (Z.)—For the construction of the words in a Covenant, "notwithstanding any act done by the covenantor," *Vin. Abr. Covenant*, (T.) *Cro. Jac.* 233, *Proctor* v. *Johnson*.—As to Covenants for further assurance, *Vin. Abr. Covenant*, (W.) (G. a.) 1 *Wood.* 117. *Gilb. Covenant*, 209. 226. *Cro. Jac.* 251.—Of Covenants to repair, *Vin. Abr. Covenant*, (L. 5.) *Shep. Touchst. Finch. Rep.* 86. *Lant.* v. *Norris*, 1. *Burr.* 287. 1 *Wils. p.* 1. 75.—Of Covenants to convey lands of a certain value; or that lands are of such a value, fully, *Ld. Raym.* 365. *Cro. El.* 43. 1 *Ro. Abr.* 429. *Langton* v. *North*, 2 *Ch. Rep.* 140.—Of Covenants that the grantor is seized in fee, *Vin. Abr. Covenant*, (Y.) *Paroles*, (D. pl. 4.) *Cro. Jac.* 369. 3 *Lev.* 46.—Of Covenants to be free from incumbrances, *Vin. Abr. Covenant*, (A. 2.) 1 *Wood*, 415. *Gilb. Covenant*, *c.* 31.

See fully in what cases and in what manner Covenants shall be said to be suspended, defeated, discharged, or void. *Bac. Abr. Covenant*, (G.) *Gilb.* 470. 1 *Wood*, 397. 429. *Com. Dig. Covenant.* (F.) *Chancery*, 2. (X. 3.) *Vin. Abr. Covenant*, (O.)

The word Covenant is also taken for the *Solemn League and Covenant*; which was a seditious conspiracy, invented in Scotland, voted illegal by parliament, and against which provision is made by *stat.* 14 *Car.* 2. *c.* 4.

Covenant to stand seised to Uses. Is when a man that hath a wife, children, brother, sister, or kindred, doth by covenant in writing, under hand and seal, agree that for their or any of their provision or preferment, he and his heirs will stand seised of land to their use: either in fee-simple, fee-tail, or for life. The use being created by the *stat.* 27 *H.* 8. *c.* 10. which conveyeth the estate as the uses are directed, this covenant to stand seised is become a conveyance of the land since the said statute. The considerations of these deeds, are natural affection, marriage, &c. and the law allows in such cases consideration of blood and marriage, to raise uses, as well as money, and other valuable consideration when a use is to a stranger. *Plowd.* 302. There are no considerations now to raise uses upon covenants to stand seised, but natural love and affection, which is for advancement of blood; and consideration of marriage, which is the joining of the blood and marriage together: other considerations, as money, &c. for land, though the words in the deeds are *stand seised*, yet they are bargains and sales, and without enrolment they raise no use. *Carter*, 138. *Lil. Abr.* 353.

The usual covenant to stand seized to uses need not be by deed indented and inrolled. And where a man limits his estate to the use of his wife for life, this imports a sufficient consideration in itself; also if a person covenants to stand seized to the use of his wife, son, or cousin, it will raise an use without any express words of consideration; for sufficient consideration appears. 7 *Rep.* 40.

In case of a covenant to stand seized, so much of the use as the owner doth not dispose of remains still in him. 1 *Vent.* 374. And where a use is raised by way of covenant, the covenantor continues in possession; and there the uses limited, if they are according to law, shall rise and draw the possession out of him: but if they are not, the possession shall remain in him until a lawful use ariseth. 1 *Leon.* 197. 1 *Mod.* 159. 160.

If on a covenant to stand seised to uses, no use doth arise, yet it may be good by way of covenant and give remedy to the covenantee in an action; as if the covenant be future, that, in consideration of a marriage, lands shall descend or remain to a son and the heirs of his body on the body of his wife; in this case the covenantee may have *writ of covenant* upon the covenant against the covenantor. But if a covenant be that a man and his heirs, shall from henceforth stand and be seized to such and such uses, and the uses will not arise by law: here no action of covenant lies on the covenant; for this action will never lie upon any covenant; but such as is either to do a thing hereafter, or where the thing is already done, and not where it is for a thing present. *Plowd.* 307. 398. *Finch's Law*, 49.—See titles *Conveyance*, *Use*.

COVERT BARON. A *feme covert baron*, is a married woman. See titles *Baron* and *Feme*.

COVERTURE, *Fr.*] Any thing that *covers*; as apparel, a coverlet, &c. but it is by our law particularly applied to the state and condition of a *married* woman, who is *sub potestate viri*; and therefore disabled to contract with any, to the damage of herself or husband, without his consent and privity, or his allowance and confirmation thereof. *Bract. lib.* 1. *c.* 10. *lib.* 2. 15. &c. *Bro. Abr.* When a woman is married, she is called a *Feme Covert*; and whatever is done concerning her, during the marriage, is said to be during the *coverture*: all things that are the wife's are the husband's; nor hath the wife power over herself, but the husband: and if the husband alien the wife's land, during the *coverture*, she cannot avoid it during his life; but after his death, she may recover by *cui in vita*. *Termes de Ley.*—See titles *Baron* and *Feme*; *Cui in vita.*

COVIN, *Covina.*] A deceitful compact between two or more to deceive or prejudice others; as if tenant for life or in tail, conspires with another, that he shall recover the land which he the tenant holds, in prejudice of him in reversion. *Plowd.* 546. *Covin* is commonly conversant in and about conveyances of lands by fine, feoffment, recovery, &c. And then it tends to defeat purchasers of the lands they purchase, and creditors of their just debts; and so it is used in deeds of gift of goods: it may be likewise sometimes in suits of law, and judgments had in them. But wherever *covin* is, it shall never be intended, unless it appears and be particularly found: for *covin* and fraud though proved, yet must be found by the jury, or it will not be good. *Brownl.* 188. *Bridgm.* 112.

If one make a lease to a person by *covin*, and after grant another lease to another *bonâ fide*, but without any fine or rent; in this case the second lessee may not avoid the first lease, because he is not a purchaser that comes in for money. 3 *Rep.* 83. On recovery by a good title, there may be *covin*; as where tenant for life by assent, &c. suffers a recovery by *Nil dicit*, without making any defence: and if a man hath a rightful and just cause of action, and of *covin* and consent shall raise up a tenant by wrong against whom he may recover; the *covin* doth so suffocate the right, that the recovery, although it be upon good title, shall not bind. *Bro. Covin*, 47. *Co. Lit.* 357. 1 *Shep. Abr.* 365. A. is tenant for life, remainder in tail to B. and a *præcipe* is brought against them as joint-tenants, by *covin* between the demandant and A. and an answer procured for B. as joint-tenant, and they join the mise (or issue), and after make default, whereby final judgment is given; this shall not defeat the estate of B. who may bring a writ of disceit, and shall be restored to land. *Rol. Abr.* 621.

If a man that has a right to certain lands, by *covin* causes another to oust the tenant of the land, to the intent to recover

it from him, and he recovers accordingly against him by action tried; yet he shall not be remitted to his ancient right; but is in, of the estate of him who made the ouster; and an assise lies against him. 2 *Danv. Abr.* 309. Land is aliened, pending a writ of debt, by *covin*, to avoid the extent thereof for the debt; the land so aliened shall be extended, when the *covin* appears upon the return of the *elegit* by the sheriff. *Ibid.* 311. If a man makes a deed of gift, &c. of his goods in his lifetime by *covin*, to oust his creditors of their debts, after his death the donee or vendee shall be charged for them. See the several statutes of *Frauds*. If goods are sold in market overt by *covin*, on purpose to bar him that hath right, this shall not bar him thereof. 2 *Inst.* 713. See title *Frauds*, &c.

COUNCIL. In the city of London, there are *common-council-men* chosen in every ward, at a court of wardmote held by the aldermen of the respective wards on St. Thomas's day yearly: they are so chosen out of the most sufficient men; and sworn to give true *counsel* for the common profit of the city, &c. *Lex Londinum*, 117. In the court of *common-council*, are made laws for advancement of trade; and committees yearly appointed, &c. But acts made by them are to have the assent of the Lord Mayor and Aldermen, by *stat.* 21 *Geo.* 1. *c.* 11. See this Dict. title *London*.

COUNSELLOR, *Consiliarius.*] A person retained by *a* client to plead his cause in a court of judicature. A *Barrister:* See title *Barrister.*—To what is there noticed may be added —That by *stat.* 5 *Eliz. c.* 14. counsellors shall *not* be punished for shewing a false deed in evidence. No recusant convict, or non-conformist shall practise the law as a *counsellor*, or otherwise, under penalties. See *stat.* 3 *Jac.* 1. *c.* 5. 7 *W.* 3. *c.* 24. 13 & 14 *W.* 3. *c.* 6. 1 *Geo.* 1. *c.* 13. See titles *Oaths*, *Non-conformists.*

COUNSEL, for *Prisoners.* See title *Trial* and 4 *Comm.* 355.

COUNT. The original declaration of complaint in a real action. As declaration is applied to personal, so *count* is applicable to real causes: but *count* and declaration are oftentimes confounded, and made to signify the same thing. *F. N. B.* 16. 60. In passing a recovery at the Common Pleas' bar, a serjeant at law *counts* upon the *præcipe*, &c. See titles *Counters*, *Declarations*, *Pleading*.

COUNTEE, Fr. *Comte.*] The most eminent dignity of a subject, before the conquest; and those who in ancient times were created *countees*, were men of great estate: for which reason, and because the law intends that they assist the king with their counsel for the public good and preserve the realm by their valour, they had great privileges; as they might not be arrested for debt or trespass; or be put on juries, &c. Of old the *countee* was *præfectus*, or *præpositus comitatûs*, and had the charge and custody of the *county;* but this authority the *sheriff* now hath. 9 *Rep.* 46. A *countee* or *count*, is an earl. *Law Fr. Dict.* See titles *Earl*, *Sheriff*.

COUNTENANCE. This word seems to be used for credit or estimation. *Old Nat. Br.* 111. And in the *stat.* 1 *Ed.* 3. *c.* 4. See *Contenement.*

COUNTER. *Computatorium* from the Lat. *computare.*] The name of two prisons in London, the Poultry *counter*, and Wood-street-*counter*, [now consolidated into one new-built prison] for the use of the city, to confine debtors, peace-breakers, &c. *Cowel.*

COUNTERFEITS. See title *Cheats.*

*Counterfeiting* the *King's seal*, or money, &c. is treason. See title *Treason:* and *counterfeiting Exchequer bills*, bank-bills, lottery-orders, &c. is felony. See titles *Felony*, *Forgery*, *Fraud.*

COUNTERMAND, *Contramandatum.*] Is where a thing formerly executed, is afterwards by some act or ceremony made void by the party that first did it. And it is either actual, by deed; or implied: *actual*, where a power to execute any authority, &c. is by a formal writing, for that very purpose put off for a time, or made void: and *implied*, is where a man makes his last will and testament, and thereby devises his land to A. B. if he afterwards enfeoffs another of the same land, here this feoffment is a *countermand* to the will, without any express words for the same, and the will is void as to the disposition of the land. Also if a woman seised of land in fee-simple, makes a will and deviseth the same to C. D. and his heirs, if he survive her; and after she intermarries with the said C. D. there, by taking him to husband, and coverture at the time of her death, the will is *countermanded. Termes de Ley.* But if a woman makes a lease at will, and then marries, this marriage is no *countermand* to the lease, without express matter done by the husband to determine the will.

Where land is devised, and after a lease made thereof for years only; it shall not be a *countermand* of the will, which is good notwithstanding, for the reversion after the lease for years is ended: but in case a man have a lease for years, and gives it by his will, and after surrenders it; it is a *countermand* of the devise, and the devisee shall not have his lease. *Dyer*, 47. *Goldsb.* 93. See title *Devise.* If a copyholder, like to die, do surrender his estate to the use of his wife or children, without any consideration of money, &c. and he recover before the presentment and admittance, it may be *countermanded:* it is otherwise if it be to the use of a stranger. *Kitch.* 82. If there be a feoffment with letter of attorney to make livery and seisin; and before it is made, the feoffor makes a feoffment, or bargain and sale of the land, or lease to another, it will be a *countermand* in law of the authority given by the letter of attorney. 2 *Brownl.* 291. A person may *countermand* his command, authority, licence, &c. before the thing is done; and if he dies, it is *countermanded.* There is also a *countermand* of *notice of trial*, &c. in law proceedings. See titles *Trial*, *Process.*

COUNTERPART. When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the *original*, and the rest are *counterparts:* though of late it is most frequent (and better) for all the parties to execute every part; which renders them all originals. 2 *Comm.* 296. See title *Deeds.*

COUNTERPLEA. Is when the tenant in any real action tenant by the curtesy, or dower, in his answer and plea, vouches any one to warrant his title, or prays in aid of another, who hath a larger estate; as of him in reversion, &c. Or where one that is a stranger to the action, comes and prays to be received to save his estate; then that which the demandant alledgeth against it, why he should not be admitted, is called a *counterplea:* in which sense it is used, *stat.* 25 *Ed.* 3. *cap.* 7. So that *counterplea* is in law a replication to *Aid Prier;* and is called *counterplea to the voucher.* But when the voucher is allowed, and the vouchee comes and demands what cause the tenant hath to vouch him, and the tenant shews his cause, whereupon the vouchee pleads any thing to avoid the warranty; that is termed a *counterplea of the warranty. Termes de Ley. Stat.* 3 *Ed.* 1. *cap.* 39. —There is also a *counterplea* to the plea of clergy; see title *Clergy*, Benefit of, II.

COUNTER-ROLLS. The *rolls* which *sheriffs* of counties have with the *coroners* of their proceedings, as well of appeals, as of inquests, &c. *Stat.* 3 *Ed.* 1. *c.* 10.

COUNTORS, Fr. *Contours.*] Have been taken for such *serjeants* at law, which a man retains to defend his cause, and speak for him in any court, for their fees. *Horn's Mirror*, *lib.* 2. And as in the court of C. B. none but serjeants at law may plead; they were anciently called *Serjeant counters*, 1 *Inst.* 17.

## COUNTY.

*Comitatus.*] Signifies the same with *shire*, the one coming from the French, the other from the Saxon. It contains a circuit or portion of the realm, into which the whole land is divided, for the better government of it, and the more easy administration of justice: so that there is no part of this kingdom that lies not within some county; and every county is governed by a yearly officer, the sheriff. *Fortescue, cap.* 24. Of these *counties*, the numbers have been different at different times; there are now in England forty, besides twelve in Wales, making in all fifty-two.—It seems that this division of the kingdom was made by King Alfred. See 4 *Comm.* 410. The names of these counties are as follows. In ENGLAND; *Bedford, Berks, Bucks, Cambridge, Chester, Cornwall, Cumberland, Derby, Devon, Dorset, Durham, Essex, Gloucester, Hereford, Hertford, Huntingdon, Kent, Lancaster, Leicester, Lincoln, Middlesex, Monmouth, Norfolk, Northampton, Northumberland, Nottingham, Oxford, Rutland* (the smallest), *Salop* (commonly called *Shropshire*), *Somerset, Stafford, Suffolk, Surrey, Sussex, Southampton* (*Hants* or *Hampshire*), *Warwick, Westmorland, Worcester, Wilts, York* (the largest), —In NORTH WALES; *Anglesea, Caernarvon, Denbigh, Flint, Merioneth*, and *Montgomery*—In SOUTH WALES; *Brecknock, Cardigan, Caermarthen, Glamorgan, Pembroke and Radnor.*

Three of the counties above enumerated, *viz.* Chester, Durham, and Lancaster, are called COUNTIES PALATINE. The two former are such by prescription or immemorial custom; or, at least as old as the Norman conquest; (*Seld.* tit. *Hon.* 2. 5. 8.) the latter was created by King Edward III. in favour of Henry Plantagenet, first Earl, and then Duke of Lancaster; (4 *Inst.* 204.) whose heiresses being married to John of Gaunt, the King's son, the franchise was greatly enlarged and confirmed in parliament to honour John of Gaunt himself, whom, on the death of his father-in-law, the King had also created Duke of Lancaster. *Plowd.* 215. *T. Raym.* 138.

COUNTIES PALATINE are so called *à palatio;* because the owners thereof, the Earl of Chester, the Bishop of Durham, and the Duke of Lancaster, had in those counties *jura regalia* as fully as the King hath in his palace: *regalem potestatem in omnibus*, as *Bracton* expresses it. *lib.* 3. *c.* 8. § 4. They might pardon treasons, murders, and felonies; they appointed all judges and justices of the peace; all writs and indictments ran in their names, as in other counties in the King's, and all offences were said to be done against their peace, and not, as in other places, *contra pacem domini regis.* 4 *Inst.* 204. And indeed by the ancient law, in all peculiar jurisdictions, offences were said to be done against his peace, in whose court they were tried; in a court-leet, *contra pacem domini:* in the court of a corporation, *contra pacem ballivorum;* in the sheriff's courts or towns, *contra pacem vice-comitis. Seld. in Heng. Magna, c.* 2.

The Palatine privileges, (so similar to the regal independent jurisdictions usurped by the great barons on the continent, during the weak and infant state of the first feodal kingdoms in Europe,) were in all probability originally granted to the counties of Chester and Durham, because they bordered upon inimical countries, Wales and Scotland: in order that the inhabitants, having justice administered at home, might not be obliged to go out of the country, and leave it open to the enemy's incursions: and the owners, being encouraged by so large an authority, might be the more watchful in its defence. And upon this account also there were formerly two other counties palatine, Pembrokeshire and Hexhamshire; the latter now united with Northumberland; but these were abolished by parliament, the former in 27 *H.* 8. the latter, in 14 *Eliz.* And in the time of H. 8. likewise, the powers beforementioned, of owners of counties palatine were abridged; *stat.* 27 *H.* 8. *c.* 24. the reason for their continuance in a manner ceasing, though still all writs are witnessed in their names, and all forfeitures for treason by the Common Law accrue to them. 4 *Inst.* 205.

Of these three, the county of Durham is now the only one remaining in the hands of a subject. For the earldom of Chester, as Camden testifies, was united to the crown by Hen. III. and has ever since given title to the King's eldest son. And the County Palatine, or Duchy of Lancaster, was the property of Henry Bolingbroke, the son of John of Gaunt, at the time when he wrested the crown from King Rich. II. and assumed the title of King Henry IV. But he was too prudent to suffer this to be united to the crown; lest if he lost one, he should lose the other also. For as *Plowden* (215.) and Sir *Edward Coke* (4 *Inst.* 245.) observe, "he knew he had the Duchy of Lancaster by sure and indefeasible title, but that his title to the crown was not so assured; for that after the decease of Richard II. the right of the crown was in the heir of Lionel Duke of Clarence, *second* son of Edward III. John of Gaunt, father to this Henry IV. being but the *fourth* son." And therefore he procured an act of parliament, in the first year of his reign, ordaining that the duchy of Lancaster, and all other his hereditary estates, with all their royalties, and franchises, should remain to him and his heirs for ever: and should remain, descend, be administered, and governed, in like manner as if he never had attained the regal dignity; and thus they descended to his son and grandson, Henry V. and Henry VI.; many new territories, and privileges being annexed to the duchy by the former. *Parl.* 3 *Hen.* 5. *n.* 30. 3 *Hen.* 5. *n.* 15.—Henry VI. being attainted in 1 Edw. IV. this duchy was declared in parliament to have become forfeited to the crown; (1 *Ventr.* 155.) and at the same time an act was made to incorporate the Duchy of Lancaster, to continue the county palatine; (which might otherwise have determined by the attainder. 1 *Ventr.* 157.) and to make the same parcel of the duchy: and, farther, to vest the whole in King Edward IV. and his heirs, *Kings of England*, for ever; but under a separate guiding and governance from the other inheritances of the crown. And in 1 *Hen.* 7. another act was made, to resume such part of the duchy lands as had been dismembered from it in the reign of Edward IV. and to vest the inheritance of the whole in the King and his heirs for ever; as amply and largely, and in like manner, form, and condition, separate from the crown of England and possession of the same, as the three Henries and Edward IV. or any of them, had and held the same.

The Isle of Ely is not a county palatine, though sometimes erroneously called so, but only a royal franchise, the bishop having, by grant of King Henry the First, *jura regalia* within the Isle of Ely; whereby he exercises a jurisdiction over all causes, as well criminal as civil. 2 *Inst.* 220.

The *Counties Palatine* are reckoned among the superior courts: and are privileged as to pleas, so as no inhabitant of such *counties* shall be compelled by any writ to appear or answer out of the same; except for error, and in cases of treason, &c. and the *Counties Palatine* of Chester and Durham are by prescription, where the King's writ ought not to come, but under the seal of the *Counties Palatine*; unless it be writs of proclamation. *Cromp. Juris.* 137. 1. *Dany. Abr.* 750.

But *certiorari* lies out of B. R. to justices of a *County Palatine*, &c. to remove indictments, and proceedings before them. 2 *Hawk. P. C. c.* 27. § 23.

There is also a court of Chancery in the *Counties* Palatine of Lancaster and Durham, over which there are Chancellors; that of Lancaster called Chancellor of the Duchy, &c. See title *Chancellor.*—And there is a court of Exchequer at Chester, of a mixed nature, for law and equity, of which the *Chamberlain of Chester* is judge. There is also a

Chief Justice of Chester; and other justices in the other *Counties Palatine*, to determine civil actions and pleas of the crown.

The bishop of Durham has that *County Palatine*: and if any erroneous judgment be given in the courts of the bishoprick of Durham, a writ of error shall be brought before the bishop himself; and if he give an erroneous judgment thereon, a writ of error shall be sued out returnable in B. R. 4 *Inst.* 218.

Infants in *Counties Palatine* enabled to convey by order of the respective courts belonging to those *counties*. 4 *G.* 3. *c.* 16.

The King may make a *County Palatine* by his letters patent without parliament. 4 *Inst.* 201.

As to further matter relative to the several Counties Palatine, see titles *Chester*, *Durham*, and *Lancaster*; and particularly as to *Chester*, *stats.* 43 *Eliz.* *c.* 15. (and this Dict. title *Fines*:) 22 *Geo.* 2. *c.* 46. 26 *Geo.* 2. *c.* 34. 27 *Geo.* 3. *c.* 43.

COUNTIES CORPORATE, are certain cities and towns, some with more, some with less territory annexed to them, to which out of special grace and favour, the Kings of England have granted the privilege to the counties of themselves, and not to be comprized in any other county; but to be governed by their own sheriffs and other magistrates, so that no officers of the county at large have any power to intermeddle therein.

The *stat.* 3 *Geo.* 1. *c.* 15. for the regulation of the office of sheriffs, enumerates 12 cities, and 5 towns, which are counties of themselves, and which have consequently their own sheriffs. The cities are, London, (by grant of *Hen.* 1.) [See 2 *Inst.* 230. that it is a corporation by prescription.—The office of sheriff of London, &c. is always united with that of Middlesex. See 2 *Inst.* 248.]—*Chester*, (42 *Eliz.*) *Bristol*, *Coventry*, *Canterbury*, *Exeter*, *Gloucester*, *Litchfield*, *Lincoln*, *Norwich*, *Worcester*, *York* (32 *Hen.* 8.)—The Towns are *Kingston-upon-Hull*, *Nottingham*, *Newcastle-upon-Tyne*, *Pool*, *Southampton*. 1 *Comm.* 116—119. To these *Cirencester* is added in *Impey's Sheriff*; but on what authority does not clearly appear.

COUNTY-COURT, *Curia Comitatûs*.] Is by Lambert called *Conventus*, in his explication of Saxon words, and divided into two sorts; one retaining the general name, as the *County-court* held every month, by the sheriff or his deputy: the other called the *turn*, held twice in every year, *viz.* within a month after Easter and Michaelmas; of both which see *Cromp. Jurisd. fol.* 241. All administration of justice was at first in the King's hands; but afterwards when by the increase of the people the burden grew too great for him, as the kingdom was divided into counties, hundreds, &c. so the administration of justice was distributed amongst divers courts; of which the sheriff had the *County-court* for government of the county, and lords of liberties had their *leets* and *law-days*, for the speedier and easier administering justice therein, &c.

Before the *courts* at Westminster were erected, the *County-courts* were the chief courts of the kingdom; and among the laws of King Edgar it is ordained, that there be two *County-courts* kept in the year, in which there shall be a bishop and an alderman, or earl, as judges; one to judge according to the Common Law, and the other acccording to the Ecclesiastical Law; but these united powers of a bishop and earl to try causes, were separated by William the First, called the *Conqueror*; and soon after the business of *ecclesiastical* cognisance was brought into its proper *courts*, and the Common Law business into the King's Bench. *Blount*.

That the *County-court*, in ancient times, had the cognisance of pleas of the crown, indictments of felony, &c. appears by *Glanv. lib.* 1. *cap.* 2. 3. 4. by *Bracton* and *Britton*, in divers places, and *Fleta*, *lib.* 2. *c.* 62. But the power of this court was much reduced by *Magn. Chart. c.* 17. and by 1 *Ed.* 4. *cap.* 2. by the former of which it is expressly provided, that "no sheriff shall hold pleas of the crown." It had formerly, and now hath the determination of certain debts, &c. under 40*s.* Over some of which causes the inferior courts have by the express words of the *stat.* of *Gloucester* 6 *E.* 1. *c.* 8. a jurisdiction totally exclusive of the King's superior courts.

This Court may also hold plea of many real actions, such as dower, right patent, right of ward. 4 *Inst.* 266. 3 *Inst.* 312. And of all personal actions to any amount, by virtue of a writ of *justices*, which is in nature of a commission to the sheriff to do it. 4 *Inst.* 266. Here the plaintiff takes out a summons, and if the defendant do not appear, an attachment or *distringas* is to be made out against him; but if the defendant appears, the plaintiff is to file his declaration, and after the defendant is to put in his answer or plea; and the plaintiff having joined issue, the trial proceeds, &c. whereupon if verdict is given for the plaintiff, judgment is entered, and a *fieri facias* may be awarded against the defendant's goods, which may be taken by virtue thereof, and be appraised and sold to satisfy the plaintiff. But if the defendant hath no goods, the plaintiff is without remedy in this *court*; for no *capias* lies therein, but an action may be brought at Common Law, upon the judgment entered. *Greenwood of Courts*, *p.* 22. *Finch*, 318. *F. N. B.* 152.

No sheriff is to enter in the *County-court*, any plaint in the absence of the plaintiff; nor above one plaint for one cause, under penalties. The defendant in the *County-court* is to have lawful summons; and two justices of peace are to view the estreats of sheriffs, before they issue them out of the *County-court*, &c. By *stat.* 11 *H.* 7. *c.* 15. causes are to be removed out of the *County-court*, by *recordare*, *pone*, and writ of *false judgment*, into B. R. &c. The *stats.* 9 *H.* 3. *c.* 35. 2 *E.* 6. *c.* 25. enact, that no County-court shall be adjourned for longer than one month, consisting of 28 days.

All popular elections which the freeholders are to make, as formerly of sheriffs and conservators of the peace, and still of coroners, verderors and knights of the shire, must ever be made in full County-court.

As this court hath of ancient times belonged to the Sheriff, and is incident to his office, the King cannot grant by letters patent the office of County-clerk, nor the fees: but it of right belongs to the sheriff. 4 *Co. Mitton's* case.

See *stats.* 7 & 8 *W.* 3. *c.* 25. as to the county courts in Yorkshire: and 27 *H.* 8. *c.* 26. 34 *H.* 8. *c.* 26. as to those in *Wales*. *Blackstone* (3 *Comm.* 82.) observes, on the late erection of numerous *Courts of Conscience* (see that title *post*) that it is to be wished that the proceedings in the County and Hundred-courts could be again revived and improved; an experiment that has been tried and succeeded in Middlesex. For by *stat.* 23 *Geo.* 2. *c.* 33. it is enacted—1. That a special County-court shall be held, at least once a month, in every hundred of the county of Middlesex, by the County-clerk.—2. That twelve freeholders of that hundred, qualified to serve on juries, and struck by the sheriff, shall be summoned to appear at such court by rotation; so as none shall be summoned oftener than once a year.—3. That in all causes not exceeding the value of 40*s.* the County-clerk and twelve suitors shall proceed in a summary way, examining the parties and witnesses, on oath, without the formal process anciently used; and shall make such order therein as they shall judge to be agreeable to conscience.—4. That no plaints shall be removed out of this court, by any process whatsoever, but the determination herein shall be final.—5. That if any action be brought in any of the superior courts, against a person resident in Middlesex, where the jury shall find less than 40*s.* damages, the plaintiff shall not recover, but pay, costs. (See title *Costs*.)—6. Lastly, A table of very moderate fees is prescribed and set down in the act, which are not to be exceeded.

It seems indeed, as the learned commentator remarks, that this plan wants only to be generally known, to secure its universal reception.—See title *Courts of Conscience*.

COUNTY RATES. By *stat.* 12 *Geo.* 3. *c.* 29. justices of peace at their quarter sessions, [and by *stat.* 13 *Geo.* 2. *c.* 18. Justices of liberties and franchises not subject to the County commissioners.] may make one general *rate*, to answer all former distinct rates, which shall be assessed on every parish, &c. and collected and paid by the high constables of hundreds to treasurers appointed by the justices; which money shall be deemed the publick stock, and be laid out in repairing of bridges, gaols, or houses of correction, on presentment made by the grand jury at the assizes or quarter-sessions, of their wanting reparation; but appeal lies by the church-wardens and overseers of the poor of the parishes to the justices at the next sessions, against the *rate* on any particular parish. And as to this appeal see also *stat.* 22 *Geo.* 3. *c.* 17.

The *stat.* 18 *Geo.* 3. *c.* 19. which enables the court in certain cases to make an order on the treasurer of the county, riding, or division, where the offence was committed, to pay the prosecutor and his witnesses their expences, extends to inferior districts, having jurisdiction to try felons, and raising their own rates similar to county rates. 6 *T. Rep.* 237.

Where, before the *stat.* 12 *Geo.* 3. *c.* 29. the county rates had been assessed upon the district or place of H. within C. but the two townships of H. and C. separately maintained their own poor, and were used to contribute towards the county rates in certain fixed proportions, between themselves; yet, as that statute only establishes the accustomed proportions of contribution to the county rates, as between the entire districts which were before assessed to such rates, within the limits of the respective counties, &c. and does not meddle with the proportions which had been used to be observed as between the subdivisions of those districts, this case was held to fall within § 3. of the statute, which provides that where there is no poor's rate in the *parish*, *township*, or *place*, assessed to the county rates, (by which must be understood no entire poor's rate co-extensive with the place or district assessed to the county rates,) the county rates shall be raised by the petty constables, in such manner as by law the poor's rate is to be assessed and levied, that is, by an equal rate on all the inhabitants, &c. *R.* v. *Yorkshire*, *W. R. Just. Hil.* 50 *G.* 3. 13 *East's Rep.* 117.

A charter granting jurisdiction to borough justices, over a district not within the borough, without words of exclusive jurisdiction, was held not to exclude the county justices from rating the district to a county rate. *Bates v. Winstanley*, *Mic.* 56 *Geo.* 3. *K. B. Term Rep.* 429.

By *stat.* 52 *Geo.* 3. *c.* 110. for amending 12 *Geo.* 2. *c.* 29. and remedying defects in the laws relating to the repairing of county bridges, &c. the Quarter Sessions are empowered to appoint, annually at Easter, &c. two or more justices to superintend the occasional repairs of bridges; who may order any expenditure not exceeding 20*l.* for such repairs, which shall be paid by the sessions on certificate of the justices. Justices at sessions may contract with commissioners of turnpike roads for repair of bridges, &c. for any term not exceeding seven years.

By *stat.* 43 *Geo.* 3. *c.* 59. amended by 54 *Geo.* 3. *c.* 90. 55 *Geo.* 3. *c.* 143. Justices are empowered to purchase land, houses, &c. for the widening, altering, and improving of county bridges; and also of old bridges repaired by hundreds or general divisions of counties. See further title *Bridges*.

By *stat.* 55 *Geo.* 3. *c.* 51. additional provisions are made for the more equally and effectually making and levying the county rates.—By this act, justices in general or quarter sessions are empowered to make a fair and equal county rate in any county, whenever circumstances appear to require it.—For this purpose they may require church-wardens and overseers of the several parishes to make returns to the justices of the respective divisions in petty sessions, of the annual value of all rateable property, which such justices must certify to the quarter sessions, who may make the county rate thereon. By this act the treasurers of counties are required to publish an abstract of their receipts and expenditure yearly, as audited by the justices.—And the high-constable, employed in levying the rates, may be required by the quarter sessions to give security; and if he fails, the rates shall be paid directly to the treasurer.

By *stat.* 56 *Geo.* 3. *c.* 49. extra-parochial places are made rateable, and the sessions are empowered to ascertain boundaries, &c.—*Stat.* 57 *Geo.* 3. *c.* 94. regulates the mode of appeal against rates, which are to remain in force until quashed on such appeal, &c.

Several local acts have been passed for regulating the county rates in particular counties.

COUNTING-HOUSE OF THE KING'S HOUSEHOLD, *Domus Computûs Hospitii Regis.*] Usually called the *Board of Green Cloth*; where sit the Lord Steward, and Treasurer of the King's House, the Comptroller, Master of the *Household*, Cofferer, and two Clerks of the *Green Cloth*, &c. for daily taking the accounts of all expences of the *Household*, making provisions, and ordering payment for the same; and for the good government *of the King's Household* servants, and paying the wages of those below stairs. *Stat.* 39 *Eliz. c.* 7.

COURIER, From the Fr. *Courir* to run.] An express messenger of haste.

COURRACIER, *Fr.*] A horse courser. 2 *Inst.* 719.

## COURTS.

A COURT, *Curia.*] The King's palace, or mansion; but more especially the place where justice is judicially administered. *Co. Lit.* 58. The *Superior Courts* are those at Westminster; and of *Courts*, *some are of record*, and some *not*; which are accounted *base Courts*, in respect of the rest.

A *Court* of record is that *Court* which hath power to hold plea, according to the course of the Common Law, of real, personal, and mixed actions, where the debt or damage is 40*s.* or above; as the *King's Bench*, *Common Pleas*, &c. A *Court*, not of record, is where it cannot hold plea of debt or damages amounting to 40*s.* but of pleas under that sum: or where the proceedings are not according to the course of the Common Law, nor inrolled; as the *County-court*, and the *Court-Baron*, &c. 1 *Inst.* 117. 260. 4 *Rep.* 52. 2 *Rol. Abr.* 574. See *Record*.

Every *Court* of record is the *King's Court*, in right of his crown and dignity, though his subjects have the benefit of it; and therefore no other Court hath authority to fine and imprison: so that the very erection of a new jurisdiction, with power of fine or imprisonment, makes it instantly a court of record. *Salk.* 200. 12 *Mod.* 388. *Finch. L.* 231. The free use of all *Courts* of record and not of record is to be granted to the people: the leet and tourn are the King's *Courts*, and of record. 2 *Danv.* 259. The rolls of the superior *Courts* of record are of such authority, that no proof will be admitted against them; and these records are only triable by themselves. 3 *Inst.* 71. But as the County-court, Court-baron, &c. are not *Courts* of record, the proceedings therein may be denied, and tried by a jury; and upon their judgments, a writ of error lies not; but writ of false judgment. 1 *Inst.* 117. See *post*, *Court-Baron*, *Record*.

In the *Courts* at Westminster, the plaintiff need not show at large in his declaration, that the cause of action arises within their jurisdiction, it being general: inferior *Courts* are to show it at large, because they have particular jurisdictions. 1 *Lil. Abr.* 371. Also nothing shall be intended to be within the jurisdiction of an inferior *Court*, but what is expressly so

alledged: and if part of the cause arises within the inferior jurisdiction, and part thereof without it, the inferior *Court* ought not to hold plea. 1 *Lev.* 104. 2 *Rep.* 16. See title *Abatement*, I. 1.

An inferior *Court*, not of record, cannot impose a fine, or imprison: but the courts of record at Westminster may fine, imprison, and amerce. 11 *Rep.* 43.

The King, being the supreme magistrate of the kingdom, and intrusted with the executive power of the law, all *Courts*, superior or inferior, ought to derive their authority from the crown. *Staundf.* 54. Though the King himself cannot now, as anciently, sit in judgment in any *Court* upon civil causes, nor upon indictments, because there he is one of the parties to the suit. 2 *Hawk. P. C. c.* 1. § 1. 2. The King hath committed all his power judicial to one *Court* or the other. 4 *Inst.* 71. And by *stat.* 52 *H.* 3. *c.* 1. it is enacted, that all persons shall receive justice in the King's *Courts*, and none take any distress, &c. of his own authority, without award of the King's *Courts*.

It is said the customs, precedents, and common judicial proceedings of a *Court*, are a law to that *Court*; and the determinations of *Courts*, make points to be law. 2 *Rep.* 12. 4 *Rep.* 53. *Hob.* 298. All things determinable in *Courts*, that are *Courts* by the Common Law, shall be determined by the judges of the same *Courts*; and the King's writ cannot alter the jurisdiction of a Court. 6 *Rep.* 11. The Court of R. B. regulates all the inferior Courts of law in the kingdom, so that they do not exceed their jurisdictions, nor alter their forms, &c. And as the Court of King's Bench hath a general superintendency over all inferior *Courts*, it may award an attachment against any such Court, usurping a jurisdiction not belonging to it: but it is sometimes usual first to award a writ of prohibition, and afterwards an attachment, upon its continuing to proceed. 2 *Hawk. P. C. c.* 22. § 25.

If a Court, having no jurisdiction of a cause depending therein, do nevertheless proceed, the judgment in such Court is *coram non judice*, and void; and an action lies against the judges who give the judgment, and any officer that executes the process under them: though where they have authority, and give an ill judgment, there the party who executes the process, &c. upon the judgment, shall be excused. 1 *Lil. Abr.* 370.

Judges of inferior Courts may be punished for misbehaviour either by information or attachment. *Moravia's case*, *Hardw.* 135. Any defects in the proceedings of an inferior Court cannot be amended by the return, which is not part of the record. *The King* v. *Holmes*, *Id.* 365. Where an inferior Court returns its proceedings, no diminution can be alleged. *Ibid. Sayer* v. *Curtis*, 367.

Action on the case lies against the plaintiff for suing one in an inferior Court, where the cause of action is out of its jurisdiction. 1 *Vent.* 369. And if a plaintiff on a contract for a large sum, splits it into several actions for small sums to give an inferior Court jurisdiction, a prohibition shall go. *Mod. Cas.* 90.

Striking in the Courts at Westminster, is punished by cutting off the right hand, and forfeiture of goods, &c. How *contempts* to Courts in general are punishable by fine and imprisonment, &c. see titles *Attachment*, *Misprison*. See further as to particular Courts, *post*, *Court-Baron*, *&c.* and under titles *King's Bench*, *Chancery*, *Common Pleas*, and *Exchequer*.

A by-stander fined and imprisoned for disturbing the Court. 6 *Term Rep.* 530.

COURT OF ADMIRALTY. See title *Admiralty*.

COURT-BARON, *curia baronis.*] A court which every lord of a manor hath within his own precinct; it is an inseparable incident to the manor: and must be held by prescription, for it cannot be created at this day. 1 *Inst.* 58. 4 *Inst.* 268. A Court-baron must be kept on some part of the manor: and is of two natures;

1. By *Common* Law, which is the *barons'* or *freeholders' court*, of which the freeholders being suitors are the judges; and this cannot be a Court-baron without two suitors at least. The steward of this court is rather the register than the judge.

2. By *custom*, which is called the *Customary-Court*: and concerns the customary tenants and copyholders, whereof the lord or his steward, is judge. See title *Copyhold*.

The Court-baron may be of this double nature, or one may be without the other; but as there can be no Court-baron at Common Law without freeholders; so there cannot be a customary court without copyholders or customary tenants. 4 *Rep.* 26. 6 *Rep.* 11. 12. 2 *Inst* 119. See title *Copyhold*.

The Freeholders' court, whose most important business is to determine, by writ of right, all controversies relating to lands within the manor, and which hath also jurisdiction for trying actions of debt, trespasses, &c. under 40*s.* may be held every three weeks; and is something like a *County-court*, and the proceedings much the same: though on recovery of debt, they have not power to make execution, but are to distrain the defendant's goods, and retain them till satisfaction is made.

The proceedings on a writ of right may be removed into the *County-courts* by a precept from the sheriff called a *tolt* (*quia tollit causam*). 3 *Rep. Pref.* And the proceedings in all other actions, may be removed into the superior courts by the king's writs of *pone*, or *accedas ad curiam*, according to the nature of the suit. *F. N. B.* 4. 70. *Finch L.* 444, 5.

After judgment given also, a writ of *false judgment* lies to the courts at Westminster to re-hear and re-view the cause: and not a writ of error; for this is not a court of record: and therefore in some of these writs of removal, the first direction given is to cause the plaint to be recorded; *recordari facias loquelam*. *F. N. B.* 18.

The other Court-baron, for taking and passing of estates, surrenders, admittances, &c. is held but once or twice in a year, (usually with the court leet) unless it be on purpose to grant an estate; and then it is holden as often as requisite. In this court the homage jury are to inquire that their lords do not lose their services, duties, or customs; but that the tenants make their suits of court; pay their rents and heriots, &c. and keep their lands and tenements in repair; they are to present all common and private nuisances, which may prejudice the lord's manor; and every public trespass must be punished in this court, by amercement, on presenting the same. By *Stat. Extent. Man.* 4 *E.* 1. it shall be inquired of customary tenants, what they hold, by what works, rents, heriots, services, &c. And of the lord's woods, and other profits, fishing, &c.

COURT OF CHANCERY. See *Chancery*.

COURT OF CHIVALRY, *curia militaris.*] Otherwise called the *Marshal court*; the judges of it are the *Lord High Constable of England*, and the *Earl Marshal*: this court is said to be the fountain of the *martial law*, and the Earl Marshal hath both a judicial and ministerial power; for he is not only one of the judges, but to see execution done. 4 *Inst.* 123. See title *Court Martial*.

The Court of Chivalry is the only Court Military known to, and established by the permanent laws of the land; it was formerly held before the *Lord High Constable* and *Earl Marshal of England*, jointly, but since the extinguishment of the former office, it hath usually, with respect to civil matters, been before the Earl Marshal only. See title *Constable*.—From the sentence of this court an appeal lies immediately to the King in person. 4 *Inst.* 125. This court was in great reputation in times of pure Chivalry, and afterwards, during our connexions with the Continent, by the territories which our princes held in France: but is now grown almost entirely out of use, on account of the feebleness of its jurisdiction, and want of power to enforce its judgments. 3 *Comm.* 68.

The jurisdiction of this court is declared by *stat.* 13 *R.* 2. *c.* 2. to be this: "that it hath cognizance of contracts touching deeds of arms, or of war, out of the realm; and also of things which touch war within the realm, which cannot be determined or discussed by the Common Law; together with other usages and customs to the same matters appertaining." So that wherever the Common Law can give redress, this court hath no jurisdiction: which has thrown it entirely out of use, as to matters of contract, all such being usually cognizable in the courts of Westminster-hall, if not directly, at least by fiction of law: as if a contract be made at Gibraltar, the plaintiff may suppose it made at Westminster, &c. for the locality, or place of making it, is of no consequence with regard to the validity of the contract.

The words, "other usages and customs," support the claim of this court. 1. To give relief to such of the nobility and gentry as think themselves aggrieved in matters of honour: and 2. To keep up the distinction of degrees and quality. Whence it follows, that the civil jurisdiction of this court of Chivalry is principally in two points; the redressing injuries of honour, and correcting encroachments in matters of coat-armour, precedency, and other distinctions of families.

As a court of honour, it is to give satisfaction to all such as are aggrieved in that point; a point of a nature so nice and so delicate, that its wrongs and injuries escape the notice of the Common Law, and yet are fit to be redressed somewhere; such for instance, as calling a man coward, or giving him the lie; for which, as they are productive of no immediate damage to his person or property, no action will lie in the courts of Westminster; and yet they are such injuries as will prompt every man of spirit to demand some honourable amends, which by the ancient law of the land was appointed to be given in the court of Chivalry. *Year Book*, 37 *Hen.* 6. 21. *Selden of Duels*, *c.* 10. *Hal. Hist. C. L.* 37. But modern resolutions have determined, that how much soever such a jurisdiction may be expedient, yet no action for words will at present lie therein. *Salk.* 583. 7 *Mod.* 125. 2 *Hawk. P. C. c.* 4. § 7. 8. And it hath always been most clearly holden, (*Hal. Hist. C. L.* 37.) that as this court cannot meddle with any thing determinable by the Common Law, it therefore can give no pecuniary satisfaction or damages, inasmuch as the quantity and determination thereof is ever of Common Law cognizance. And therefore this court of Chivalry can at most only order reparation in point of honour; to compel the defendant *mendacium sibi ipsi imponere*, to take the lie he has given upon himself, or to make such other submission as the laws of honour may require. 1 *Ro. Ab.* 128. Neither can this court, as to the point of reparation in honour, hold a plea of any such word, or thing wherein the party is relievable by the courts of Common Law. As if a man give another a blow, or calls him thief or murderer; for in both these cases the Common Law has pointed out his proper remedy by action.

As to the other point of its jurisdiction, the redressing of encroachments and usurpations in matters of heraldry and coat-armour; it is the business of this court, according to *Sir Matthew Hale*, to adjust the right of armorial ensigns, bearings, crests, supporters, pennons, &c. and also rights of place or precedence, where the King's patent or act of parliament (which cannot be over-ruled by this court) have not already determined it.

The proceedings in this court are by petition, in a summary way; and the trial not by a jury of twelve men, but by witnesses, or by combat. *Co. Lit.* 261. See title *Battel*. But as it cannot imprison, not being a court of record, and as by the resolutions of the superior courts, it is now confined to so narrow and restrained a jurisdiction, it has fallen into contempt and disuse. The marshalling of coat-armour, which was formerly the pride and study of all the best families in the kingdom, is now greatly disregarded; and has fallen into the hands of certain officers and attendants upon this court, called heralds, who consider it only as a matter of lucre and not of justice: whereby such falsity and confusion have crept into their records (which ought to be the standing evidence of families, descents, and coat-armour) that though formerly some credit has been paid to their testimony, now even their common seal will not be received as evidence in any court of justice in the kingdom. 2 *Roll. Abr.* 686. 2 *Jon.* 224. But their original visitation-books, compiled when progresses were solemnly and regularly made into every part of the kingdom, to inquire into the state of families, and to register such marriages and descents as were verified to them upon oath, are allowed to be good evidence of pedigrees. And it is much to be wished, that this practice of visitation at certain periods were revived; for the failure of inquisitions *post mortem*, by the abolition of military tenures, combined with the negligence of heralds in omitting their usual progresses, has rendered the proof of a modern descent, for the recovery of an estate or succession to a title of honour, more difficult than than that of an ancient. This will be indeed remedied for the future, with respect to claims of peerage, by a standing order (11th May, 1767) of the House of Lords; directing the heralds to take exact accounts, and preserve regular entries of all peers and peeresses of England, and their respective descendants; and that an exact pedigree of each peer and his family shall, on the day of his first admission, be delivered to the house by Garter, the principal King-at-arms. But the general inconvenience, affecting mere private successions, still continues without a remedy. 3 *Comm.* 103—6.

COURT-CHRISTIAN, *Curia Christianitatis.*] The ecclesiastical judicature, opposed to the civil court, or lay tribunal: and as in secular courts, human laws are maintained, so in the *Court Christian*, the laws of *Christ* should be the rule. And therefore the judges are divines: as archbishops, bishops, archdeacons, &c. 2 *Inst.* 488. See *post*, title *Courts Ecclesiastical*.

COURTS OF CONSCIENCE, *Curiæ Conscientiæ.*] Courts for the recovery of small debts by summary process before commissioners appointed for that purpose. In the 9th year of King Hen. 8. the *Court of Conscience*, or *Court of Requests*, in London was erected: there was then made an act of common council, that the Lord Mayor and Aldermen should assign monthly two Aldermen and four discreet Commoners, to be Commissioners to sit in this court twice a week, to hear and determine all matters brought before them between party and party, between citizens and freemen of London, in all cases where the debt or damage was under 40*s.* And this act of Common Council was confirmed by *stat.* 1 *Jac.* 1. *c.* 14. which empowered the Commissioners of this court to make such orders between the parties touching such debts, as they should find stand to equity and good conscience. The *stat.* 3 *Jac.* 1. *c.* 15. fully establishes this court; the course and practice whereof is by summons, to which if the party appear, the commissioners proceed summarily; examining the witnesses of both parties, or the parties themselves on oath, and as they see cause give judgment. And if the party summoned appear not, the commissioners may commit him to the Compter prison till he does; also the commissioners have power to commit a person refusing to obey their orders, &c.

By *stat.* 14 *Geo.* 2. *c.* 10. the proceedings of the Court of Conscience are regulated; and in case any person affront or insult any of the commissioners, on their certifying it to the Lord Mayor, he shall punish the offender by fine, not exceeding 20*s.* or may imprison him ten days. See 25 *Geo.* 3. *c.* 45. 26 *Geo.* 3. *c.* 38. *Debtors.*

By 39, 40 *Geo.* 3. *c.* civ. (a local act) the acts 3 *Jac.* 1. *c.* 15. and 14 *Geo.* 2. *c.* 10. are explained and amended, and the jurisdiction of the London Court of Conscience extended to 5*l.* See 7 *East*, 47. 50. 14 *E. R.* 301.

A market-gardener renting a stand in Fleet-market at an annual rent, which he occupies three times a week on market days till ten in the morning only, does not *keep* a stand within the meaning of the London Court of Requests act, so as to be privileged to be sued there for a debt under *5l.* 8 *E. R.* 336.

Courts of Conscience have been established in many parts of the kingdom by acts passed for that purpose. It has of late been the practice to extend the jurisdiction to *5l.* and to direct that a larger number of commissioners shall be requisite when the demand exceeds 40*s.* than when it is within that value. See further title *County Courts, Debtors,* &c.

By *stat.* 19 *Geo.* 3. *c.* 70. so much of all acts for recovery of small debts as authorises the arrest of a defendant for less than 10*l.* is repealed, § 3.—And by § 4. of the same act it is provided that in all cases when final judgment shall be obtained in any inferior court, and affidavit made thereof in any court of record at Westminster, and of execution being issued against the person or effects of the defendant; and that the same cannot be found within the jurisdiction of the inferior court; the record of such judgment may be removed into the superior court, and writs of execution issued to the sheriff of any county, &c. By 33 *Geo.* 3. *c.* 68. these provisions are extended to judgments in the courts of Great Sessions, and county courts in Wales, and to the courts of the counties Palatine of Chester, Lancaster, and Durham.

By 25 *Geo.* 3. *c.* 45. as to the Courts of Conscience in London, Middlesex, and Southwark, and by 26 *Geo.* 3. *c.* 38. which extends to all Courts of Conscience in the kingdom, the time of imprisonment of debtors in execution is regulated, so that it shall not last more than twenty days for debts not exceeding 20*s.* nor more than forty days for debts not exceeding 40*s.* Like limitations are made by subsequent local acts for the respective jurisdictions.

If a defendant lodge within the jurisdiction of the Southwark Court of Conscience, *acts* 22 *Geo.* 2. *c.* 47. 46 *Geo.* 3. *c.* 78. though he carry on his business, and the goods were delivered out of the jurisdiction, and the plaintiff had no knowledge of his lodging within it, till after the process was sued out, yet he is within the statutes. 15 *E. R.* 647.

Court, County. See title *County Court.*

Court of Delegates. See *post,* title *Courts Ecclesiastical,* 6.

Courts Ecclesiastical, *curiæ ecclesiasticæ, Spiritual Courts.*] Are those *Courts* which are held by the King's authority as supreme governor of the church, for matters which chiefly concern religion. 4 *Inst.* 321. And the *laws and constitutions* whereby the church of England is governed, are, 1. Divers immemorial *customs.* 2. Our own *provincial constitutions;* and the *canons* made in convocations, especially those in the year 1603. 3. Statutes or *Acts of Parliament* concerning the affairs of religion, or causes of *ecclesiastical* cognizance: particularly the *rubricks* in our Common Prayer Book, founded upon the statutes of uniformity. 4. The *articles of religion,* drawn up in the year 1562, *Articuli Cleri.* 9 *E.* 2. and established by 33 *Eliz. cap.* 12. And it is said, by the general *Canon Law,* where all others fail.

As to *suits* in spiritual or *Ecclesiastical Courts,* they are for the reformation of manners, or for punishing of heresy, defamation, laying violent hands on a clerk, and the like; and some of their suits are to recover something demanded, as tithes, a legacy, contract of marriage, &c. And in causes of this nature, the courts may give costs, but not damages: things that properly belong to these jurisdictions are matrimonial and testamentary; and such defamatory words, for which no action lies at law; as for calling one adulterer, fornicator, usurer, or the like. 11 *Rep.* 54. *Dyer,* 240.

The *proceedings* in the *Ecclesiastical Courts* are according to the *Civil* and *Canon Law,* by *citation, libel, answer* upon *oath,* proof by *witnesses,* and *presumptions,* &c. and after *sentence,* for contempt, by *excommunication:* and if the sentence is disliked, by *appeal.*

The *jurisdiction* of these *courts* is *voluntary,* or *contentious;* the voluntary is merely concerned in doing what no one opposes, as granting dispensations, licences, faculties, &c.

The punishments inflicted by these courts are censures, punishments *pro salute animæ,* by way of penance, &c. They are not courts of record. See further title *Prohibition.*

Much oppression having been exercised through the channel of these courts, on persons charged with trifling offences within their spiritual jurisdiction, the *stat.* 27 *Geo.* 3. *c.* 44. limits the time of commencing suits for defamatory words to six months—and for incontinence and beating in the church-yard to eight months.—See titles *Limitations, Fornication.*

By *stat.* 53 *Geo.* 3. *c.* 127. for the better regulation of Ecclesiastical Courts in England, and the more easy recovery of church rates and tithes (and a similar act, 54 *Geo.* 3. *c.* 68. for Ireland), it is enacted, that Excommunication and all proceedings thereupon, in all cases (except on definitive sentences or decrees pronounced as spiritual censures for offences of ecclesiastical cognizance,) shall be discontinued; and instead thereof a writ *de contumace capiendo* (in the form required by the act,) shall issue to compel the party to obedience, and be executed in like manner as the writ *de excom. cap.* See title *Excommunication,* &c. By this act Justices of Peace are empowered to determine complaints respecting tithes, not exceeding 10*l.*; and in case of Quakers, not exceeding 50*l.* All suits for tithes must be brought within six years after they are due. Provisions are made for the recovery of church and chapel rates, before justices of the peace; and proctors are prohibited from practising in the several ecclesiastical courts, unless duly admitted and enrolled.

In briefly recounting the various species of Ecclesiastical Courts, or as they are often stiled, Courts Christian (*curiæ christianitatis*), we may begin with the lowest, and so ascend gradually to the supreme court of appeal.

1. *The Archdeacon's Court* is the most inferior court in the whole ecclesiastical polity. It is held in the Archdeacon's absence before a judge appointed by himself, and called his official: and its jurisdiction is sometimes in concurrence with, sometimes in exclusion of, the Bishop's Court of the diocese. From hence however, by *stat.* 24 *Hen.* 8. *c.* 12. an appeal lies to that of the bishop.

2. *The Consistory Court* of every diocesan bishop is held in their several cathedrals, for the trial of all ecclesiastical causes arising within their respective dioceses. The Bishop's Chancellor, or his Commissary, is the judge; and from his sentence an appeal lies, by virtue of the same statute, to the Archbishop of each province respectively.

3. As to *The Court of Arches,* see title *Arches Court.*

4. *The Court of Peculiars* is a branch of and annexed to the Court of *Arches.* It has a jurisdiction over all those parishes dispersed through the province of Canterbury in the midst of other dioceses, which are exempt from the Ordinary's jurisdiction, and subject to the Metropolitan only. All ecclesiastical causes, arising within these peculiar or exempt jurisdictions, are, originally, cognizable by this court; from which an appeal lay formerly to the Pope, but now by the *stat.* 25 *Hen.* 8. *c.* 19. to the King in Chancery.

5. *The Prerogative Court* is established for the trial of all testamentary causes, where the deceased hath left *bona notabilia* within two different dioceses. In which case the probate of wills belongs to the archbishop of the province, by way of special prerogative. And all causes relating to the wills, administrations, or legacies of such persons, are originally, cognizable herein, before a judge, appointed by the Archbishop, called the judge of the Prerogative Court, from whom an ap-

peals lies by *stat.* 25 *Hen.* 8. *c.* 19. to the King in Chancery, instead of the Pope as formerly.

6. *The Great Court of Appeal* in all ecclesiastical causes, viz. the *Court of Delegates*, (*judices delegati,*) appointed by the King's commission under his Great Seal, and issuing out of Chancery, to represent his royal person, and hear all appeals made to him by virtue of the before mentioned *stat.* of *Hen.* 8. This commission is frequently filled with Lords, spiritual and temporal, and always with judges of the courts at Westminster, and Doctors of the Civil Law. Appeals to Rome were always looked upon by the English nation, even in the time of popery, with an evil eye; as being contrary to the liberty of the subject, the honour of the crown, and the independence of the whole realm; and were first introduced in very turbulent times in the sixteenth year of King Stephen (A. D. 1151); at the same period (Sir Henry Spelman observes) that the civil and canon laws were first imported into England. *Cod. Vet. Leg.* 315. But in a few years after, to obviate this growing practice, the constitutions made at Clarendon, 11 Hen. II. on account of the disturbances raised by Archbishop Beckett, and other zealots of the Holy See, expressly declare (*chap.* 8.) that appeals in causes ecclesiastical ought to lie, from the Archdeacon to the Diocesan; from the Diocesan to the Archbishop of the Province; and from the Archbishop to the King; and are not to proceed any farther without special licence from the crown. But the unhappy advantage that was given in the reigns of King John and his son Henry III. to the encroaching power of the Pope, who was ever vigilant to improve all opportunities of extending his jurisdiction hither, at length riveted the custom of appealing to Rome in causes ecclesiastical so strongly, that it never could be thoroughly broken off; till the grand rupture happened in the reign of Henry VIII. when all the jurisdiction usurped by the Pope in matters ecclesiastical was restored to the crown, to which it originally belonged; so that the *stat.* 25 *Hen.* 8. was but declaratory of the antient law of the realm. 4 *Inst.* 324. But in case the King himself be party in any of these suits, the appeal does not then lie to him in Chancery, which would be absurd; but by the *stat.* 24 *Hen.* 8. *c.* 12. to all the Bishops of the realm assembled in the upper house of Convocation.

7. *A Commission of Review* is a commission sometimes granted, in extraordinary cases, to revise the sentence of the Court of Delegates; when it is apprehended they have been led into a material error. This commission the King may grant, although the *stats.* 24 and 25 *Hen.* 8. before cited, declare the sentence of the delegates definitive; because the Pope as supreme head by the canon law used to grant such commission of review; and such authority as the Pope heretofore exerted, is now annexed to the Crown by *stats.* 26 *H.* 8. *c.* 1. and 1 *Eliz. c.* 1. But it is not matter of right, which the subject may demand *ex debito justitiæ*; but merely a matter of favour, and which therefore is often denied.

These are now the principal courts of ecclesiastical jurisdiction; none of which are allowed to be Courts of Record; no more than was another much more formidable jurisdiction, but now deservedly annihilated, *viz.* the Court of the King's *High Commission* in causes ecclesiastical. This court was erected and united to the regal power by virtue of the *stat.* 1 *Eliz. c.* 1. instead of a larger jurisdiction which had before been exercised under the Pope's authority. It was intended to vindicate the dignity and peace of the church, by reforming, ordering, and correcting the ecclesiastical state and persons, and all manner of errors, heresies, schisms, abuses, offences, contempts and enormities. Under the shelter of which very general words, means were found in that, and the two succeeding reigns, to vest in the High Commissioners extraordinary, and almost despotic powers of fining and imprisoning; which they exerted much beyond the degree of the offence itself, and frequently over offences by no means of spiritual cognizance. For these reasons, this Court was justly abolished by *stat.* 16 *Car.* 1. *c.* 2.—See 3 *Comm.* 64, *& seq.*

The wrongs or injuries cognizable by the Ecclesiastical Court not for the reformation of the offender himself, relate chiefly to the non-payment of *Tithes* or other *ecclesiastical* dues, and fees; for *spoliations* and dilapidations of church benefices, churches, &c.; *matrimonial causes* and *testamentary causes:* As to all these see the proper titles in this Dict.

See further on the general principles, as to the jurisdiction of Ecclesiastical Courts, this Dict. titles *Canon Law*, *Civil Law*.

COURTS OF EQUITY. See title *Equity*.

COURTS OF GUERRA. Costs holden upon Neighbour Feuds and Riots. *Scotch Dict.*

COURT OF HUSTINGS, *curia hustingi.*] The highest Court of Record, holden at Guildhall, for the City of London, before the Lord Mayor and Aldermen, the Sheriffs and Recorder. 4 *Inst.* 247. This *court* determines all pleas *real*, *personal*, and *mixt*: and here all lands, tenements, and hereditaments, rents and services within the City of London and *suburbs* of the same, are pleadable in two *Hustings*; one called *Hustings of plea of lands*, and the other *Hustings of common pleas*. In this court the burgesses to serve for the city in Parliament, must be elected by the Livery of the respective companies.

In the *Hustings of plea of lands*, are brought *writs of right patent* directed to the sheriffs of London, on which writs the tenant shall have three summonses at the three *hustings* next following, and after the three summonses, there shall be three essoins at three other *hustings* next ensuing, and at the next *hustings* after the third essoin, if the tenant makes default, process shall be had against him by *grand cape*, or *petit cape*, &c. If the tenant appears, the demandant is to declare in the nature of what writ he will; without making protestation to sue in nature of any writ; then the tenant shall have the view, &c. and if the parties plead to judgment, the judgment shall be given by the Recorder: but no damages, by the custom of the city, are recoverable in any such writ of right patent.

In the *Hustings of common pleas* are pleadable, writs *ex gravi querela*, writs of *gavelet*, of *dower*, *waste*, &c. also writs of *exigent* are taken out in the *hustings*; and at the fifth *hustings* the outlawries are awarded, and judgment pronounced by the Recorder.

If an erroneous judgment is given in the *hustings*, the party grieved may sue a *commission* out of Chancery, directed to certain persons to examine the record, and thereupon do right. 1 *Rol. Abr.* 745.—See further the *Privilegia Londini*; and this Dict. title *London*.

COURT OF THE DUTCHY OF LANCASTER. See title *Chancellor of the Dutchy*, &c.

## COURT-LEET; *or* LEET.

The word *Leet* is not to be found either in the *Saxon* law, or in *Glanvil*, *Bracton*, *Britton*, *Fleta*, or the *Mirror*, our most antient law writers: nor in any statute prior to *stat.* 27 *E.* 3. *c.* 28. though it is allowed to occur in the Conqueror's charter for the foundation of Battle Abbey, and not unfrequently in Domesday Book, *Spelm* v. *Leta*. It seems to be derived from the Saxon, *leod*, *plebs*; and to mean the *populi curia*, or folk-mote, as the sheriff's tourn or *Leet* of the county (at least) appears to have been once actually called (See *Spelman in verb. Folkmote*;) in contradiction, perhaps to the Halmote or Court Baron, which consisted of the free tenants only, who being few in number, might conveniently assemble in the Lord's Hall; whereas the *Leet*, which required the attendance of all the resiants, within the particular hundred, lordship, or manor, and concerned the administration of public justice, was usually held in the open air. *Spelman in verb. Mallobergium.* According to *Hawkins* (*Leach's*

*Hawk. P. C.* ii. 112. which see;) a Court-Leet is a Court of Record, having the same jurisdiction within some particular precinct, which the sheriff's tourn hath in the county. See also 4 *Comm.* 273.

The view of Frank-pledge, *visus franciplegii*, means the examination or survey of the free-pledges, of which every man, not particularly privileged, was antiently obliged to have nine, who were bound that he should be always forthcoming to answer any complaint. The better to understand this, we are to be informed, that the kingdom being divided by King Alfred into counties or shires, and each county into hundreds, and each hundred into tithings, each tithing containing ten families or households, the heads of these families were reciprocally bound and responsible for each other; so that, in fact, of every ten householders throughout the kingdom, each man had nine pledges or sureties for his good behaviour.

*Leet* is also a word used for a *Law Day*, in several of our antient statutes. See *Dyer*, 30 *b.*

That the *Leet* is the most antient court in the land (for *criminal* matters, the Court Baron being of no less antiquity in *civil*,) has been pronounced by the highest legal authority. 7 *H.* 6. 12 *b.* 1 *Roll. Rep.* 73. For though we do not meet with the *word* among the *Saxons*, there can be no doubt of the existence of the *thing*.

*Lord Mansfield* states that this court was co-eval with the establishment of the Saxons here, and its activity "marked very visibly both amongst the Saxons and the Danes." 3 *Burr.* 1860. In those times whoever possessed a vill or territory, with the liberties of *soc*, *sac*, &c. (a long string of barbarous words) was the lord of a manor, had a court-leet, court-baron, and in a word, every privilege which it seems to have been possible for the monarch to bestow, or for the subject to acquire. See *Spelman in verb. Manerium.*

The Leet is a Court of Record for the cognisance of criminal matters, or pleas of the crown, and necessarily belongs to the King; though a Subject, usually the Lord of a Manor, may be and is entitled to the profits, consisting of the essoign pence, fines and amerciaments.

It is held before the steward, (or was, in antient times, before the bailiff,) of the Lord; *Mirror passim: Finch's Law*, 248.—See also *Kennet's P. A.* 319. This officer who should be a barrister of learning and ability, is a judge of record, may take recognizance of the peace, may fine, imprison, and in a word, as to things to which his power extends, hath equal power with the justices of the Bench.—By *stat.* 1 *Jac.* 1. *c.* 5. he is prohibited from taking to the value of 12*d.* for his own use, by colour of any grant of the profits of this court.

This court is held sometimes once, sometimes thrice, but most commonly twice in the year; that is, within a month after Easter, and a month after Michaelmas; and cannot, unless by adjournment, be held at any time not warranted by antient usage. See *Mag. Char. c.* 35. and *Spelman* in v. *Leta*; according to whom this court should be held regularly only *once* a year; though sometimes by custom twice, when it is called *residuum letæ*. As to the place in which it is held, that it has been said, may be any where within the precinct. 8 *H.* 7. 3. *Owen* 35. But more strictly speaking, ought to be certain and accustomed. *Rastall's Entries* 151.

All persons above the age of twelve years, and under sixty, except peers, clerks, women and aliens, resiant within the district, whether masters or servants, owe personal suit and attendance to this court, and ought to be here sworn to their fealty and allegiance. 2 *Inst.* 120. 121. And here also, by immemorial usage and of common right, that most ancient constitutional officer the constable, (4 *Inst.* 265.) and sometimes by prescription the mayor of a borough, (See *stat.* 2 *Geo.* 1. *c.* 4.) are elected and sworn.

The general jurisdiction of the court extends to all crimes, offences and misdemeanors at the Common Law, as well as to several others which have been subjected to it by act of parliament. These are inquired after by a body of the suitors, elected, sworn and charged for that purpose, who must not be less than twelve, nor more than twenty-three; and who, in some manors, continue in office for a whole year; while in others, they are sworn and discharged in the course of a day. Whatever they find they present to the steward; who, if the offence be treason or felony, must return the presentment, (in these cases called an indictment) to the King's justices of oyer and terminer, and gaol delivery. See *stats. W.* 2. *c.* 13. 1 *E.* 3. *st.* 2. *c.* 17. In all other cases he has power, upon the complaint of any party grieved, or upon suspicion of the concealment of any offence, to cause an immediate inquiry into the truth of the matter, by another jury. See *stats.* 33 *H.* 8. *c.* 6. and 1 *Eliz. c.* 17. § 10. But the presentment, being received, and the day passed, shall be held true, and unless it concern the party's freehold, shall not be shaken or questioned by any tribunal whatever. *Hale. P. C.* 153, 5. *Leach's Hawk. P. C.* ii. 111. 112. and 11 *Co.* 44. Upon every presentment of the jury retained by the court, an amerciament follows of course, which is afterwards assessed in open court agreeable to *Magna Charta*, *c.* 14. by the *pares curiæ*, that is, the peers or equals of the delinquent; and *affeered* or reduced to a precise sum, by two or more suitors sworn to be impartial. 8 *Rep.* 39. See also *stat. W.* 1. *c.* 6. And that these statutes were in this particular but in affirmation of the Common Law, see 8 *Rep.* 39 *b.* 2 *Inst.* 27. The amerciaments thus ascertained are then estreated (or extracted) from the roll or book in which the proceedings are recorded and levied by the bailiff, by distress and sale of the party's goods, (8 *Rep.* 41.) by virtue of a warrant from the steward to that effect, or may be recovered by other means as by a process of *levari facias*, (*Hardr.* 471.) or action of debt. (*Bull. N. P.* 167.) No crime in those remote ages appears to have been punished by death; unless it were that of open theft, where the offender was taken with the *mainour*, that is, with the thing stolen upon him: and of this crime, and this only, the cognizance did not belong to the Leet. All other offences of what nature or degree soever, subjected the party to mulct or pecuniary fine, which was in many cases determined and fixed. This pecuniary composition, with respect to certain capital offences, was abrogated, and the punishment of death substituted in its place, by King Henry I. *Spelman* in v. *Felo. Wilkins. LL. Sax.* 304.

It is not improbable that the distinction of *indictments* for felonies, and *presentments* of inferior offences, owes its origin to the above measure.

It has been said, that by the clause *nullus vicecomes*, &c. in the *Great Charter*, *c.* 17. the jurisdiction of the Leet was abridged, and its power to hear and determine taken away; but this has been said and repeated without due attention either to the nature and constitution of the court, or to the law of the time. No offence, it is well known, is at this day, or, for aught that appears, ever was, heard and determined in the Leet, (nor before the period referred to, by any other criminal-court in the kingdom), otherwise than upon the presentment of twelve men, or what we now call in most courts the Grand Jury. This presentment, as has been already observed, found and established the fact; and judgment, whether of *miscricordia*, mutilation or death, followed as an incident or matter of course; precisely indeed, as the punishment does at this day on the verdict for the king of the petty jury. In fact, therefore, the jurisdiction of the Leet was not in the least abridged or affected by that charter; nor is it at all probable that the barons would either seek or suffer the diminution of their own privileges, of which on the contrary, there is an express saving.

That this court has no power to inquire of the death of a man, or of a rape, is a more ancient, but not less erroneous

opinion. The contrary is most directly and expressly held in the *Statutum Wallie*, in *Britton*, *Fleta*, the *Mirror*, and the *stat.* of 18 *E.* 2. (which statute, though it enumerates certain particulars of the jurisdiction of the Leet, does not confine it to them only); all much older and better authorities than the book of Assises, 41 *E.* 3. *p.* 40. in which that opinion first appears.

The steward of a Leet may award to prison, persons either indicted or accused of felony before him, or guilty of any contempt in the face of the court. *Stat. Westm.* 2. *c.* 13. which however seems to apply, *only* to the sheriff's tourn. See *Cromp. J. P.* 92 *b.* *Ow.* 113.

See further for the whole of this subject, *Com. Dig.* title *Leet.*

The Court-Leet has now been for a long time in a declining way; its business as well as that of the tourn having for the most part gradually devolved on the quarter sessions. See 4 *Comm.* 274. 3 *Burr.* 1864.

This last circumstance is very pathetically lamented by the ingenious author from whom the above account of the Court-Leet is principally drawn; and to whom the editor of the present work is indebted for much of the information under title *Constable.* How far the restoration of the power of the Court-Leet in the present extensive deluge of crimes is advisable or not, is a question not to be determined in the compass here allotted to the subject. Every one desirous of being accurately informed of the foundations of the English law, will wish that the learned author from whom the above extracts have been made, would spend his time rather in examining the ancient, than condemning the present state of our jurisprudence. For the former task he is eminently qualified; the latter is only worthy of inferior talents.

COURT OF MARSHALSEA, *curia palatii.*] A court of record to hear and determine causes between the servants of the King's household and others within the verge; and hath jurisdiction of all matters within the verge of the court, and of pleas of trespass, where either party is of the King's family, and of all other actions personal, wherein both parties are the king's servants; and this is the original jurisdiction of the *court of marshalsea.* 1 *Bulst.* 211. But the *curia palatii*, erected by King Charles I. by letters-patent, in the 6th year of his reign, and made a court of record, hath power to try all personal actions, as debt, trespass, slander, trover, actions on the case, &c. between party and party, the liberty whereof extends twelve miles about Whitehall; *stat.* 13 *R.* 2. *st.* 1. *c.* 3. Which jurisdiction was confirmed by King Charles II.

The judges of this court are the steward of the King's household, and knight marshal for the time being, and the steward of the court, or his deputy, being always a lawyer. *Crompt. Jurisd.* 102. *Kitch.* 199, &c. 2 *Inst.* 548.

This court is kept once a week in Southwark: and the proceedings here are either by *capias* or attachment; which is to be served on the defendant by one of the knight-marshal's men, who takes bond with sureties for his appearance at the next court; upon which appearance, he must give bail, to answer the determination of the court; and the next court after the bail is taken, the plaintiff is to declare, and set forth the cause of his action, and afterwards proceed to issue and trial by a jury, according to the custom of the Common Law courts. If a cause is of importance, it is usually removed into B. R. or C. B. by an *habeas corpus cum causa:* otherwise causes are here brought to trial in four or five court-days. The inferior business of this court hath of late years been much reduced, by the new courts of conscience in and near London; for which the four counsel belonging to the court were indemnified by salaries during their lives, by *stat.* 23 *Geo.* 2. *c.* 27.

By *stat.* 28 *E.* 1. *c.* 3. the steward and marshal of the King's house are not to hold plea of freehold, &c. Error in the *Marshalsea court* may be removed into the King's Bench. *Stats.* 5 *E.* 3. *st.* 2. *c.* 3. And the fees of the *Marshalsea* are limited by the *stat.* 2 *H.* 4. *c.* 23.—This *Marshalsea* is that of the household; not the *King's Marshalsea*, which belongs to the King's Bench. See *Court of the Lord Steward*, &c.



## COURT-MARTIAL.

*Curia Martialis.*] A Court for trying and punishing the military offences of Officers and Soldiers.

I. *Of the Origin,*
II. *Of the Jurisdiction,* } *Of Courts-Martial.*

1. Though the authority of the *Court of Chivalry*, with regard to matters of war, &c. both within and without the realm, not determinable by the general municipal law, was first established by the Common Law, and afterwards confirmed by several statutes; and was never objected to, even in criminal cases, till the post of High Constable was laid aside: (See titles *Constable*, *Court of Chivalry*;) yet we find its jurisdiction encroached upon much earlier; for by the *stat.* 18 *H.* 6. *c.* 19. desertion from the King's army was made felony, and by *stats.* 7 *H.* 7. *c.* 1. 3 *H.* 8. *c.* 5. benefit of clergy is taken away, and authority given to justices of peace to inquire thereof, and hear and determine the same. And *Rapin* quotes an instance of H. VII. having ordered those accused of holding intelligence with the enemy after the battle of Stoke, 1487, to be tried by commissioners of his own appointing, or by Courts-Martial, according to the Martial Law; instead of the usual court of justice, which was not so favourable to his design of punishing them only by fines. This however seems to have been an avaricious, arbitrary and illegal exertion of power, not authorised by any law of the land.

From the time that the Court of Chivalry was abridged of its criminal jurisdiction, by the suppression of the post of High Constable until the Revolution, there appears to have been no regular established court for the administration of Martial Law. For although the Court of Chivalry still continued to be held from time to time by the Earl Marshal, its authority extended only to civil matters; and notwithstanding desertion was by *stat.* 2 & 3 *E.* 6. *c.* 2. made felony without benefit of clergy, and other military crimes were made punishable by fines, imprisonment, &c. and by *stat.* 39 *Eliz. c.* 17. idle and wandering soldiers and mariners were to be reputed as felons, and to suffer as in cases of felony, without benefit of clergy (with some exceptions); and the justices of assize and gaol-delivery were to hear and determine these offences; yet there are instances during this period, of other courts being erected for the administration of Martial Law; and not only military persons made subject to it, but many others punished thereby; some entirely at the discretion of the crown, and others by appointment of the parliament only; and it was a circumstance of nearly a similar nature that occasioned the enacting the *Petition of Right*, 3 *C.* 1. *c.* 1. one clause of which was, that the commissions for proceeding by Martial Law, should be dissolved and annulled: and no such commission be issued for the future.

Though undoubtedly these commissions were illegal, yet the necessity of subordination in the army, and the impossibility of establishing that subordination without Martial law, soon became apparent; and the two Houses of Parliament, in the beginning of their rebellion against Charles I. passed an *Ordinance*, appointing commissioners to execute Martial law; which was certainly at least as unconstitutional an act, without the assent of the King, as any proceedings of his had been without consent of Parliament. So true is it that necessity has no law; and that usurped power is always obliged

to have recourse to means to support itself, at least as severe as, and generally more violent than, those which it previously condemns in a lawful government; which it may for a while succeed in overturning on false and specious pretexts of undefined liberty.

This ordinance was passed in 1644, and afterwards renewed by the parliament; and in process of time adopted as a model for the Mutiny Act passed after the Revolution: as many other regulations made during the powerful but tyrannical usurpation of sovereign authority, were afterwards modified to the true genius of the British constitution.

At the restoration, one of the first steps taken by the parliament was, to disband the army, and to regulate the militia, among whom a military subordination was established, whenever they were drawn out; and fines and imprisonments imposed on them for particular delinquencies. See title *Militia*.

Charles II. however kept up 5,000 regular troops, for guards and garrisons, by his own authority; which his successor, Jac. II. by degrees increased to 30,000, and more numerous armies were occasionally raised by authority of parliament; yet we find no statute for the government of these troops; nor was it till after the Revolution that a regular act of the whole legislature passed for punishing mutiny and desertion, &c. by Courts-Martial.

This act was first occasioned by a mutiny, in a body of English and Scots troops, upon their being ordered to Holland to replace some of the Dutch troops which Will. III. had brought over with him, and intended to keep in England. The King immediately communicated this event to the Parliament, who readily agreed to give their sanction to punish the offenders, and on the 3d April, 1689. (1 *W. & M.*) passed an act for punishing Mutiny and Desertion, &c. which was to continue in force only until November following.—It was however renewed again in January, and has with the interruption of about three years only, from April 1698, to February 1701, been *annually* renewed ever since, with some occasional alterations and amendments, as well in times of peace as war.

II. Martial Law, as formerly exercised at the discretion of the Crown, and too often made subservient to bad purposes, justly became obnoxious to the people; and not only the propriety but the legality of its being executed in times of peace, has been absolutely denied. It is laid down (3 *Inst.* 52.) that if a lieutenant or other, that hath commission of Martial-law, doth in time of peace, hang, or otherwise execute any man by colour of Martial-law, this is murder, for it is against *Magna Charta*.—And *Hale* (*Hist. C. L. c.* 2.) declares Martial-law to be in reality, no law, but something indulged rather than allowed as law: that the necessity of order and discipline is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the King's courts are open for all persons to receive justice according to the laws of the land: and if a Court-martial put a man to death in time of peace, the officers are guilty of murder. See *H. P. C.* 46.

As future exigencies however have arisen in the State, it has become necessary to alter and amend the old laws and enact new ones; and since the custom of keeping up standing armies in time of peace as well as war has become prevalent and general throughout Europe, (a custom as it seems originally introduced by Charles VII. of France about 1445,) the Legislature of Great Britain has also judged it necessary, for the safety of the kingdom, the defence of its possessions, and the balance of power in Europe, (as the preamble to the Mutiny-act expresses it,) to maintain, even in times of peace, a standing body of troops; and to authorise the exercise of Martial-law among them.

A proper distinction then should be made between Martial law, as formerly executed, entirely at the discretion of the Crown, and unbounded in its authority, either as to persons or crimes, and that at present established, which is limited with regard to both.—Courts-martial are at present held by the same authority as the other courts of judicature, of this kingdom: and the King (or his Generals, when empowered to appoint them) has the same prerogative of moderating the rigor of the law, and pardoning and remitting punishments, as in other cases; but he can no more add to, nor alter the sentence of a Court-martial, than he can a judgment given in the courts of law. Martial-law is now exercised within its proper limits, by the advice and concurrence of parliament, and the condemnation of criminals by Courts-martial acting under such authority, cannot be regarded as illegal or contrary to *Magna Charta*; since during the existence of the statute by which these Courts are held, Martial-law, so modified and restrained, is as much part of the law of the land as *Magna Charta* itself.

Courts-Martial being established in this country by positive law, their proceedings and the relation in which they stand to the Courts of Westminster-hall, must depend upon the same rules with all other courts which are instituted and have particular powers given them, and whose acts therefore may become the subject of application to the courts at Westminster for a prohibition. 2 *H. Blackst.* 100.

*Courts-Martial* cannot sit before eight in the morning, or after three in the afternoon, except in cases which require an immediate example: the attendance therefore of the members does not exceed seven hours at a time: and they are at liberty to adjourn from day to day till they have fully considered the matter before them: and when they come to give their opinions, they are not under the necessity of being unanimous, but the prisoner is condemned or acquitted by a majority of voices; except in cases of death, where nine out of thirteen, or two-thirds, if there be more than thirteen, present, must concur in opinion. *Articles of War*, § 15 *a.* 8. 9.

As to general Courts-Martial, the Mutiny act and Articles of War are very explicit, both as to the number they shall consist of, and the rank of the officers who are to compose them.

*The Crimes* that are cognisable by a Court-martial, as repugnant to military discipline, are pointed out by the Mutiny-act, and Articles of War; which every military man is, or ought to be fully acquainted with, and therefore not necessary to be recited here: and as to other crimes which officers and soldiers being guilty of, are to be tried for in the ordinary course of law, it is needless to enter into a detail of them.

By the last article in the code of Military laws, Courts-martial are authorised to take cognizance of all crimes *not capital*, and all *disorders* and *neglects* which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, which are not enumerated in the preceding articles, and punish them at their discretion. *Art. of War*, § 20 *a.* 3. Upon the authority of this article it has been too much the custom in the army to try soldiers by Courts-martial, for thefts and other crimes cognisable before the courts of law. But it seems questionable, whether an exception might not in many such cases be made to their jurisdiction: for the Mutiny acts, and Articles of War, § 11 *a.* 1. expressly direct, that any officer, non-commissioned officer, or soldier who shall be accused of any capital crime, violence or offence, against the person, estate or property of any of his Majesty's subjects, punishable by the laws of the land, shall be delivered over to the civil magistrate by the commanding officer, under penalty of his being cashiered in case of refusal.—There was formerly an article, of late omitted, particularly authorising Courts-Martial to take cognisance of all soldiers accused of stealing from their comrades.

*The Persons* liable to Martial-law, are likewise enumerated in the Act and the Articles. The latter mention only officers, soldiers, and persons serving with the armies in the field. But *Hale* and others are of opinion, that *aliens* who in a hostile manner invade the kingdom, whether their king were at war or peace with ours, and whether they come by themselves, or in company with English traitors, cannot be punished as traitors, but must be dealt with by Martial-law. *H. P. C. cc.* 10. 15. 3 *Inst.* 11.—This however means *Martial-law*, in the strict sense of the word, in which it cannot be applied to proceedings under the Mutiny-act; and which kind of Martial-law is unknown in this kingdom.—The *receiving pay* as a soldier, subjects the receiver to military jurisdiction. The court of C. P. therefore refused to grant a prohibition to prevent the execution of the sentence of a Court-martial, passed against one who *received pay* as a soldier; but who assumed the military character merely for the purpose of recruiting, in the usual course of that service—and this, though the proceedings of the Court-martial appeared, in some instances, to be erroneous. *Grant* v. *Sir Charles Gould*, 2 *H. Black. Rep.* 69.

The Articles of War, in a few cases, point out the express *Sentence* to be passed on criminals, without any alternative: in some an optional power is given, of punishing with death or otherwise, and in others, offenders are punished at the discretion of the Court, omitting the word *death*; evidently meaning thereby to exclude the power of punishing capitally in such cases.

In cases where an optional power is vested in the Court to punish with death or otherwise, the question to follow that of *guilty* or *not guilty*, (upon the Court or the majority of it declaring for the former,) is, whether or not the prisoner shall suffer death? If *two thirds* of the Court do not concur in the affirmative, the votes of the affirmants are considered as void. A lesser number than two-thirds being, as was before said, incompetent to give judgment of death, another question becomes necessary to be proposed to every member, what punishment, *other than death*, shall the prisoner undergo? And each member gives his voice, *de novo*, on this question, wherein a majority is competent to determine.

The crimes cognisable by a Court-martial may be divided into *felonies* and *misdemeanors*; or more properly, into capital offences, and offences only criminal and not capital; and if on the evidence a prisoner does not appear guilty of a crime of so capital a nature, as is set forth in the charge, the Court may find him guilty in a less degree; but they cannot declare him guilty of a mutiny, or any other *distinct* crime or offence, unless it be likewise in the charge given against him, before the trial commences.

By *stat.* 37 *G.* 3. *c.* 140. His Majesty is enabled more easily and effectually to grant conditional pardons to persons under sentence by *Naval* Courts-martial, and to regulate imprisonment under such sentences, *viz.*

By *sect.* 1. if his Majesty shall extend his mercy to persons liable to death by the sentence of a Naval Court-martial, a Justice of the King's Bench, &c. may on notification from the Secretary of State, allow the benefit of such conditional pardon as if it had passed under the Great Seal, and shall make orders accordingly.

The Justice or Baron allowing the pardon, shall direct the notification, and order it to be filed with the clerk of the crown of the Court of King's Bench, § 2.—Like provisions are made with respect to the army by the annual Mutiny Acts.

*The Judgments* of Courts-martial, besides being open to the disapprobation of the King, or his commanders in chief, are liable like those of other courts, to be taken cognisance of, and the members punished for illegal proceedings; for the Court of King's Bench being the supreme court of Common Law, hath not only power to reverse erroneous judgments given by inferior courts, but also to punish all inferior magistrates, and all officers of justice, for all wilful and corrupt abuses of authority against the known, obvious, and common principles of justice. 2 *Hawk. P. C. c.* 3. § 10.; *c.* 27. § 22.—The Mutiny act directs, that every action against any member or minister of a Court-martial, in respect to any sentence, shall be brought in some of the courts of record at Westminster, &c. § 63. And there have been many instances of actions of this nature in Westminster-hall. See Navy, III. *ad finem*.—An officer on a Court-martial however is not liable to be punished for mere mistakes which an honest well-meaning man may innocently fall into. And if the plaintiff or prosecutor becomes nonsuited, or the defendant has a verdict, he shall recover treble costs. *Mutiny-act*, § 62.—There is also another tribunal before which the proceedings of Courts-martial are liable to *censure* at least, namely, the House of Commons.

Courts-martial are bound by the same rules of evidence as the courts of Common Law; and their general proceedings, where not otherwise regulated by act of parliament, must follow the same course. 1 *East*, 313.

It is enacted by the *Mutiny-acts*, that no officer or soldier being acquitted or convicted of any offence, shall be liable to be tried a second time by the same or any other Court-martial, for the same offence, unless in the case of an *appeal* from a regimental to a general Court-martial; and by the Articles of War "If upon a second hearing the appeal shall appear to be vexatious and groundless, the person so appealing shall be punished at the discretion of the General Court-martial."—No sentence given by any Court-martial, and signed by the President, is liable to be revised more than once. And this may be rather deemed an appeal to the same court than a new trial; since in this case the same persons only are to re-consider what they have already done, without any new judges being added to them, or any new witnesses produced.

A distinction is made in the *Oath* taken by the *President and Members* of a Court-martial, and that of the *Judge Advocate*. The former are sworn, not only to conceal the vote or opinion of each particular member, but also the sentence of the Court, until it shall be approved by his Majesty, or by some person duly authorised by him; the latter is only sworn not to divulge the opinion of any particular member of the Court-martial.

For further particulars, see *Adye's Treatise on Courts-Martial*; from whence most of the above is abridged. See also this Dict. title *Soldiers*.—And as to Naval Courts-martial, title *Navy*. See also *M'Arthur* on Courts-martial, 2 Edit. 1805.

Court of Piepowder, *curia pedis pulverisati*.] Is a court held in fairs, to do justice to buyers and sellers, and for redress of disorders committed in them: so called, because they are most usual in Summer, when the suitors to the court have *dusty feet*; and from the expedition in hearing causes proper thereunto, before the dust goes off the feet of the plaintiffs and defendants. 4 *Inst.* 272. Or from *Pied poudreaux* a pedlar. *Barrington, Anc. stats.* 337. It is a *court of record* incident to every *Fair*; and to be held only *during the time* that the *Fair* is kept. *Doct. & Stud. c.* 5. As to the jurisdiction, the cause of action for contract, slander, &c. must arise *in* the fair or market, and not before at any former fair, nor after the fair: it is to be for some *matter concerning* the same *fair* or *market*; and must be done, complained of, heard and determined the same day. Also the plaintiff must make oath that the contract, &c. was *within the jurisdiction* and *time* of the *fair*. See *stats.* 17 *Ed.* 4. *c.* 2. 1 *Rich.* 3. *c.* 6.

The Court of *Piepowder* may hold a plea of a sum above 40*s.* and it is said, judgment may be given at another fair, at a court held there, and a writ of error lies upon a judgment given. *Dyer*, 133. *F. N. B.* 18. This court may not

meddle with any thing done in a *market*, without a *special custom* for it; but for what is done in a *fair* only: and not there for *slanderous words*, unless they concern *matters of contract in* the *fair*; as where it is for slandering the *wares* of another, and not of his *person* in the same fair. *Moor. Ca.* 854. The steward before whom the court is held, is the judge: and the trial is by merchants and traders in the fair; and the judgment against the defendant shall be *quod amercietur*. If the steward proceeds contrary to the *stat.* 17 *Ed.* 4. *c.* 2. he shall forfeit 5*l.*

From this court a writ of error lies in the nature of an appeal to the courts at Westminster. *Cro. Eliz.* 773.—And those courts are now bound by the *stat.* 19 *Geo.* 3. *c.* 70. to issue writs of execution in aid of its process, after judgment, where the person or effects of the defendant are not within the limits of this inferior jurisdiction. See Piepowder.

Court of Requests, *curia requisitionum.*] Was a court of equity, of the same nature with the court of Chancery, but inferior to it; principally instituted for the relief of such petitioners, as in conscionable cases addressed themselves by supplication to his majesty. Of this court, the Lord Privy Seal was Chief Judge, assisted by the Master of Requests; and it had beginning about the 9 *H.* 7. according to Sir *Julius Cæsar's* Tractate on this subject: though Mr. *Gwyn* in his *Preface to his Readings*, saith it began from a commission first granted by King Hen. VIII.

This court having assumed great power to itself, so that it became burdensome, *Mich. anno.* 40 & 41 *Eliz.* in the court of Common Pleas, it was adjudged, upon solemn argument, that the Court of Requests, was no court of judicature, &c. And by the *stat.* 16 & 17 *Car.* 1. *c.* 10. it was taken away. 4 *Inst.* 97.—See title *Courts of Conscience.*

Court of Session in Scotland. See the acts 48 *Geo.* 3. *c.* 151. 50 *Geo.* 3. *c.* 112. and 53 *Geo.* 3. *c.* 64. for the better regulation of this court.

Court of the Lord Steward of the King's House. The Lord Steward, or, in his absence, the treasurer and controller of the King's house, and Steward of the Marshalsea, may inquire of, hear and determine in this court, all treasons, murders, manslaughter, bloodsheds, and other malicious strikings, whereby blood shall be shed, *in any of the palaces* and *houses of the King*; [or within the limits *i. e.* 200 feet from the gate, 4 *Comm.* 276.] or in *any other house* where his *royal person shall abide.* And this jurisdiction was given by the *stat.* 33 *H.* 8. *c.* 12. 3 *Inst.* 140. But this court was at first intended only to inquire of and punish felonies, &c. by the King's servants against any lord or other person of the King's council. 3 *H.* 7. *c.* 14. See 4 *Comm.* 276.

Court of Star-Chamber, *Curia cameræ stellatæ.*] A Court of very ancient original, but new-modelled by *stats.* 3 *H.* 7. *c.* 1. 21 *H.* 8. *c.* 20. which ordained, That the Lord Chancellor, Treasurer, and Lord Privy Seal, calling a Bishop, and Lord of the King's Council, and the two Chief Justices to their assistance, on bill or information might make process against maintainors, rioters, persons unlawfully assembling, and for other misdemeanors, which, through the power and countenance of such as did commit them, lifted up their heads above their faults, and punish them as if the offenders had been convicted at law, by a jury, &c. But this act was repealed, and the Court dissolved by *stat.* 16 & 17 *Car.* 1. *c.* 10. having been used to oppress the subject, particularly in matters of state.

Courts of Universities.] These are the Chancellor's courts in the two Universities of England, Oxford and Cambridge. Which two learned bodies enjoy the sole jurisdiction, in exclusion of the King's courts, over all civil actions and suits whatsoever, when a scholar or privileged person is one of the parties; excepting in such cases where the right of freehold is concerned. And these, by the University charter, they are at liberty to try and determine, either according to the Common Law of the land, or according to their own local customs, at their discretion; which has generally led them to carry on their process in a course much conformed to the civil law.

These privileges were granted, that the students might not be distracted from their studies by legal process from distant courts, and other forensic avocations.—The oldest charter, it appears, containing this grant to the University of Oxford, was 28 *Hen.* 3. *A. D.* 1244. And the same privileges were confirmed and enlarged by almost every succeeding prince, down to King Henry VIII. in the fourteenth year of whose reign the largest and most extensive charter of all was granted. One similar to which was afterwards granted to Cambridge in the third year of Queen Elizabeth. But yet, notwithstanding these charters, the privileges granted therein, of proceeding in a course different from the law of the land, were of so high a nature, that they were held to be invalid; for though the King might erect new courts, yet he could not alter the course of law by his letters patent. Therefore in the reign of Queen Elizabeth a statute was passed, (13 *Eliz. c.* 29.) confirming *all* the charters of the two Universities, and those of 14 *Hen.* 8. and 3 *Eliz.* by name. Which statute established this high privilege without any doubt or opposition. *Jenk. Cent.* 2. *pl.* 88. *Cent.* 3. *pl.* 33. *Hard.* 504. *Godb.* 201. *Hist. C. L.* 33.

This privilege, so far as it relates to civil causes, is exercised at Oxford in the Chancellor's court; the judge of which is the Vice-chancellor, his deputy, or assessor. From his sentence an appeal lies to delegates appointed by the congregation; from thence to other delegates of the house of Convocation; and if they all three concur in the same sentence it is final: at least by the statutes of the University. (*Tit.* 21. § 18.) according to the rule of the civil law (*Cod.* 7. 70, 1.) But, if there be any discordance or variation in any of the three sentences, an appeal lies in the last resort to judges delegates, appointed by the Crown under the great seal in Chancery. 3 *Comm.* 83—5. See 2 *Ld. Raym.* 1346. that it is the same at Cambridge.

Courts of Wales. *Curiæ principalitatis Walliæ.*] The Courts of the Principality of Wales.

These Courts upon the thorough reduction of that principality, and the settling of its polity in the reign of Hen. VIII. were erected all over the country; principally by the *stat.* 34 & 35 *Hen.* 8. *c.* 26. though much had before been done, and the way prepared by the *stat.* of *Wales*, 12 *Ed.* 1. and other statutes. By the *stat.* of *Hen.* 8. before mentioned, courts-baron, hundred, and county-courts are there established as in England. A Session is also to be held twice in every year in each county, by judges, (See *stat.* 18 *Eliz. c.* 8.) appointed by the King. This Session is to be called the *Great Session* of the several counties in Wales; in which all pleas of real and personal actions shall be held, with the same form of process, and in as simple a manner as in the courts of King's Bench and Common Pleas, at Westminster. See, *for farther regulation of the practice of these courts, stat.* 5 *Eliz. c.* 25. 8 *Eliz. c.* 20. 8 *Geo.* 1. *c.* 25. § 6. 6 *Geo.* 2. *c.* 14. 13 *Geo.* 3. *c.* 51. Writs of error shall lie from judgments in this great sessions, it being a court of record, to the Court of King's Bench at Westminster. But the ordinary original writs of process from the King's courts at Westminster, do not run into the principality of Wales, (2 *Rol. Rep.* 141.) though process of execution does; (2 *Bulst.* 1. 6. 2 *Sand.* 193. *Raym.* 206.) as do also prerogative writs, as writs of *certiorari*, *quo minus*, *mandamus*, and the like. *Cro. Jac.* 484.—And even in causes between subject and subject, to prevent injustice through family factions or prejudices, it is held lawful (in causes of freehold at least, and it is usual in all others) to bring an action in the English courts, and try

the same in the next English county, adjoining to that part of Wales where the cause arises, and wherein the venue is laid. *Vaugh.* 413. *Hardr.* 66. But, on the other hand, to prevent trifling and frivolous suits, it is enacted by *stat.* 13 *Geo.* 3. *c.* 51. that in *personal* actions, *tried* in any English county, where the cause of action arose, and the defendant resides in Wales, if the plaintiff shall not recover a verdict for 10*l.* he shall be nonsuited, and pay the defendant's costs; unless it be certified by the judge that the freehold or title came principally in question, or that the cause was proper to be tried in such English county. And if any *transitory* action, the cause whereof arose, and the defendant is resident in Wales, shall be *brought* in any English county, and the plaintiff shall not recover a verdict for 10*l.* the plaintiff shall be nonsuited, and shall pay the defendant's costs, deducting thereout the sum recovered by the verdict.

By *stat.* 11 & 12 *W.* 3. *c.* 9. it is enacted that sheriffs in Wales shall not hold to bail, on process issuing out of *any of his Majesty's courts of record at Westminster*, unless the debt be sworn to be under 20*l.*

For further satisfaction, as to the several Courts within this kingdom, see 4 *Inst.* and the *Commentaries.*

COURT-LANDS. Domains, or lands kept in the lord's hands, to serve his family. See *Curtiles Terræ.*

COUSENAGE. See *Cosenage.*

COUTHUTLAUGH. From the Sax. *couth*, i. e. *sciens*, and *utlaugh*, exlex.] A person that willingly and knowingly receives a man *outlawed*, and cherishes or conceals him: for which offence he was, in antient times, to undergo the same punishment as the outlaw himself. *Bract. lib.* 3. *tract.* 2. *cap.* 13.

COWS. See title *Cattle.*

CRAIERA, *crayer.*] A small vessel of lading; a hoy or smack. *Pat.* 2. *R.* 2. *Stat.* 14 *Car.* 2. *c.* 27.

CRAIL. An engine made use of to catch fish. *Blount.*

CRANAGE, *cranagium.*] A liberty to use a *crane* for drawing up of goods and wares of burden from ships and vessels, at any creek of the sea or wharf, unto the land, and to make profit of it: it also signifies the money paid and taken for the same. *Stat.* 22 *Car.* 2. *c.* 11.

CRANNOCK. An ancient measure of corn. *Cartular. Abbot. Glaston. MS. f.* 39.

CRASPISCIS. A whale, *viz. piscis crassus. Blount.*

CRASRINO SANCTI VINCENTII. The *morrow* after the feast of St. Vincent the Martyr, *i. e.* the 22d of January: which is the date of the *statutes* made at Merton, *anno* 20 *H.* 3. There are likewise certain *return days* of writs in terms, in the courts at Westminster, beginning with *Crastino*, &c. as *Crastino Animarum*, the Morrow of All Souls, in Michaelmas term; *Crastino Purificationis beatæ Mariæ Virginis*, in Hilary term; *Crastino Ascensionis Domini*, in Easter term; and *Crastino Sanctæ Trinitatis*, in Trinity term. See *stats.* 51 *H.* 3. *st.* 2 & 3. 32 *H.* 8. *c.* 21. 16 *Car.* 1. *c.* 6. 24 *Geo.* 2. *c.* 48. —See *Days in Bank; Terms.*

CRATES, *Lat.*] An iron grate before a prison, used in the time of the Romans. 1 *Vent.* 304.

CRAVARE. To impeach. *Si homicida divadietur ibi vel* cravetur, &c. *Leg. H.* 1. *c.* 30.

CRAVEN, OR CRAVENT. The word of obloquy, where in the ancient trial by battel, the victory should be proclaimed, and the vanquished acknowledged his fault, or pronounce the word *cravent*, in the name of *Recreontisse*, &c. and thereupon judgment was given forthwith: after which the *recreant* should become infamous, &c. 2 *Inst.* 248. If the *appellant* joined battel, and cried *cravent*, he should lose *liberam legem*; but if the *appellee* cried out *cravent*, he was to be hanged. 3 *Inst.* 221.—See titles *Battel, Champion.*

CREAMER. A foreign merchant; but generally taken for one who hath a stall in a fair or market. *Blount.*

CREANSOR, CREDITOR, from Fr. *croyance.*] Signifies him that trusts another with any debt, money, or wares; in which sense it is used in *Old Nat. Br.* 66. and 38 *Ed.* 3. *c.* 5.

CREAST, OR CREST, *crista.*] Any imagery, or carved work, to adorn the head of wainscot, &c. like our modern *cornice*; but this word is now applied by the *heralds* to their devices set over a coat of arms. *Kennet's Paroch. Antiq.* 573.

CREATION-MONEY. This is mentioned in *stat.* 12 *Car.* 2. *c.* 1. See 1 *Inst.* 836. in *n.* and this Dict. title *Peers.*

CRECHE. A drinking-cup. *Mon. Ang. tom.* 1. *p.* 104.

CREDITORS. Shall recover their debts of executors or administrators, who in their own wrong, waste, or convert to their use the estate of the deceased, &c. *Stat.* 30 *Car.* 2. *c.* 7. Wills and devises of lands, &c. as to *creditors* on bonds or other specialties, are declared void: and the *creditors* may have actions of debt against the *heir* at law and *devisees.* 3 & 4 *W.* & *M. c.* 14.—See titles *Assets, Copyhold, Executor, Fraud.*

CREEK, *creca, crecca.*] A part of a haven where any thing is landed from the sea: so that it is observed, if when you are out of the main sea within the haven, you look round and see how many landing places there are, so many creeks may be said to belong to that haven. *Cromp. Jurisd. fol.* 110. It is also said to be a shore or bank whereon the water beats, running in a small channel from any part of the sea; from the Lat. *crepido.* This word is used in the *stats.* 4 *Hen.* 4. *c.* 20. 5 *Eliz. c.* 5.—See title *Navigation Acts.*

CREMENTUM COMITATUS. The sheriffs of counties anciently answered in their accounts for the *improvement* of the King's rents, above the antient *vicoatiel* rents, under the title of *Crementum* [*incrementum*, increase] *Comitatus*, or *Firma de* Cremento Comitatus. *Hale's Sher. Acco. p.* 36.

CREPARE OCULUM. To put out an eye; which had a pecuniary punishmeat of 60*s.* annexed to it. *Leg. H.* 1.

CREST. See *Creast.*

CRETINUS, *cretena.*] A sudden stream or torrent. *Histor. Croyland contin.* 485. 617.

CRIMINAL CONVERSATION. See titles *Adultery, Baron and Feme.*

CROCARDS. A sort of old base money. See *Pollards*, and title *Coin.*

CROCIA. The *crosier* or pastoral staff, so called *a similitudine crucis* which bishops, &c. had the privilege to carry as the common ensign of their religious office; being invested in their prelacies by the delivery of such a *crosier*: hence the word *crocia* did sometimes denote the collation to, or disposal of bishopricks and abbies, by the donation of such pastoral staff: so as when the King granted large jurisdictions, *exceptis crociis*, it is meant, except the collation or investure of episcopal fees, &c. *Addit. to Cowel.*—See title *Bishops.*

CROCIARIUS. The *crociary* or cross-bearer, who like our verger, went before the prelate and bore his cross. *Liber de Miraculis Tho. Episc. Heref. M.S. anno* 1290.

CROFT, Sax. *croftum* and *crofta.*] A little close adjoining to a dwelling house and enclosed for pasture or arable, or any particular use. In some old deeds *crufta* occurs as the Latin word for a *croft*; but *cum toftis et croftis*, is most frequent. *Ingulph.* It seems to be derived from the old English word *creaft*, signifying *handy-craft*; because such grounds are usually manured and extraordinarily drest by the hand and skill of the owner.—See *Toft.*

CROISES, and *croisado.* See *Croyses.*

CROK, *crocus.*] Turning up the hair into curls or *croks*; whence comes *crook, crooked*, &c. *Pat.* 21 *H.* 3.

CROP, *croppa.*] The seeds or products of the harvest in corn, &c. *Fleta, lib.* 2. *cap.* 82.

CROSS-BOWS. None shall shoot in, or keep any cross-bow, hand-gun, hagbut, &c. but those who have lands of the

value of 100*l.* *per annum*; and no person shall travel with a cross-bow bent, or gun charged, except in time of war; or shoot within a quarter of a mile of any city, or market town, unless for defence of himself or his house, or at a dead mark, under the penalty of 10*l.* *stat.* 33 *H.* 8. *cap.* 6.—See titles *Arms*, *Game*.

CROSSES. By *stat.* 13 *Eliz. c.* 2. Crosses, beads, &c. used by the Roman Catholicks, are prohibited to be brought into this kingdom, on pain of a *præmunire*, &c. In ancient times, it was usual for men to erect crosses on their houses, by which they would claim the privileges of the Templars to defend themselves against their rightful lords; but this was condemned by the *stat. Westm.* 2. *c.* 37. It was likewise customary in those days to set up crosses in places where the *corps* of any of the nobility rested, as it was carried to be buried, that *à transeuntibus pro ejus anima deprecetur.* *Walsing. anno* 1291. There were several of these crosses erected over England, especially in honour of the resting places of our Kings, on their bodies being transmitted to any distant place for burial: but these superstitions sunk in this kingdom with the Romish religion.

CROY. Marsh land. *Ingulphus, p.* 853.—*Blount.*

CROYSES, *cruce signati.*] Is used by *Britton* for *pilgrims*, because they wear the sign of the cross upon their garments. Of these and their privileges, *Bracton* hath treated *lib.* 5. *part* 2. *cap.* 2. *part* 5. *cap.* 9. Under this word are also signified the Knights of St. John of Jerusalem, created for the defence of pilgrims; and likewise all those persons who in the reigns of K. Hen. II.; Ric. I.; Hen. III.; and Ed. I. *cruce signati*, took upon them the *croisado*, dedicating and listing themselves to the wars, for the recovery of Jerusalem and the Holy Land. *Greg. Syntag. lib.* 15. *cap.* 13. 14. See a general account of the *croisades* in *Robertson's Hist. Emp. C. V. vol.* 1. *p.* 22, &c.

CROWN. See title *King*.

CROWN OFFICE. An office belonging to the court of King's Bench, of which the King's Coroner or Attorney there is commonly Master. The Attorney General, and Clerk of the Crown exhibit informations in this office, for crimes and misdemeanours; the one *ex officio*, and the other usually by order of court; and here informations may be laid for offences and misdemeanours at Common Law, as for *batteries*, *conspiracies*, *libelling*, *nuisances*, *contempt*, *seditious words*, &c. wherein the offender is liable to pay a fine to the King. *Finch.* 340. *Show.* 109.

By *stat.* 4 *& 5 W. & M. c.* 18. the Clerk of the Crown, in B. R. is not to receive or file any information for *trespass*, *battery*, &c. without express order of court: nor to issue any process, without taking a recognisance in 20*l.* penalty to prosecute with effect; and if the party appear, and the plaintiff do not procure a trial in a year, or if verdict pass for the defendant, &c. the court shall award the defendant costs; but this act doth not extend to informations in the name of the King's Coroner or Attorney, &c.

When a *battery* is committed privately, so that the person injured can make no proof thereof by witnesses at law; it is usual to bring an information in this office, or to prefer an indictment, the most legal method, where the party may be a witness for the King, it being his suit. See titles *Indictment*, *Information*, *King's Bench*, *Quo Warranto*, &c.

CRUSTUM. Was a garment of purple, mixed with many colours. *Mon. Ang. tom.* 1. *page* 210.

CRY DE PAIS. On a robbery or other felony done, *hue and cry* may be raised by the country in the absence of the constable, which is called *cry de pais.* 2 *Hale's Hist. P.C.* 100. See title *Hue and Cry*.

CRYPTA. A chapel or oratory under ground, or under a church or cathedral. *Du Cange.*

CUCKING STOOL. See title *Castigatory*.

CUDE. A *cude cloth* is a chrysom or face-cloth for a child baptized. Vide *Chrismale.*

CUI ANTE DIVORTIUM. A writ for a woman divorced from her husband to recover her lands and tenements which she had in fee-simple, or in tail, or for life, from him to whom her husband did alienate them during the marriage, when she could not gainsay it. *Reg. Orig.* 233. *F. N. B.* 240. And the heir shall have a *sur cui ante divortium*, where the wife dieth before the action brought; as well as he shall have a *sur cui in vita. F. N. B.* 193. But if an estate tail, the heir shall not have *sur cui in vita*, or *ante divortium*, but shall be put to his *formedon* in the descender. *New. Nat. Br.* 454.—See title *Entry*.

CUI IN VITA. A writ of entry, for a widow against him to whom her husband aliened her lands or tenements in his life-time; which must contain in it, that during his life she could not withstand it. *Reg. Orig.* 232. *F. N. B.* 193. If husband and wife be *jointenants* before the coverture, and the husband alieneth all the land, and dieth, she shall have a *cui in vita* for a moiety and no more; but if they are *joint purchasers during the coverture*, and he alien all the land and dieth, his wife shall have a *cui in vita* of the whole land; because that during the coverture, as to *purchase*, they are but one person in law. *F. N. B.* 187. And for this reason, if husband and wife, and a third person, *purchase jointly*, and the husband alieneth all in fee, and dieth, the wife shall have a *cui in vita* of a moiety. *Ibid.*

Where the husband and wife exchange the lands of the wife for other lands, if the wife agree unto the exchange after the husband's death, she shall not have a *cui in vita*. Also if the wife do accept of parcel of the land in dower, of which she hath a *cui in vita*, by that acceptance she shall be barred of the residue. *New Nat. Br.* 430. If the husband and wife lose by default the wife's lands, after the death of her husband, she shall have a *cui in vita* to recover those lands so lost by default. *F. N. B.* 187. By *stat.* 13 *Ed.* 1. *c.* 3. *Cui in vita* is given to the wife where the deceased husband lost her lands by default in his life-time: and she shall be admitted to defend her right during his life, if she come in before judgment. Likewise if tenant in dower, by the curtesy, or for life, do make default, &c. the heirs and they to whom the reversion belongeth shall be admitted to their answer, if they come before judgment: and if on default judgment happen to be given, such heirs, &c. shall have a writ of *entry* for recovery of the same after the death of such tenants. See *Booth* on real actions, and *F. N. B.*

CULAGIUM. The laying up of a ship in the dock to be repaired. *MS. Arth. Trevor. Arm. de Plac. Edw.* 3.

CULM. See *Coal.*

CULPRIT. A prisoner accused for trial. The word arose originally from the *reply* of the proper officer *in behalf of the King*, affirming a criminal to be *guilty*, after he hath pleaded Not Guilty, without which the issue to be tried is not joined: it is compounded of two words, *viz. Cul.* and *prit*; the one an abbreviation of *culpabilis*, and the other derived from the French word *prest*, *i. e.* ready; and it is as much as to say that he is ready to prove the offender guilty. See 4 *Comm.* 339.

CULREACH. A caution given by a lord of regality, to punish a malefactor, whom he replevied from the sheriff.—*Scotch Dict.*

CULTURA. A parcel of arable land. *Blount.*

CULVERTAGE, *Culvertagium.*] Is said by some persons to be derived from *Culum* and *vertere*, to turn tail: and in this sense, *sub nomine culvertagii*, was taken to be on pain of cowardice, or being accounted cowards. And in this sense *Spelman in voc. Niderling* derives it from *Culver*, a dove. But in the opinion of others, it rather signifies some base slavery, or the confiscation of an estate; being a *feudal* term for the

lands of the vassal forfeited and escheating to the lord: and *sub nomine culvertagii* in this signification, was under pain of confiscation. *Mat. Paris, anno* 1212.

CULWARD AND CULVERD. A coward, or cowardice. *Chart. Temp. E.* 1. See the preceeding word.

CUNA-CERVISIÆ. A tub of ale. *Domesday.* But this word is truly *Cuva.*

CUNEUS. A mint or place to coin money: *Coneum Monetum* signifies the King's stamp for coinage; and from the word *cune*, is derived coin. See *Coin.*

CUNTEY-CUNTEY. A kind of trial, as appears by *Bracton. Bract. lib.* 4. *tract.* 3. *c.* 18. where it seems to intend the ordinary jury.

CORAGULUS. One who taketh care of a thing. *Mon. Ang. Tom.* 2.

CURATE, *Curator.*] He who represents the incumbent of a church, parson or vicar, and takes *care* of divine service in his stead: in case of pluralities of livings, or where a clergyman is old and infirm, it is requisite there should be a *Curate* to perform the cure of the church. He is to be licensed and admitted by the bishop of the diocese, or by an Ordinary, having episcopal jurisdiction: and when a curate hath the approbation of the bishop, he usually appoints the salary too; and in such case, if he be not paid, the *Curate* hath a proper remedy in the ecclesiastical court, by a sequestration of the profits of the benefice: but if he hath no licence from the bishop, he is put to his remedy at Common Law, where he must prove the agreement, &c. *Right Clerg.* 127.

By *stat.* 28 *H.* 8. *c.* 11. such as serve a church during its vacancy, shall be paid such stipend as the Ordinary thinks reasonable out of the profits of the vacancy; or, if that be not sufficient, by the successor, within fourteen days after he takes possession.

By *stat.* 12 *Ann. c.* 12. where *Curates* are licensed by the bishop, they are to be appointed by him at a stipend not exceeding 50*l. per ann.* nor less than 20*l.* a year, according to the value of the livings, to be paid by the rector or vicar: and the same may be done on any complaint made.

By *stat.* 36 *Geo.* 3. *c.* 83. § 1. the bishop or ordinary may appoint a stipend to Curates of 75*l. per ann.* with the use of the parsonage house, or allowance for it where the rector or vicar does not personally reside.

Churches augmented by Queen Anne's bounty shall be deemed benefices presentive, and the officiating Curate may have a like stipend. *Id.* §§ 3. 4.

Bishop or Ordinary may apportion the stipend to officiating Curates, of perpetual curacies not augmented. *Id.* § 5.

Ordinary may license Curates employed though no nomination shall have been made to him by the incumbent, and may revoke any licence subject to appeal to the archbishop of the province. *Id.* § 6.

§§ 3 & 4 of this act, 36 *Geo.* 3. *c.* 83. were by the 47 *G.* 3. *stat.* 2. *c.* 25. suspended, (so far as related to the avoidance of benefices by the acceptance of augmented curacies). But this act of suspension was repealed by *stat.* 48 *Geo.* 3. *c.* 5.

Certain provisions were made by *stat.* 53 *Geo.* 3. *c.* 149. for the support, &c. of stipendiary Curates. These were repealed, and more effectual regulations made by 57 *Geo.* 3. *c.* 99. §§ 1, 48. &c. Under this latter act, the bishops are empowered to license Curates and to assign them salaries, in no case less than 80*l.* a year, and increasing up to 150*l.* according to the population of the parish, &c. The occupation of the parsonage house may in certain cases be assigned to the Curate, who is not to quit his curacy without three months notice to the incumbent and the bishop. These regulations are to operate on persons having become incumbents after 20th July, 1813; and in case only of the non-residence of the incumbent on his living for more than three months in the year. See further *Parson, Residence.*

One person cannot be *Curate* in two churches, unless such may satisfy the law, by reading both morning and evening prayers at each place: nor can he serve one cure on one Sunday and another cure on the next; for he must not neglect to read morning and evening prayer in his church every Lord's day; if he doth he is liable to punishment. *Comp. Incumb.* 572. But it is otherwise where a church or chapel is a member of the parish church; and where one church is not able to maintain a *curate. Can.* 48. See now *stat.* 57 *Geo.* 3. *c.* 99.

A *Curate* having no fixed estate in his curacy, not being instituted and inducted, may be removed at pleasure by the bishop or incumbent. *Noy.* But there are *perpetual curates*, as well as temporary, who are appointed where tithes are impropriate, and no vicarage endowed: these are not removeable: and the impropriators are obliged to find them, some whereof have certain portions of the tithes settled on them.—*Stat.* 29 *Car.* 2. *c.* 8. See title *Parson.*

It was provided in 1603 by *Can.* 33. that if a bishop ordains any person not provided with some ecclesiastical preferment, except a fellow or chaplain of a college, or a Master of Arts of five years standing, who lives in the University at his own expense, the bishop shall support him till he prefer him to a living. 3 *Burn. Eccl. L.* 28. The bishops before they confer orders require either proof of such a *title* as is described by the canon, or a certificate from some Rector or Vicar, promising to employ the candidate for orders *bonâ fide* as a curate, and to grant him a certain allowance till he obtains some ecclesiastical preferment, or shall be removed for some fault. In a case where the Rector of St. Anne, Westminster, gave such a title, and afterwards dismissed his curate without assigning any cause, the curate recovered in an action of *assumpsit* the same salary for the time after his dismission which he had received before. *Cowp.* 437. When the rector had vacated St. Anne's by accepting the living of Rochdale, the curate brought another action to recover his salary after the rector left St. Anne's; but the Court of K. B. held that that action could not be maintained; as these titles are only binding upon those who give them, while they continue incumbents in the church for which such curate is appointed. *Doug.* 137.

No Curate (or Minister) ought to perform the duties of any church, before he has obtained a licence from the bishop. 2 *Burn.* 58.

The Bishop cannot increase the salary of the curate, where there is a specific agreement between the incumbent and the curate. *Freem.* 70.

Every clergyman that officiates in a church, (whether incumbent or substitute) is in our liturgy called a *curate. Curates* must subscribe the declaration, according to the act of Uniformity, or are liable to imprisonment, &c. See titles *Clergyman, Parson, Advowson, Chaplain,* &c.

CURFEU, Fr. *Couvrir*, to *cover; Feu. fire.*] A *bell* which rang at eight o'clock in the evening, in the time of William the Conqueror: by which every person was commanded to rake up or *cover over his fire*, and put out his light; and in many places of England at this day, where a bell is customarily rung towards bed-time, it is said to ring *curfew. Stowe's Annals.*

In the Welch language, *curfa* signifies a *beating*: also a *stroke. Richards's Antiquæ Linguæ Britannicæ Thesaurus.*

CURIA, *Court.*] Applied to all Courts of Justice, &c. It is sometimes taken for the persons, as feudatory and other customary tenants, who did their suit and service at the court of the lord. *Kennet's Paroch. Antiq.* 139. And it was usual for the Kings of England, in antient times, to assemble the bishops, peers, and great men of the kingdom to some particular place, at the chief festivals in the year; and this assembly is called by our historians *Curia.* And it was called *Solemnis Curia, Augustalis Curia, Curia Pullica,* &c. See titles *Court, Witenagemote.*

CURIA ADVISARE VULT. Is a deliberation which a court of judicature sometimes takes, where there is any point of difficulty, before they give judgment in a cause. *New Book, Entr.* And when judgment is staid, upon motion to arrest it, then it is entered by the judges *curia advisare vult. Shep. Epit.* 682.—See title *Judgment.*

CURIA CURSUS AQUÆ. A court held by the lord of the manor of Gravesend for the better management of barges and boats using the passage on the river Thames from thence to London, and plying at Gravesend bridge, &c. mentioned in *stat.* 2 *Geo.* 2. *c.* 26.

CURIA CLAUDENDA. A writ to compel another to make a fence or wall, which he ought to make between his land and the plaintiff's, on his refusing or deferring to do the same. *Reg. Orig.* 155. This writ doth not lie but against him who hath a *close* adjoining to the plaintiff's land, who is obliged to *inclose it;* and it lieth not but for him who hath a freehold, &c. It may be sued before the sheriff in the county-court, or in the common pleas; and the judgment is to recover the inclosure and damages. *New. Nat. Br.* 282. 283. But if the occupier of a close adjoining to mine, ought to repair the fence between the closes, and do not, and his cattle stray into my close and do damage, I may distrain them damage feasant, or drive them out, and bring an action of trespass. If my cattle stray into his close and do damage, he has not a right to distrain them, nor can he support trespass against me for the same. Should my cattle after straying into his close, stray out of the same into any highway, or other place, and be lost, or trespass in the grounds of a third person, and be by him distrained damage feasant, and kept till replevied, or I have made satisfaction, I may maintain an action against the defaulter, *i. e.* against the occupier of the adjoining close, for not repairing his fence, whereby such damage hath happened to me. The writ of *curia claudenda* therefore is grown out of use. See title *Trespass.*

CURIA DOMINI. The lord's house, hall or court, where all the tenants attend at the time of keeping courts.

CURIA PENTICIARUM. Is a court held by the sheriff of Chester, in a place there called the *Pendice*, or *Pentice:* and it is probable its being originally kept under a *pent-house*, or open shed covered with boards, gave it this denomination.—*Blount.*

CURNOCK. A measure containing four bushels, or half a quarter. *Fleta, lib.* 2. *c.* 12.

CURRICULUS. The year or course of a year. *Actum est hoc annorum Dominicæ incarnationis quatuor quinquagenis et quinquies, quinis lustris, et tribus* curriculis. This is the year 1028: for four times 50 make 200, and five times 200 make 1000. Then five *lustra* are twenty-five years, and three *Curriculi*, three years; making in all the very year. *Blount.*

CURRIERS. Persons that curry and dress leather. No currier shall use the trade of a butcher, tanner, &c. or shall curry skins insufficiently tanned, or gash any hides of leather, on pain of forfeiting for every hide or skin 6*s.* 8*d.* And person in London putting leather to be curried to any but freemen of the Curriers' Company; and such curriers not currying the leather sufficiently, shall forfeit the ware or the value, &c. *stat.* 1 *Jac.* 1. *c.* 22. The clause relating to freemen is repealed; but if any currier do not curry leather sent him, within sixteen days between Michaelmas and Lady-day, and in eight days at other times, on conviction before a justice, he shall forfeit 5*l.* to be levied by distress, &c. yet subject to mitigation. 12 *Geo.* 2. *c.* 25. Curriers and such as deal in leather, may cut and sell it in small pieces in their shops to any persons whatsoever. *Ibid.* See titles *Leather, Skins,* &c.

CURSING. See *Swearing.*

CURSITORS, *Clerici de Cursu.*] Clerks belonging to the Chancery, who make out original writs; and are called *Clerks of Course*, in their oath appointed, 18 *Ed.* 3. *stat.* 5. There are of these clerks twenty-four in number, which make a corporation of themselves: and to each clerk is allotted a division of certain counties, in which they exercise their functions.—2 *Inst.* 670. See title *Process.*

CURSONES TERRÆ. Ridges of land.

CURTESY OF ENGLAND, *Jus Curialitatis Angliæ.*] Is where a man taketh a wife seised in fee-simple, or fee-tail general, or as heiress in special tail, and hath issue by her, male or female, born alive, which by any possibility may inherit, and the wife dies: the husband holds the lands during his life; and is called *Tenens per legem Angliæ*, or *Tenant by the curtesy of England.* See title *Tenures*, III. 9. Though this is called the *curtesy of England*, it appears to have been the established law of *Scotland*, where it was called *Curialitas.* It is likewise used in *Ireland*, by virtue of an ordinance of H. III. So that probably the word *curtesy* is in this sense understood rather to signify an attendance upon the lord's *courts*, than to denote any peculiar favour. See 2 *Com.* 126.

Four things are requisite to give an estate by the *curtesy*, *viz.* Marriage, seisin of the wife, issue, and death of the wife. *Co. Lit.* 30. If the land descend to the wife after the husband hath issue by her; or if the issue be dead at the time of her death, being born alive; the husband shall be tenant by the *curtesy.* Also if a child is *born alive*, it is not material whether it is baptised, or ever heard to cry, to make the husband tenant by the *curtesy:* for if it is born alive, it is enough.—*Dy.* 25. 8 *Rep.* 34.

The words in the general editions of *Littleton*, 1 *Inst.* 29. are *oyes ou vife*, but in *Lettou* and *Michlinia's* edition they are *neez vif*, and are translated by *Lord Coke*, *born alive.*—May not the word *vife* in the first instance have been an error for *vise*, meaning thereby that the issue must be *heard* or *seen*: so as to ascertain its being alive?

But the child must be such as by possibility may inherit; and therefore if land be given to a woman, and the heirs male of her body, and she takes husband and hath issue a daughter, and dies, as this issue cannot possibly inherit, the husband shall not be tenant by the *curtesy. Termes de Ley.*

If the child is ripped forth of the mother's belly, after her death, though it be alive, it will not cause tenancy by the curtesy; for this ought to begin by the issue, and be consummate by the death of the wife, and the estate of tenant by the curtesy, should *avoid* the *immediate* descent. *Ibid.* A man shall not be tenant by the curtesy of a bare right, title, use, reversion, &c. expectant upon an estate of freehold, unless the particular estate is determined during the coverture; nor of a seisin in law: but if a wife dies before a rent becomes due; or in the case of an advowson, before the church becomes void; the husband shall be tenant by the curtesy, though the wife had only a seisin in law; for in this case no other seisin could be attained. *F. N. B.* 149. *Co. Lit.* 29. 30. 40.

Though in strictness of law there cannot be curtesy of *Trusts*, yet since *Lord Coke's* time our courts of equity have allowed curtesy, both of trusts and other interests which, though in law mere rights and titles, are deemed estates in equity; and made to conform to many of the rules and consequences incident to estates in law. See in 1 *Atk.* 603. the case of *Cashbourn* v. *English*, in which *Hardwicke*, C. decreed curtesy of an equity of redemption. See S. C. more fully reported in *Vin.* tit. *Curtesy*, (E.) pl. 23. However, a wife may in point of benefit have a trust of inheritance, which may be so declared as to prevent curtesy; as by directing the profits, during the wife's life, to be paid for her separate use; for in such case the intention to exclude the husband from curtesy is manifest, and he cannot have an equitable seisin. 3 *Atk.* 715. It is also proper to remark that though *curtesy* out of a trust is allowed, yet dower has been refused; a distinction not easily reconcileable with reason, however settled by the current of authorities. See 1 *Inst.* 29 *a.*; *n.* 6.

As to *Curtesy* in *Titles* and *Offices of honour*, see 1 *Inst.* 29. *b.* and *Mr. Hargrave's* learned notes there, by which it seems that no such curtesy can take place; though the question appears not to be settled, a decision having been repeatedly avoided thereon.

There is no tenancy by the curtesy of *copyhold* lands, except there be a *special custom* for it. But in gavelkind lands, a husband may be tenant by the curtesy without having issue. 1 *Inst.* 30. But it is only of a *moiety* of the wife's land, and ceases if the husband marries again. *Robins. Gavelk. l.* 2. *c.* 1. Where a husband is entitled to this tenancy, if after the wife is an *ideot*, and her estate in the land found: when she dies, he shall not be tenant by the curtesy, for the King's title by relation prevents it. *Plowd.* 263. If the wife be seized in fee of lands, and attaint of felony, but have issue by her husband, and she is hanged, &c. it is said the husband shall be a tenant by the curtesy; but yet the land will be forfeited; according to *Kitch.* 159. 21 *Ed.* 3. 49.

A woman seised of land had two daughters, and covenanted to stand seised to the use of E. her eldest daughter in tail; on condition that she should pay to her other daughter within a certain time 300*l.* And if E. made default, or died without issue before such payment, then the land to go to the second daughter; the mother dying, E. took a husband, and had issue, and died afterwards without any issue living, before the day of payment: it was here held, that her husband should be tenant by the curtesy. 1 *Leon. ca.* 233.—See *Kitch.* 159.

CURTEYN, *Curtana.*] The name of King Edward the Confessor's *sword*; which is the first sword carried before the Kings of England at their coronation: and it is said the point of it is broken as an emblem of mercy. *Mat. Paris in Hen.* III.

CURTILAGE, *Curtilagium*, from the Fr. *Cour*, *Court*, and Sax. *Leagh*, *locus.*] A court-yard, back-side, or piece of ground lying near and belonging to a dwelling-house. See *stats.* 4 *Ed.* 1. *c.* 1. 35 *H.* 8. *c.* 4. 39 *Eliz. c.* 10. 6 *Rep.* 64. and *Spelm.* And though it is said to be a yard or garden, belonging to a house; it seems to differ from a garden, for we find, *cum quodam* gardino et curtilagio. 15 *Ed.* 1. *n.* 34.

CURTILES TERRÆ. Court Lands. It is recorded that among our Saxon ancestors, the *Thanes* or nobles who possessed *Bockland*, or hereditary lands, divided them into *Inland* and *Outland*: the *Inland* was that which lay most convenient for the lord's mansion house; and therefore the lords kept that part in their own hands, for the support of their families, and for hospitality: afterwards the Normans called these lands *Terras Dominicales*, the demains, *demesnes*, or lord's lands: the Germans termed them *Terras Indominicatas*, lands in the lord's own use: and the Feudists, *Terras Curtiles*, lands appropriate to the court or house of the lord. *Spelm. of Feuds, c.* 5.

CUSTANTIA, *Custagium:*] Costs.

CUSTODE ADMITTENDO, CUSTODE AMOVENDO. Writs for the admitting or removing of *Guardians. Reg. Orig.*

CUSTODES LIBERTATIS ANGLIÆ AUTHORITATE PARLIAMENTI. The style in which writs and all judicial process were made out during the grand rebellion, from the murder of King Charles I. till the Usurper Oliver was declared Protector, &c. mentioned and declared traiterous, by *stat.* 12 *Car.* 2. *c.* 3.

CUSTOM, *consuetudo.*] Is a law not written, established by long usage, and the consent of our ancestors. No law can oblige a free people without their consent: so wherever they consent and use a certain rule or method as a law, such rule, &c. gives it the power of a law; and if it is *universal*, then it is *common law*: if *particular* to this or that place, then it is *custom.* 3 *Salk.* 112. As to the rise of customs, when a reasonable act once done, was found to be good and beneficial to the people, then they did use it often, and by frequent repetition of the act, it became a custom; which being continued without interruption time out of mind, it obtained the force of a law, to bind the particular places, persons, and things concerned therein. Thus a custom had beginning and grew to perfection.

To make a particular custom good, the following are necessary requisites.

1. *Antiquity.*—That it have been used so long, that the memory of man runneth not to the contrary. So that, if any one can show the beginning of it, within legal memory, that is within any time since the first year of Richard I. it is no good custom. For which reason no custom can prevail against an express act of parliament, since the statute itself is a proof of a time when such a custom did not exist. *Co. Lit.* 113. Therefore a custom that every pound of butter sold in a certain market, should weigh eighteen ounces, is bad; being directly contrary to *stat.* 13 & 14 *Car.* 2. *c.* 26. which directs it to contain 16 *oz.* 3 *Term Rep.* 271.

2. It must have been *continued.* Any interruption would cause a temporary ceasing: the revival gives it a new beginning, which will be within time of memory, and thereupon the custom will be void. But this must be understood with regard to an interruption of the *right*; for an interruption of the possession only, for ten or twenty years will not destroy the custom. *Co. Lit.* 114. As if the inhabitants of a parish have a customary right of watering their cattle at a certain pool, the custom is not destroyed, though they do not use it for ten years; it only becomes more difficult to prove: but if the *right* be any how discontinued for a day, the custom is quite at an end.

3. It must have been *peaceable*, and acquiesced in; not subject to contention and dispute. *Co. Lit.* 114. For as customs owe their original to common consent, their being immemorially disputed, either at law or otherwise, is a proof that such consent was wanting.

4. Customs must be *reasonable*, (*Litt.* § 212.;) or rather, taken negatively, they must not be unreasonable. Which is not always, as *Sir Edward Coke* says, (1 *Inst.* 62.) to be understood of every unlearned man's reason, but of artificial and legal reason, warranted by authority of law. Upon which account a custom may be good, though the particular reason of it cannot be assigned; for it sufficeth, if no legal reason can be assigned against it. Thus a custom in a parish, that no man shall put his beasts into the common till the third of October, would be good; and yet it would be hard to show the reason why that day in particular is fixed upon, rather than the day before or after. But a custom, that no cattle shall be put in till the lord of the manor has first put in his, is unreasonable, and therefore bad; for peradventure the lord will never put in his; and then the tenants will lose all their profits. *Co. Copyh.* § 33.

5. Customs ought to be *certain.* A custom, that lands shall descend to the most worthy of the owner's blood, is void: for how shall this worth be determined? But a custom to descend to the next male of the blood, exclusive of females, is certain, and therefore good. 1 *Rol. Abr.* 565. A custom to pay two-pence an acre in lieu of tithes, is good; but to pay sometimes two-pence, and sometimes three-pence, as the occupier of the land pleases, is bad, for its uncertainty. Yet a custom to pay a year's improved value for a fine on a copyhold estate, is good: though the value is a thing uncertain; for the value may be ascertained at any time; and the maxim of law is, *id certum est, quod certum reddi potest.*—A custom that poor house-keepers shall carry away rotten wood in a chase is bad; being too vague. 2 *Term Rep.* 758.

6. Customs, though established by consent, must be (when established) *compulsory*; and not left to the option of every

man, whether he will use them or no. Therefore a custom that all the inhabitants shall be rated toward the maintenance of a bridge, will be good; but a custom that every man is to contribute thereto at his own pleasure is idle and absurd; and indeed no custom at all.

7. Lastly, customs must be *consistent* with each other: one custom cannot be set up in opposition to another. For if both are really customs, then both are of equal antiquity, and both established by mutual consent: which to say of contradictory customs is absurd. Therefore if one man prescribes that by custom he has a right to have windows looking into another's garden, the other cannot claim a right by custom to stop up or obstruct those windows: for these two contradictory customs cannot both be good, nor both stand together. He ought rather to deny the existence of the former custom. 9 *Rep.* 58. See *Doug.* 190.

As to the *Allowance* of special customs. Customs in derogation of the Common Law must be construed strictly. This rule is founded upon the consideration that a variety of customs in different places upon the same subject is a general inconvenience: the courts therefore will not admit such customs, but upon the clearest proofs. 1 *Term. Rep.* 466. Thus by the custom of gavelkind, an infant of fifteen years may by one species of conveyance (called a deed of feoffment) convey away his lands in fee-simple. Yet this custom does not empower him to use any other conveyance, or even to lease them for seven years, for the custom must be strictly pursued. *Co. Cop.* § 33.—And moreover all special customs must yield to the King's prerogative. Therefore if the King purchases land of the nature of gavelkind, where all the sons inherit equally; yet on the King's demise, his eldest son shall succeed to those lands alone. *Co. Lit.* 15.

A custom contrary to the public good, or injurious to a multitude, and beneficial only to some particular persons, is repugnant to the law of reason, and consequently void. 2 *Danv.* 424. 427. Customs ought to be beneficial to all, but may be good where against the interest of a particular person if for the public good. *Dyer*, 60. A custom is not unreasonable for being injurious to private persons or interests, so as it tends to the *general advantage* of the *people*. 3 *Salk.* 112.

A custom alleged by churchwardens of a parish to set up monuments, &c. in a church, without the consent either of the rector or ordinary, declared to be illegal. *Beckwith* v. *Harding*, *T. R. K. B. E.* 58 *Geo.* 3.

A *custom* may be good in some cases where a *prescription* is not: but *customs* that are good for the substance and matter of them, may yet be bad for the manner: if they are uncertain, or mixed with any other custom that is unreasonable, &c. 2 *Bulst.* 166. 2 *Brownl.* 198.

Custom is, and must always be alleged to be in many persons; and so it may be claimed by copyholders, or the inhabitants of a place, and when it is claimed, it must be as within such a county, hundred, city, borough, manor, parish, hamlet, &c. *Co. Lit.* 110. 113. 4 *Rep.* 31. A good custom or prescription hath the force of a grant; as where one and his ancestors have had a rent time out of mind, and used to distrain, &c. But a custom that begins by extortion of lords of manors, is judged wanting a lawful commencement, and therefore void: and where custom is amongst many, and they are all dead but one, the custom is gone. *Plowd.* 322. *Dyer*, 199.

*General Customs* which are used throughout England, and are the Common Law, are to be determined by the judges: but *particular customs*, such as are used in some certain town, borough, city, &c. shall be determined by a jury. *Doct. & Stud. c.* 7. 10. 1 *Inst.* 110. *Consuetudo pro lege servatur*, &c.: saith *Bracton*, *lib.* 3. *c.* 3. And custom is said to be *altera lex*: but the judges of the court of B. R. or C. B. can over-rule a custom though it be one of the customs of London, if it be against *natural reason*, &c. 1 *Mod.* 212.

The law takes particular notice of the custom of *Gavelkind* and *Borough English*; (*Co. Litt.* 175.) and there is no occasion to prove that such customs actually exist, but only that the lands in question are subject thereto. All other private customs must be particularly pleaded; (*Lit.* § 265.) and as well the existence of the custom must be shewn, as that the thing in dispute is within the custom alledged. The trial in both cases is by a jury of twelve men, and not by the judges, except the same particular custom has been before tried, determined and recorded in the same court. *Doct. & Stud.* 1. 10. 1 *Comm.* 76.

See further title *Prescription*, and as to particular customs relative to *Inheritance*, *Dower*, &c. see titles *Copyhold*, *Gavelkind*, &c.

The Customs of London differ from all others in point of trial, for if the existence of the custom be brought in question, it shall not be tried by a jury, but by certificate of the Lord Mayor and Aldermen, by the mouth of the Recorder. *Cro. Car.* 516. Unless it be such a custom as the Corporation itself is interested in, as a right of taking toll, &c. for then the law permits them not to certify in their own behalf. *Hob.* 85.—And when a custom has once been certified by the Recorder, the judges will take notice of it, and will not suffer it to be certified a second time. *Dougl.* 365.—As to the *form* in which the recorder shall certify a custom, see 1 *Burr.* 248. and title *Certificate*.

These *Customs of London* relate to divers particulars, with regard to trade, apprentices, widows, orphans, &c. As to the custom relative to the distribution of a freeman's estate, and which now in consequence of *stat.* 11 *Geo.* 2. *c.* 18. § 17. extends only to cases of intestacy, or express agreements made in consideration of marriage, see title *Executor*, V. 9. —As to the custom of Foreign *Attachment*, see title *Attachment Foreign*.—As to the custom of a feme covert being a sole trader, see titles *Baron & Feme*, *Bankrupt*.—And further in more particular detail, as to the general and local customs of London, see this Dict. under title *London*.

It is said, 1 *Ro. Rep.* 106. that the courts at Westminster of course take notice of the customs of London, but not of any other place.—But this is only where they have been certified. See *ante* title *Custom*.

The customs of London are confirmed by act of parliament. 8 *Rep.* 126. *Cro. Car.* 347.

The Custom of Merchants, *Lex Mercatoria*.] A particular system of customs used only among one set of the King's subjects; which, however different from the rules of the Common Law, is yet ingrafted into it, and made part of it: being allowed for the benefit of trade, to be of the utmost validity in all commercial transactions; for it is a maxim in law that *cuilibet in arte suâ credendum est*. 1 *Comm.* 75.

It seems that this *Custom of Merchants* is only so far considered as law, that it affords the rule of construction in cases of *contracts*, *agreements*, &c. and other transactions in Trade and Commerce. Mr. *Christian*, in his note on the above passage of the Commentaries, truly remarks, that the *lex mercatoria*, like the *lex et consuetudo parliamenti*, describes only a great division of the law of England. The laws relating to bills of exchange, insurance, and all mercantile contracts, are as much the general law of the land, as the laws relating to marriage or murder.—And the opinion of Mr. Justice *Foster* is, that the Custom of Merchants is the general law of the kingdom, and therefore ought not to be left to a jury after it has been settled by judicial determination. 2 *Burr.* 1226.

The Custom of Merchants is likewise understood to comprehend the *Usage* of Merchants, which generally governs mercantile questions, where no positive law points out the rule for decision: and therefore the Courts at Westminster

have frequently granted a new trial where the verdict of a jury has militated against the custom or *usage* of merchants. *Rex* v. *Miller*, 6 *Term Rep* 268.

See further more particularly as to the effect and influence of this Custom of Merchants, under *Bankrupt*, *Bill of Exchange*, *Factor*, *Insurance*, *Partnership*, and other titles in this Dictionary.

CUSTOMS ON MERCHANDISE. These are enumerated, (1 *Comm.* 313.) among the perpetual taxes; and are there explained to be the *Duties*, *Toll*, *Tribute* or *Tariff* payable upon merchandise exported and imported.

The considerations, says the Commentator, upon which this revenue, or the more antient part of it which arose only from exports, was invested in the King, were said to be two. —1. Because he gave the subject leave to depart the kingdom, and to carry his goods along with him.—2. Because the King was bound of common right to maintain and keep up the ports and havens, and to protect the merchants from pirates. *Dyer*, 165.—Some have imagined they were called with us customs, because they were the inheritance of the King, by immemorial usage, and the Common Law, and not granted him by any *stat. Dy.* 43. *pl.* 24.—But Sir *Edward Coke*, 2 *Inst.* 58, 9. hath clearly shewn that the King's first claim to them was, by grant of parliament. 3 *E.* 1. And indeed this is in express words confessed by *stat.* 25 *E.* 1. *c.* 7. wherein the King promises to take no customs from merchants without the common assent of the realm, "saving, to us and our heirs, the customs on *wool*, *skins* and *leather* formerly granted to us by the commonalty aforesaid." These were formerly called the hereditary *Customs of the Crown*, and were due on the exportation only of the said three commodities, and of none other: which were styled the *staple* commodities of the kingdom, because they were obliged to be brought to those ports where the King's staple was established, in order to be there first rated and then exported. *Danv.* 9. They were denominated in the barbarous Latin of our ancient records, *custuma*; not *consuetudines*, which is the language of our law, whenever it means merely usages. The duties on wool, sheep skins, or wool-fells, and leather, exported, were called *custuma antiqua sive magna*: and were payable by every merchant, as well native as stranger; with this difference, that merchant-strangers paid an additional toll *viz.* half as much again as was paid by natives. The *custuma parva et nova* were an impost of 3*d.* in the pound, due from merchant-strangers only, for all commodities as well imported as exported; which was usually called the aliens' duty, and was granted in 31 *Edw.* 1. 4 *Inst.* 29. But these ancient hereditary customs, especially those on wool and wool-fells, came to be of little account, when the nation became sensible of the advantages of a home manufacture, and prohibited the exportation of wool by *st.* 11 *Ed.* III. *c.* 1.

There is also another very ancient hereditary duty belonging to the crown, called the *prisage* or *butlerage* of wines; which is considerably older than the customs, being taken notice of in the great roll of the Exchequer, 8 *Ric.* 1. still extant. *Madox*, *Hist. Exch.* 526. 532. Prisage was a right of *taking* two tons of wine from every ship (English or Foreign) importing into England twenty tons or more; one before, and one behind, the mast: which by charter of *Edw.* 1. was exchanged into a duty of 2*s.* for every ton imported by merchant strangers, and called butlerage, because paid to the King's butler. *Dav.* 8. 2 *Bulst.* 254. *Stat. Esta.* 16 *Edw.* 2. *Com. Journ.* 27 *Apr.* 1689.

Other Customs payable upon exports and imports were distinguished into *subsidies*, *tonnage*, *poundage*, and other imposts. Subsidies were such as were imposed by parliament upon any of the staple commodities before mentioned over and above the *custuma antiqua et magna*: tonnage was a duty upon all wines imported, over and above the prisage and butlerage aforesaid: poundage was a duty imposed *ad valorem*, at the rate of 12*d.* in the pound on all other merchandise whatsoever, and the other imposts were such as were occasionally laid on by parliament, as circumstances and times required. *Danv.* 11. 12.

These distinctions are now in a manner forgotten, except by the officers immediately concerned in this department; their produce being in effect all blended together, under one denomination of THE CUSTOMS.

By these we understand at present a duty or subsidy paid by the merchant, at the quay, upon imported as well as exported, commodities, by authority of parliament; unless where, for particular national reasons, certain rewards, bounties or drawbacks, are allowed for particular exports or imports. Those of tonnage and poundage, in particular, were at first granted, as the old statutes (and particularly 1 *Eliz.* 19.) express it, for the defence of the realm, and the keeping and safeguard of the seas, and for the intercourse of merchandise safely to come into and pass out of the same. They were at first usually granted only for a stated term of years, as, for two years in 5 *Ric.* II. *Dav.* 12. but in Henry the Sixth's time, they were granted him for life by a statute in the thirty-first year of his reign; and again to Edward IV. for the term of his life also: since which time they were regularly granted to all his successors for life, sometimes at the first, sometimes at other subsequent parliaments, till the reign of Charles the First.

Upon the Restoration, this duty was granted in England to King Charles the Second for life, and so it was to his two immediate successors; and by three several *stats.* 9 *Ann. c.* 6. 1 *Geo.* 1. *c.* 12. 3 *Geo.* 1. *c.* 7. it was made perpetual and mortgaged for the debt of the Public. [As to the customs in Ireland, see *Irish act.* 14, 15 *Car.* 2. *c.* 9.] The customs thus imposed by parliament were, till the *stat.* 27 *Geo.* 3. *c.* 13. contained in two books of rates, set forth by parliamentary authority; *stat.* 12 *Car.* II. *c.* 4. 11 *Geo.* 1. *c.* 7. Aliens used to pay a larger proportion than natural subjects, generally called the aliens' duty; now repealed by *stat.* 24 *Geo.* III. *sess.* 2. *c.* 16. except as to scavage duties granted to the city of London.

By *stat.* 27 *Geo.* 3. *c.* 13. called the *Consolidation Act*, all the former statutes *imposing duties* of customs and excise were repealed with regard to the *quantum* of the duty; and the two books of rates above-mentioned were declared to be of no avail for the future; but all the former duties were consolidated, and were ordered to be paid according to a new book of rates annexed to that statute. The like plan has been followed in subsequent acts. See 43 *Geo.* 3. *c.* 68. 49 *Geo.* 3. *c.* 98. the last general act of that nature; and as to Ireland, 54 *Geo.* 3. *c.* 129; and as to customs on East India goods, 54 *Geo.* 3. *c.* 36. 103. 55 *Geo.* 3. *c.* 10.; and as to the Isle of Man, 50 *Geo.* 3. *c.* 42. 51 *Geo.* 3. *c.* 52. [*the acts in force while this was passing through the press. Jan.* 1819.]

*Bullion*, *Wool*, and some few other commodities, may be imported duty-free. All the articles enumerated in the tables or book of rates pay upon importation or exportation, the sum therein specified, according to their weight, number or measure. And all other goods and merchandise, not being particularly enumerated or described, and permitted to be imported and used in Great Britain, shall pay upon importation a certain duty *ad valorem*, or for every 100*l.* of the value thereof; but subject to a drawback upon exportation. Very few commodities pay a duty upon exportation; but where that duty is not specified in the tables, and the exportation is not prohibited, all articles may be exported without payment of duty, provided they are regularly entered and shipped; but on failure thereof, they are subject to a duty *ad valorem*. And to prevent frauds, in the representation of the value, a very simple and equitable regulation is prescribed,

*viz.* the proprietor shall himself declare the value, and if this should appear not to be a fair and true estimate, the goods may be seized by the proper officer; and four of the commissioners of the customs may direct that the owner shall be paid the price, which he himself fixed upon them, with an advance of 10*l. per cent.* besides all the duty which he may have paid; and they may then order the goods to be publickly sold, and if they raise any sum beyond what was paid to the owner, and the subsequent expences, one half of the overplus shall be paid to the officer who made the seizure, and the other half to the publick revenue.

A very great number of Acts of Parliament have been passed to prevent frauds in this branch of the revenue, as well as in the Excise; and it is more to be wished than hoped, that the measure, pursued respecting the *quantum* of the duties, by the Consolidation Act, could be followed by a general act restraining every fraud, and containing every regulation, with a precise statement of the punishment for each offence. But while the dishonest are ingenious to find out means of evading the most explicit laws, the honest part of the community must forgive the length and intricacy of statutes which ultimately secure their liberty and property.

The following are short extracts of such statutes as seem most material to the present purpose; besides those already mentioned.

By *stat.* 14 *R.* 2. *c.* 10. no Customer or Comptroller of the customs, shall have any ships of his own, or meddle with the freight of ships. And by *stat.* 20 *H.* 6. *c.* 5. no searcher, surveyor, &c. or their clerks, deputies, or servants, may have any such ships of their own; nor shall use merchandise, keep a wharf, inn or tavern, or be factor, attorney, &c. to a merchant, under the penalty of 40*l.*—By *stat.* 3 *H.* 6. *c.* 3. customers, collectors, or comptrollers, shall not conceal customs duly entered and paid, on pain to forfeit the treble value of merchandise so customed, and to make fine and ransom to the king. By *stat.* 13 & 14 *Car.* 2. *c.* 11. § 19. If any persons employed about the customs and subsidies *take a bribe*, or connive at any false entry, they shall forfeit 100*l.* and be incapable of any employment under the king; and the person *giving* the bribe shall forfeit 50*l.*—By *stat.* 5 *Geo.* 1. *c.* 11. § 24. &c. if an officer of the revenue shall make any collusive seizure of foreign goods, to the intent the same may escape payment of the duties, he is to forfeit 500*l.* and be incapable of serving his Majesty: and the importer and owner shall forfeit treble the value of the goods so collusively seized, &c.—By *stat.* 12 *Geo.* 1. *c.* 28. § 7. officers of the customs, &c. are not to trade in brandy, coffee, &c. or any exciseable liquor, on pain of 50*l.* and forfeiture of offices.

Officers of the customs may search ships, 13 & 14 *Car.* 2. *c.* 11. § 4. Having writ of *assistance*, may search houses, § 4. The penalty of abusing officers, § 6. Keepers of wharfs, quays, &c. landing or shipping goods, without the presence of some officer of the customs, shall forfeit 100*l.*

By *stat.* 6 *Geo.* 1. *c.* 21. where officers of the Customs are hindered in the execution of their duty by persons armed to the number of eight, the offenders are to be transported for seven years.

By *stat.* 8 *Geo.* 1. *c.* 18. if any goods are put into any vessel to be carried beyond sea: or be brought from beyond sea, and unshipped to be landed, the duties not being paid nor agreed for at the Custom house; the same shall be forfeited, one moiety to the king, the other to the seizer, &c. And by subsequent statutes, foreign goods taken in at sea, by any coasting vessel, &c. shall be forfeited, and treble value.

By *stat.* 9 *Geo.* 2. *c.* 35. where three persons are assembled and armed with fire arms, &c. to be assisting in the running of goods, they shall be guilty of felony and transported, and 50*l.* be paid for apprehending such offenders: also the like reward to any of them for discovering others. All persons two or more in company, found passing within five miles from the sea-coasts, with any horses, carts, &c. wherein are put above six pounds of tea, or five gallons of brandy, or other foreign goods of 30*l.* value, landed without entry, and not having permits, and who shall carry offensive weapons, &c. or assault any of the officers of the Customs, shall be adjudged runners of goods, and be transported as felons, and all the goods to be seized and forfeited: and suspected persons lurking near the coasts, not giving a good account of themselves, may be sent by a justice to the house of correction for a month; and informers to have 20*s.* for every offender so taken.

If any person offers any tea, brandy, &c. to sale, without a permit, the persons to whom offered may seize and carry it to the next warehouse belonging to the Customs or Excise; and the seizers shall have a third part, &c. And watermen, carmen, porters, &c. in whose custody run goods are found, shall forfeit treble value, or be commited for three months.

Ships and vessels from foreign parts, having on board tea, or brandy, rum, &c. in casks under sixty gallons, (except for the use of seamen) found at anchor or hovering near any port, or within two leagues [increased to *eight* leagues by subsequent acts] of the shore, and not proceeding in their voyages, unless in cases of unavoidable necessity, all such tea, &c. shall be forfeited.

Persons *offering* any *bribe* to officers of the Customs, to connive at the running of goods to forfeit 50*l.* and obstructing such officer in entering or searching ships, incurs a forfeiture of 100*l.* And if an officer be wounded or beaten on board a ship, the offenders to be transported, &c.

By *stat.* 19 *Geo.* 2. *c.* 34. (made perpetual by 43 *Geo.* 3. *c.* 157.) if any persons, to the number of three, or more, armed with offensive weapons, shall be assembled in order to be aiding in the illegal exportation of goods prohibited to be exported, or the running uncustomed goods, or the illegal relanding any goods, or rescuing the same, after seizure, from any officer, or from the place where they shall be lodged, or in the rescuing any person apprehended for any offence made felony by any act relating to the Customs or Excise, or preventing the apprehending any person guilty of any such offence; or in case any persons to the number of three, or more, so armed, shall be so assisting, or if any person shall have his face blacked, or wear any mask, or other disguise, when passing with such goods, or shall forcibly hinder, obstruct, assault, oppose, or resist any officer of his Majesty's revenue, in seizing such goods, or shall maim, or dangerously wound any such officer in his attempting to go on board any vessel, or shoot at or dangerously wound any such person when on board and in the execution of his office, every such person shall be guilty of felony, and suffer death. § 1.

On information on oath of any person's being guilty of any of the above offences, the justice may certify the information to one of the Secretaries of State, who is to lay it before his Majesty; whereupon his Majesty may make an order, requiring the offender to surrender himself in forty days after publication thereof in the *Gazette*: and in default thereof, the order being published twice in the *Gazette*, and proclaimed in two markets near where the offence was committed, and a copy thereof affixed in some public place there, the offender shall be attainted of felony, and suffer death. § 2. Any person harbouring or aiding any such offender after the time for his surrender expired, knowing him to have been so required to surrender, being prosecuted within a year, shall be transported for seven years. § 3. Offences made felony by this act, may be sued in any county. § 5.

If any officer, &c. in the seizing, &c. such goods, or in the endeavouring to apprehend any such offender, shall be beat,

wounded, maimed, or killed, or the goods be rescued, the inhabitants of the rape, lath or hundred, unless the offender be convicted within six months, shall forfeit 100*l.* to the executors of any officer killed; and pay damages to any officer beat, &c. not exceeding 40*l.* and for any goods rescued, not exceeding 200*l.* § 6. A reward of 500*l.* for apprehending any offender; a person wounded in apprehending an offender to have 50*l.* extraordinary, and the executors of a person killed, to have 100*l.* § 10.

By *stat.* 13 & 14 *Car.* 2. *c.* 11. ships and vessels outward-bound are not to take in any goods, till the vessel, &c. is entered with the collectors of the Customs; and before departure, the contents of the lading are to be brought in under the hands of the laders, &c. Also when ships arrive from beyond sea, the masters are to make a true entry upon oath, of the lading, goods, ship, &c. under the penalty of 100*l.* And if any concealed goods are found after clearing for which the duties have not been paid, the master of the vessel shall be subject to the like penalty.

By 46 *G.* 3. *c.* 82. (and see 48 *G.* 3. *c.* 9.) for the Port of London (extended to the whole kingdom, by 47 *G.* 3. *st.* 1. *c.* 51.) the fees of officers of the Customs in Great Britain are abolished, and their time of attendance, &c. regulated.—By 46 *G.* 3. *c.* 150. some salutary checks are imposed on the office of Receiver General of the Customs in Great Britain, so as to prevent any danger of the misapplication of the immense revenues which pass through his hands. See 47 *G.* 3. *stat.* 1. *c.* 12. for abolishing and regulating certain offices in the Customs of Ireland: and 48 *Geo.* 3. *c.* 56. abolishing the fees of officers of the Customs there, and regulating their hours of attendance.

By 49 *G.* 3. *c.* 65. jurisdiction is given to two justices of the peace for the recovery of penalties not exceeding 50*l.* against the laws of customs in Great Britain.

By 51 *Geo.* 3. *c.* 71. several offices in the Customs of England were abolished or regulated.

As to the superannuation fund, see *stat.* 51 *G.* 3. *c.* 55. for England, and 52 *G.* 3. *c.* 60. for Scotland.

By 54 *G.* 3. *c.* 171. the Treasury are empowered to restore seizures, or remit or mitigate fines, penalties, and forfeitures incurred by laws relating to the Customs [Excise or Navigation] Laws of Great Britain.

By 56 *G.* 3. *c.* 93. officers of Customs at creeks and harbours in Great Britain are empowered to take entries of ships and goods to and from Ireland. See further titles *Smuggling*, *Navigation*.

CUSTOMS AND SERVICES, belonging to the tenure of lands, are such as tenants owe unto their lords; which being with-held from the lord, he may have a writ of *customs and services*. See titles *Consuetudinibus & Servitiis*.

Customary Freehold. See title *Copyhold*.

CUSTOS BREVIUM. A principal clerk belonging to the Court of Common Pleas, whose office is to receive and keep all the writs returnable in that court, and put them upon files, every return by itself; and to receive of the *prothonotaries* all the records of *nisi prius*, called the *Posteas*; for they are first brought in by the clerk of assise of every circuit to the prothonotary, who enters the issue in the causes, to enter the judgment: and four days after the return thereof, the prothonotary enters the verdict and judgment thereupon, into the rolls of the court; whereupon he afterwards delivers them over to the *custos brevium* who binds them into a bundle. He makes entry likewise of all writs of covenant, and the concord upon every fine; and maketh forth exemplifications, and copies of all writs and records in his office, and of all fines levied.

The *Fines* after they are engrossed are divided between the *custos brevium* and the *chirographer*; the chirographer always keeps the writ of covenant and the note, and the custos brevium the concord and the foot of the fine; upon which foot of the fine the chirographer causeth the proclamations to be indorsed, when they are proclaimed. This officer is made by the king's letters patent; and in the court of King's Bench, there is also a *custos brevium et rotulorum*, who fileth such writs as are in that court filed, and all warrants of attorney, &c. and whose business it is to make out the records of *nisi prius*, &c. See titles *Chirographer*, *Common Pleas*.

Custos Placitorum Coronæ. An officer which seems to be the same with him we now call *custos rotulorum*. *Bract. lib.* 2. *c.* 5.

Custos Rotulorum, *Keeper of the rolls* or records of the county. The officer who hath the custody of the rolls or records of the sessions of the peace, and also of the commission of the peace itself. He is always a justice of the peace of the *quorum* in the county where appointed, and usually some person of quality; but he is rather termed an officer or minister than a judge. *Lamb. Eiren. lib.* 4. *cap.* 3. *p.* 373. By *stat.* 37 *H.* 8. *c.* 1. (altered by *stat.* 3 & 4 *E.* 6. *c.* 1. but restored by 1 *W.* & *M.* *c.* 21.) the *Custos rotulorum* in every county is appointed by a writing signed by the King's hand, which shall be a warrant to the Lord Chancellor to put him in commission: and he may execute his office by deputy: and hath power to appoint the clerk of the peace, &c. See title *Clerk of the Peace*. The *Custos rotulorum*, two justices of the peace, and the clerk of the peace, are to inroll deeds of bargain and sale of lands of papists, &c. by 3 *Geo.* 1. *cap.* 18. See title *Papists*.

Custos of the Spiritualities. } See *Guardian*.
Custos of the Temporalities. }

CUT-PURSE. If any person *clam et secretè*, and without the knowledge of another, cut his purse or pick his pocket, and steal from thence to the value of 12*d.* it is felony without benefit of clergy. *Stat.* 8 *Eliz. c.* 4. See title *Felony*.

CUTTS. Flat-bottomed boats, built low and commodiously, used in the channel for transporting of horses. *Stow. Annal. p.* 412.

CUTTER of the Tallies. An officer in the Exchequer, to whom it belonged to provide wood for the *tallies*, and to cut the sum paid upon them, &c. See title *Exchequer*.

CUVE, Fr.] A *keeve*, from whence comes *keever*, a tub or vat for *brewing*. *Cowel*.

CYCLAS. A long garment close upwards, and open or large below. See *Matt. Paris. Anno* 1236.

CYDER. Is one of the many articles liable to Excise-duties. See title *Excise*.

CYNEBOTE. A mulct anciently paid, by one who killed another, to the kindred of the deceased. *Spelman. Blount*.

CYRICBRYCE, Sax.] *Irruptio in ecclesiam. Leg. Eccl. Canuti Regis*. See title *Sacrilege*.

# D.

## D A

DA, *Fr.*] A word affirmative for yes. *Law. French Dict.*

DAG. A gun; *un dagg*, a small gun, or hand gun. See *Haque.*

DAGENHAM-BREACH. A duty is granted on coals imported into London, to repair the walls and banks thereof; to be collected and disposed by trustees, &c. *Stats.* 12 *An. stat.* 2. *c.* 17. 7 *Geo.* 1. *c.* 20. *sec.* 32.

DAGUS OR DAIS. The chief or upper table in a monastery; from a cloth called *dais*, with which the tables of kings were covered.

DAKIR. See *Dicker.*

DALMATICA. A garment with large open sleeves, at first worn only by bishops, though since made a distinction of degrees: so called, because it came originally from Dalmatia.

DALUS, DAILUS, DAILIA. A certain measure of land.—*Et totam* Dailiam *marisci tam de rossa, quam de prato, &c. Mon. Ang. tom.* 2. *p.* 211. In some places it is taken for a ditch or *vale*, whence comes *dale*. The *dali prati* have been esteemed such narrow slips of pasture as are left between the ploughed furrows in arable land: which in some parts of England are called *doles*: the present Welch use this word for low meadow by the river side. And this seems to be the original name and nature of *Deal*, in Kent, where Cæsar landed, and fought the Britons: *Cæsar ad* Dolam *bellum pugnavit.—Cowel.*

## DAMAGES.

DAMNA.] This term signifies generally any hurt or hindrance that a man receives in his estate: but particularly a part of what the jurors are to enquire of and bring in, when an action passeth for the plaintiff: for after verdict given on the principal cause, the jury are asked touching *costs* and *damages*, which comprehend a recompense for what the plaintiff hath suffered, by means of the wrong done him by the defendant. *Co. Lit.* 257. This word *damage* is taken in law, in two several significations, the one *properly* and *generally*, the other *relatively*; *properly*, as it is in cases wherein *damages* are founded upon the statutes where *costs* are included within the word *damages*, and taken as damages.

But when the plaintiff declares for the wrong done to him, to the *damage* of such a sum, this is to be taken *relatively* for the *wrong* which passed before the writ brought, and is assessed by reason of the foregoing trespass, and cannot extend to *costs* of suit, which are future, and of another nature. 10 *Rep.* 116. 117. See title *Costs.*

I. *In what Actions Damages may be recovered, and against whom.*

II. *How Damages are to be assessed, increased and mitigated.*

I. In *personal* and *mixed* actions, *damages* were recovered at Common Law: but in *real* actions, no *damages* were recoverable, because none were *demanded* by the count or writ. Whereas in actions *personal*, the plaintiff counts *ad dampnum* for the injury; and if he recovers no *damages*, he hath no costs. 10 *Rep.* 111. 117. In a *personal* action, the plaintiff shall recover *damages* only for the tort done *before* the action brought; and therein he counts for his *damages*: in a *real* action, he *recovers* his *damages* pending the writ; and therefore *never counts* for his *damages.* 10 *Rep.* 117. By the *stat.* of *Glous.* 6 *Ed.* 1. *cap.* 1. *damages* are given in real actions,





assises of *novel disseisin*, *mort d'ancestor*, &c. and shall be recovered against the alienee of a disseisor, as well as against the disseisor himself; and the demandant shall have of the tenant likewise costs of suit; but not expences for trouble and loss of time. 2 *Inst.* 288. See further the said *stat.* 6 *Ed.* 1. *c.* 1. *Stat.* 3 *H.* 7. *c.* 10. 2 *Inst.* 284. 286. 2 *Danv. Abr.* 448.

No *damages* could be recovered at the Common Law, but against the wrong doer, and by him to whom the wrong was done. 2 *Inst.* 284.

Any person, who, in the exercise of a public function void of emolument, (which he is compellable to execute, acting without notice, and according to his best skill and diligence, with the best information he can obtain,) does an act which occasions consequential damages, is not liable to an action for such damages. Therefore where the Trustees of a turnpike road, empowered to make watercourses to prevent the road from being overflowed, directed their surveyor to present a plan for carrying off the water of an adjacent brook, and on his recommendation ordered him to make a wide channel from the road, gradually narrowing, and conducting the water into the ordinary sluice ditches of the plaintiff's land, which were insufficient to discharge it, and his land was consequently overflowed, it was held by the court of C. P. that no action lay against the chairman of the trustees who signed the order for cutting the trench. *Sutton* v. *Clarke*, 6 *W. P. Taunton*, 29.

*Damages* shall be recovered in writ of admeasurement of dower; but not in a writ of admeasurement of pasture. 2 *Danv.* 457. In writ of partition, by one co-parcener against another, it is said no *damages* shall be had. In a formedon, no *damages* shall be recovered: so in a *nuper obiit*, writ of account, writ of execution, &c. *Ibid.* 455. 456. *Damages* and costs are due in a writ of annuity; and if the jury find for the plaintiff, and do not assess *damages*, it will be error; though he may after verdict release the *damages*, and take judgment for the annuity. 11 *Rep.* 56. *Dyer*, 320. 369.

In battery, imprisonment, and taking of goods, against three persons; one commits the battery, another the imprisonment, the third takes the goods, all at one time, all are guilty of the whole, and to be charged in *damages.* 3 *Lev.* 324. See 10 *Rep.* 66. 69.

II. In real actions, *damages* are assessed by writ of inquiry; when the jury find the issue for the plaintiff, they are to assess the *damages.* And in actions upon the case, &c. where *damages* are uncertain, it is left to the jury to inquire of them: In debt, which appears certain to the court what it is, the *damages* assessed by the jury are small, in fact only nominal, as one shilling; and the master in B. R. taxeth the costs; which are added thereto, and called *damages.* 1 *Lill.* 390. When judgment is given by default, in action of debt, the court is to assess the *damages*, and not the jury; so if judgment by *nil dicit*, in action of debt.

Where excessive *damages* have been given, or there hath been any misdemeanour in executing a writ of inquiry; the court hath sometimes relieved the defendant by a new writ of inquiry. 2 *Danv.* 464. And where *damages* are excessive, on motion, the defendant may have a new trial. *Style*, 465. 1 *Nels. Abr.* 587. In trespass against two, one comes and pleads Not guilty, and it is found against him; and afterwards another comes and pleads the like, and is found Guilty by another inquest; in this case, the first jury shall assess all the

*damages* for the trespass. *New. Nat. Br.* 256. Trespass against divers defendants, they plead Not guilty severally, and the jury finds them all Guilty: the jury must assess the *damages jointly*, for it is but *one entire trespass*, and made *joint* by the declaration. 11 *Rep.* 5.

If action is brought for two several causes of action, one of which is not actionable, if intire *damages* are given, the verdict is void: *contra* if the *damages* are severed. And where *damages* are entirely assessed, and they ought not to be given for some part; no judgment can be given on the verdict. 10 *Rep.* 130. Where damages are awarded for delay of execution, and being kept out of the money, they are usually assessed by allowing the party what lawful interest he might have. 1 *Salk.* 208.

For money lent, interest shall be given from the time the money was payable, to the time of liquidating the debt, by the court's giving judgment. 2 *Burr.* 1081, 6.—So on a bill of exchange, it is usual to calculate the interest up to the time when judgment may be entered up. And it is now settled as a general rule, that where a new action may be brought, and a new satisfaction obtained on that, for duties or demands arisen since the commencement of the depending suit, these shall not be included in the judgment on the former action. But where the interest is an accessory to the principal, and the plaintiff cannot bring a new action for interest grown due between the commencement of the action and judgment, it shall be included. *Id.* 1086, 7.—As to interest from the time of the original judgment to the affirmance in case of a writ of error, see *Doug.* 752 *in n.* 2 *Term. Rep.* 57. 59. 78. and the *stat.* 3 *H.* 7. *c.* 10.—A jury may, and now frequently do, give interest on book-debts in the name of damages. See *Doug.* 676.

In what case the plaintiff shall have no more costs than *damages*, unless the jury finds more than 40*s.* See title *Costs.*

In action upon the case the jury may find less *damages* than the plaintiff lays in his declaration: but ought not to find more, though costs may be increased beyond the sum mentioned in the declaration for *damages.* The plaintiff may release part of the *damages*, upon entering up his judgment. 10 *Rep.* 115. If he does not, but takes judgment for damages (exclusive of costs) to a larger amount than laid in the declaration, it is error, and not within any of the statutes of amendment or jeofails. *Sandiford* v. *Been.* In debt against a sheriff or gaoler for an escape, the jury cannot give a less sum than the creditor would have recovered against the prisoner, *viz.* the sum indorsed on the writ and the legal fees of execution. 2 *Term. Rep.* 126.

In actions upon any bond, &c. for non-performance of covenants, the jury shall assess *damages* for those the plaintiff proves broken: and the plaintiff may assign as many breaches as he thinks fit. 8 & 9 *W.* 3. *c.* 11. See titles *Bond*, *Covenants.* In debt for a penalty in articles the jury ought to assess damages on the breach assigned, under this *statute*, and shall not find the debt. 2 *Wils.* 377.

*Damages* are not to be given for that which is not contained in the plaintiff's declaration; and only for what is materially alleged. 1 *Lill.* 381.

When *damages* double or treble are given in an action newly created by statute; if no *damages* were formerly recoverable, there the demandant or plaintiff shall recover those *damages* only, and shall not have costs, being a new creation in recompence where there was none before. As upon *stat.* 1 & 2 *P. & M. c.* 12. for driving of distresses out of the hundred, &c. whereby *damages* are given, the plaintiff shall recover no costs, only his *damages*, because this action is newly given. But in an action upon the *stat.* 8 *H.* 6. *c.* 9. of forcible entry, which giveth treble *damages*, the plaintiff shall recover his *damages* and his costs to the treble amount, by reason he was entitled to single *damages* before by the Common Law; and the statute, as part of the *damages*, increases the costs to treble; and when a statute increases *damages*, costs shall likewise be increased. 2 *Inst.* 289. 10 *Rep.* 116.

Double, treble *damages*, &c. are allowed, in several cases, by a very great variety of statutes; as for not setting forth tithes; distresses wrongfully taken; rescous; though if it be not found by the jury, that the plaintiff hath sustained some *damage*, in cases where treble damages, &c. are inflicted by law, no *damages* can be awarded. See *the several acts.*

How *damages* given to a person sued for an act done in the execution of his office, are to be assessed and recovered, see *Valentine* and *Fawcet*, *Hardw.* 138, 139.

Plaintiff may take judgment *de melioribus damnis* where several damages are given, or enter a *remittitur.* *Sabin* v. *Long*, 1 *Wils. par.* 1. *fo.* 30.

The court in their discretion may increase the *damages* in *Mayhem.* *Brown* v. *Seymour*, *Wils. par.* 1. *fo.* 5. and *vide* 3 *Salk.* 115. 2 *Inst.* 200. See *Mayhem.*

See further as to *Damages* in general, *Com. Dig.* title *Damages.*

DAMAGE CLEER, *damna clericorum.*] Was a fee assessed of the tenth part in the Common Pleas, and the twentieth part in the King's Bench and Exchequer, out of all *damages* exceeding five marks, recovered in those courts, in actions upon the case, covenant, trespass, battery, &c. wherein the *damages* were uncertain; which the plaintiff was obliged to pay to the *prothonotary*, or the chief officer of the court wherein recovered, before he could have execution for the *damages*: this was originally a gratuity given to the *prothonotaries* and their clerks, for drawing special writs and pleadings; but it is taken away by statute, and if any officer in the King's courts, take any money in the name of *damage cleer*, or any thing in lieu thereof, he shall forfeit treble the value. *Stat.* 17 *Car.* 2. *c.* 6.

DAMAGE-FEASANT, or *faisant.*] Is when a stranger's beasts are found in another person's ground without his leave or licence, and without the fault of the possessor of the close, (which may happen from his not repairing his fences,) and there doing *damage*, by feeding, or otherwise, to the grass, corn, woods, &c. In which case, the tenant whom they *damage*, may distrain and impound them, as well by night as in the day, lest the beasts escape before taken; which may not be done for rent, services, &c. only in the day time. *Stat.* 51 *H.* 3. *stat.* 4. 1 *Inst.* 142. If a man take my cattle, and put them into the land of another, the tenant of the land may take these cattle *damage-feasant*, though I who am the owner, was not privy to the cattle's being there *damage-feasant*; and he may keep them against me till satisfaction of the *damages.* 2 *Danv. Ab.* 364.

But if one comes to distrain *damage-feasant*, and to seize the cattle, and the owner drives them out before they are taken, he cannot distrain them *damage-feasant*, but is put to his action of trespass; for the cattle ought to be actually upon the land *damage-feasant*, at the time of the distress. 1 *Inst.* 161. 9 *Rep.* 22. He that hath but the *possession* of, and no title to the land, may justify taking a distress *damage-feasant.* *Plowd.* 431. If a man puts cattle to pasture at so much a week with another, who after gives notice that he will not have them there any longer; in this case the owner of the ground may distrain them *damage-feasant*, though the cattle be in lawfully at first: so where a lessee holds after his estate is ended. 43 *Ed.* 3. *Keilw.* 69. But the owner of the cattle should have proper notice and reasonable time allowed for taking away his cattle.

Beasts belonging to the plough, or beasts of husbandry, sheep, horses joined to a cart, may be distrained *damage-feasant*, though not for rent. 1 *Sid.* 422. 440. But the owner may tender amends, before the cattle are impounded; and then the detainer is unlawful: also if when impounded

the pound door is open, the owner may take them out. 5 *Rep.* 76. See further title *Distress.*

A greyhound may be taken *damage-feasant*, running after conies in a warren: so a man may take a ferret that another hath brought into his warren, and taken conies with. If a person bring nets and gins through my warren, I cannot take them out of his hands. 2 *Danv.* 633. But if men are rowing up my water, and endeavouring with nets to catch fish in my *several* piscary, I may take their oars and nets, and detain them as *damage-feasant*, to stop their further fishing; though I cannot cut their nets. *Cro. Car.* 228. See titles *Distress*, *Trespass.*

DAM. A boundary, or confinement; as to *dam* up or *dam* out: *infra damnum suum*, within the bounds or limits of his own property or jurisdiction. *Bract. lib.* 2. *c.* 37.

DAMISELLA. A light damosell or miss. *Stat.* 12 *Ed.* 1: See *Pimp Tenure.*

DAMNUM ABSQUE INJURIA. If one man keeps a school in such a place, another may do so likewise in the same place, though he draw away the scholars from the other school; and this is *damnum absque injuria*, a loss without an injury; but he must not do any thing to disturb the other school. 3 *Salk.* 10.

DAN. Anciently the better sort of men in this kingdom had the title of *Dan*; as the Spaniards *Don*, from the Lat. *Dominus.*

DANEGELT, OR DANE GELD, *danegildum.*] Is compounded of the words *dane* and *gelt*, money or tribute, and was a tax of 1*s.* and after of 2*s.* upon every hide of land through the realm, laid upon our ancestors the Saxons by the Danes, when they lorded it here. *Camd. Brit.* 83. 142. According to some accounts, this tax was levied for clearing the seas of Danish pirates; which heretofore greatly annoyed our coasts: but King Ethelred being much distressed by the continual invasions of the Danes, to procure peace, was compelled to charge his people with very heavy payments, called *danegelt*, which he paid to the Danes at several times. *Hoveden par. post. Annal.* 344. *Ingulph.* 510. *Selden's Mare Claus.* 190. This *danegelt* was released by Edward the Confessor; but levied again by William the First and Second: then it was released again by King Henry the First, and finally by King Stephen.

DANELAGE. The law of the Danes, when they governed a third part of this kingdom. See further, titles *Merchenlage*, *Common Law.*

DANGERIA. A payment in money made by forest tenants, that they might have liberty to plough and sow in time of *pannage* or mast feeding. *Manw. For. Laws.*

DAPIFER, *à dapes ferendo.*] Was at first a domestic officer, like unto our *Steward of the Household*; or rather *Clerk of the Kitchen*: but by degrees it was used for any fiduciary servant, especially the chief steward or head bailiff of an honour or manor. There is mention made in our ancient records of *dapifer regis*; which is taken for Steward of the King's Household. *Cowel.*

DARDUS, *i. e.* A dart. In Wales an oak is called a *dar.*

DARE AD REMANENTIAM. To give away in fee or for ever. *Glanv. lib.* 7. *cap.* 1. This seems to be only of a *remainder.*

DARREIN. Is a corruption from the Fr. *dernier*, viz. *ultimus*, the last; in which sense we use it: as *darrein continuance*, &c.

DARREIN PRESENTMENT. Last Presentation.] See title *Advowson*, III. An assise of *Darrein Presentment* lies when a man, or his ancestors, under whom he claims, having presented a clerk to a benefice, who is instituted; afterwards upon the next avoidance a stranger presents a clerk, and thereby disturbs him that is real patron; in which case the patron shall have this writ, (*F. N. B.* 31.) directed to the sheriff to summon an assise or jury to inquire who was the last patron that presented to the church now vacant, of which the plaintiff complains that he is deforced by the defendant: and, according as the assise determines that question, a writ shall issue to the Bishop, to institute the clerk of that patron, in whose favour the determination is made, and also to give damages, in pursuance of *stat. West.* 2. (13 *E.* 2. *c.* 5.) This question it is to be observed, was, before the *stat.* 7 *Ann. c.* 18. entirely conclusive, as between the patron or his heirs and a stranger: for, till then, the full possession of the advowson was in him who presented last, and his heirs; unless since that presentation, the clerk had been evicted within six months, or the rightful patron had recovered the advowson in a writ of right; which is a title superior to all others. But that statute having given a right to any person to bring a *quare impedit*, and to recover (if his title be good) notwithstanding the last presentation by whomsoever made; assises of *darrein presentment*, now not being in anywise conclusive, have been totally disused; as indeed they began to be before; a *quare impedit* being a more general, and therefore a more usual, action. For the assise of *darrein presentment* lies only where a man has an advowson by descent from his ancestors; but the writ of *quare impedit* is equally remedial, whether a man claims title by descent or by purchase. 2 *Inst.* 355. See title *Quare Impedit.*

DATE OF A DEED. Is the description of the time, *viz.* the day, month, year of our Lord, year of the reign, &c. in which the deed was made. 1 *Inst.* 6. But the *ancient* deeds had no *dates*, only of the month and the year; to signify that they were not made in haste, or in the space of a day; but upon longer and more mature deliberation. *Blount.* If in the *date* of a deed, the year of our Lord is right, though the year of the King's reign be mistaken, it shall not hurt it. *Cro. Jac.* 261. A deed was *dated* 30th March 1701, without *anno Domini* and *anno Regni*; and it was adjudged that both the year of the Lord and of the King were implicitly in the deed. 2 *Salk.* 658. A deed is good, though it hath no *date* of the day or place, or if the *date* be mistaken, or though it hath an impossible *date*, as the 30th of February, &c. But he that doth plead such a deed, without any *date*, or with an impossible *date*, must set forth the time when it was delivered. 2 *Rep.* 5. 1 *Inst.* 46. If no *date* of a deed be set forth, it shall be intended that it had none; and in such case it is good from the delivery; for every deed or writing hath a *date* in law, and that is the day in which it is delivered: and a deed is no deed till the delivery, and that is the *date* of it. *Mod. Ca.* 244. 1 *Nels. Abr.* 525.

An impossible date of a bond, &c. is no date at all; but the plaintiff must declare on the bond as made at a certain time: and if the express *date* be insensible, the real *date* is the delivery. 2 *Salk.* 463. Where there is none or an impossible *date*, the plaintiff may count of any *date*. 1 *Lill. Abr.* 293. If there be a mistaken *date*, or a *date* be impossible, &c. the plaintiff may surmise a legal *date* in the declaration, whereupon the defendant is to answer to the deed, and not to the *date*. *Yelv.* 194. If a deed bears *date* at a place out of the realm, it may be averred that the place mentioned in the deed is in some county in England; and here the place is not traversable; without this the deed cannot be tried. 1 *Inst.* 261. A deed may be *dated* at one time, and sealed and delivered at another: but every deed shall be intended to be delivered on the same day it bears *date*, unless the contrary is proved. 2 *Inst.* 674. Though there can be no delivery of a deed before the day of the *date*; yet after, there may. *Yelv.* 138. So that a deed may be *dated* back on a time past, but not at a day to come. See title *Deed.*

DATIVE, OR DATIF, *dativus.*] Signifies that which may be given or disposed of at will and pleasure. *Stat.* 9 *R.* 2. *c.* 4.

DAVATA TERRÆ, DAWACH. A portion of land so called in Scotland. *Skene.*

DAY, *dies.*] A certain space of time, containing twenty-four hours; and if a fact be done in the night, you must state it in law proceedings, in the night of the same day. The *natural day* consists of twenty-four hours, and contains the solar *day* and the night: and the *artificial day* begins from the rising of the sun, and ends when it sets. See 1 *Inst.* 135. *Day*, in legal understanding, is the *day of appearance* of the parties, or continuance of the suit where a day is given, &c. And there is a *day* of appearance in court by the *writ* and by the *roll*; by *writ*, when the sheriff returns the writ; by *roll*, when he hath a day by the roll, and the sheriff returns not the writ, there the defendant, to save his freehold, and prevent loss of issues, imprisonment, &c. may appear by the *day* he hath by the roll. *Co. Lit.* 135.

In *real* actions there are *dies communes*, common *days*; and in all summonses there must be fifteen *days* after the summons before the appearance; and before the statute of *articuli super chartas*, in all summons and attachment in plea of land, there should be contained fifteen *days*. *Co. Lit.* 134.

As to offences in B. R. if the offence be committed in another county than where the court sits, and the indictment be removed by *certiorari*, there must be fifteen *days* between every process and the return thereof; but if it be committed in the same county where the bench sits, they may sit *de die in diem*; but this they will very rarely do. *Ibid.* There is a *day* called *dies specialis*, as in an assise in the King's Bench or Common Pleas, the attachment need not be fifteen days before the appearance; otherwise it is before justices assigned; but generally in assises the judges may give a special day at their pleasure, and are not bound to the common *days*; and these days they may give as well out of term as within.

There is also a *day* of grace, *dies gratiæ*; and generally this is granted by the court at the prayer of the demandant or plaintiff, in whose delay it is; but it is never granted where the King is party, by *aid prior* of the tenant or defendant; nor where any lord of parliament, or peer of the realm is tenant or defendant.

And sometimes the *day* that is *quarto die post*, is called *dies gratiæ*, for the very *day* of return is the *day* in law, and to that *day* the judgment hath relation, but no default shall be recorded till the fourth *day* be past; unless it be in a writ of right, where the law alloweth no *day* but the *day* of the return. *Co. Lit.* 135.—See titles *Judgment*, *Term*.

There are several *return-days* in the terms; and if either of them happen upon a Sunday, the *day* following is taken in-instead of it; for Sunday is *dies non juridicus*; and so is Ascension day in Easter term, St. John Baptist in Trinity term, All Saints and All Souls, in Michaelmas term, and the Purification of the Virgin Mary in Hilary term. 2 *Inst.* 264.—See title *Term*.

*Days in Bank* are *days* set down by statute, or order of the court, when writs shall be returned, or when the party shall appear upon the writ served. See *stat.* 51 *H.* 3. *stat* 2. & 3. [or rather of uncertain time.] 32 *Hen.* 8. *cap.* 21. 16 *Car.* 1. *c.* 6. and 24 *Geo.* 2. *c.* 48. And by the statute *de anno bissextili*, 21, [or 40, or 44] *H.* 3. the *day* increasing in the leap year, and the day next going before are to be accounted but one *day*.

It is commonly said that the *day* of *Nisi prius*, and the *day in Bank*, is all one *day*; but this is to be understood as to pleading, not to other purposes. 1 *Inst.* 135. But after issue found for the plaintiff at the *Nisi prius*, if a day be given *in Bank*, and the defendant makes default, judgment shall be given against him. 2 *Danv. Abr.* 477. and *vide Id.* 476.

To be dismissed *without day*, is to be finally dismissed the court: and when the justices before whom causes were depending, do not come on the *day* to which they were continued, whether such absence be occasioned by death or otherwise, they are said to be *put without day*: but may be revived, or recontinued by re-summons, re-attachment, &c. See *stat.* 1 *E.* 6. *c.* 7. Also by the Common Law, all proceedings upon any indictment, &c. whereon no judgment had been given, were determined by the demise of the King, and nothing remained but the indictment, original writ, &c. which were *put without day*, till re-continued by re-attachment to bring in the defendants, to plead *de novo*: though this is remedied by *stats.* 4 & 5 *W.* 3. *c.* 18. 1 *An. c.* 8. by which such process, &c. are to continue in the same force after the King's demise, as they would have done if he had lived. See titles *Discontinuance*, *Process*, *King*.

In action of trespass, if the *day* laid in the declaration be either *before* or *after* the actual *day* on which the trespass is committed, it is not material, if a trespass be proved. *Co. Lit.* 283. *a.* But N. B. The *day* laid must be before the first *day* of that term of which the declaration is intituled, or if the trespass be committed within the term, there must be a special memorandum of some particular day, (if by bill) or of some general return day, (if in C. P. or B. R. by original writ) *subsequent* to the day whereon the trespass was committed: and so as to other actions, where the cause of action arises *within* the term. See titles *Declaration*, *Pleading*.

DAY-LIGHT. See titles *Burglary*, *Robbery*.

DAY-RULE. See *Day-Writ*.

DAYWERE OF LAND, *Diurnalis Diurturna*.] As much arable land as could be ploughed up in one day's work; or one *journey*, as the farmers still call it.

DAY-WRIT, OR RULE. A rule or order of court, permitting a prisoner in custody in the King's Bench prison, &c. to go without the bounds of his prison for *one day*. By a rule of the Court of K. B. Easter 30 *Geo.* 3. a prisoner shall not have day rules above *three days* in each term; and shall return to prison before nine in the evening.

But by a rule of that court in Michaelmas, 37 *G.* 3. if any person state, by affidavit, any special cause, to the satisfaction of the Court, for having an additional day-rule, it may be granted accordingly.

However by rule of Hil. 45 *G.* 3. it was ordered, that the rules of East. 30 *G.* 3. and Michaelmas, 37 *G.* 3. should both be repealed, except as to the regulation that every prisoner, having a day-rule, should return within before nine in the evening. See *Debtors*.

The King may grant *writ of warrantia diei* to any person, which shall save his default *for one day*, be it *in plea of land or other action*, and be the cause true, or not; and this by his prerogative, *quod nota*.

It is against law to grant liberty to *debtors in execution* by other writs than *day writs* (or rules). *Chan. Rep.* 67.

No prisoner *committed by* B. R. ought to have the benefit of the *day-rule* of going abroad in term time; for their imprisonment is their punishment for their contempt, or misbehaviour. 2 *Show.* 88. *pl.* 80.

One in execution had a *habeas corpus from the Lord Keeper* (which they call a day writ) *returnable three or four days after its teste*. By virtue of this writ, he went to the wine-licence office, but never to any inn of court or Chancery, or to the Lord Keeper's, and this in the vacation. *Per Pemberton*, Ch. J. This is a *habeas* out of Chancery, which they may send at any time, and by virtue of the King's writ, the party was brought out of the prison-house, and that is justifiable. Then all the day, *so long as there was a keeper with him*, he was in custody still, and returning to prison at night, it is well enough, and no escape; though Chancery may examine the contempt, that is nothing to B. R. 2 *Show.* 298.

A prisoner taken on an *escape-warrant before the sitting of the court* the same day, shall be discharged, if his name was entered with the clerk the night before; but not if it was entered the same morning only. 8 *Mod.* 80.

DAYERIA, *Dairy*, from *day*, *dieie*, Sax. *dag*.] Was at first the *daily* yield of milch cows, or profit made of them. In Lorrain and Champaign they use the word *dayer*, for the meeting of the *day*-labouring people to give an account of their daily work, and receive the wages of it. A *dairy* in the North is called *milkness*; as the *dairy-maid* is in all parts a *milk-maid*: she is termed *androchia* by *Fleta*, *lib.* 2. *cap.* 87. and see *Paroch. Antiq.* 548.

DAYS-MAN. In the North of England, an arbitrator, or elected judge, is usually termed a *dies-man*, or *days-man*: and *Dr. Hammond* says, that the word *day* in all idioms signifies judgment.

DEADLY FEUD. Is a profession of an irreconcileable hatred, till a person is revenged even by the death of his enemy. It is mentioned in *stat* 43 *El. c.* 13. And such enmity and revenge were allowed by the old Saxon law; for where any man was killed, if a pecuniary satisfaction was not made to the kindred of the slain, it was lawful for them to take up arms against the murderer, and revenge themselves on him: and this is called *deadly feud*; which it is conjectured was the original of an *appeal*. *Blount*.—See *stat.* 43 *Eliz. c.* 13. and this Dict. titles *Feud*, *Malicious Mischief*, *Felony*.

DEAD PLEDGE, *mortuum vadium*.] A pledge of lands or goods. See *Mortgage*.

DEAD'S PART. The remainder of the defunct's moveables, beside what is due to the wife and children. *Scotch Dict.* See title *Executor*.

DEAF, DUMB, AND BLIND. A man who is born *deaf, dumb, and blind*, is looked upon by the law in the same state as an idiot: he being supposed incapable of any understanding; as wanting all those senses which furnish the human mind with ideas. 1 *Comm.* 304. See *F. N. B.* 233. See titles *Idiot*, *Lunatic*.

A man who *could neither speak nor hear* committed felony, and was arraigned, and therefore was commanded to prison. *Br. Corone*, *pl.* 216. cites 26 *Edw.* 3. See *Thel. Dig.* 6. *lib.* 1. *c.* 7. and this Dictionary, title *Mute*.

*One who had made his will*, and became ill, and (as it seems) had *lost his speech*; the same will was delivered into his hands, and *it was said to him, that he should deliver it to the vicar, if it should be his last will, otherwise he should retain it; and he delivered it to the vicar, and this was held a good will. Thel. Dig.* 6. *lib.* 1. *cap.* 7. § 8. cites 44 *Ass.* 36.—See title *Will*.

It appearing by oath, that the defendant was both *senseless and dumb*, and therefore could not instruct his counsel to draw his answer: it was ordered that *no attachment*, or other process of contempt, should be awarded against the defendant for not answering, without special order of the court. *Cary's Rep.* 132. cites 22 *Eliz. Altham* v. *Smith*.

One that is *deaf* and wholly deprived of his hearing cannot give, and so one that is *dumb* and cannot speak. Yet (according to the opinion of some) they may *consent by signs*; but it is generally held, that he that is *dumb* cannot make a gift, because he cannot consent to it. 1 *Inst.* 107.

If, however, a blind man has understanding, he may *deliver a deed* sealed by him. *Jenk.* 222. *pl.* 75.

The lord shall have the *custody of a copyholder* that is deaf and dumb; for else he shall be prejudiced in his rents and services; and adjudged for the grantee of the lord against the prochein amy of the copyholder. *Cro. Jac.* 105.

One born *deaf* and *dumb*, who signified by signs that she understood what she was about to do, was allowed to *levy a fine* of lands. *Cart.* 53.

DEAFFORESTED, OR DISAFFORESTED, *Deafforestatus*.] *Discharged* from being *forest*; or freed and exempted from the forest laws. 17 *Car.* 1. *c.* 16. There is likewise *dewarrenata*, as well as *deafforestata*; which is when a *warren* is *diswarrened* or broke up and laid in common.

DEAN, *Decanus*; from the *Greek* Δέκα, *decem*.] An ecclesiastical governor or dignitary, so called, as he presides over ten Canons or Prebendaries at the least. And we call him a *Dean*, that is next under the bishop, and chief of the chapter, ordinarily in a cathedral church; the rest of the society being called *capitulum*, the chapter. As there are two foundations of cathedral churches in England, the *old* and the *new*, the new erected by King Hen. VIII. so there are two means of creating these *Deans*: for those of the *old* foundation, as the *Dean of St. Pauls*, *York*, &c. are exalted to their dignity much like bishops; the King first sending out his *congé d'elire* to the chapter to choose such *Dean*, and the chapter then choosing, the King afterwards yielding his royal assent, and the bishop confirming him, and giving his mandate to instal him.

Those of the *new* foundation, whose deaneries were translated from priories and convents, to *Dean* and Chapter, are donative, and installed by a shorter course, by virtue of the King's letters-patent, without either election or confirmation; and are visitable only by the Lord Chancellor, or by special commission from the King: but the letters-patent are presented to the bishop for institution, and a mandate for installment goes forth. 1 *Inst.* 95. *Davis*, 46, 47.

The *new* Deaneries and Chapters to *old* bishopricks are *eight*, viz. Canterbury, Norwich, Winchester, Durham, Ely, Rochester, Worcester, and Carlisle. The new Deaneries and Chapters to *new* bishopricks are *five*, Peterborough, Chester, Gloucester, Bristol, and Oxford. 1 *Inst.* 95. *a. n.* 3.

Of the four Welsh Cathedrals, *two* are without Deans; or rather the dignities of Bishop and Dean unite in the same person, the bishop being deemed *quasi decanus*; and having, it is said, both an episcopal throne, and a decanal stall allotted to him in the choir. Of this kind are the Cathedrals of St. David's and Llandaff.—St. Asaph and Bangor, the two other Welsh Cathedrals have the dignity of Dean distinct from that of Bishop, but the patronage of both Deaneries is in the respective bishops, they being neither elective by the Chapter, nor donative in the Crown. 1 *Inst.* 95. *a. n.* 4.

In Ireland it seems that the King appoints to Deaneries, as to bishopricks, by letters-patent. *Id. ib.*

Various kinds of *Deans*, besides Deans of Chapters, are known to our law; and several divisions seem necessary to distinguish them properly.

Considered in respect of the difference of office, Deans are of six kinds. 1. *Deans of Chapters*, who are either of cathedral or collegiate churches; though the members of churches of the latter sort may more properly be denominated *colleges* than chapters. See title *Chapters*.—2. *Deans of Peculiars*; who have sometimes both jurisdiction and cure of souls, as the Dean of Battel in Sussex; and sometimes jurisdiction only, as the Dean of the Arches in London; (See title *Arches Court*) and the Deans of Bocking, in Essex, and of Croydon, in Surrey.—3. *Rural Deans*, who had first jurisdiction over deaneries, as every diocese is divided into archdeaconries and deaneries; but afterwards their power was diminished, and they were only the bishops' substitutes to grant letters of administration, probate of wills, &c. And now their office is wholly extinguished, for the archdeacons and chancellors of bishops execute the authority which *Rural Deans* had through all the dioceses of England. 1 *Nels. Abr.* 596, 597. and see 1 *Comm.* 383.—4. *Deans* in the *Colleges* of our *Universities*; who are officers appointed to superintend the behaviour of the members, and to enforce discipline.—5. *Honorary Deans*; as the Dean of the Chapel-Royal at St. James's, who is so stiled on account of the dignity of the person over whose chapel he presides. As to the chapel of St. George, Windsor, there being Canons as well as a Dean, it is something more than a mere chapel, and except in name, resembles a collegi-

ate church.—6. *Deans of Provinces;* or as they are sometimes called, Deans of Bishops. Thus the Bishop of London, is Dean of the Province of Canterbury; and to him as such, the Archbishop sends his mandate for summoning the Bishops of his Province when a Convocation is to be assembled; which may perhaps account for calling him Dean of the Bishops; what the other parts of his office are, the books do not explain, nor do they mention whether there is a Dean for the Province of York. See *Lyndw. Gibs.* 1 *Inst.* 95. (*a*) in *n.*

Another division of Deans, arising from the nature of their office, is into Deans of *Spiritual* promotions, and Deans of *Lay* promotions. Of the former kind are Deans of Peculiars, with cure of souls, Deans of the Royal Chapels, and Deans of Chapters; though as to these last, a contrary opinion formerly prevailed. Perhaps too, Rural Deans might be added to the number. Of the latter kind are Deans of Peculiars, without cure of souls, who therefore may be, and frequently are, persons not in holy orders.

In respect of the *manner of appointment*, Deans are—1. *Elective;* as Deans of Chapters of the old foundation; though they are only so (like Bishops) nominally, and in form; the King, being in fact the real patron.—2. *Donative*, as those Deans of Chapters of the New Foundation, who are appointed by the King's letters-patent, and are installed, under his command to the Chapter, without resorting to the Bishop either for admission, or for a mandate of installment; if that mode of promoting *still* prevails in respect to any of the new deaneries. Deans of the Royal Chapels are also donative, the King appointing to them in the same way. So too may Deans of Peculiars, without cure of souls, be called; as the Dean of the Arches, who is appointed by commission from the Archbishop of Canterbury; but this must be understood in a large sense of the word *Donative*, it being most usually restrained to spiritual promotions.—3. *Presentative;* as some Deans of Peculiars with cure of souls, and the Deans of *some* chapters of the New Foundation, if not *all*. Thus the Dean of Battel is presented by the patron to the Bishop of Chichester, and from him receives institution. This Deanery was founded by William the Conqueror. He hath ecclesiastical jurisdiction within the liberty of Battel, and is presentable by the Duke of Montague, and though instituted and inducted by the Bishop of Chichester, is not subject to his visitation. 1 *Nels. Abr.* Thus too the Dean of Gloucester is presented by the King to the Bishop, with a mandate to admit him, and to give orders for his instalment.—4. *By virtue of another office;* as the Bishop of London is Dean of the Province of Canterbury; and the Bishop of St. David's is Dean of his own Chapter.

As to further particulars relative to the manner of coming to the possession of Deaneries, see a long and learned historical account in 1 *Inst.* 95. (*a*) *n.* 4. from which it appears that the right to appoint Deans of Cathedral and Collegiate Churches, and the mode of appointing them, must generally depend almost wholly upon *charters, usage*, or *acts of parliament;* and if a case should, by bare possibility, arise, where neither of those rules could be had recourse to, *foundership* seems the only true criterion of patronage.

In respect of the manner of holding, Deans are either absolute or *in commendam*. But this applies only to Spiritual Deaneries. It is said there are also *Deputy* Deans. A commendatory *Dean* may, with the Chapter, choose a bishop. And if a *Dean* be elected bishop, and before consecration doth obtain dispensation to hold his deanery *in commendam*, such *Dean* may well confirm, &c. for his old title remains, and therefore confirmations, and other acts done by him as *Dean*, are good in law. *Latch.* 237. 250. *Palm. Rep.* 460.

A *Dean* and Chapter are the bishop's council, to assist him in the affairs of religion, &c. to consult in deciding difficult controversies, and consent to every grant which the bishop shall make to bind his successors, &c.

A *Dean* that is solely seised of a distinct possession, hath an absolute fee in him as well as a bishop. 1 *Inst.* 125. A Deanery is a spiritual promotion, and not a temporal one, though the *Dean* be appointed by the King; and the *Dean* and Chapter may be in part secular, and in part regular. *Dyer*, 10. *Palm.* 500. As a Deanery is a spiritual dignity, a man cannot be *Dean* and Prebendary in the same church. *Dyer*, 273.

DEATH OF PERSONS. There is a *natural* death of a man, and a *civil* death: natural where nature itself expires, and extinguishes; and civil, is where a man is not actually dead, but is adjudged so by law; as where he enters into religion, &c. By *stat.* 19 *C.* 2. *c.* 6. if any person for whose life any estate hath been granted, remain beyond sea, or is otherwise absent *seven* years, and no proof made of his being living, such person shall be accounted naturally dead; though if the party be after proved living at the time of the eviction of any person, then the tenant, &c. may re-enter, and recover the profits. And by *stat.* 6 *An. c.* 18. persons in reversion or remainder, after the death of another, upon affidavit that they have cause to believe such other dead, may move the Lord Chancellor to order the person to be produced; and if he be not produced, he shall be taken as dead; and those claiming may enter, &c. See further titles *Occupancy, Life-Estate, Reversion.*

A man seised in fee of lands, made a lease in reversion to L. D. for ninety-nine years, to commence after the *deaths* of J. D. and E. D. who had then a lease in possession for the like term, if they or either of them so long lived: the plaintiff positively proved the *death* of J. D. but as to the *death* of E. D. the proof was that he had been reputed dead, and no body had heard of him for fifteen years past; and the defendant not being able to prove that he was alive at any time within seven years, this case was adjudged within the *stat.* 19 *Car.* 2. *c.* 6. *Carthew*, 246.

In law proceedings, the death of either party, between the verdict and judgment, shall not be error; so as judgment be entered in two terms. 16 & 17 *Car.* 2. *c.* 8. See titles *Amendment, Error.*

A Corporation never dies. 1 *Wils.* 184.

Where the plaintiff dies after a verdict and before the day in bank, though the entry of the judgment be right, yet a *scire facias* must be sued out before execution issue. 1 *Wils.* 302.—See titles *Judgment, Execution.*

Where, on the death of parties to a suit, the writ, &c. shall abate. See title *Abatement.*

DEBATING SOCIETIES. See this Dict. titles *Holidays, Advertisements.*

DE BENE ESSE. To take or do any thing *de bene esse*, is to accept or allow it as *well done for the present;* but when it comes to be more fully examined or tried, to stand or fall according to the merit of the thing in its own nature. As in Chancery, upon motion to have one of the less principal defendants in a cause examined as a witness, the Court (not then thoroughly examining the justice of it, or not hearing what may be objected on the other side) will often order such a defendant to be examined *de bene esse, viz.* that his depositions shall be taken, and allowed or suppressed at the hearing of the cause, upon the full debate of the matter, as the Court shall think fit; but in the interim they have a *well-being*, or conditional allowance. 3 *Cro.* 68.

Where a complainant's witnesses are aged, or sick, or going beyond sea, whereby the plaintiff thinks he is in danger of losing their testimony, the Court will order them to be examined *de bene esse;* so as to be valid, if the plaintiff hath not an opportunity of examining them afterwards; as if they die before answer, or do not return, &c. In either of which

cases, the depositions may be made use of in the court of Chancery, or at law: but if parties are alive and well, or do return, &c. after answer, these depositions are not to be of force, for the witnesses must be re-examined.

So also at Common Law, the judges frequently take bail *de bene esse*, that is, to be allowed or disallowed upon the exception, or approbation of the plaintiff's attorney; however, in the interim, they are good, or have a conditional allowance. *Cowel.* Declarations likewise are sometimes delivered *de bene esse.* See titles *Declaration, Practice, Process*, &c.

DEBENTURE. An instrument in the nature of a bond or bill, to charge Government, &c. There are custom-house debentures, &c. the forging of which is single felony by 41 *Geo.* 3. (U. K.) *c.* 75. § 7.

DEBET ET DETINET. See title *Debt*, II.

DEBET ET SOLET. If a person sues to recover any right, whereof his ancestor was disseised by the tenant of his ancestor, then he useth the word *debet* alone in his writ, because his ancestor only was disseised, and the estate discontinued: but if he sue for any thing that is now first of all denied him, then he useth *debet et solet*, by reason his ancestor before him, and he himself usually enjoyed the thing sued for, until the present refusal of the tenant. *Reg. Orig.* 140. The writ of *secta ad molendinum* is a writ of right, in the *debet et solet*, &c. *F. N. B.* 98.

## DEBT.

Debitum.] In common parlance is a sum of money due from one person to another. And if an action be brought, and the plaintiff recovers judgment, he may by law take either the person, or his real or personal estate in execution, *i. e.* the moiety of his real estate, or the whole of the personal, if not more than sufficient for payment of the sum recovered and charges.

In the legal sense of the word, *debt* is said to be an action which lieth where a man *oweth* another a certain sum of money, either by a debt of *record*, by *specialty* or by *simple contract*; as on a judgment, obligation, or bargain for a thing sold, or by contract, &c. and the debtor will not pay the debt at the day agreed; then the creditor shall have action of debt against him for the same. See 2 *Comm.* 464. If a man contract to pay money for a thing which he hath bought; and the seller takes bond for the money, the contract is discharged, so that he shall not have action of debt upon the *contract*, but on the *bond. New Nat. Br.* 268.

I. *In what Cases Action of Debt will lie; and how and by whom, and against whom it may be brought.*
II. *Where it shall be brought in the* debet *and* detinet, *and where in the* detinet *only.*
III. *How it may be extinguished.*

I. The legal acceptation of *debt*, is a sum of money due by certain and express agreement: as, by a bond for a determinate sum; a bill, or note; a special bargain; or rent reserved on a lease; where the quantity is fixed and specific, and does not depend upon any subsequent valuation to settle it. The non-payment of these is an injury, for which the proper remedy is by action of *debt*, (*F. N. B.* 119.) to compel the performance of the contract, and recover the specific sum due. This is the shortest and surest remedy; particularly where the debt arises upon a specialty, that is, upon a deed or instrument under seal. So also, if I verbally agree to pay a man a certain price for a certain parcel of goods, and fail in the performance, an action of debt lies against me; for this is also a *determinate* contract; but if I agree for no settled price, I am not liable to an action of debt, but a special action on the case, according to the nature of my contract. And indeed actions of debt are now seldom brought but upon special contracts under seal; wherein the sum due is clearly and precisely expressed; for, in case of such an action upon a simple contract, the plaintiff labours under two difficulties; First, the defendant has here the same advantage, as in an action of *detinue*, that of waging his law, or purging himself of the debt by oath, if he thinks proper. 4 *Rep.* 94. Secondly, in an action of debt, the plaintiff must prove the whole debt he claims, or recover nothing at all. For the debt is one single cause of action, fixed and determined; and which therefore, if the proof varies from the claim, cannot be looked upon as the same contract, whereof the performance is sued for.—But in actions of debt, where the contract is proved or admitted, if the defendant can shew that he has discharged any part of it, the plaintiff shall recover the residue. 1 *Rol. Rep.* 257. *Salk.* 664. 3 *Comm.* 154.

When also the damages can be reduced by the averment to a certainty, *debt* will lie; as on a covenant to pay so much *per* load for wood, &c. So if in an action, in which the plaintiff can only recover damages, there be judgment for him, he can afterwards bring *debt* for those damages. *Bull. N. P.* (8vo.) 167.—And as to cases in which on actions of debt it is not necessary to prove the exact sum laid in the declaration, see at large *Doug.* 6. 732. *in n.*

If one binds himself in a single obligation, or with condition, to pay money at a day; or to deliver corn, or the like, and do not perform it accordingly, the obligee may bring action of *debt* for it. *F. N. B.* 120. A man acknowledges by deed, that he hath so much of the money of J. S. due to him in his hands; here debt may be brought: and debt will lie on a talley sealed. *F. N. B.* 122. 1 *H.* 6. 55. A. delivers 20*l.* to B. to buy goods, and B. gives a receipt to A. testifying the delivery and receipt of the 20*l.* but doth not promise to deliver the goods, &c. A. may maintain debt upon this receipt. *Dyer*, 20. 2 *Bulst.* 256. If one binds himself to pay A. B. 10*l.* at one day, and 10*l.* at another, after the first day action of debt lies for 10*l.* being a several duty. 2 *Danv. Abr.* 501. The nature of the bond, and of the condition, (if there is any) must be carefully attended to, to see if by non-payment of the first sum the bond is forfeited. *Vide Co. Lit.* 292 *b.*

Action of *debt* lies upon a *parol contract*, and so doth *action on the case.* 1 *Lil.* 403. And *vide* 9 *Rep.* 87. If goods or money are delivered to a third person for my use, I may have action of debt or account for them. 2 *Danv.* 404. Where money is delivered to a person, to be re-delivered again, the property is altered, and debt lies: but where a horse, or any goods are thus delivered, there *detinue* lies, because the property is not altered; and the thing is known, whereas money is not. *Owen.* 86. 1 *Nels. Abr.* 603.

Action of debt lies against the husband, for goods which were delivered or sold to the wife, if they come to the use of the husband. 1 *Lil.* 400. If one delivers meat, drink, or clothes, to an infant, and he promises to pay for them, action of debt, or on the case, will lie against the infant. Though debt may not be brought on an *account stated* with an infant: and what is delivered must be averred to be for the necessary use of the infant. 1 *Lil. Abr.* 401.—See title *Infant.* An attorney shall have action of debt against his client, for money, which he hath paid to any person for the client, for costs of suit, or unto his counsel, &c.

An heir mediate may be sued in debt as if he were immediate heir, &c. The heir may not bring action of debt for a debt due to his ancestor; though it be by specialty, by which the party is bound to pay it to him and his heirs: the executor shall nevertheless have the action. *Dyer*, 368. *F. N. B.* 120. Action of debt lies not against executors, upon a simple contract made with the testator. 9 *Rep.* 87. and see 5 *W. P. Taunton*, 665.

Before the *stat.* 32 *H.* 8. *c.* 37. the heirs of executors of a man seised of a rent-service, rent-charge, &c. in fee simple,

or fee-tail, had no remedy for the arrearages incurred in the life time of the owner of such rents: but by that statute, the executors and administrators of tenants in fee-simple, fee-tail, or for life, of any rent, shall have *action of debt* for all arrearages of rent due in the life of the testator. 1 *Inst.* 162. 2 *Danv.* 492.

A feme sole seised of a rent in fee, &c. which is behind and unpaid, takes husband, and the rent is behind again, and then the wife dieth, by the said *stat.* 32 *H.* 8. *c.* 37. the husband shall have the arrears due before marriage, and he hath a double remedy for the same. 1 *Inst.* 162.

But by *stat.* 8 *Ann. c.* 14. any person having rent in arrear upon any lease for life or lives, may bring *action of debt* for such rent, as where rent is due on a lease for years. Action of *debt* will lie against a lessee, for rent due after the assignment of the lease; for the personal privity of contract remains, notwithstanding the privity of estate is gone. 3 *Rep.* 22. But after the death of the lessee, it is then a real contract, and runs with the land. *Cro. Eliz.* 555. When a lease is ended, the duty in respect of the rent remains, and debt lieth by reason of the privity of contract between lessor and lessee. 2 *Cro.* 227. 1 *Nels. Abr.* 604. If debt be brought by an executor for arrears of rent ended, it is local still, and must be laid where the land lies. *Hob.* 37. Action of *debt* may be had against the *lessee* in any place; but if it be brought against an *assignee*, it must be where the land lieth; and upon the *privity* of *contract*, it is to be brought against the lessee where the land is. *Latch.* 197. 271. 2 *Leon. c.* 28.

Debt does not lie at the Common Law, nor by *stat.* 8 *Ann. c.* 14. for the arrear of an annuity or yearly rent, payable to A. during the life of B. out of lands devised to B. for life. *Webb* v. *Jiggs & Ux. Term Rep. K. B. Hil.* 55 *Geo.* 3. 113.

Debt lies for use and occupation generally, without stating the place where the premises lie, or any of the particulars of the demise. *King* v. *Fraser*, 6 *East's Rep.* 348. See also *Wilkins* v. *Wingate*, 6 *Term. Rep.* 62. and *Stroud* v. *Rogers*, *Hil.* 32 *Geo.* 3. *cited ibid.*

Debt for rent on a lease against *assignee* is local. *Barker* v. *Dormer*, 1 *Show.* 191.

In an action of debt for rent, without showing in what parish the lands were situate, and a particular of the plaintiff's demand describing them in a wrong parish, yet the court of K. B. held that the plaintiff might recover; it not appearing that any misrepresentation was intended, or that defendant had held more than one parcel of land of plaintiff so as to be misled by such inaccuracy. *Davies* v. *Edwards*, *Term Rep. K. B. Hil.* 55 *G.* 3. 380.

In some cases action of *debt* will lie, although there be no contract betwixt the party that brings the action, and him against whom brought; for there may be a duty created by law, for which action will lie. 2 *Saund.* 343. 366. *Debt* lieth against a sheriff, for money levied in execution. 1 *Lil. Abr.* 403. Action of *debt* lies against a gaoler for permitting a prisoner committed in execution, to escape; because thereupon the law makes the gaoler debtor; but where the party is not in execution, there action on the case only lies for damages suffered by the escape. 1 *Saund.* 218. 1 *Lil. Abr.* 402.

A person may have debt upon an arbitrament: also debt lies for money recovered upon a judgment, &c. And upon a recovery in the superior courts at Westminster, the plaintiff must bring the action in Middlesex, the record being there; but a *sci. fa.* to execute judgment, must be where the original was, and follow it. *New Nat. Br.* 267. 268. &c.

When judgment is bad in the King's Bench, and a writ of error brought in the Exchequer chamber, or in Parliament; yet an action of debt will lie on the judgment: in this case, if the plaintiff levies part of his money, by *elegit*, he may likewise bring debt for the residue. 1 *Sid.* 184. 236.

Whatever the laws order any one to pay, that becomes instantly a debt, which he hath before-hand contracted to discharge. And this implied agreement it is, that gives the plaintiff a right to institute a second action, founded merely on the general contract, in order to recover such damages or sum of money, as are assessed by the jury, and adjudged by the court to be due from the defendant to the plaintiff in any former action. So that if he hath once obtained a judgment against another for a certain sum, and neglects to take out execution thereupon, he may afterwards bring an action of debt upon this judgment; (1 *Rol. Abr.* 600, 1.) and shall not be put upon the proof of the original cause of action; but upon shewing the judgment once obtained, still in full force, and yet unsatisfied, the law immediately implies, that by the original contract of society the defendant hath contracted a debt, and is bound to pay. This method seems to have been invented, when *real* actions were more in use than at present, and damages were permitted to be recovered thereon; in order to have the benefit of a writ of *capias*, to take the defendant's body in execution for those damages: which process was allowable in an action of debt, (in consequence of the *stat.* 25 *Ed.* 3. *c.* 17.) but not in an action real. Wherefore, since the disuse of those real actions, actions of debt upon judgment in personal suits have been pretty much discountenanced by the courts, as being generally vexatious and oppressive, by harassing the defendant with the costs of two actions instead of one. 3 *Comm.* 160.

*Debt* will lie upon the judgment of a Foreign Court, and the plaintiff need not shew the ground of the judgment; but it is not to be declared on as a matter of record, for it is here but of the nature of a simple contract debt; therefore in such case the judgment is sufficient only to establish a demand, and put the defendant to impeach the justice of it, or show the same to have been unduly or irregularly obtained. And as it is but a simple contract, *assumpsit* will also lie on it.—*Walker* v. *Witter*, *Doug.* 1—6.; in which several other cases on the same point are also cited and reported.

If a man recovers debt or damages in London, on action brought there by the custom of the city, which lies not at Common Law; when it is become a debt by the judgment, action of debt lies in the courts at Westminster upon this judgment. 2 *Danv.* 449.

Action of debt will lie for breach of a by-law; or, for amercement in a court-leet, &c. 1 *Lil.* 400. 5 *Rep.* 64. *Hob.* 259. And action of debt is sometimes grounded on an act of parliament; as upon *stat.* 2 *Ed.* 6. *c.* 13. for not setting out tithes: *stat.* 27 *El. c.* 13. against the hundred for a robbery, &c. Against physicians in London, for practising without licence, by *stat.* 14 & 15 *H.* 8. *c.* 5.—By assignees of a commission of bankrupt, *stat.* 1 *Jac.* 1. *c.* 15, &c.—A college shall have action of debt for commons of any student; adjudged, *Pasch.* 9 *Jac. B. R.*—And in general, all the cases show that wherever *indebitatus assumpsit* is maintainable, debt also is. *Doug.* 6. *per Buller*, J.

For debt to a bishop or parson, after his death, his executors shall have the action; but of a dean and chapter, mayor and commonalty, &c. the successors are entitled to the action of debt. *F. N. B.* 120. Action of debt lies on a recognisance; so upon a statute merchant, it being in nature of a bond or obligation: but it is otherwise in case of a statute staple. 2 *Danv.* 497.

In bringing this action, it is a general rule, that the party himself, to whom the debt is originally due, whilst he doth live, must bring the action; and after his death, his executors, &c. And the action must be brought against the party himself that doth originally owe the debt, whilst he is living; and after his death, it may be brought against the executor, if he make any; or otherwise against the administrator; and if the Ordinary appoint none, against the Ordinary himself; and if he die possessed of the goods, against his executor, &c. And also against executors of executors *in infinitum*. *Dyer*, 24. 471. 3 *Rep.* 9. 2 *Brownl.* 207.

Action of debt for 100*l.* lies in *stat.* 19 *G.* 2. *c.* 34. § 6. against the inhabitants of a Lath in Kent, by the executors of a revenue officer, who being in a boat between high and low water mark in pursuit of a smuggling boat, in which were offenders against that act, received a mortal wound by a shot fired by a person on the shore within the Lath: though the officer afterwards died on the high sea beyond the low water mark, and consequently out of the Lath.—*Ellis's Executors* v. *St. Augustine's Lath, Kent,* 12 *East's Rep.* 244.

II. The form of the writ of *debt* is sometimes in the *debet & detinet*, and sometimes in the *detinet* only; that is, the writ states, either that the defendant *owes*, and unjustly *detains* the debt or thing in question, or only that he unjustly *detains* it. It is brought in the *debt*, as well as *detinet*, where sued by one of the original contracting parties who personally gave the credit, against the other who personally incurred the debt, or against his heirs, if they are bound to the payment; as by the obligee against the obligor, the landlord against the tenant, &c. But, if it be brought by, or against an executor for a debt due to or from the testator, this, not being his own debt, shall be sued for in the *detinet* only. *F. N. B.* 119. So also if the action be for goods, for corn, or an horse, the writ shall in the *detinet* only; for nothing but a sum of money, for which I (or my ancestors in my name) have personally contracted, is properly considered as my *debt*. And indeed a writ of *debt* in the *detinet* only, for goods and chattels, is neither more nor less, than a mere writ of *detinue;* and is followed by the very same judgment. *Rast. Entr.* 174. 3 *Comm.* 156.

In debt, if it be demanded by original, the process is summons, attachment and distress; and upon a default of sufficiency, on a *nihil* returned, process to the outlawry, &c. And the judgment in debt, where the demand is in the *debet & detinet*, is to recover the debt, damages and costs of suit; and the defendant *in misericordia*. 1 *Shep. Abr.* 523. Where the plaintiff in debt declares on some specialty, or contract for a sum of money, it must be certainly demanded, and no other; and the demand cannot be of a lesser sum, but it must be shewn how the remainder was satisfied: but in an action upon a statute, that gives a certain sum for the penalty, though less be recovered than the plaintiff lays, it will be good. *Cro. Jac.* 498. If action of debt is brought on a specialty, bill, bond, lease, &c. the several writings must be well considered by which the plaintiff warrants his action, and the sum due is to be rightly set forth; and if it be debt for rent, the time of commencement, and ending, &c. In debt on single bill or upon judgment, the defendant may plead payment (before the action brought) in bar; and pending an action, on bond, &c. the defendant may bring in principal, interest and costs; and the court shall give judgment to discharge the defendant. *Stat.* 4 & 5 *An. c.* 16. See title *Bond*.

If the action be brought for money, it must be in the *debet & detinet;* but if goods or chattels, it must be in the *detinet* only. 50 *Ed.* 3. 16. 1 *Rol. Abr.*—If an *executor* brings debt for any thing in right of his testator, it must be in the *detinet* only. *Moor,* 566. 1 *Rol. Abr.* 602, 603.

If an *executor* brings an action upon an obligation made to the testator, where the day of payment incurred after the death of the testator, yet the writ shall be in the *detinet* only, for he brings the action as *executor*. *Lane,* 80. *S. P.* 20 *H.* 6. 5. 1 *Rol. Abr.* 602. *S. C.*

So if a man binds himself to the testator to pay him 100*l.* when such a thing shall happen; if it happens after the death of the testator, yet the writ by the *executor* shall be in the *detinet* only. 20 *H.* 6. 6. 1 *Rol. Abr.* 602.

If in an *account* an *executor* recovers a debt due to his testator, in action for the arrearages thereupon, the writ shall be in the *detinet* only, for though the action is converted into a debt by the *account*, yet it is the same thing which was received in the life of the testator. *Cro. Eliz.* 326. *Cro. Jac.* 545. 5 *Co.* 31.

If the *executor* sells the goods of the testator for a certain sum, he shall have action for this in the *debet & detinet*. 1 *Rol. Abr.* 602.

If an *executor* having lands by an *extent* upon a statute made to the testator, and naming himself *executor*, by deed leases them for three years, rendering rent, &c. if an action is afterwards brought by him for his rent, it must be in the *debet & detinet*, because it is founded upon his *own* contract. *Lane,* 80. *Cro. Jac.* 685. *Brown,* 205. 1 *Mod.* 185.

So an executor, being lessee for years of a rectory in the right of the testator, may have action upon 2 *Ed.* 6. *c.* 13. for not setting out tithes in the *debet & detinet*, because founded upon a wrong in his *own* time, and by the statute it is given to the party *grieved*. *Cro. Jac.* 545.

Also action against an *executor* shall be in the *detinet* only, for he is chargeable no farther than he has assets. 11 *H.* 4. 16. 1 *Rol. Abr.* 603.

In an action against an executor for rent, incurred in the life of the testator, the writ shall be in the *detinet* only. 11 *H.* 6. 36. 1 *Rol. Abr.* 603.

But if an action be brought against an executor for the arrearages of a rent, reserved upon a lease for years, and incurred *after* the death of the testator, the writ shall be in the *debet & detinet*, because the executor is charged of his *own* possession. 1 *Rol. Abr.* 603. *Cro. Eliz.* 711. *Moor,* 566. 1 *Brownl.* 56. *Cro. Jac.* 411. And the declaration is against him as *assignee*, not as *executor*.

If an action is brought against *baron* and *feme*, upon an *obligation* entered into by the *feme before* marriage, it shall be in the *debet & detinet;* for by the marriage all the personal goods and power of disposing of the real estate are by law given the husband, which he has to his *own* use, and not as *executors*, who have them only to the use of another. 5 *Co.* 36. 3 *Leon.* 206. *S. C.*

So if an action is brought upon a *bond* against the *heir* of the obligor, it shall be in the *debet & detinet*, because he hath the assets in his own right. 5 *Co.* 36.

Debt lies by the assignees of a replevin-bond against one of the sureties in the *detinet* only. *Wilson* v. *Hobday, Term Rep. K. B.* 55 *G.* 3. 120.

III. If a man accepts an *obligation* for a debt due by simple contract, this extinguishes the *contract*, but the acceptance of an *obligation*, for a debt due by another *obligation*, is no bar of the first obligation. 13 *H.* 4. *c.* 1. 1 *Rol. Abr.* 604. *i. e.* if between the same parties. See title *Bond*, V. *Acceptance, Payment*.

In *debt* upon an *obligation*, the defendant cannot plead *nil debet*, but must *deny* the *deed* by pleading *non est factum* for the seal of the party, continuing, it must be dissolved *eo ligamine quo ligatum est*. Hard. 332.

But if the debt be due by *simple contract*, then he may plead *nil debet*, for it does not appear that there is any *debt* continuing. *Hob.* 218.

In *debt* for *rent*, if it be by *deed*, the proper plea is *non est factum;* but if it be *without deed*, the defendant may plead *non demisit*, nothing in arrear, or that he never entered. 2 *Inst.* 651. *Hard.* 332.

In *debt* for the arrears of an *annuity* granted for life *nil debet* is no good plea, for the action is merely founded upon the *deed*, for without it no action can be maintained, and though by the death of the grantee the nature of the action is changed, the annuity being determined; yet this proves not but that the action is founded upon the deed. *Keilw.* 147.

But in *debt* for the arrears of a *rent-charge*, by will devised to the plaintiff's wife for life; against the *administrator* of the occupier of the land, *nil detinet* is a good plea, for the will is no deed, nor wants any delivery; adjudged, and said the action was not so much grounded upon the *will* itself as upon the *statute*, by which men are enabled by will to dispose of their lands and rents issuing out thereof. *Hard.* 322.

In debt upon *stat.* 2 & 3 *E.* 6. *c.* 13. for not setting forth tithes. Not guilty, or *nil debet* are good issues: 2 *Inst.* 651. *Cro. Eliz.* 621. S. P.; because by the action the defendant is charged with a *tort*, and if he is not guilty of the *tort*, he does not *owe* the *debt*.

In *debt* upon a *contract*, the defendant cannot plead the contract was for a less sum, or otherwise than the plaintiff has declared, and traverse the contract in the declaration laid, but may wage his law. *Moor.* 49. See further *Com. Dig.* title *Debt*, and this Dictionary titles *Action*, *Assumpsit*, *Information*, &c. And as to setting off mutual debts, see title *Set off*.

DEBT TO THE KING. The *King's debt* is to be satisfied before that of a subject, and until his *debt* be paid, he may protect the *debtor* from the arrest of others. By the Common Law, the *King* for his *debt* had execution of the body, lands and goods of the *debtor*. By *Magna Charta*, 9 *H.* 3. *c.* 8. the *King's debt* shall not be levied on lands, where the goods and chattels of the *debtor* are sufficient to levy the *debt*. Also pledges shall not be distrained, when the principal is sufficient. Sheriffs having received the *King's debt*, upon their next account are to discharge the *debtors*, on pain to forfeit treble value; and the sheriffs are to give tallies to the *King's debtors* on payment. *Stat.* 3 *Ed.* 1. *c.* 19. By *stat.* 33 *H.* 3. *c.* 39. all obligations made to the King shall have the same force as a Statute-Staple: 1 *Inst.* 130. But by *stat.* 25 *E.* 3. *st.* 5. *c.* 19. notwithstanding the King's protection, creditors may proceed to judgment against their *debtors*, with a *cesset executio* till the *King's debts* be paid. Lands, &c. of the *King's debtor* and accountant, may be sold as well after his death, as in his life-time: but if the accountant or *debtor to the King* had a *quietus* during his life, his heir shall be discharged of the *debt*. *Stat.* 27 *Eliz. cap.* 3. See also *stat.* 25 *Geo.* 3. *c.* 35. regulating the sale of extended estates, on motion to the Court of Exchequer, by the Attorney General. See further titles *Extent*, *Execution*, *King*, *Prerogative*, and *Com. Dig.* title *Debt*, *ad fin.*

DEBTEE-EXECUTOR. See title *Executor*.

DEBTORS. A Work of the nature of this Dictionary is by no means adapted to political disquisitions on the propriety of *imprisonment for debt*—nor to historical details of the proceedings of *foreign nations* on the subject. The Legislature, who are the proper, and indeed the *only legal* judges, of what regulations on the subject are necessary, have repeatedly interfered for the relief of *honest*, *unfortunate debtors*, (too generally a small part of the number confined,) by *Insolvent acts*; and the liberty of the subject in this particular, has in the present reign been much favoured by the laws relative to *Arrests*.—See titles *Arrest*, *Prisoners*, *Execution*, *Insolvent*.

By *stat.* 25 *Geo.* 3. *c.* 45. for the Courts of Conscience in London, Middlesex, and Southwark, the provisions of which are extended by *stat.* 26 *Geo.* 3. *c.* 38. nearly *totidem verbis*, to ALL Courts for the recovery of small debts;—no debtor committed to gaol by such Court for a debt not exceeding 20*s.* shall be kept in custody *on any pretence whatsoever*, more than *twenty days*—nor for a debt between that and 40*s.* more than *forty* days—then to be discharged without payment of fees, on forfeiture by the gaoler of 5*l.*—In case only of fraudulent concealment of money or goods by the debtor, the time of confinement may be enlarged, in the first instance to 30 days, and in the latter to 60.



By a temporary Act, 41 *G.* 3. (U. K.) *c.* 64. § 1. Creditors were allowed to discharge Debtors without losing the benefit of the Judgment upon which the execution issued, except that the Debtor should not be again liable to be arrested for the same Debt, nor the bail be proceeded against.

As to the general relief of the persons of *Insolvent Debtors* surrendering their effects, see the temporary acts, 53 *Geo.* 3. *cc.* 102. 138. and 54 *Geo.* 3. *cc.* 23. 114. passed for England and Ireland respectively, and this Dict. title *Insolvents*.

DEBTS, PRIORITY OF. See titles *Assets*, *Executor*, *Mortgage*.

DECEIT, *Deceptio.*] A subtle trick or devise, whereunto may be referred all manner of craft and collusion, used to deceive and defraud another, by any means whatsoever, which hath no other or more proper name than *deceit* to distinguish the offence. *West. Symb. sect.* 68.

There is a writ called a WRIT OF DECEIT that lies for one that receives injury or damage from him that doth any thing *deceitfully* in the name of another person; by which he is deceived or injured; which writ is either original or judicial. *Reg. Orig.* 112. *Old Nat. Br.* 50.

*Deceit* is an offence at Common Law, and by statute: and all practices of defrauding or endeavouring to defraud another of his right, are punishable by fine and imprisonment; and if for cheating, by pillory, &c. See title *Cheats*. Serjeants, counsellors, attornies, and others doing any manner of *deceit*, are to be imprisoned a year and a day; also pleaders by *deceit* shall be expelled the court. *Stat.* 3 *Ed.* 1. *cap.* 29.

If a fine be levied by *deceit*, or if one recover land by *deceit*, the fine, and the recovery, shall be void. 3 *Rep.* 77. And if a man be attorney for another in a real action against the demandant, and afterwards by covin between such attorney and the demandant, the attorney makes default, by which the land is lost, the tenant who lost the land shall have a writ of *deceit* against the attorney. *F. N. B.* 96. So writ of deceit lies to set aside a fine and recovery in C. B. of lands in ancient demesne. 2 *Wils.* 17.

In a *præcipe quod reddat*, if the sheriff return the tenant summoned, where he was not summoned, by which the defendant loseth his land by default at the grand *cape* returned; the tenant shall have a writ of *deceit* against him who recovered, and against the sheriff for his false return; and by that writ the tenant shall be restored unto his land again: and the sheriff shall be punished for his falsity. *F. N. B.* 97. If a man bring a writ of *deceit* against him that recovers in the first action, and the sheriff return him summoned, upon which for non-summons in that action on finding the same the recovery is reversed: in this case the defendant shall not have writ of *deceit* to recover the land again, if he were not summoned: but he shall have his remedy against the sheriff. *Rol. Abr.* 621. And where *debt* was brought, and the defendant pleaded in abatement, and the plea was overruled, the attornies on both sides by *deceit* between them, to the end the plaintiff might recover his debt, entered another judgment when it should have been a *respondeas ouster*; and it was held that the writ of *deceit* would not lie to reverse the record, but only to recover damages. *Ibid.* 622.

If in a suit or action, another person shall come into court and pretend he is party to the suit, and so let judgment be had, or some other damage done to the party himself; or if one have cause to have an action, and another brings it in his name, and lets judgment go by nonsuit, or the like, the injured party may have this writ of *deceit*. *F. N. B.* 96. *March*, 48.

If any one forge a statute, &c. in my name, and sueth a *capias* thereupon, for which I am arrested; I shall have a writ of *deceit* against him that forged it, and against him who sued forth the writ of *capias*, &c. And if a person procure another to sue an action against me to trouble me, I shall have a writ of *deceit*. *F. N. B.* 96.

There are many frauds and *deceits* provided against by statute, relating to artificers, bakers, brewers, victuallers, false weights and measures, &c. which are liable to penalties and punishment in proportion to the offence committed. And writ of *deceit* lies in various cases, for not performing a bargain; or not selling good commodities, &c. 1 *Inst.* 357.

On almost all occasions, where a person is deceived or injured, and where anciently remedy was sought by the *writ of deceit*, an action on the case for damages, in nature of a writ of deceit, is now more usually brought. And indeed it is the only remedy for a lord of a manor in or out of ancient demesne, to reverse a fine or recovery had in the king's court, of lands lying within his jurisdiction, which would otherwise be thereby turned into frank-fee. And this may be brought by the lord against the parties and *cestui que use* of such fine and recovery; and thereby he shall obtain judgment not only for damages (which are usually remitted) but also to recover his court and jurisdiction over the lands, and to annul the former proceedings. 3 *Lev.* 415. 419. *Lutw.* 711. 749.

A count for a deceit, averring that the defendant represented to the plaintiff that his lessor required 150*l.* premium for a lease, whereas he required only 100*l.* whereby defendant fraudulently obtained from plaintiff and converted to his own use 50*l.* is sufficient. *Pewtriss* v. *Austin*, 6 *W. P. Taunton*, 552.

DECENNARY. A town or tithing consisting (originally) of ten families of freeholders. Ten tithings composed an *hundred*. The institution of *decennaries* (or *frank pledges*) is imputed to Alfred. In these decennaries the whole neighbourhood or tithing of freemen were mutually pledges for each other's good behaviour. 1 *Comm.* 114. See *Deciners*.

DECEM TALES. When a full *jury* doth not appear at a trial at bar, then a writ goes to the sheriff *apponere decem tales*, &c. whereby a supply is made of jurymen to proceed in the trial. See titles *Jury*, *Tales*.

DECIES TANTUM. A writ under *stat.* 38 *E.* 3. *c.* 12. against a *juror*, who hath taken money of either party for giving his verdict, to recover *ten times as much as* the sum taken. See title *Jury*. This writ also lies against *embraceors* that procure such an inquest; who shall be further punished by imprisonment for a year. *Reg. Orig.* 188. *F. N. B.* 171. *Stat.* 38 *Ed.* 3. *cap.* 12.

DECIMATION, *Decimatio.*] The punishing every *tenth soldier* by lot, was termed *decimatio legionis:* it likewise signifies tithing, or paying a tenth part. There was a *decimation* during the time of the Usurper, 1655.

DECINERS, DECENNIERS, OR DOZINERS, *Decennarii.*] In our ancient law, such as were wont to have the oversight of the *Friburghs* or views of *frank-pledge*, for the maintenance of the King's peace; and the limits or compass of their jurisdiction was called *Decenna*, because it commonly consisted of ten households; as every person, bound for himself and his neighbours to keep the peace, was stiled *Decennier*. *Bract. lib.* 3. *tract.* 2. *c.* 15.

These seem to have had large authority in the time of the Saxons, taking knowledge of causes within their circuits, and redressing wrongs by way of judgment, and compelling men thereunto, as appears in the laws of King Edward the Confessor. *Lambard*, *Numb.* 32. But of late *decennier* is not used for the chief man of a *dizein*, or *dozein;* but he that is sworn to the king's peace, and by oath of loyalty to the prince, is settled in the society of a *dozein*.

A *dozein* seemed to extend so far as a leet extendeth; because in leets the oath of loyalty is administered by the steward, and taken by all such as are *twelve* years old, and upwards, dwelling within the precinct of the leet where they are sworn. *F. N. B.* 161. There are now no other *dozeins* but leets; and there is a great diversity between ancient and modern times, in this point of law and government. 2 *Inst.* 73. See 1 *Comm.* 114. 4 *Comm.* 252. and ante *Decennary*.

## DECLARATION.

*Declaratio, Narratio.*] A legal specification, on record, of the cause of action, by a plaintiff against a defendant.

In the King's Bench, when the defendant is brought into court by bill of Middlesex, upon a supposed trespass, in order to give the court a jurisdiction, the plaintiff may declare in whatever action, or charge the defendant with whatever injury, he thinks proper, unless he has held him to bail by a special *ac etiam;* which the plaintiff is then bound to pursue. And so also, in order to have the benefit of a *capias* to secure the defendant's person, it was the ancient practice, and is therefore still warrantable, in the Common Pleas, to sue out a writ of trespass *quare clausum fregit*, for breaking the plaintiff's close: and when the defendant is once brought in upon this writ, the plaintiff declares in what action the nature of his true injury may require; as in an action of covenant or on the case for breach of contract, or other less forcible transgression. (2 *Ventr.* 159.): unless, by holding the defendant to bail on a special *ac etiam*, he has bound himself to declare accordingly. 3 *Comm.* 295. See *Ac etiam*, *Capias*.

In either case, the declaration should correspond with the process, in the names and descriptions of the parties: for if there be a material variance, the court will set aside the proceedings, unless where the process is taken out against the defendant by a wrong name, and he appears by his right name, there the plaintiff may declare against him by the name in which he appears, stating that he was arrested by the other name: for by appearing, the defendant admits himself to be the person sued; and so the variance is immaterial. 3 *Term Rep.* 611.

The substantial rules of pleading according to which declarations are to be drawn are founded in strong sense and the soundest and closest logic, and so appear when well understood and explained; though by being misunderstood and misapplied, they are often made use of as instruments of chicane. 1 *Burr.* 319.

*Rules respecting the form of the Declaration.*—The parties plaintiff or demandant, defendant or tenant, ought to be well named.—The time of a matter charged in the declaration ought to be certainly alledged: and therefore in *assumpsit*, the day being omitted on which the promise is made, it is bad. *Yel.* 94. *Pl. Com.* 24.—A certain place ought to be alledged where every fact material and traversable was done. *Kitch.* 226.—The gist, and every thing that is of the essence of the plaintiff's action, must be set forth in the declaration. That seems properly to be the essence of the action without which the court could have no sufficient grounds to give judgment. *Doct. Pl.* 85.—If the declaration be not sufficient on which to found a judgment, this may be moved in arrest of judgment after verdict. *Ibid.*—The declaration must shew a title in the plaintiff, see *Cro. Eliz.* 325. *Moor*, 598.—In all cases where an interest or estate commences upon condition, the plaintiff ought to shew it in his declaration, and aver the performance of it; but when the interest of the estate passes presently, and vests in the grantee, and is to be defeated by condition; there the plaintiff may count generally, and the condition shall be pleaded by him who is to take advantage of it. 7 *Co.* 10. *Lil. Reg.* 418.

The declaration must contain such certain affirmation that it may be traversed; for if there be no certain affirmation to make the declaration itself traversable, it will not be cured after a verdict, because it is a defect in substance. *Co. Lit.* 30. *Cro. Jac.* 361. 2 *Bulst.* 214. *Cro. Eliz.* 33. 441. 2 *Saund.* 319. —If a declaration be good in part, though bad as to another part, the plaintiff is entitled to judgment for so much as is well alledged, especially if it be not of an entire demand. 10 *Co.* 115. *Rol. Abr.* 784, 5. 2 *Show.* 103. 1 *Salk.* 138. Vide 3 *Burr.* 1235.

# DECLARATION.

For preventing unnecessary length of declarations, it has been specially ordered, that in actions of covenant, the declaration is not to repeat more of the deed than is necessary for the assignment of the breach, and not to repeat the covenant in the conclusion.—In actions of slander, long preambles to be forborne, and no more inducement than what is necessary for the maintenance of the action; but when it requires a special inducement or *colloquium*.—In actions upon general statutes, the declaration not to repeat the statute, but to conclude 'against the form of the statute in such case made and provided.'—In actions of debt upon judgment had in the Courts at Westminster, to recite only the judgment; but if on a judgment had by, or against an executor or administrator, then the action of debt upon that judgment to repeat the declaration and judgment. *R. M.* 1654. § 13.—In a declaration on action founded on a deed, the plaintiff need not set forth more than that part which is necessary to entitle him to recover. *Cowp.* 665. And it will be sufficient to state the substance and legal effect even of such part; which is shorter, and not liable to mis-recitals and literal mistakes. The distinction is between that which may be rejected as surplusage (which might have been struck out on motion), and what cannot: where the declaration contains impertinent matter foreign to the cause, and which the Master on a reference to him would strike out (irrelevant covenants for instance), that will be rejected by the Court and need not be proved. But if the very ground of the action is mis-stated, as where the plaintiff undertakes to recite that part of a deed on which the action is founded, and it is mis-recited, that will be fatal: for then the case declared on is different from that which is proved, and he must recover *secundum allegata et probata*. *Doug.* 665. *Bristow* v. *Wright and another;* and the notes there.

*Of Declarations, in Chief, De bene esse, and By-the-by.*—There are two ways in which the plaintiff may declare, the one on the return-day of the writ, which is called, *de bene esse*, conditionally, until special, or common bail be filed; the other after the day for filing common bail, or when the defendant has justified his bail, which is called in chief. If to speed the cause, the former is the best way of proceeding. And a rule to plead may be given on the same day.—When a Declaration is filed *de bene esse*, till common bail or appearance entered, or till special bail be filed, notice that it is so filed must be given to the defendant in writing. *Impey, K. B.*

The plaintiff cannot declare in chief, unless common bail be filed by the defendant, or plaintiff has done it for him. *Smith* v. *Painter*, 2 *Term Rep.* 719. 1 *Term Rep.* 635. *Cooke* v. *Raven*. And it must be filed the term the writ is returnable. *Hardw.* 138.

When the defendant has filed common or special bail for himself, any person may deliver or file a Declaration against him by-the-by, at any time during the term wherein the process against the defendant is returnable, *sedente curiâ;* and the practice hath been, that the plaintiff, at whose suit the process is, might declare against the defendant in as many actions as he thinks fit, before the end of the next term, after the return of the process. *Impey, K. B.* 177. See 4 *Burr.* 2180.

*Of the time of declaring.*—The plaintiff must declare before the end of the term next after the return of the process; or the defendant may sign a *non-pros* (except in replevin) without entering any rule to declare, and the defendant shall have costs taxed as usual. *Stat.* 13 *Car.* 2. *c.* 2. § 5. And no rule to declare need be given in K. B. either by bill or original.

By the general rules of law, a plaintiff must declare against a defendant within twelve months after the return of the writ. But by the rules of the court, if he do not deliver his Declaration within two terms, the defendant may sign judgment of *non-pros*. Though unless he takes such advantage of the plaintiff's neglect, the plaintiff may still deliver a Declaration within the year. 2 *Term Rep.* 112. 3 *Term Rep.* 123.

Where a writ is returnable on the last return-day of one term, the plaintiff, who is not bound to declare *de bene esse*, is under no compulsion to declare before the essoign day of the next term; and therefore the defendant is not entitled to an imparlance. *Kent* v. *Yates*, 6 *W. P. Taunton*, 261.

Where the court on demurrer gives leave to amend, by stating particularly that which before was stated too generally, plaintiff may add new counts, though more than two terms have elapsed from the commencement of the suit, if they contain no *new cause* of action. *Brown* v. *Crump, C. P.* 6 *W. P. Taunton*, 300.

The defendant cannot sign a *non-pros*, unless he enter his appearance within the term the writ is returnable. *Hardw.* 138. 2 *Term. Rep.* 719. To prevent a *non-pros* being signed, the plaintiff may get a side-bar rule, if the defendant is not in custody, the last day of the second term, for time to declare, until the first day of the next term; and he may have as many rules as he likes, from term to term, but there must be two in a term, *viz.* one from the first day of the term to the last day, and the other from the last day to the first day of the next term. But the defendant may, if he thinks proper, move the court, that the last rule may be peremptory. *Impey, K. B.*

The delivery of a declaration against a prisoner, though within two terms, is a nullity if there were no bill filed before; and he is entitled to his discharge under the rule of court. 5 *W. & M. Nowell* v. *Bingham*, 4 *East's Rep.* 16.

In all *Notices of Declarations*, care is to be taken that the cause be properly named, as well as the court in which the suit is instituted; and in notices of Declaration, the nature of the action is to be expressed, and at whose suit prosecuted, and the time limited to plead to such declaration. *R. T.* 1 *G.* 2.

Serving notice of a declaration filed together with the writ at the same time is irregular. *Steward* v. *Lund*, *K. B. H.* 50 *G.* 3. 12 *East's Rep.* 116.

*Of entitling, and laying the day and place in Declarations.*—It is usual when the cause of action will admit of it, to entitle the Declaration generally, of the term in which the writ is returnable: but it should always be entitled, after the time when the cause of action is stated to have accrued: therefore where the cause of action is stated to have accrued after the first day of the term in which the writ is returnable, the Declaration should be entitled of a subsequent day in that term, and not of the term generally; for as a general title refers to the first day of the term, upon such a title it would appear, that the action was commenced before the cause of it accrued. Yet where the cause of action was stated to have accrued on the first day of the term, the court on demurrer held, that the declaration might be entitled of the term generally, for the delivery of the declaration is the act of the party, and in ancient times it could not have been delivered till the sitting of the court; so that the cause of action might well have accrued, before the actual delivery of the Declaration. 1 *Term Rep.* 116. *Vide* 2 *Lev.* 176. and 3 *Term Rep.* 624.

If the cause of action arises within the term the Declaration is of, then do not entitle it as of the term generally, but make a special day after the cause of action accrued, as, "Thursday next after the Morrow of all Souls, in Michaelmas Term, in the 32d year of the reign of King George 3." instead of "Michaelmas Term" generally.

If the plaintiff declares on a note, the day is material, and an essential part of the agreement, from which he cannot vary; so on a bond or other writing; but in the case of a common *assumpsit*, the day is alledged only for form, and therefore the defendant cannot confine the plaintiff to the day alledged in the Declaration. *Str.* 21. *Vide Co. Lit.* 283. *Plowd. Com.* 24 *a.*

In other cases, as in trespass, assault, battery, &c. the day is immaterial, but is in general laid after the cause of action accrued, and before the term or time of which the Declaration is entitled.

In local actions, where possession of land is to be recovered, or damages for an actual trespass, or for waste, &c. affecting land, the plaintiff must lay his Declaration, or declare his injury to have happened in the very county and place where it really did happen; but in transitory actions, for injuries that might have happened any where, as debt, detinue, slander, and the like, the plaintiff may declare in what county he pleases, and then the trial must be had in that county in which the Declaration is laid. 3 *Comm.* 294. See titles *Action*, *Venue*.

In a *qui-tam* action, if the declaration do not on the record appear to be filed within a year of the writ, it is necessary to connect it with the writ by evidence of the time when the Declaration was filed, and stating the writ to be continued on the roll down to that time.—In C. P. the *placitum* being always intituled of the term in or after which the trial takes place, it furnishes no evidence of the date of the Declaration. *Thistlewood* v. *Craycraft*, 6 *W. P. Taunton*, 141.

In action of debt, upon a bond, the plaintiff in his *declaration* must alledge a place where the bond was made, because the jury should come from that place; and if this be omitted, the *declaration* is ill. *Dyer*, 15, 39. 1 *Nels. Abr.* 619.

It is good to lay large and sufficient damages in *declarations:* and damages shall not be given for that which is not contained in the *declaration*, and only for what is materially alledged. 10 *Rep.* 115. 1 *Lill. Abr.* 381.

Where a *Declaration* is defective, it is aided by the statutes of amendments and jeofails when on record; but this was heretofore allowed only in matters of form, not of substance unless the justice of the case required it. 2 *Barnard, K. B.* 153. 2 *Str.* 1162. 1202. 1 *Wils.* 173. *Say. Rep.* 150. 294. 2 *Burr* 1098. But by the liberality of modern practice, amendments have been allowed even in matters of substance, not only while the proceedings were on paper, but even in some cases when on record. See 7 *T. R.* 132. 447. (d.) 698. 2 *Str.* 890. *Fitzgib.* 193. 1 *Barnard*, 408. 418. 2 *Saund.* 402. 1 *East.* 372. Whilst the proceedings are *in paper* the amendment is at Common Law, and not within any of the statutes of amendments which relate only to proceedings on record. 1 *Salk.* 47. 3 *Salk.* 31. And there is no difference, as to the doctrine of amending at Common Law, between *civil* and *criminal* cases. 1 *Salk.* 51. 2 *Lord Raym.* 1038. 6 *Mod.* 285. *S. C.* nor between *penal* and other actions. 1 *Stra.* 137. 2 *Str.* 1227. 1 *Wils.* 256. 1 *Burr.* 402. 2 *Burr.* 1098, 9.—5 *Burr.* 2833, 4. 6 *T. R.* 173. 543. and 7 *T. R.* 55. See titles *Amendment*, *Practice*.

*On filing Declarations*, copies thereof are served on the defendants or their attornies, &c. And by an order of all the judges (12 *W.* 3.) the plaintiff's attorney is not obliged to deliver the defendant's attorney the original *Declaration;* but instead of it is to deliver a true copy of the *Declaration;* upon delivery or tender whereof, the defendant's attorney shall pay for such copy after the rate of *4d. per* sheet, &c. and if any person refuse to pay for the copy tendered, the said copy is to be left in the office, with the clerk that keeps the files of *Declarations*, and thereupon the plaintiff's attorney giving rule to plead, may, for want of a plea, sign judgment; and before any plea shall be received, the defendant's attorney is to pay for the copy of the *Declaration*.

And by another order (*Trin.* 2 *Geo.* 2.) in every cause, where special or common bail is filed, and notice given to the plaintiff, a copy of the *Declaration* shall be delivered to the attorney for the defendant, who shall pay for it according to the usual rate; but if the defendant's attorney, or his clerk in his absence, refuses to pay for such copy; or if it happens the habitation of the attorney for the defendant be unknown to the attorney for the plaintiff; then it shall be lawful to leave the copy with the officer of the court appointed for filing *Declarations*, which shall be good, giving notice, &c.—There are several other rules of Court as to the filing and delivering Declarations, &c. for which see the several books of Practice, and further this Dict. titles *Practice*, *Process*, *Prisoner*, &c. Declarations and Issues are not now paid for on delivery, but are allowed in Costs afterwards.

DECLARATOR. Is an action, whereby we pray something to be declared in our favours. *Scotch Dict.*

DECLARATOR OF PROPERTY. Is when the complainer narrating his right to lands, desires he should be declared sole proprietor, and all others discharged to molest him any way. *Scotch Dict.*

DECLARATOR OF REDEMPTION. Is, when after a process before the Lords against the wadsetter, who refuses to renounce after the order of redemption is used, the Lords force him to renounce, and by a decreet declare the lands redeemed. *Scotch Dict.*

DECLARATORY ACTIONS. Are these wherein the right of the pursuer is craved to be declared: but nothing claimed to be done by the defender. *Scotch Dict.*

DECREE. The judgment of a court of equity on any bill preferred. See title *Chancery*.

A decree in Chancery is of the like nature with a judgment at Common Law. *Chan. Rep.* 234.

Several questions and disputes were heretofore warmly agitated, as to the authority of the Master of the Rolls to hear and determine causes; and as to his general power in the Court of Chancery: to quiet which, it was declared by *stat.* 3 *Geo.* 2. *c.* 30. that all orders and decrees by him made, except such as by the course of the court were appropriated to the great seal alone, should be deemed to be valid, subject nevertheless to be discharged or allowed by the Lord Chancellor; and so as they shall not be enrolled till the same are signed by his Lordship.

If either party to the suit thinks himself aggrieved by a decree, he may petition the Chancellor for a *re-hearing*, whether it was heard before the Chancellor himself or any of the judges sitting for him, or before the Master of the Rolls. For in all cases it is the Chancellor's decree, and must be signed by him before it is enrolled; which is done of course, unless a re-hearing be desired. Every petition for a re-hearing must be signed by two counsel, usually such as have been concerned in the cause; certifying that they apprehend the cause is proper to be re-heard. And upon the re-hearing, all the evidence taken in the cause, whether read before or not, is then admitted to be read; because it is the decree of the Chancellor himself, who only sits to hear reasons why it should not be enrolled and perfected, at which time all omissions of either evidence or argument may be supplied. *Gilb. Rep.* 151, 2.—But after the decree is once signed and enrolled, it cannot be re-heard or rectified but by Bill of Review, or by appeal to the House of Lords.

*A Bill of Review*, may be had upon apparent error in judgment, appearing upon the face of the decree; or by special leave of the court, upon oath made, of the discovery of new matter or evidence, which could not possibly be had or used at the time when the decree passed. But no new evidence or matter then in the knowledge of the parties, and which might have been used before, shall be a sufficient ground for a Bill of Review. 3 *Comm.* 454. See further this Dict. title *Chancery*; and *Vin.* title *Decree*.

DECREET COGNITIONIS CAUSA. Is when the apparent heir is called to hear the debt constitute, it not being already clearly constitute by writ; and the appearing Heir renounces, being charged to enter Heir. *Scotch Dict.*

DECREET COGNITIONIS CAUSA, *against Executors*, is when the nearest of kin are pursued by the Executor Creditor, who hath no writ to instruct his Debt to hear the Debt constitute. *Scotch Dict.*

DECREET OF COMPRISING. Is when at the day appointed in the Letters, the Debitor being called, the messenger offers him his lands for the money; which if he have not ready, the Inquest declares the lands to belong to the Creditor for his payment. *Scotch Dict.*

DECREET OF EXONERATION. Is a decreet of the Commissars against the Creditors or nearest of kin; wherein it is proven, that the Executor hath executed the whole testament, and that all is exhausted by lawful sentences. *Scotch Dict.*

DECREET OF LOCALITY. Is a decreet modifying a stipend for a minister, dividing and proportioning the same among the heretors. *Scotch Dict.*

DECREET OF MODIFICATION. Is that which modifies a stipend to a minister, but doth not divide and proportion it among the heretors. *Scotch Dict.*

DECREET OF VALUATION. Is a sentence of the Lords (who are now in the place of the Commission) determining the extent and value of teinds. *Scotch Dict.*

DECRETALS, *Decretales.*] A volume of the *Canon Law*, so called as containing the *decrees* of sundry *Popes*; or a Digest of the canons of all the councils that pertained to one matter under one head. See title *Canon Law.*

DECURIARE. To bring into order. *Mon. Ang. Tom. p.* 243.

DEDBANA, *Ded-bane, Sax.*] An actual homicide, or manslaughter. *Leg. H.* 1. *c.* 85.

DEDI, [I have given]. This word amounts to a warranty in law; as if it be said in a *deed* or conveyance, That A.B. hath *Given, &c.* to C. D. it is a warranty to him and his heirs. *Co. Lit.* 304. Also *dedi* imports a power of giving any thing. *Hob.* 12. See titles *Conveyance, Deed.*

DEDICATION-DAY, *Festum Dedicationis.* The feast of *dedication* of *churches*, or rather the feast-*day* of the Saint and Patron of a church; which was celebrated not only by the inhabitants of the place, but by those of all the neighbouring villages, who usually came thither; and such assemblies were allowed as lawful: it was usual for the people to feast and drink on those days; and in many parts of England, they still meet every year in villages for this purpose, which days are called *Feasts* or *Wakes. Cowel.*

DEDIMUS POTESTATEM. A Writ or Commission given to one or more private persons, for the speeding some act appertaining to a judge, or some court: and it is granted most commonly upon suggestion, that the party who is to do something before a judge, or in court, is so weak that he cannot travel; as where a person lives in the country, to take an answer in *Chancery*; to examine witnesses in a cause depending in that court; to levy a fine in the *Common Pleas*, &c.—On renewing the commission of the peace, there cometh a writ of *dedimus potestatem* out of *Chancery*, directed to some ancient justice to take the oath of him, which is newly inserted. See title *Justices of Peace.*

DEDIMUS POTESTATEM DE ATTORNATO FACIENDO. As the words of writs do command the defendant to appear, &c. anciently the judges would not suffer the parties to make attornies in any action or suit without the King's writ of *Dedimus Potestatem*, to receive their attornies: but now by statutes, the plaintiff or defendant may make attornies in suits without such writs. *New. Nat. Br.* 55, 56. See title *Attornies.*

## DEED,

FACTUM.] An instrument in parchment, or paper, but chiefly in parchment, comprehending a contract or bargain between party and party; or an agreement of the parties thereto, for the matters therein contained: and it consists of three principal points, *writing*, *sealing* and *delivery*; writing, to express the contents; sealing, to testify the consent of the parties; and delivery, to make it binding and perfect. *Termes de Ley.*

I. *What a Deed is.*
II. *The Requisites to make a good Deed.*
III. *How a Deed may be avoided..*
IV. *Of the inrolling, exposition, and pleading of Deeds.*

I. A *Deed* is a Writing sealed and delivered by the parties. 1 *Inst.* 171. It is sometimes called a charter, *charta*, from its materials; but most usually, when applied to the transaction of private subjects, it is called a deed, in Latin *factum*, because it is the most solemn and authentic *act* that a man can possibly perform, with relation to the disposal of his property; and therefore a man shall always be *estopped* by his own deed, or not permitted to aver or prove any thing in contradiction to what he has once so solemnly and deliberately avowed. *Plowd.* 434. If a deed be made by more parties than one, there ought to be regularly as many copies of it as there are parties, and each should be cut or indented (formerly in acute angles, *instar dentium*, like the teeth of a saw, but at present in a waving line) on the top or sides to tally, or correspond with each other; which deed so made, is called an *Indenture.* Formerly when deeds were more concise than at present, it was usual to write both parts on the same piece of parchment, beginning at the middle and continuing to the contrary ends, with some word or letters of the alphabet written between them; through which the parchment was cut either in a straight or indented line, in such a manner as to leave half the word on one part, and half on the other. Deeds thus made were denominated *syngrapha* by the canonists, and with us *chirographa*, or hand-writings, *Mirror, c.* 2. § 27.; the word *cirographum* or *cyrographum* being usually that which is divided in making the indentures of a fine. See title *Chirograph.*—But at length indenting only has come into use, without cutting through any letters at all; and it seems at present to serve for little other purpose, than to give name to the species of the deed. See further 1 *Inst.* 229. (*a*) *in n.* —When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the *Original*, and the rest are *Counterparts*; though of late it is most frequent for all the parties to execute every part, which renders them all originals. A deed made by one party only is not indented, but *polled* or shaved quite even; and therefore called a *deed-poll*, or a single deed. *Litt.* § 371, 2.

A *deed-poll* is said to be a *deed* testifying that only one of the parties to the agreement hath put his seal to the same, where such party is the principal or only person, whose consent or act is necessary to the *deed*; and it is therefore a plain *deed*, without indenting, and is used when the vendor, for example, only seals, and there is no need of the vendee's sealing a counterpart, because the nature of the contract is such, as to require no covenant from the vendee, &c. *Co. Lit.* 55.

The several parts of deeds by indenture are belonging to the feoffor, grantor, or lessor, who have one; the feoffee, grantee, or lessee, who have another; and some other persons, as trustees, a third, &c. and the deed poll which is single, and of but one part, is delivered to the feoffee, or grantee, &c.

All the parts of a deed indented, in judgment of law, make but one entire deed; but every part is of as great force as all the parts together, and they are esteemed the mutual acts of either party, who may be bound by either part of the same, and the words of the indenture are the words of either party, &c. But a *deed-poll* is the sole deed of him that makes it, and the words thereof shall be said to be his words, and bind him only. *Plowd.* 134. 421. *Lit. s.* 370.

II. 1. The first requisite of a Deed is, that there be persons able to contract and be contracted with, for the purposes intended by the deed; and also a thing, or subject-matter to be contracted for; all which must be expressed by sufficient names. *Co. Lit.* 35. So as in every grant, there must be a grantor, a grantee, and a thing granted; in every lease, a lessor, a lessee, and a thing demised.

Some persons are *disabled* to contract by Common Law, and some by statute; some absolutely, and some *secundum quid* only; as in case of infants, feme coverts, ideots, persons *non compos mentis*, aliens, tenants in tail, ecclesiastical persons, and others; some of which may not make any deeds or estates by them at all, others but so and so limited and qualified. *Stat.* 32 *Hen.* 8. *cap.* 28.—See title *Leases*.

Disabilities to make Deeds, &c. are chiefly amongst persons of non-sane memory, infants, aliens, women who have husbands, men who have wives, &c. persons born deaf and dumb, persons attaint of treason or felony, or, in a *præmunire*, clerks convict, tenant in tail, ecclesiastical persons, as bishops, parsons, and the like, with respect to lands, &c. which they hold as such; joint-tenants, tenants in common, coparceners, disseissors, disseissees, &c. See these several titles.

He who has only an estate for his own or another's life, or a lease for years of land, may give, grant, or charge it at his pleasure, for so long as his estate lasts; and it will be good to all purposes, and against all persons for that time.

And a man who has an estate in land to him and his wife, and his heirs, may make what estate he will of it, and this will be good against all but his wife, and that for her life only. 7 *Co.* 12. *Co. Lit.* 42. *Perk.* § 182.

The King, for the greatness of his person, is disabled to take by deed *in pais*; and therefore if a feoffment be made to him there, and livery of seisin be made upon it, this will be void; but *he is to take by matter of record*, which is of an higher nature than a deed. *Fitz. Fait and Feoffment*, 21.

Leases made to the King by colleges, deans and chapters, or any other, having a spiritual or ecclesiastical living, against the *stat.* 13 *Eliz. c.* 10. are restrained by the same act, as well as leases made to common persons. 5 *Co.* 14.

The *names* of the parties to deeds serve to distinguish persons, and to make the person intended certain; yet mistakes in this, unless they be very gross, will not hurt: *nihil facit error nominis cum de corpore constat. Bulst.* 21, 22. 2 *Bulst.* 302, 303. *Co. Lit.* 3. *Perk.* § 36.

But if the name of baptism or surname be mistaken, as John for Thomas, &c. this is dangerous. *Moor*, 407. 897. And see 2 *Bulst.* 70. *Perk.* § 39.

It is also prudent to add the addition of each party, as the place of *residence*, with his or her *degree*, *profession*, or *mystery*.

There are many descriptions of grantors and grantees; as (1.) Proper names of baptism and surnames, and the names of corporations, or bodies politic or corporate. (2.) Names of dignities, office, and the like. And these (of both sorts) will admit a description made good by reputation. And so land will pass to one, by the name of a *son*, who is a *bastard*; so to one by the name of a *wife*, who is *not a wife*, 27 *Ed.* 3. 85. *Bulst.* 3. if they be reputed or known by that name. *Hob.* 32.

There must be such a person *in esse* at the time of the deed made as is named, and the parties must be able to give, and capable to receive, that which is given or granted by the deed. *Plowd.* 345. *Co. Lit.* 2, 3. *Perk.* 43. 52.

And therefore if an annuity be granted to the right heirs of J. S. he being then living, this is void; for there is none such, nor can be whilst he lives. *Perk.* § 52. See *Cro. Car.* 22.

If a man gets another name by common esteem than his right name, and he is known by his other name, his deed made by this other name may be good. 6 *Co.* 36. *Co. Lit.* 3. *Perk.* § 41.

The mistake is less dangerous where any other part of the deed, or some other addition, shall make the person intended certain. 6 *Co.* 36. *Co. Lit.* 3. *Perk.* § 40.

As to the subject-matter of Contracts, Grants, &c. See this Dict. title *Grant*, and other proper titles.

2. The deed must be founded upon good and sufficient *consideration*. Not upon an usurious contract (*stat.* 13 *Eliz. c.* 8.); nor upon fraud or collusion, either to deceive purchasers *bonâ fide* (*stat.* 27 *Eliz. c.* 4.); or just and lawful creditors (*stat.* 13 *Eliz. c.* 5.); any of which bad considerations will vacate the deed, and subject such persons, as put the same in ure, to forfeitures, and often to imprisonment. A deed also or other grant, made without any consideration, is as it were of no effect; for it is construed to inure, or to be effectual only to the use of the grantor himself. *Perk.* § 533. The consideration may be either a *good* or a *valuable* one. See further title *Consideration*, and *post*, III.

In deeds, the *consideration* is a principal thing to give them effect: and the foundation of deeds ought always to be honest. That a deed was executed upon a corrupt agreement, *dehors* the deed, may be averred in pleading. See the case of *Collins* and *Blantern*, a new and very peculiar case. 2 *Wils.* 341. &c.

3. The deed must be *written*, or (as is the case at present with many instruments, such as *Bonds*, *Policies of Insurance*, &c.) *printed*; for it may be in any character, or any language; but it must be upon paper or parchment. For if it be written on stone, board, linen, leather, or the like, it is no deed. *Co. Lit.* 229. *F. N. B.* 122.

*All* the matter and form of a deed must be written *before* the sealing and delivery of it; for if a man seals and delivers an empty piece of parchment or paper, although he therewithal gives commandment that an obligation or other matter shall be written in it, which is done accordingly, yet this will not make it a good deed. *Co. Lit.* 171. *Perk.* § 118. 119. See *Moor*, 28. *Hetley*, 136, 7.

A deed may be written in any hand, as in text, court or Roman hand; or in any language, as in Latin or French, and is as good as a deed written in English, and in a secretary hand. 2 *Co.* 3.

It may be written either in a piece of loose paper or parchment, or in a paper or parchment sewed in a book. *Bro. Oblig.* 67. *Co. Lit.* 137. 139.

A deed must also have the regular *Stamps*, imposed on it by the several statutes, for the increase of the public revenue; else it cannot be given in evidence. See *post*, 7.

Formerly many conveyances were made by *parol*, or word of mouth only, without writing; but this giving a handle to a variety of frauds, the *stat.* 29 *Car.* 2. *c.* 3. enacts, that no lease, estate, or interest in lands, tenements, or hereditaments, made by livery of seisin, or by parol only, (except leases not exceeding three years from the making, and whereupon the reserved rent is at least two thirds of the real value,) shall be looked upon as of greater force than a lease or estate at will; nor shall any assignment, grant, or surrender of any interest in any freehold hereditaments be valid; unless in both cases the same be put in writing, and signed by the party granting, or his agent, lawfully authorised in writing. See title *Frauds*.

4. The matter written must be *legally* and *orderly* set forth; that is, there must be words sufficient to specify the agreement, and bind the parties; which sufficiency must be left to the courts of law to determine. *Co. Lit.* 225. For it is not absolutely necessary in law, to have all the formal parts that are usually drawn out in *Deeds*, so as there be sufficient words to declare clearly and legally the party's meaning. But, as these formal and orderly parts are calculated to convey that meaning in the clearest, distinctest, and most effectual manner, and have been well considered and settled by the wisdom of successive ages, it is prudent not to depart from

them without good reason or urgent necessity; therefore they shall be recapitulated in their usual order. See 1 *Inst.* 6.

It may in the first place be generally observed with regard to the words requisite in a deed; that they depend upon the estate intended to be conveyed. If a man would purchase *lands* or tenements in *fee-simple*, it behoves him to have these words in his purchase, *To have and to hold to him and to his heirs;* for these words, *his heirs*, (*only*) make the estate of inheritance, in all feoffments and grants. But this is to be understood of natural bodies: for if lands be given to a sole body politic or corporate, (as to a bishop, parson, vicar, master of an hospital, &c.) there, to give him an estate of inheritance in his politic or corporate capacity, he must use these words, *To have and to hold to him and his successors. Co. Lit.* 8. &c.

If an estate *tail* is intended to be created, the words must be, *To have and to hold to him and to the heirs of his body.* See title *Fee.*

The insertion of the word *heirs* or *successors*, as the case requires, is therefore absolutely necessary in conveyances of estates of inheritance; for if a man purchase lands by these words, *To have and to hold to him for ever*, he has but an estate for term of life. See *Co. Lit.* 8. *b.* &c.

We may now proceed more particularly to observe on the formal and orderly parts of a Deed.

The *Premises* are used to set forth the number and names of the parties, with their additions or titles. They also contain the recital, if any, of such deeds, agreements, or matters of fact, as are necessary to explain the reasons upon which the present transaction is founded; and herein also is set down the consideration upon which the deed is made. And then follows the certainty of the grantor, grantee, and thing granted. See title *Premises.*

Next come the *Habendum* and *Tenendum*. The office of the *habendum* is properly to determine what estate or interest is granted by the deed; though this may be performed, and sometimes is performed in the premises. In which case the *habendum* may lessen, enlarge, explain, or qualify, but not totally contradict or be repugnant to the estate granted in the premises. As if a grant be "to A. and the heirs of his body," in the premises, *habendum* "to him and his heirs for ever," or *vice versa*, here A. has an estate tail, and a fee-simple expectant thereon. *Co. Lit.* 21. 2 *Roll. Rep.* 19. 23. *Cro. Jac.* 476. But, had it been in the premises, "to him and his heirs," *habendum*, "to him for life," the *habendum* would be utterly void, 2 *Rep.* 23. 8 *Rep.* 56.; for an estate of inheritance is vested in him before the *habendum* comes, and shall not afterwards be taken away, or devested, by it. See title *Habendum.* The *tenendum*, "and to hold," is now of very little use, and is only kept in by custom. It was sometimes formerly used to signify the tenure, by which the estate granted was to be holden; *viz.* "*tenendum per servitium militare, in burgagio, in libero socagio*, &c." But, all these being now reduced to free and common socage, the tenure is never specified. Before the statute of *quia emptores*, 18 *Ed.* 1. *st.* 1. it was also sometimes used to denote the lord of whom the land should be holden; but that statute directing all future purchasers to hold, not of the immediate grantor, but of the chief lord of the fee; this use of the *tenendum* hath been also antiquated; though for a long time after we find it mentioned in ancient charters, that the tenements shall be holden, *de capitalibus dominis feodi*, but, as this expressed nothing more than the statute had already provided for, it gradually grew out of use. See title *Tenure.*

Next follow *the Terms of stipulation*, if any, upon which the grant is made: the first of which is the *reddendum*, or reservation, whereby the grantor doth create or reserve some new thing to himself out of what he had before granted. As "rendering therefore yearly the sum of ten shillings, or a pepper-corn, or two days' ploughing, or the like." Under the pure feodal system, this render, *reditus*, return, or rent, consisted in chivalry, principally of military services; in villenage, of the most slavish offices; and in socage it usually consists of money, though it may still consist of services, or of any other certain profit. To make a *reddendum* good, if it be of any thing newly created by the deed, the reservation must be to the grantors, or some, or one of them, and not to any stranger to the deed. *Plowd.* 13. 8 *Rep.* 71. But if it be of ancient services or the like, annexed to the land, then the reservation may be to the lord of the fee. See *Reddendum.*

Another of the terms upon which a grant may be made is a *Condition;* as to which see fully title *Condition.*

Next may follow the clause of *Warranty.*

This was anciently inserted in deeds to secure the estate to the grantee and his heirs, &c. and was a *covenant real*, annexed to the land granted, by which the grantor and his heirs were bound to warrant the same to the grantee and his heirs, and that they should quietly hold and enjoy it; or upon voucher, &c. the grantor should yield other lands, to the value of what should be evicted. See further title *Warranty.*

After warranty usually follow *Covenants*, or conventions; which are clauses of agreement contained in a deed, whereby either party may stipulate for the truth of certain facts, or may bind himself to perform, or give, something to the other. Thus the grantor may covenant that he hath a right to convey; or for the grantee's quiet enjoyment; or the like; the grantee may covenant to pay his rent, or keep the premises in repair, &c. If the covenantor covenants for himself and his *heirs*, it is then a covenant real, and descends upon the heirs, who are bound to perform it, provided they have assets by descent, but not otherwise: if he covenants also for his *executors* and *administrators*, his personal assets, as well as his real, are likewise pledged for the performance of the covenant; which makes such covenant a better security than any *warranty.* It is also in some respects a less security, and therefore more beneficial to the grantor; who usually covenants only for the acts of himself, and his ancestors, whereas a general *warranty* extended to all mankind. For which reasons the covenant has in modern practice totally superseded the other. See fully this *Dict.* titles *Assets*, *Covenant*, *Assignment*, *Heir.*

Lastly, comes the *Conclusion*, which mentions the execution and date of the deed, or the time of its being given or executed, either expressly, or by reference to some day or year before-mentioned. Not but a deed is good, although it mention no date: or hath a false date, or even if it hath an impossible date, as the 30th of February, provided the real day of its being dated or given, that is delivered, can be proved. *Co. Lit.* 46. *Dyer*, 28.—See further title *Date.*

5. A *fifth* requisite for making a good deed is the *reading* of it. This is necessary, wherever any of the parties desire it, and, if it be not done on his request, the deed is void as to him. If he can, he should read it himself; if he be blind or illiterate, another must read it to him. If it be read falsely, it will be void; at least for so much as is misrecited; unless it be agreed by collusion, that the deed shall be read false, on purpose to make it void; for in such case it shall bind the fraudulent party. 2 *Rep.* 3. 9. 11 *Rep.* 27.

6. It is requisite that the party or parties, whose deed it is, should *seal*, and now in most cases should *sign* it also. The use of seals, as a mark of authenticity to letters and other instruments in writing, is extremely ancient. We read of it among the Jews and Persians in the earliest and most sacred records of history. But in the times of our Saxon ancestors, they were not much in use in England. The method of the Saxons was for such as could write to subscribe their names, and, whether they could write or not, to affix the sign of the cross; which custom our illiterate vulgar do, for the most

part, to this day keep up; by signing a cross for their mark, when unable to write their names. In like manner, the Normans, at their first settlement in France, used the practice of sealing only, without writing their names: which custom continued, when learning made its way among them, though the reason for doing it had ceased; and hence the charter of Edward the Confessor to Westminster-Abbey, himself being brought up in Normandy, was witnessed only by his seal, and is generally thought to be the oldest sealed charter of any authenticity in England. *Lamb. Archeion*, 51.—At the Conquest, the Norman lords brought over into this kingdom their own fashions; and introduced waxen seals only, instead of the English methods of writing their names, and signing with the sign of the cross. *Ingulph.* And in the reign of Edward I. every freeman, and even such of the more substantial villeins as were fit to be put upon juries, had their distinct particular seals. *Stat. Exon.* 14 *Ed.* 1. Coats of Arms were not introduced into seals, nor indeed into any other use, till about the reign of Richard I. who brought them from the Croisade in the Holy Land.

The *signing* is of great use, for the subscribing witnesses to the *deed* may be dead, when proving their death, and the hand-writing of the party executing the *deed*, will be sufficient to establish the same. If a writing is not sealed, it cannot be a *deed*. 3 *Inst.* 169. 5 *Rep.* 23. See further, 2 *Rep.* 3. 2 *Rol. Abr.* 28. 12 *Rep.* 90. *Hob.* 96.

If two make a *deed*, and one of them seals it at one time, and the other at another time; this is as good as if they sealed it together. *Lane*, 32.

If A. executes a deed for himself and his partner, by the authority of his partner, and in his presence, it is a good execution though only sealed once. 1 *Term Rep.* 313.

A person executing a deed for his principal under a power of attorney should sign in the name of the principal. 6 *Term Rep.* 176. See 2 *Term Rep.* 142.

The neglect of signing, and resting only upon the authenticity of seals, remained very long among us; for it was held in all our books that sealing alone was sufficient to authenticate a deed: and hence the common form of attesting deeds, "*sealed* and delivered," notwithstanding the *stat.* 29 *Car.* 2. *c.* 3. before mentioned, revives the Saxon custom, and expressly directs the *signing*, in all grants of lands, and many other species of deeds: in which therefore signing seems to be now as necessary as sealing, though it hath been sometimes held that the one includes the other. 3 *Lev.* 1. *Stra.* 764.

By *stat.* 54 *Geo.* 3. *c.* 168. to amend the laws respecting the attestation of instruments of appointment and revocation made in exercise of certain *powers* in deeds or wills, after reciting that powers, authorities, and trusts are in many cases required to be executed by deeds *signed* by or under the hands of the persons executing or consenting thereto, and it has been the ordinary practice in the memorandum of attestation of deeds to express the facts of *sealing* and *delivering* only, and that the omission of the word *signed* in such attestation might affect titles under such deeds although actually signed by the parties; it is enacted, that every deed or instrument then *already made* with intent to execute any power, &c. shall if duly signed, &c. be from the date thereof of the like validity as if a memorandum of signature had been subjoined by the attesting witnesses.

Since the passing of this act the practice has been, in cases not only of deeds for execution of powers but generally of other deeds, to insert in the memorandum of the attestation the words "*signed, sealed* and *delivered*," and this is the safest and properest way.

7. A seventh requisite to a good deed is, that it be *delivered* by the party himself or his certain attorney: which therefore is also expressed in the attestation, "sealed and *delivered*." A deed takes effect only from this tradition or delivery; for if the date be false or impossible, the delivery ascertains the time of it. And if another person seals the deed, yet if the party delivers it himself, he thereby adopts the sealing; *Perk.* § 130. and by a parity of reason the signing also, and makes them both his own. A delivery may be either absolute, that is, to the party or grantee himself; or to a third person, to hold till some condition be performed on the part of the grantee; in which last case it is not delivered as a *deed*, but as an *escrow*; that is, as a scrowl or writing, which is not to take effect as a deed, till the condition be performed, and then it is a deed to all intents and purposes. *Co. Lit.* 36.

If I have sealed my *deed*, and after I deliver it to him to whom it is made, or to some other by his appointment, and say nothing, this is a good delivery.

So if I take the *deed* in my hand, and use these, or the like words, *here take him*; or, *this will serve*; or, *I deliver this as my deed*; or *I deliver him you*; these are deliveries.

So if I make a *deed* of land to another, and being upon the land, I deliver the *deed* to him in the name of seisin of the land; this is a good delivery.

So if the *deed* be sealed, or lying in a window, or on a table, and I use these, or the like words, *There he is*, take it as my *deed*: this is a good delivery, and perfects the *deed*; for, as a *deed* may be delivered by words without acts, so may it also be delivered by acts without words. 9 *Co.* 137. *Dyer*, 167. 192. *Co. Lit.* 36. 49. 35 *Ass. pl.* 6. *Contra*, if the party to whom made takes it without any act done purporting to be a delivery. But where parties have come for the purpose, and done every thing but delivery, it has been adjudged a good delivery. *Cro. Eliz.* 7. 1 *Leon.* 140.

Regularly there may not be two deliveries of a *deed*, for where the first doth take effect, the second is void: *unless* it be where the *deed* is delivered to a stranger as an *escrow*; *or*, when a *deed*, good at first, becomes void afterwards; *or*, a feme covert seals a *deed*, and after being sole, delivers it again, &c. *Perk. sect.* 154. *Co. Lit.* 48. 5 *Rep.* 119.

The *stat.* 26 *Geo.* 3. *c.* 60. § 17. avoids a bill of sale of a registered ship, which does not truly and accurately recite the certificate of registry: where parties by mistake mis-recited in a bill of sale the certificate of registry, by stating Guernsey as the port where the certificate was granted instead of Weymouth, which mistake was rectified when discovered, by consent of all parties and the deed *delivered de novo*, the court of K. B. held that *no new stamp* was necessary on such re-delivery or re-execution: the deed taking no effect from its first delivery, and the defect arising not from intention but from mistake, and the alteration merely making the contract what it was originally intended to have been. *Cole* v. *Parkin*, *T.* 50 *G.* 3. 12 *East's Rep.* 471.

The delivery of a *deed* may be alledged at any rate *after* the date; but not before. *Dyer*, 315. A *deed* may be good without all the orderly and formal parts: but without *delivery*, it is no *deed*. 1 *Inst.* 35. 2 *Rep.* 5.

8. The last requisite to the validity of a deed is, the *attestation*, or *execution of it in the presence of witnesses*: this however is necessary, rather for preserving the evidence, than for constituting the essence of the deed. And as to such attestation so far as relates to *signing* and *sealing*, see *ante*, II. 6. Our modern deeds are in reality nothing more than an improvement or amplification of the *brevia testata* mentioned by the feodal writers; (*Feud. l.* 1. *t.* 4.) which were written memorandums, introduced to perpetuate the tenor of the conveyance and investiture, when grants by parol only became the foundation of frequent dispute and uncertainty. To this end they registered in the deed the persons who attended as witnesses, which was formerly done without their signing their names, (that not being always in their power) but they only heard the deed read; and then the clerk or scribe added

their names, in a sort of memorandum, "*hiis testibus*," &c. This like all other solemn transactions, was originally done only *coram paribus*, (*Feud. l. 2. t.* 32.) and frequently when assembled in the court-baron, hundred, or county-court, which was then expressed in the attestation, *teste comitatu, hundredo*, &c. *Spelm. Gloss.* 228. *Madox Formul. N.* 221. 322. 660.—Afterwards the attestation of other witnesses was allowed, the trial in case of a dispute being still reserved to the *pares*; with whom the witnesses (if more than one) were associated and joined in the verdict; (*Co. Lit.* 6.) till that also was abrogated by the *stat.* of *York*, 12 *Edw. 2. st.* 1. *c.* 2. And in this manner, with some such clause of *hiis testibus*, are all old deeds and charters, particularly *Magna Charta*, witnessed. And in the time of Sir Edward Coke, creations of nobility were still witnessed in the same manner. 2 *Inst.* 77. But in the King's common charters, writs, or letters-patent, the stile is now altered: for at present the King is his own witness, and attests his letters-patent thus, "witness ourself at Westminster, &c." a form which was introduced by Richard I. but not commonly used till about the beginning of the fifteenth century; nor the clause of *hiis testibus* entirely discontinued till the reign of Henry VIII. which was also the æra of discontinuing it, in the deeds of subjects, learning being then revived, and the faculty of writing more general; and therefore ever since that time the witnesses have usually subscribed their attestation, either at the bottom, or on the back of the deed. 2 *Inst.* 78.

III. From what has been before laid down, it will follow, that if a deed wants any of the essential requisites beforementioned; either, 1. Proper parties, and a proper subject matter.—2. A good and sufficient consideration.—3. Writing on paper or parchment, duly stamped.—4. Sufficient and legal words, properly disposed.—5. Reading if desired before the execution.—6. Sealing; and, by the statute, in most cases signing also;—or 7. Delivery, it is a void deed *ab initio*. It may also be avoided by matter *ex post facto*, as 1. By rasure, interlining, or other alteration in any material part; unless a memorandum be made thereof at the time of execution and attestation. 11 *Rep.* 27.—2. By breaking off, or defacing the seal. 5 *Rep.* 23.—3. By delivering it up to be cancelled; that is, to have lines drawn over it in the form of a lattice work or *cancelli*; though the phrase is now used figuratively for any manner of obliteration or defacing it.—4. By the disagreement of such, whose concurrence is necessary, in order for the deed to stand; as a husband where a feme covert is concerned; an infant, or person under duress, when those disabilities are removed; and the like.—5. By the judgment or decree of a court of judicature. This was anciently the province of the court of *Star-chamber*, and now of the Chancery; when it appears that the deed was obtained by fraud, force, or other foul practice: or is proved to be an absolute forgery. *Toth.* 24. 1 *Ventr.* 348. In any of these cases the deed may be avoided, either in part or totally, according as the cause of avoidance is more or less extensive.

*More particularly.*—If there be any alteration, rasure, or interlining made in any part of the deed *before the delivery* of it, this will not hurt the deed.

But in such cases it is policy to make a memorandum of it upon the back of the deed, and to give the witnesses notice of it, (this is now usually done in the attestation of the deed thus: *Sealed and delivered, the word—being first interlined*, &c.) For otherwise, if it be in any place material, as in the name of the grantor, grantee, in the limiting of the estate, or the like, and it cannot be proved to be done before the sealing and delivery of it, especially if it be a deed poll, it is very suspicious. *Co. Lit.* 37. 225. *Perk.* § 125, 126, 127, 128. 155.

Where an estate cannot have its essence without a deed, there, if the deed is rased in any material part, after the delivery, it makes the estate void: but if the estate may have essence without a deed, then, notwithstanding it is created by deed, and that deed is rased, it shall not destroy the estate, but the deed. 1 *Nels. Abr.* 625.

When a chose in action is created by deed, the destruction of such deed is the destruction of the duty itself; as in case of a bond, bill, &c. though it is not so, where an estate or interest is created by a deed. 3 *Salk.* 120.

If a deed be suppressed, on proof made that it came to the party's hands, and of its contents, the person injured will have the same benefit to hold the estate, as if the deed could be produced. 2 *Vern.* 280. A person committed for burning a deed, see 2 *Vern.* 561. *Abr. Cas. Eq.* 169. An indorsement on a deed, at the time of the sealing and delivery, is a part of the same: but if an indorsement be after the delivery, it is a new deed. *Mod. Cas.* 237.

Deeds, if *fraudulently* made; when got by *corrupt agreement*, as on usurious contract; and when made by *force* or *duress*, &c. are void: so they are for uncertainty, and by reason of infancy, coverture, or other disability in the makers, &c. 2 *Rol. Abr.* 28. 1 *Inst.* 253. 11 *Rep.* 27.

A deed may be good in part, and void in part; or good against one person, and void as to another: if all the parts of a deed may by law stand together, no one part shall make the whole void. And if a deed by any *construction* of law be construed to have *legal operation*, the law will not make it utterly void, though it may not operate according to the purport of the deed: also the law will transpose and marshal clauses in deeds, to come at their true meaning; but not to confound them. Where the words of a deed may have a double intendment, one standing with law, and the other contrary to it, the intendment that standeth with law shall be taken. 1 *Lil. Abr.* 421. 1 *Inst.* 42. 217. 1 *Shep. Abr.* 540.

IV. Deeds of *Bargain and Sale* are to be *inrolled*, by *stat.* 27 *Hen.* 8. *c.* 16. A copy of a bargain and sale inrolled, shall be as sufficient as the original deed, by *stat.* 10 *An. c.* 18. *sect.* 3. But estates in fee are now generally granted and conveyed by indentures of *lease* and *release*. *All deeds* are to be *registered* in the counties of York and Middlesex. *Stat.* 2 *&* 3 *An. c.* 4. 5 *An. c.* 18. 6 *An. c.* 35. 7 *An. c.* 20. 8 *Geo.* 2. *c.* 6. 25 *Geo.* 2. *c.* 4. And it is much to be wished that registers were universally established throughout the kingdom. See further titles *Bargain and Sale*, *Conveyance*, *Inrollment*, &c.

It may here be cursorily observed, that of conveyances by the Common Law, some may be called *original*, or *primary* conveyances; which are such by means whereof the benefit or estate is created, or first arises: others are *derivative*, or *secondary*; whereby the benefit or estate, originally created, is enlarged, restrained, transferred, or extinguished.

Original conveyances are,—1. Feoffment;—2. Gift;—3. Grant;—4. Lease;—5. Exchange;—6. Partition.—*Derivative*, are,—7. Release;—8. Confirmation;—9. Surrender;—10. Assignment;—11. Defeasance.—See those titles, and also particularly title *Conveyance*, and 2 *Comm.* 295. 310.

There are four grounds for the *exposition of deeds*. 1. That they may be beneficial to the taker. 2. That where the words may be employed to some intent, they shall never be void. 3. That the words be construed according to the intention of the parties, and not otherwise; and the intent of the parties shall take effect, if it may possibly stand with law. 4. That they are to be consonant to the rules of the law. And deeds shall have a reasonable exposition, without injury against the grantor, to the greatest advantage of the grantee. They are to be expounded upon the whole, and if the second part contradicts the first, such second part shall be void; but if the latter part expounds or explains the former, which it may do,

both of them shall stand. *Plowd.* 160. *Raym.* 142. 6 *Rep.* 36. 1 *Inst.* 313. 1 *Rol. Rep.* 375.

If a deed correctly describe land by its quantities and occupiers, though it describe it as being in a parish in which it is not, the land shall pass by the deed. 5 *W. P. T.* 207.

The first *deed* of a person, and last will stand in force. In deeds indented, all parties are estopped, or concluded, to say any thing against what is contained in the deed. 1 *Inst.* 45. And where a deed is by indenture between parties, none can have an action upon that deed, but he who is a party to it; but where it is a deed poll, one may covenant with another who is not a party to it, to do certain acts, for the non-performance whereof he may bring an action. 2 *Lev.* 74.

Where an interest is the same as that secured by a deed, *assumpsit* will not lie, but the remedy is upon the deed. 1 *Maul. & Selw. Rep.* 573.

Where a man justifies title under a deed, he is to produce the deed: if a deed is alledged in pleading, it must be shewed to the court that the court may judge of the validity of it, and whether there are sufficient words to make a good contract; and when it is shown to the court, the deed shall remain in court all the term, in the hands of the *custos brevium*; but at the end of the term, it shall be delivered to the party. If the deed is denied, it must remain in court till the plea is determined. 10 *Rep.* 88. *Wood*, 235. A deed set forth with a *profert hic in curia*, remains in court in judgment of law all that term, and any person may, during that term, have benefit by it, though he hath it not ready to shew: the adverse party may take any advantage by the deed that it will afford him. 5 *Rep.* 74. 1 *Nels.* 625.

Where two parts of an indenture of charter-party were supposed to have been interchangeably executed, and the part, of which the master of the chartered vessel had the custody, was lost at sea with the ship, the court of C. P. would not compel the charterer, being sued thereon, to grant inspection and a copy of the other part, for the purpose of the plaintiff's declaring with certainty. *Street* v. *Brown*, 6 *W. P. Taunton*, 302.

Deeds are not now actually brought into court, but generally remain in the hands of the party's attorney, who gives oyer and copy of them to the attorney of the other party, if demanded. See title *Oyer*.

DEEDS, *stealing of.* At Common Law, bonds, bills, and notes, which concern mere *choses in action*, were held not to be such goods whereof *larceny* might be committed: but by *stat.* 2 *Geo.* 2. *c.* 25. they are put upon the same footing, with respect to *larcenies*, as the money they were meant to secure. See titles *Felony*, *Robbery*.

DEEMSTERS, from the Sax. *dema*, a judge or umpire.] Are a kind of judges in the Isle of Man, who, without process, or any charge to the parties, decide all controversies in that island; and they are chosen from among themselves. *Cam. Brit.*

DEER FALD. A park, or *deer fold*; Sax. *deer*, *fera*, and *fald*, *stabulum*. *Cowel.*

DEER HAYES. Are engines or great nets made of cords to catch deer; and no person not having a park, &c. shall keep any of these nets under the penalty of 40*s.* a month. *Stat.* 19 *H.* 7. *c.* 11. See title *Game*.

DEER STEALERS. Much of the law relating to these offenders is implicated in the general rules relative to hunting in forests, &c. for which see this Dict. title *Game*, more at large.

Several ancient statutes have been made to punish *Deer-stealers*; and a very severe one 9 *Geo.* 1. *c.* 22. known by the name of the *Black Act*, against those and other offenders. See title *Black Act*.

See the statutes 3 *E.* 1. *c.* 20. against trespassers in parks: 21 *Ed.* 1. *st.* 2. *de malefactoribus in parcis.* 1 *H.* 7. *c.* 7. of unlawful hunting in parks by night. 1 *Jac.* 1. *c.* 27. against sellers and buyers of deer who are to forfeit 40*s.* *stat.* 5 *Geo.* 1. *c.* 28. by which wounding or killing deer in a park is punishable with transportation.

The above and all former statutes except 9 *Geo.* 1. *c.* 22. (Black Act) are repealed by *stat.* 16 *Geo.* 3. *c.* 30. which though like some others of the game laws inaccurately penned, or copied on record, is now generally pursued for the punishment of *Deer-stealers*. See *Will's Reports*, 49 *in n.*

By this *stat.* 16 *Geo.* 3. *c.* 30. if any persons shall hunt or take in a snare, or kill or wound any red or fallow deer in any forest, chase, &c. whether inclosed or not: or in any inclosed park, paddock, &c. without the consent of the owner, or be aiding in such offence, they shall forfeit 20*l.* for the first *offence*; and also 30*l.* for each deer wounded, killed or taken. A game-keeper offending to forfeit double.—For a second offence offenders shall be transported for seven years. § 1.—Justices to transmit convictions to the sessions. § 2.—Justices may grant warrants to search for heads, skins, &c. of stolen deer, and for toils, snares, &c. and persons having such in their possession to forfeit from 30*l.* to 10*l.* at the discretion of the justices. §§ 4, 5, 6.—Persons unlawfully setting nets or snares, to forfeit for the first offence from 10*l.* to 5*l.*—And for every other offence 20*l.* to 10*l.* § 7.—Persons pulling down pales or fences of any forest, chase, park, paddock, wood, &c. subject to the penalties annexed to the first offence for killing deer. § 8.—Dogs, guns and engines may be seized by park-keepers; and persons resisting shall be transported for seven years. § 9.—Penalties may be levied by distress; in default of which offenders to be committed for twelve months. § 11, &c.—No *certiorari* to be allowed, unless the party convicted become bound to the prosecutor in 100*l.* to pay him all costs and damages, and to the Justice in 60*l.* to prosecute the *certiorari* with effect. § 19, 20.; and see § 23. by which later § it seems that convictions are not removable by *certiorari* on mere points of informality, in case the facts alleged are sufficient to support the conviction.—See *Burn's Just.* tit. *Game*, V. 1. ii.—1 *Hawk. P. C. c.* 27. § 60. and this Dict. title *Certiorari*.—Appeal given to the sessions. § 21, &c.—Prosecutions limited to twelve months from the time of the offence committed. § 25.

By *stat.* 42 *G.* 3. *c.* 107. 'more effectually to prevent the stealing of deer,' persons who shall illegally course, hunt, snare, kill, wound, or shoot at, destroy, or carry away, any red or fallow deer in any inclosure for deer, without consent of the owner, are declared guilty of felony punishable by seven years transportation. § 1.—Persons committing such offences in uninclosed grounds shall forfeit 50*l.* (which by *stat.* 51 *Geo.* 3. *c.* 120. may be mitigated to 20*l.*) and keepers or persons intrusted with deer so offending, shall forfeit double. 42 *Geo.* 3. *c.* 107. § 2.—Persons convicted of a second finable offence are declared felons, and transportable for seven years. § 4.—This Act does not extend to Scotland or Ireland. § 7.—The powers of 16 *G.* 3. *c.* 30. are extended to this act, and in default of payment of penalties offenders may be imprisoned for six months. § 3.—§ 1. of 16 *G.* 3. *c.* 30. (as far as relates to *fallow* deer) is repealed by this act 42 *Geo.* 3. *c.* 107. See § 6.

By *stat.* 28 *Geo.* 2. *c.* 19. destroying goss, furze, and fern, in forests and chases, being the covert for deer, subjects the offenders to a penalty from 5*l.* to 40*s.* or to three months imprisonment.

For the provisions of *stat.* 57 *Geo.* 3. *c.* 90. for preventing persons going armed by night in forests, &c. for the destruction of game, see this Dict. title *Game*.

DE ESSENDO QUIETUM DE TOLONIO. A writ that lies for those who are by privilege free from the payment of *toll*; on their being molested therein. *F. N. B.* 226. See titles *Corporation*, *Toll*.

DE EXPENSIS MILITUM. A writ commanding the sheriff to levy the expences of *knights of the shire* for attend-

ance in *parliament*, [being 4*s. per diem.*] There is a like writ *de expensis civium et burgensium*, to levy the expences of every *citizen* and *burgess* of *parliament*, [2*s. per diem.*] See *stats.* 12 *Rich.* 2. *c.* 12. 23 *Hen.* 6. *cap.* 10. 4 *Inst.* 46. and further title *Parliament.*

DE FACTO. Signifies a thing actually done; that is done *in deed.* A king *de facto* (in fact) is one that is in actual possession of a crown, and hath no lawful right to the same; in which sense it is opposed to a king *de jure* (of right), who hath right to a crown, but is out of possession. 3 *Inst.* 7. See title *King.*

DEFAMATION, *defamatio.*] Is when a person *speaks* scandalous words of another, as of a magistrate, &c. whereby they are injured in their reputation; for which the party offending shall be punished according to the nature and quality of his offence: sometimes by action on the case at Common Law, sometimes by statute, and sometimes by the ecclesiastical laws.

*Defamation* is also punishable by the spiritual courts; in which courts it ought to have three incidents: *viz. First*, It is to concern matters spiritual, and determinable in the ecclesiastical courts, as for calling a man heretick, schismatick, adulterer, fornicator, &c. *Secondly*, that it be a matter spiritual only; for if the *defamation* concern any thing determinable at the Common Law, the ecclesiastical judges shall not have conusance thereof. And *Thirdly*, although such *defamation* be merely spiritual, yet he that is defamed cannot sue for damages in the ecclesiastical courts; but the suit ought to be only for punishment of the fault, by way of penance. *Termes de Ley.* See titles *Action, Courts-Ecclesiastical, Prohibition.*

DEFAULT, Fr. *defaut.*] Is commonly taken for *non-appearance* in court, at a day assigned; though it extends to any omission of that which we ought to do. *Bract. lib.* 5. *tract.* 3. *Co. Lit.* 259. If a plaintiff makes *default* in appearance in a trial at law, he will be non-suited; and where a defendant makes *default*, judgment shall be had against him by *default.* See titles *Judgment, Nonsuit.*

Tenant in tail, tenant in dower, by the curtesy or for life, losing their lands by *default*, in a *præcipe quod reddat* brought against them; they are to have remedy by the writ *quod ei deforciat, &c. Stat. Westm.* 2. *c.* 4. And in a *quod ei deforciat*, where the tenant joined issue upon the mere right, and the jury appearing, the defendant made *default*; it was adjudged, that in such case final judgment shall be given: but if the tenant had made *default*, it would be otherwise, for then a *petit cape* must issue against him, because it may so happen that he may save his *default.* 1 *Nels. Abr.* 627.

By *default* of a defendant, he is said to be generally out of court to all purposes, but only that judgment may be given against him: and no judgment can be afterwards given for the defendant. *Ibid.* 628.

When two are to recover a personal thing, the *default* of one is the default of the other: *contra*, where they are to discharge themselves of a personalty: where the *default* of the one is not the *default* of the other. 6 *Rep.* 25. 1 *Lill. Abr.* 425. In an action against two, if the process be determined against one, and the other appears; he shall be put to answer, notwithstanding the default of his companion. 3 *Danv. Abr.* 480. Where the baron is to have a corporal punishment for a *default*, there the *default* of the wife shall not be the *default* of the husband: but otherwise it is where the husband is not to have any corporal punishment by the *default. Ibid.* 472. 473.

If a defendant imparl to another day in the same term and make *default* at the day, this is a departure in despite of the court: and when the defendant after appearance, and being present in court upon demand makes departure, it is in despite of the court. *Co. Lit.* 139.

Suffering judgment to go by *default* is an admission of the contract declared on. *Stra.* 612. After the inquest is taken by *default*, the defendant can make no suggestion on the roll. *Str.* 46.

*Default* and saver of *default* made a large title in the old books of law. See *stats.* 52 *H.* 3. *cc.* 9. 13. 18. 24. 3 *E.* 1. *c.* 1. 42. &c. and titles *Amendment, Trial.*

DEFAULT IN CRIMINAL CASES. An offender indicted appears at the *capias*, and pleads to issue, and is let to bail to attend his trial, and then makes *default*; here the inquest in case of felony shall never be taken by *default*, but a *capias ad audiendam juratem* shall issue, and if the party is not taken, an *exigent*; and if he appear on that writ, and then make *default*, an *exigi facias de novo* may be granted: but whereupon the *capias* or *exigent* the sheriff returns *cepi corpus*, and at the day hath not his body, the sheriff shall be punished, but no new *exigent* awarded, because in custody of record. 2 *Hale's Hist. P. C.* 202.

DEFAULT OF JURORS. If *jurors* make default in their appearance for trying of causes, they shall lose and forfeit *issues*, unless they have any reasonable excuse proved by witnesses, in which case the justices may dischage the issue for *default.* *Stat.* 35 *H.* 8. *c.* 6. See title *Jury.*

DEFEASANCE, from the Fr. *defaire*, to defeat or undo.] Is of two sorts. 1. A collateral deed made at the same time with a feoffment or other conveyance, containing certain conditions, upon the performance of which the estate then created may be defeated or totally undone. In this manner mortgages were in former times usually made; the mortgagor enfeoffing the mortgagee, and he at the same time executing a deed of defeasance, whereby the feoffment was rendered void, on repayment of the money borrowed at a certain day. And this, when executed at the same time with the original feoffment, was considered as part of it by the ancient law; and therefore only indulged: no subsequent secret revocation of a solemn conveyance, executed by livery of seisin, being allowed in those days of simplicity and truth; though when *uses* were afterwards introduced, a revocation of such uses was permitted by courts of Equity. But things that were merely executory or to be compleated by matter subsequent, (as rents of which no seisin could be had till time of payment; annuities, conditions, warranties and the like,) were always liable to be recalled by defeasances made subsequent to the time of their creation.—2. A Defeasance on a bond, recognisance, or judgment recovered, is a condition which when performed defeats that, in the same manner as the foregoing Defeasance of an estate. It differs only from the common condition of a bond, in that the one is always inserted in the deed or bond itself, the other is made between the same parties by a separate, and frequently by a subsequent deed. This like the condition of a bond when performed, discharges and disincumbers the estate of the obligor. 2 *Comm.* 327. 342. See 1 *Inst.* 236, 7. 2 *Sand.* 47.

The *Defeasance* may generally (as in the case of a bond, &c.) be indorsed on the back of the deed.

To make a good *Defeasance* it must be, 1. By deed; (in the case of indorsement by a *deed-poll*;) for there cannot be a *Defeasance* of a deed without deed; and a writing under hand doth not imply it to be a deed. 2. It must recite the deed it relates to, or at least the most material part thereof; or in case of indorsement refer thereto. 3. It is to be made between the same persons that were parties to the first deed. 4. It must be made at the time, or after the first deed, and not before. 5. It ought to be made of a thing *defeasible.* 1 *Inst.* 236. 3 *Lev.* 234.

Inheritances executed by livery, such as estates in fee, or for life, cannot be subject to *Defeasance* afterwards, but at the time of making the feoffment, &c. only: but executory inheritances, such as leases for years, rents, annuities, conditions, covenants, &c. may be defeated by *Defeasance* made after the things granted. And it is the same of obligations,

recognisances, statutes, judgments, &c. which are most commonly the subject of *Defeasance*, and usually made after the deed whereto they have relation. *Plowd.* 137. 1 *Rep.* 113.

Where a *proviso* goes by way of *Defeasance* of a *covenant*, it must be pleaded on the other side, otherwise, where by way of *exclamation*, or *restriction* of the covenant. 2 *Salk.* 574. See further, titles *Conveyance*, *Deed*, *Mortgage*.

DEFENCE. In its true legal sense, signifies, not a justification, protection, or guard, which is now its popular signification; but merely an *opposing* or *denial* [from the French *defendre*,] by the defendant of the truth or validity of the plaintiff's complaint. It is a general assertion that the plaintiff hath no ground of action, which assertion is afterwards extended and maintained in the defendant's plea. For it would be ridiculous to suppose that the defendant comes and *defends* (or in the vulgar acceptation, justifies) the force and injury, in one line, and pleads that he is *not guilty* of the trespass complained of, in the next. And therefore in actions of dower, where the demandant does not count of any injury done, but merely demands her endowment, (*Rastal. Entr.* 234.) and in assises of land, where also there is no injury alledged, but merely a question of right stated for the determination of the recognitors or jury, the tenant makes no such defence. *Booth of Real Actions*, 118. In writs of entry, where no injury is stated in the count, but merely the right of the demandant and the defective title of the tenant, the tenant comes and defends or denies *his* right, *jus suum*, that is, (as it seems though with a small grammatical inaccuracy) the right of the demandant, the only one expressly mentioned in the pleadings; or else denies his own right to be such, as is suggested by the count of the demandant. And in writs of right the tenant always comes and defends the right of the demandant and his seisin *jus prædicti* S. *et seisinam ipsius*, (*Co. Entr.* 182.) or else the seisin of his ancestor, upon which he counts, as the case may be, and the demandant may reply, that the tenant unjustly *defends* [*i. e. denies*] his, the demandant's right, and the seisin on which he counts. *Nov. Narr.* 230. *edit.* 1534. All which is extremely clear, if we understand by *defence* an *opposition* or *denial*, but it is otherwise inexplicably difficult. The true reason of this, says *Booth*, unaccountably, I could never yet find. *Booth on Real Act*, 94. 112.

The Courts were formerly very nice and curious with respect to the nature of the defence, so that if no defence was made, though a sufficient plea was pleaded the plaintiff should recover judgment. *Co. Lit.* 127. And therefore the book entitled *Novæ Narrationes* or the *The New Talys*, [*edit.* 1534.] at the end of almost every count, *narratio*, or tale, subjoins such defence as is proper for the defendant to make. For a general defence or denial was not prudent in every situation, since thereby the propriety of the writ, the competency of the plaintiff, and the cognizance of the court, were allowed. By defending the force and injury the defendant waved all pleas of misnomer; by defending the damages, all exceptions to the person of the plaintiff; and by defending either one or the other *when and where* it should behove him, he acknowledged the jurisdiction of the court. But of late years these niceties have been very deservedly discountenanced: though they still seem to be law, if insisted on. 3 *Comm.* 296—8.

The maxim that a defendant cannot plead any plea, before he hath made a *defence*, must not be intended absolutely, for in a *scire facias*, a *defence* is never made. 3 *Lev.* 182.

See further titles *Pleading*, *Abatement*, &c.

DEFENCE OF THE REALM. Several temporary Acts of Parliament have been from time to time passed, with a view to securing the kingdom in time of war against the attacks of foreign enemies. Though these acts were made to continue only during the war, which produced the necessity of them, a short sketch of their provisions may be useful.

By 43 *G.* 3. *c.* 55. (amended by 44 *G.* 3. *c.* 95.) to enable his Majesty more effectually to provide for the defence and security of the realm during the war, and for indemnifying persons who might suffer in their property, by such measures as might be necessary for that purpose, returns were directed to be made in Great Britain and Ireland of all males from 15 to 60, and general powers were given for training all such as should be desirous of offering their services in defence of the kingdom in case of invasion, &c. upon the same principles as the Militia are trained and exercised.—In case of invasion or apprehension thereof, horses, waggons, provisions, boats, &c. might be removed or destroyed, and the inhabitants ordered to remove themselves also.—Ground might be taken where necessary for the public service, due compensation being made to the owners, tenants, &c.—See also *stats.* 43 *G.* 3. *cc.* 96. 120. 46 *G.* 3. *c.* 90. for training and exercising a proportion of the subjects (in *England.*)—The purposes of all these acts were to call forth occasionally the strength of the country, in its defence, by enrolling certain numbers, who, being trained and exercised, should on invasion be liable to be called on for military service.

Several acts were also passed for raising and maintaining a permanent additional force, but after a few years' trial, repealed. —See the *Acts* 43 *G.* 3. *c.* 82. 44 *G.* 3. *c.* 56. for England; 43 *G.* 3. *c.* 83. 44 *G.* 3. *c.* 66. for Scotland: all repealed by 46 *G.* 3. *c.* 51.—43 *G.* 3. *c.* 85. 44 *G.* 3. *c.* 74. for Ireland, repealed by 46 *G.* 3. *c.* 63.—43 *G.* 3. *c.* 101. 44 *G.* 3. *c.* 96. for London; repealed by 46 *G.* 3. *c.* 144. See this Dictionary, title *King*.

DEFEND, *defendere*.] In our ancient laws and statutes signifies to forbid; and there is a statute intitled, *Statutum de* defensione *portandi arma, &c.* 7 *Ed.* 1. In divers parts of England we commonly say, *God defend*, instead of *God forbid*. *Blount*.

DEFENDANT, *defendens*.] The party sued in a *personal action*; as *tenant* is he that is sued in an *action real*.

DEFENDEMUS. An ordinary word used in grants and donations; and hath this force, that it binds the donor and his heirs to defend the donee, if any one go about to lay any incumbrance on the thing given, other than what is contained in the deed of donation. *Bract. lib.* 2. *c.* 16. See title *Warranty*.

DEFENDER OF THE FAITH, *fidei defensor*.] A peculiar title belonging to the King of England, as *Catholick*, to the King of Spain; and *Most Christian* to the King of France, &c. These titles were given by the Popes of Rome; and that of *Defensor Fidei* was first conferred by Pope Leo the Tenth on King Henry the Eighth, for writing against Martin Luther, and the bull for it bears date *quinto Idus Octob.* 1521. *Lord Herbert's Hist. Hen.* VIII. 105. The Pope on King Henry's suppressing the houses of religion, at the time of the Reformation, futilely sentenced him to be deprived of this title, and deposed from his crown. In the 35th year of his reign this title, &c. was acknowledged by parliament; and hath continued to be used by all succeeding Kings to this day. *Lex Constitutionis*, 47, 48.

DEFENDERE SE *per Corpus suum*. To offer duel or combat as a legal trial and appeal. *Bract. lib.* 3. *cap.* 26. See title *Battel*.

DEFENDERE UNICA MANU. Words signifying to wage law, and a denial of the accusation upon oath. See *Manus*, *Wager of Law*.

DEFENSA. A park or place fenced in for deer, and *defended* as a property for that use and service. *H. Knighton*, *sub. ann.* 1352.

DEFENSIVA. A Lord or *Earl*, of the *Marches*; who were the wardens or *defenders* of their country. *Cowel*.

DEFENSO. That part of any open field or place that was allotted for corn and hay, and upon which there was no common or feeding, was anciently said to be *in defenso*: so of

any meadow ground, that was laid in for hay only. It was likewise the same of a wood, where part was inclosed and fenced up, to secure the growth of the underwood from the injury of cattle. *Mon. Angl. tom.* 3. *p.* 306.—*Cowel.*

DEFENSUM. An inclosure of land, or any fenced ground. *Mon. Angl. tom.* 2. *p.* 114.

DEFORCEMENT, *Deforciamentum.*] A species of injury by ouster or privation of the freehold, where the entry of the present tenant or possessor was originally lawful, but his detainer is now become unlawful. 3 *Comm.* 172.

For that at first the with-holding was with *force* and violence, it was called a *deforcement* of the lands or tenements: But now it is generally extended to all kind of wrongful withholding of lands or tenements from the right owner.—There is a writ called a *quod ei deforciat*, which lieth where tenant in tail, or tenant for life, loseth by default, by the *stat. Westm.* 2. *c.* 4. he shall have a *quod ei deforciat* against the recoveror; and yet he cometh in by course of law. 1 *Inst.* 331, *b.* See title *Quod ei deforciat*—and as to entries with actual force, tit. *Forcible Entry.*

*Deforcement* in its most extensive sense, is *nomen generalissimum* signifying the holding of any lands or tenement to which another person hath a right. *Co. Lit.* 277. So that this includes as well an *abatement* an *intrusion*, a *disseisin*, or a *discontinuance*, as any other species of wrong whatsoever, whereby he that hath right to the freehold is kept out of possession. But, as contradistinguished from these, it is only such a detainer of the freehold, from him that hath the right of property, but never had any possession under that right, as falls not within any of those terms. As in case where a lord has a seignory, and lands escheat to him *propter defectum sanguinis*, but the seizin of the lands is with-held from him; here the injury is not *abatement*, for the right vests not in the lord as heir or devisee; nor is it *intrusion*, for it vests not in him who hath the remainder or reversion; nor is it *disseisin*, for the lord was never seised; nor does it at all bear the nature of any species of *discontinuance*; but being neither of these four, it is therefore a *deforcement*. *F. N. B.* 143. If a man marries a woman, and during the coverture is seised of lands, and aliens, and dies; is disseised, and dies; or dies in possession: and the *alienee*, disseisor, or heir, enters on the tenements, and doth not assign the widow her dower; this is also a Deforcement to the widow, by with-holding lands to which she hath a right. *F. N. B.* 147. In like manner, if a man lease lands to another for term of years, or for the life of a third person, and the term expires by surrender, efflux of time, or death of the *cestuy que vie*; and the lessee or any stranger, who was at the expiration of the term in possession, holds over, and refuses to deliver the possession to him in remainder, or reversion, this is likewise a Deforcement. *Finch L.* 263. *F. N. B.* 201. 5, 6, 7.

Deforcements may also arise upon the breach of condition in law; as if a woman gives lands to a man by deed, to the intent that he marry her, and he will not when thereunto required, but continues to hold the lands; this is such a fraud on the man's part, that the law will not allow it to devest the woman's right of possession, though his entry being lawful, it does devest the actual possession, and thereby becomes a Deforcement. *F. N. B.* 205.

Deforcements may also be grounded on the disability of the party deforced: as if an infant do make an alienation of his lands, and the alienee enters and keeps possession; now, as the alienation is voidable, this possession as against the infant (or, in case of his decease, as against his heir) is after avoidance wrongful, and therefore a Deforcement. *Finch L.* 264. *F. N. B.* 192. The same happens, when one of non-sane memory aliens his lands or tenements, and the alienee enters and takes possession, this may also be a Deforcement. *Finch L.* 264. *F. N. B.* 202.

Another species of Deforcement is, where two persons have the same title to land, and one of them enters and keeps possession against the other, as where the ancestor dies seised of an estate in fee-simple, which descends to two sisters as coparceners, and one of them enters before the other, and will not suffer her sister to enter and enjoy her moiety; this is also a *Deforcement*. *Finch L.* 293, 4. *F. N. B.* 197.

Deforcement may also be grounded on the non-performance of a covenant real; as if a man seised of lands, covenants to convey them to another, and neglects or refuses so to do, but continues possession against him; this possession being wrongful, is a Deforcement. *F. N. B.* 146. In levying a fine of lands, the person, against whom the fictitious action is brought, upon a supposed breach of covenant is called the *deforciant*. And, lastly by way of analogy, keeping a man by any means out of a freehold office is construed to be a Deforcement; though, being an incorporeal hereditament the deforciant has no corporal possession. So that whatever injurious withholding the possession of a freehold is not included under *abatement*, *intrusion*, *disseisin*, or *discontinuance*, (See those titles) is comprised under *Deforcement*. 3 *Comm.* 172, 4.

DEFORCEOR, *deforciator*, from the French *forceur*, *expugnator*; or DEFORCIANT.] One that overcometh, and casteth out by *force*. *Britton, cap.* 53. *Old Nat. Brev. fol.* 118. *Bract. lib.* 4. *cap.* 1. *Stat.* 23 *Eliz. c.* 3. See title *Deforcement*.

DEFORCIATO. Is used for a distress, or holding of goods for satisfaction of a debt. *Paroch. Antiq.* 239.

DEGRADATION, *degradatio.*] An ecclesiastical censure, whereby a clergyman is divested of his holy orders. There are two sorts of *degrading*, by the *Canon Law*; one *summary*, by word only; the other *solemn*, by stripping the party *degraded* of those ornaments and rights which are the ensigns of his order or degree. *Selden's Titles of Hon.* 787.

*Degradation* is otherwise called *deposition*; and in former times the *degrading* of a clerk was no more than a displacing or suspension from his office: but the *Canonists* have since distinguished between a deposition and a *degradation*; the one being now used as a greater punishment than the other, because the bishop takes from the criminal all the badges of his order, and afterwards delivers him to the secular judge, where he cannot purge himself of the offence whereof he is convicted, &c.

There is likewise a *degradation* of a *Lord*, or a *Knight*, &c. at *Common Law*; when they are attainted of treason; as in Hil. 18 Ed. 2. Andrew Harcla, Earl of Carlisle, who was also a Knight was *degraded*, and when judgment of treason was pronounced against him, his sword was broken over his head, and his spurs hewn off his heels, &c. And there is a *degrading* by *act of parliament*; for by *stat.* 13 *Car.* 2. *c.* 16. William Lord Monson, Sir Henry Mildmay, and others, were *degraded* from all titles of honour, dignities, and pre-eminences, and none of them to bear or use the title of Lord, Knight, Esquire, or Gentleman, or any coat of arms for ever after. See title *Peers.*

DEHORS, Fr. *without.*] A word used in ancient pleading, when a thing is *without* the land, &c. or *out of* the point in question. Vide *Hors de son fee.*

DE INJURIA SUA PROPRIA, *absque tali causa.* Are words used in replications, in actions of trespass. 1 *Lil. Abr.* 427. When one justifies by command or authority derived from another, or if a defendant justifies by authority at Common Law, as a constable by arrest for breach of the peace; or if he justifies by act of parliament, &c. the plaintiff may reply, that he did it *of his own wrong, without any such cause as the defendant has alleged*. *Cro. Eliz.* 539. 2 *Salk.* 628. See this Dict. titles *Trespass, Pleading.*

DEI JUDICIUM. The old Saxon trial by *ordeal* was so called: because they thought it an *appeal to God*, for the justice of a cause, and verily believed that the decision was

according to the will and pleasure of Divine Providence. See title *Ordeal*.

DEIS. The high table of a monastry. See *Dagus*.

DELATURA, Saxon.] An accusation; and sometimes hath been taken for the reward of an informer. *Leges H.* 1. c. 46. *Leges Inæ* 20. *apud Brompton*.

DEL CREDERE. In a confined sense a commission *del credere* is an undertaking by an insurance broker, for an additional premium, to insure his principal against the contingency of the failure of the under-writer. See *Grove & al'* v. *Dubois*, 1 *Term Rep.* 112. *Bigs* v. *Dickason*. *Id.* 285.

In a more enlarged sense the Nature of a Commission *Del Credere*, appears from the case of *Mackenzie & al'* v. *Scott*, *Parl. Cases*, 8vo. vi. 280. to be as follows:

*Del Credere* is an Italian mercantile phrase signifying the same as the English term Guarantee, or *Warranty*, or the Scotch term Warrandice: and when applied to the situation of a factor, is understood in the following sense. A Factor who has general orders to dispose of goods for his constituent to the best advantage, is, like all factors, liable only to that degree of diligence which a prudent man uses in his own affairs; and consequently a Factor is authorised to dispose of the goods according to the best terms which can be attained; and if it shall appear that he has done so, and that he has sold his goods to persons in reputed good circumstances at the time, and to whom he would have given credit in his own affairs, he will not be liable to his constituent although some of these persons should fail; and, for such trouble, the factor is generally paid by a per centage upon the goods sold, and in this case the constituent runs the risk of the credit of the person to whom the goods are so sold. Many merchants do not choose to run this risk, and to trust to the prudence and discretion of the Factor; and therefore the agreement called *del credere* was invented, by which the Factor, for an additional premium when he sells goods on credit, becomes bound to warrant the solvency of the purchasers; and, as it seems, renders himself liable in all events for the payment of the price of the goods sold.—In the case of *Mackenzie* v. *Scott* above quoted, where a factor under a commission *Del credere* sold goods and took accepted bills from the purchasers, endorsed those bills to a banker at the place of sale, and received the banker's bill payable to the factor's order on a house in London, which bill the factor indorsed and transmitted to his principal, who got the same accepted, the acceptor and drawer failing, the factor was held answerable for the amount of the bill.

DELEGATES. Commissioners of appeal appointed by the King under the Great Seal, in cases of appeals from the Ecclesiastical Court, &c. by *stat.* 25 *H.* 8. *c.* 19. See title *Court-Ecclesiastical*, 6.

DELF. From the Sax. *delfan*. to dig or delve.] A quarry or mine, where stone or coal, &c. are dug. *Stat.* 31 *Eliz.* 7.

DELIVERANCE. When a criminal is brought to trial, and the clerk in court asks him whether he is *Guilty* or *Not guilty*, to which he replies Not guilty, and puts himself on God and his country, the clerk wishes him a *good deliverance*. See *Trial*.

DELIVERY OF DEEDS. See titles *Date*, *Deed*.

DEMAND, Fr. *demande*, Lat. *postulatum*.] A calling upon a man for any thing due. There are two manner of *demands*, the one in *deed*, the other in *law*: in deed as in a *precipe quod reddat*, there is an express *demand*. Every entry on land, distress for rent, taking of goods, &c. which may be done without words, is a *demand* in law. 8 *Rep.* 153.

It is also said there are three sorts of *demands*; one in writing without speaking, and that is in every *precipe*; one without writing, being a verbal *demand* of the person, who is to do or perform the thing; and another made without either word or writing, which is a *demand* in law, in cases of entries on lands, &c. As an entry on land and taking a distress, are a *demand* in law of the land and rent, so the bringing an action of debt for money due on an obligation is a *demand* in law of the debt. 1 *Lill.* 432. 1 *Nels. Abr.* Debts, claims, &c. are to be *demanded* and made in time by the statute of Limitations, 21 *Jac.* 1. *c.* 16. and other statutes; or they will be lost by law. See title *Limitation of Actions*.

Where there is a duty which the law makes payable on *demand*, no *demand* need be made; but if there is no duty till *demand* in such case there must be a *demand*, to make the duty. 1 *Lill.* 432. *Cro. Eliz.* 548. Upon a penalty the party need not make a *demand*, as he must in the case of a *nomine pœnæ*; for if a man be bound to pay 20*l.* on such a day, and in default thereof to pay 40*l.* the 40*l.* must be paid without demand. 1 *Mod.* 89. If a man leases land by indenture for years, reserving a rent payable at certain days, and the lessee covenants to pay the said rent at the days limited; the lessor is entitled to his rent, without *demand*, for the lessee is obliged to pay it at the days, by force of his covenant. 2 *Danv. Abr.* 101. But if a lessor makes a lease rendering rent, and the lessee covenant to pay the rent, being lawfully *demanded*, the lessee is not bound to pay the rent, without a *demand*. *Ibid.* 102.

A person makes a lease for life, or years, reserving a rent upon condition, that if the lessee doth not pay the rent at the day, that then without any *demand* it shall be lawful for the lessor to re-enter; by this special agreement of the parties, the lessor may enter on non-payment of the rent without any *demand*. 2 *Danv. Abr.* 100. A lease for years, with condition to be void, on non-payment of the rent, is not void unless the rent be *demanded*; and an interest shall not be determined, without an actual *demand*. *Hob.* 67. 331. 2 *Mod.* 264. But now by the statutes relative to rents an ejectment may be maintained without an actual entry. See *stats.* 4 *Geo.* 2. *c.* 28. § 2. 11 *Geo.* 2. *c.* 19. § 16. and this Dict. titles *Ejectment*, *Lease*, *Rent*.

A *demand* is to be legal, and made in such manner as the law requires: if it be for rent of a messuage and lands, it ought to be made at the messuage, at the fore door of the house, the most notorious place: where lands and woods are let together, the rent is to be *demanded* on the land as the most worthy thing, and on the most public part thereof; if wood only be leased, the *demand* must be made at the gate of the wood, &c. 1 *Inst.* 201. *Poph.* 58. Vide *Dyer*, 51. 1 *Leon.* 425. *Cro. Eliz.* 209.

He that would *enter* for a condition broken, which tends to the destruction of an estate, must—1. *Demand* the rent. —2. Upon the land, if there is no house.—3. If there is a house, at the fore door; though it is not material whether any person be in the house or no.—4. If the appointment is at any other place off the land, the *demand* must be at that place.—5. The time of the *demand* is to be certain, that the tenant may be there, if he will, to pay the rent: and the last time of *demand* of the rent, must be such a convenient time before the sun-setting of the last day of payment, as the money may be numbered. The lessor or his sufficient attorney is to remain upon the land, the last day on which the rent due ought to be paid, until it be so dark that he cannot see to tell the money: and if the money thus *demanded* is not paid, this is a denial in law, though there are no words of denial; upon which a re-entry may be made, &c. 1 *Inst.* 201, 202. 4 *Rep.* 73.—See further title *Entry*. As to demand of lands, see title *Fine*.

As a release of *suits* is more large than of quarrels or actions; so a release of *demands* is more large and beneficial than either of them. By a release of all *demands*, all executions, and all freeholds, and inheritances, executory, are released: by a release of *demands* to the disseisor, the right of entry in the land, and all that is contained therein is released.

And he that releaseth all *demands*, excludes himself from all actions, entries, and seizures: but a release of all *demands*, is no bar in a writ of error to reverse an outlawry. 8 *Co.* 153. 154.—See title *Release.*

DEMANDANT, *petens.*] All civil actions are prosecuted either by *demands* or *plaints*, and the pursuer is called *demandant*, in actions real; and *plaintiff*, in personal actions: in a real action, lands, &c. are *demanded*. *Co. Lit.* 127.

DEMEASE. Death. *Scotch Dict.* See *Demise.*

DEMEINE, DEMAIN, DEMESNE, Fr.—Lat. *dominicum, domanium;* also written *domaine*, and signifieth *patrimonium domini.*] *Demains* according to common speech are the lord's chief manor-place, with the lands thereto belonging; *terræ dominicales*, which he and his ancestors have from time to time kept in their own manual occupation, for the maintenance of themselves and their families: and all the parts of a manor, except what is in the hands of freeholders, are said to be *demains.* Copyhold lands have been accounted *demains*, because they that are the tenants hereof are judged in law to have no other estate but at the will of the lord; so that it is still reputed to be, in a manner, in the lord's hands: but this word is oftentimes used for a distinction between those lands that the lord of the manor hath in his own hands, or in the hands of his lessee demised at a rack-rent, and such other land appertaining to the manor, which belongeth to free or copy-holders. *Bract. lib.* 4. *tract.* 3. *c.* 9. *Fleta, lib.* 5. *cap.* 5. As *demains* are lands in the lord's hands manually occupied, some have thought this word derived from *de manu;* but it is from the Fr. *demaine*, which is used for an inheritance, and that comes from *dominium*, because a man has a more absolute dominion over that which he keeps in his hands, than of that which he lets to his tenants. *Blount.*

*Domanium* properly signifies the King's lands in France, appertaining to him in property: and in like manner do we in some sort use it here in England; for all lands, it is said, are either mediately or immediately held of the Crown; and when a man in pleading would signify his land to be his own he saith, that he is seised thereof in his *demain*, (or rather *demesne*) *as of fee;* whereby is meant, that although his land be to him and his heirs, it depends upon a superior lord, and is held by rent or service, &c. *Lit. lib.* 1. *cap.* 1. From this it hath been observed, that lands in the hands of a common person cannot be *true demesnes:* and certain it is, that lands in the possession of a subject, are called *demains* in a different sense from the *demain* lands of the Crown. For *demains*, or *domains*, in the hands of a subject, have their derivation *à domo*, because they are lands in his possession for the maintaining of his house: but the *domains* of the Crown are held of the King, who is absolute lord having proper *dominion;* and not by any feudal tenure of a superior lord, as of fee. *Wood's Inst.* 139.

*Demain* is sometimes taken in a *special* signification, as opposite to frank-fee: for example, Those lands which were in the possession of King Edward the Confessor are called *ancient demains*, or *ancient demesne*, and all others *frank-free*; and the tenants which hold any of those lands are called *tenants in ancient demain*, or *ancient demesne*, and the others *tenants in frank-fee*, &c. *Kitch.* 98. See title *Ancient Demesne.*

DEMISE, *demissio.*] Is applied to an estate either in fee, for term of life, or years, but most commonly the latter: it is used in writs for any estate. 2 *Inst.* 483. The word *demisi*, in a lease for years, implies a warranty to the lessee and his assignee; and upon this word action of covenant lies against the heir of the lessor, if he oust the lessee; it binds the executors of the lessor, who has fee-simple, or fee-tail, where any lessee is evicted, and the executor hath assets. *Dyer*, 257.

The King's death is in law termed, the *Demise of the King*, to his royal successor, of his crown and dignity, &c. See *King, Lease, Covenant, Ejectment.*

DEMISE AND REDEMISE. The conveyance by *demise* and *redemise* is where there are mutual *leases* made from one to another on each side, of the same land, or something out of it; and is proper upon the grant of a rent-charge, &c.

DEMURRAGE. An allowance made to the master of a ship by his freightors, for staying longer in a place than the time first appointed for his departure.—The amount is generally inserted in the charter-party to be paid daily as it becomes due; the *days* are always limited; so that on the expiration thereof, and protests duly made, the master is at liberty to proceed. *Spirit of Marine Laws.*

The word "*Days*" used alone in a clause of demurrage for unlading in the river Thames, is to be understood of *working* or *running* days only, and not to comprehend Sundays or holidays, by the usage among merchants in London. *Cochran* v. *Retbergh.* 3 *Espin. N. P.* 121.

The payment of *Demurrage*, stipulated to be made while a ship is waiting for *convoy*, ceases as soon as the convoy is ready to depart; and such payment, stipulated to be made while a ship is waiting to receive a *cargo*, ceases when the ship is fully laden, and the necessary clearances are obtained, although the ship may in either case happen to be further detained by adverse winds or tempestuous weather. And if the ship has once set sail and departed, but is afterwards driven back into port, the claim of demurrage is not thereby revived. *Lannoy* v. *Werry*, iv. *Parl. cases* (8°) *p.* 630. *Jamieson* v. *Lawrie*, vi. *Parl. cases* (8°) *p.* 471. See also *Marshall* v. *De la Torre*, 1 *Espin. N. P.* 367.

If a contract of freight and demurrage be entered into by deed, the plaintiff cannot declare in debt generally, and give the deed in evidence; but ought to declare upon the deed. *Atty* v. *Parish.* 1 *Bos. & Pul. New Rep.* 104.

DEMURRER. From the Lat. *demorare*, Fr. *demeurer.*] A pause or stop, put to any action upon a point of difficulty, which must be determined by the Court, before any farther proceedings can be had therein: for in every action the point of controversy consists either in *fact* or in *law;* if in *fact*, that is tried by the *jury;* but if in *law*, that is determined by the Court.

A *demurrer* therefore, is an issue upon matter of law. It confesses the facts to be true, as stated by the opposite party; but denies that by the law arising upon those facts, any injury is done to the plaintiff; or that the defendant has made out a lawful excuse; according to the party which first demurs, (*demoratur, moratur in lege,*) rests or abides in law upon the point in question. As, if the matter of the declaration be insufficient in law, (as by not assigning any sufficient trespass, &c. then the defendant demurs to the declaration.—If on the other hand the defendant's excuse or plea be invalid, (as if he pleads that he committed the trespass by authority from a stranger, without making out the stranger's right,) here the plaintiff may demur to the plea: and so in every other part of the proceedings.

The form of such demurrer is by averring the declaration or plea, the replication or rejoinder, to be insufficient in law to maintain the action or the defence; and therefore praying judgment for want of sufficient matter alledged. Sometimes demurrers are merely for want of sufficient *form* in the writ or declaration. But in case of exception to the form or manner of pleading, the party demurring, must by *stats.* 27 *Eliz. c.* 5. 4 *& 5 An. c.* 16. set forth the *causes* of his demurrer. See titles *Amendment, Pleading.*—And upon either a *general* or such *special* demurrer, the opposite party must aver it to be sufficient, which is called a joinder in demurer; and then the parties are at issue in point of law; which issue, as above mentioned, the judges of the court before which the action is brought must determine. 3 *Comm.* 314. *Finch L. lib.* 4. *c.* 40. 1 *Inst.* 71.

A *demurrer* may be to the writ, (*i. e.* the original where the proceedings are by original,) to the count, or declaration, or to any part of the pleadings.

A demurrer is admitting the matter of fact, since it *refers the law arising on the fact, to the judgment of the Court*; and therefore the fact is taken to be true on such *demurrer*, or otherwise the Court has no foundation on which to make any judgment. *Gilb. Hist. of C. P.* 55.

As a demurrer *at Common Law did confess all matters formally pleaded*; so now by *the statutes a* general *demurrer does confess all matters pleaded, though informally. Hob.* 233. But a *special demurrer* admits only facts *well* pleaded.

*Demurrers* are *general*, without shewing any particular causes; or *special*, where the causes of *demurrer* are particularly set down: and the judgment of the court is not to be prayed upon an insufficient declaration or plea, otherwise than by a *demurrer*; when the matter comes judicially before the court. If in pleadings, &c. a matter is insufficiently alledged, that the court cannot give certain judgment upon it, a general *demurrer* will suffice; and for want of substance, a general *demurrer* is good: but for want of form, there must be a special *demurrer*, and the causes specially assigned. The practice is now, on a special *demurrer*, to take advantage of any real error, though not expressed, in the causes assigned.

A man who demurs generally, shall take advantage of all matters which are requisite to shew a good right or title in the plaintiff. *Plowd. Com.* 66 *a. Hob.* 301.

If a man demurs for form, he must shew specially the causes of demurrer. 2 *Rol.* 330. *Stats.* 27 *Eliz. c.* 5, 4, 5 *An. c.* 16. *R. M.* 1654. § 17.

If there be a general demurrer to the declaration, the plaintiff may apply to a judge for a summons for leave to amend; if not, he may proceed to join in demurrer, and make up the demurrer-book himself, a copy of which he is to deliver to defendant's attorney, and if not paid for on demand, sign judgment. *R. Tr.* 12 *W.* 3. [now allowed in costs and need not be paid for on delivery]. In case of a demurrer to a plea, &c. by a plaintiff, the demurrer-book cannot be made up by the defendant, until default made by the plaintiff. *R. E.* 11 *W.* 3.

If a defendant pleads to part, and *demurs* to part; the *demurrer* should first be determined, and the issue last; because upon the trial of the issue, the jury may assess damages as to both. *Palm.* 517. Where there is a *demurrer* in part, and issue is joined upon the other part, and the plaintiff hath judgment on the *demurrer*; here he may enter a *Non-pros.* as to the issue, and proceed to a writ of inquiry upon the *demurrer*: but otherwise he cannot have such writ of inquiry. 1 *Salk.* 219. See 1 *Stra.* 532. 574.

If there be three counts in the declaration, to which there is a general demurrer; if any one of the counts be good, judgment must be for the plaintiff, if such count can be joined with the other two. 1 *Wils.* 252.

A *demurrer* is to be signed, and argued on both sides by counsel. After a *demurrer* is joined, the plaintiff having entered it on the roll, delivers the roll to the Secondary, and makes a motion for a *Consilium* or day to argue it, which the court grants of course on the Secondary's reading the record; then the *demurrer* must be entered by the plaintiff in the court-book with the Secondary, who, on his rule sets down the day appointed for argument, at least four days before the *demurrer* is argued: and paper-books, containing all the proceedings at length, which are afterwards entered on record, are made and delivered to the judges, two days before argument. See *Imp. K. B.*

By a rule of Court of *Hil.* 38 *G.* 3. the points intended to be argued in demurrer, are to be set down in the margin of the paper-book delivered to the judges; which rule, the Court has since observed, was not a new rule but the revival of an old one, made in *E.* 2. *Jac.* 2. (Vide 2 *Tidd's Pract.* 669. 670.) 2 *East's Rep.* 287. in note (*a*).

The *demurrant* argues first, and the Court will hear but two counsel on a day, *viz.* one of a side; and, if desired on either side, (unless the case be very plain,) the court will hear further arguments the next term. If the major part of the judges of the court cannot determine the matter on the *demurrer*, it is to be sent into the Exchequer-chamber to be determined by all the judges of England. 1 *Inst.* 71. Demurrers are now frequently put in for delay. In such cases, the party wishing to avoid the delay, makes up four demurrer-books and delivers to the judges two days before the day when judgment is moved for; which is given of course without argument.

When the Court gives judgment on *demurrer* in debt for the plaintiff in the action, the judgment is for the plaintiff to recover his debt, costs and damages; but if it be in action on the case, a writ of inquiry of damages must be awarded, before the plaintiff can have *final* judgment; or if the action be on Bill of Exchange, or promissory note the plaintiff may obtain a rule to refer the same to the master to assess the damages, compute interest, &c., and after costs are taxed, final judgment is entered, &c. and execution may be sued out. If judgment on the *demurrer* is for the defendant in the action, the judgment is, that the plaintiff take nothing by his writ, bill, &c. and that the defendant go without day. *Wood's Inst.* 603.

After judgment for plaintiff on demurrer, without argument, and general damages assessed, the Court of C. P. refused to permit the defendant to move in arrest of judgment, on the ground that the damages appeared to be partly given upon a count in the declaration which could not be sustained; for the defendant had the opportunity of excepting to that count on demurrer. *Creswell* v. *Packham*, 6 *W. P. Taunton*, 650. (630).

General *demurrer* being entered, it cannot be afterwards waved, without leave of the court, but a special *demurrer* generally may, unless the plaintiff hath lost a term, or the assizes by the defendant's *demurring*. *Impey, K. B.*

After demurrer to one count of a declaration, plaintiff may enter a *nolle prosequi* on that count, and proceed to trial on the others. *Bertram* v. *Gordon*, *C. P.* 6 *W. P. Taunton*, 444.

*A Demurrer in Equity*, is nearly of the same nature with a demurrer in law; being an appeal to the judgment of the court, whether the defendant shall be bound to answer the plaintiff's bill: as for want of sufficient matter of equity therein contained: or where the plaintiff upon his own shewing appears to have no right; or where the bill seeks a discovery of a thing which may cause a forfeiture of any kind, or may convict a man of any criminal misbehaviour. For any of these causes, a defendant may demur to a bill in equity; and if on demurrer the defendant prevails, the plaintiff's bill shall be dismissed; if the demurrer be over-ruled, the defendant is ordered to answer. 3 *Comm.* 446.

It is allowed a good cause of *demurrer* in Chancery, that a bill is brought for *part of a matter only*, which is proper for one intire account, because the plaintiff shall not *split causes*, and make a multiplicity of suits. *Vern.* 29.

If an *original bill* be brought *for matters, part of which are in a former bill and decree, and part new, or by way of supplimental bill*; the court will, on a demurrer to so much as was contained in the former decree, send it to a master to see what was, and what was not in the first bill, and allow the *demurrer* accordingly. *Gilb. E. R.* 184. See further, title *Chancery*.

Demurrer to Evidence. This happens where a record or other matter is produced in evidence, concerning the

legal consequences of which there arises a doubt in law: in which case the adverse party may, if he pleases, demur to the whole evidence; which admits the truth of every fact that has been alledged, but denies the sufficiency of them all in point of law to maintain or overthrow the issue, as the case may be. 1 *Inst.* 72. 5 *Rep.* 104. This draws the question of law from the cognizance of the jury to be decided, as it ought, by the court, out of which the record is sent. 3 *Comm.* 372.

So if the plaintiff brings witnesses to prove a fact, and a matter of law ariseth upon it; if the defendant admits their testimony to be true, there also the defendant may *demur* in law: and so may the plaintiff *demur* upon the defendant's evidence. And in these cases, the counsel for the plaintiff and defendant agree the matter of fact in dispute; and the jury are discharged; and the matter of law is referred to the judges to determine.

But where evidence is given for the King, in an information or other suit, and the defendant offers to *demur* upon it, the King's counsel *are not obliged* to join therein; but the Court ought to direct the jury to find the special matter. And, indeed, because juries of late usually find a doubtful matter specially, *demurrers upon evidence* are now seldom used. See 5 *Rep.* 104. 1 *Inst.* 72. 2 *Inst.* 426.

On a demurrer to circumstantial evidence the party offering the evidence is not obliged to join in demurrer unless the party demurring will distinctly admit upon the record every fact, and every conclusion, which the evidence offered conduces to prove. *Gibson* v. *Hunter*, 2 *H. Blackst.* 187.

If the Court doth not agree to a *demurrer to evidence* in a civil cause; they ought to seal a *bill of exceptions*, &c. 9 *Rep.* 13.—See title *Bill of Exceptions.*

DEMURRER TO INDICTMENTS. A demurrer is incident to criminal cases as well as civil, when the fact as alledged is allowed to be true, but the prisoner joins issue upon some point of law in the indictment; by which he insists that the fact, as stated, is no felony, treason, or whatever the crime is alledged to be. Thus, for instance, if a man be indicted for *feloniously* stealing a greyhound, which is an animal in which no valuable property can be had, and therefore it is not felony, but only a civil trespass to steal it: in this case the party indicted may demur to the indictment; denying it to be felony, though he confesses the act of taking it. Some have held, (2 *Hal. P. C.* 257.) that if on demurrer, the point of law be adjudged *against* the prisoner, he shall have judgement and execution, as if convicted by verdict. But this is denied by others; (2 *Hawk. P. C. c.* 32. § 5, 6.) who hold, that in such case he shall be directed and received to plead the general issue, *Not guilty*, after a demurrer determined against him. Which appears the more reasonable, because it is clear, that if the prisoner freely discovers the fact in court, and refers to the opinion of the court, whether it be felony or no; and upon the fact thus shewn, it appears to be felony; the court will not record the confession, but admit him afterwards to plead not guilty. 2 *Hal. P. C.* 225. And this seems to be a case of the same nature, being for the most part a mistake in point of law, and in the conduct of his pleading; and though a man by mis-pleading, may in some cases lose his property, yet the law will not suffer him by such niceties to lose his life. However, upon this doubt, demurrers to indictments are seldom used; since the same advantages may be taken upon a plea of Not guilty; or afterwards in arrest of judgment, when the verdict has established the fact. See *Smith* v. *Bowen, Mich.* 7 *An.* in which case the demurrer was continued on the record with a *cesset triatio exitûs*, &c. and after the demurrer was determined against the defendant, a *Venire* was awarded. See *Salk.* 59, 60. *Dyer*, 38. 2 *Hawk. P. C. ubi suprà in n.* 4 *Comm.* 333, 4.

DEMY-SANGUE. Half-blood: where a man marries a woman, and hath issue by her a son, and the wife dying he marries another woman, by whom he hath also a son; now these two sons, though they are called *brothers*, are but *brothers of the half blood*, because they had not both one father and mother: and therefore by law they cannot be heirs to one another; for he that claims freehold as heir to another by descent, must be of the whole blood to him from whom he claimeth. *Termes de Ley.*—See titles *Descent*, *Executor.*

DEN. From the Sax. *Den.* i. e. *Vallis, Locus Sylvestris.*] The name of places ending in *den*, as *Biddenden*, &c. signify the situation to be in a valley, or near woods. *Blount.*

DEN AND STROND. Is a liberty for ships or vessels to run or come ashore: and King Ed. I. by charter granted this privilege to the Barons of the *Cinque Ports. Placit. temp. Ed.* 1.

DENA TERRÆ. A hollow place between two hills; it is also used for a little portion of woody ground, commonly called a coppice. *Domesday.*

DENARII. A general term for any sort of *pecunia numerata*, or ready money. *Paroch. Antiq.* 320.

DENARII DE CARITATE. Customary oblations made to *Cathedral Churches* about the time of *Pentecost*, when the parish priests, and many of their people went in procession to visit their mother church: this custom was afterwards changed into a settled due, and usually charged upon the parish priest; though at first it was but a gift of *charity*, or present, to help to maintain and adorn the bishop's see. *Cartular. Abbat. Glaston. MS. f.* 15.

DENARIUS. An English penny: it is mentioned in the antient statute, *de compositione mensurarum*, &c. *Temp. inc.*

DENARIUS DEI. God's penny, or *earnest* money given and received by the parties to contracts, &c. *Cart. Ed.* 1. The earnest money is called *Denarius Dei*, or *God's penny*, because, in former times, the piece of money so given to bind the contract, was given to God, *i. e.* to the church, or the poor.

DENARIUS S. PETRI. An annual payment of one penny from every family to the Pope, during the time that the Roman Catholic religion prevailed in this kingdom, paid on the feast of St. Peter. See *Peter Pence.*

DENARIUS TERTIUS COMITATUS. Of the *Fines* and other profits of the *County Courts*, originally when those courts had superior jurisdiction before other courts were erected, two parts were reserved to the King, and a *third part* or *penny* to the *Earl of the county*; who either received it in specie at the assises and trials, or had an equivalent composition for it out of the *Exchequer. Paroch. Antiq.* 418.

DENBER. From the Sax. *Den*, a vale, and *berg*, a *barrow* or hog.] A place for the running and feeding of hogs, wherein they are penned; by some called a *Swinecomb. Cowel.*

DENIZEN. See title *Alien.*

DESNHIRING OF LAND. Is the casting parings of earth, turf and stubble into heaps, which when dried are burnt into ashes, for a compost on poor barren land. This method of improvement is used on taking in and inclosing common and waste ground; and in many parts of England is called *burn-beating*, but in Staffordshire and other counties, they term it *denshiring of land.*

DE NON DECIMANDO, *Modus.* To be discharged of tithes. See *Modus Decimandi*, *Tithes.*

DE NON RESIDENTIA CLERICI REGIS. An ancient writ where a person was employed in the King's service, &c. to excuse and discharge him of *non-residence.* 2 *Inst.* 624.

DE NOVO DAMUS. A clause of a charter, which in effect, renders it an original charter.—*Scotch Dict.*

DENTRIX. A fish with many teeth. *Chart. Hen.* 6. *Manast. Romsey.*

DEODAND, *Deo dandum.*] By this is meant whatever personal chattel is the immediate occasion of the death of any reasonable creature: which is forfeited to the King to be applied to pious uses, and distributed in alms by his high almoner, though formerly destined to a more superstitious purpose. 1 *H. P. C.* 419. *Fleta, lib.* 1. *c.* 25.

It seems to have been originally designed as an expiation for the souls of such as were snatched away by sudden death; and for that purpose ought properly to have been given to Holy Church, in the same manner as the apparel of a stranger who was found dead, was applied to purchase masses for the good of his soul. And this may account for that rule of law, that no Deodand is due, where an infant under the age of discretion is killed by a fall *from* a cart or horse, or the like, not being in motion; whereas, if an adult person falls from thence, and is killed, the thing is certainly forfeited. 3 *Inst.* 57. 1 *H. P. C.* 422. Such infant being presumed incapable of actual sin, and therefore not needing a Deodand to purchase propitiatory masses. 1 *Comm.* 300.

Thus stands the law, if a person be killed by a fall from a thing standing still. But if a horse, or ox, or other animal of his own motion, kill as well an infant, as an adult; or if a cart run over him, they shall in either case be forfeited as Deodands; which is grounded upon this additional reason, that such misfortunes are in part owing to the negligence of the owner; and therefore he is properly punished by such forfeiture. *Bract. l.* 3. *c.* 5.

Where a thing not in motion is the occasion of a man's death, that part only which is the immediate cause is forfeited; as if a man be climbling up the wheel of a cart, and is killed by falling from it, the wheel alone is a Deodand. 1 *H. P. C.* 422.—But wherever the thing is in motion, not only that part which immediately gives the wound (as the wheel which runs over his body,) but all things which move with it, and help to make the wound more dangerous, (as the cart and loading, which increase the pressure of the wheel,) are forfeited. 1 *Hawk. P. C. c.* 26.

It matters not whether the owner of the thing moving to the death of a person were concerned in the killing or not: for if a man kills another with my sword, the sword is forfeited. *Dr. & Stud. d.* 2. *c.* 51. And therefore in all indictments for homicide, the instrument of death, and the value are presented and found by the Grand Jury; (as that the stroke was given by a certain penknife, value 6*d.*) that the King or his grantee may claim the Deodand. For it is no Deodand, unless it be presented as such by a jury of twelve men. 3 *Inst.* 57. 5 *Rep.* 110. 1 *Inst.* 144.

No Deodands are due for accidents happening upon the high sea, that being out of the jurisdiction of the Common Law: but if a man falls from a boat or ship in fresh water and is drowned, it hath been said that the vessel and cargo are in strictness of law a Deodand. 3 *Inst.* 58. 1 *H. P. C.* 423. *Moll. de Jur. Marit.* 2. 225.

Juries however have of late perhaps too frequently taken upon themselves to mitigate these forfeitures, by finding only some trifling thing, or part of an entire thing to have been the occasion of the death. But in such cases, although the finding by the jury be hardly warrantable by law, the court of K. B. hath generally refused to interfere on behalf of the Lord of the Franchise, to assist so unequitable a claim. *Fost. on Homic.* 266.

Deodands, as well as other forfeitures in general, wrecks, treasure-trove, &c. may be granted by the King to particular subjects as a Royal Franchise: and indeed they are for the most part granted out to the lords of manors or other liberties; to the perversion of their original design. 1 *Comm.* 299, *& seq.*

If a man riding over a river, is thrown off his horse by the violence of the water, and drowned, his horse is not *Deodand;* for his death was caused *per cursum aquæ.* 2 *Co.* 483.

If a person wounded by any accident, as of a cart, horse, &c. die within a year and a day after, what did it, is *Deodand:* so that if a horse strikes a man, and afterwards the owner sells the horse, and then the party that was stricken dies of the stroke, the horse, notwithstanding the sale, shall be forfeited as *Deodand. Plowd.* 260. 5 *Rep.* 110.

Things fixed to the freehold; as a bell hanging in a steeple, a wheel of a mill, &c. unless severed from the freehold, cannot be *Deodands.* 2 *Inst.* 281. And there is no forfeiture of a *Deodand,* till the matter is found of record, by the jury that finds the death; who ought also to find and appraise the *Deodand.* 5 *Rep.* 110. 1 *Inst.* 144. After the coroner's inquisition, the sheriff is answerable for the value, where the *Deodand* belongs to the King; and he may levy the same on the town, &c. Wherefore the inquest ought to find the value of it. 1 *Hawk. P. C.*

Grants of *Deodands,* &c. how to be inrolled, 3 & 4 *W. & M. c.* 22. *sect.* 1. See *Franchises.* The goods and chattels of *felo de se,* &c. were likewisely anciently held to be Deodands, and are now forfeitable to the Crown. See title *Felo de se.* 1 *Lil.* 443.

DE ONERANDO PRO RATA PORTIONIS. An ancient writ where a person was distrained for rent, that ought to be paid by others proportionably with him. *F. N. B.* 234. If a man hold twenty acres of land, by fealty and twenty shillings rent; and he aliens one acre to one person, and another acre to another, &c. the lord shall not distrain one alience for the whole rent, but for the rate and value of the land he hath purchased, &c. And if he be distrained for more, he shall have this writ. *New Nat. Br.* 586.

DEPARTURE. A term of law properly applied to a defendant, who first pleading one thing in bar of an action, and being replied unto, in his rejoinder, quits that and shews another matter contrary to, or not pursuing his first plea, which is called a *departure from his plea:* also where a plaintiff in his declaration sets forth one thing, and after the defendant hath pleaded, the plaintiff in his replication shews new matter different from his declaration, this is a *departure. Plowd.* 7, 8. 2 *Inst.* 147. But if a plaintiff in his replication *depart* from his count, and the defendant takes issue upon it: if it be found for the plaintiff, the defendant shall take no advantage of that *departure:* though it would have been otherwise, if he had demurred upon it. *Raym.* 86. 1 *Lil. Abr.* 444.

If a man plead a general agreement in bar, and in his rejoinder alledge a special one, this is a *departure* in pleading: and if an action is brought at Common Law, and the plaintiff by his replication would maintain it by virtue of a custom, &c. it hath been held a *departure.* 1 *Nels. Abr.* 638. Where a matter is omitted at first, it is a *departure* to plead it afterwards. *Ibid.* If in covenant, the defendant pleads performance; and after rejoins that the plaintiff ousted him, it is a *departure* from his plea. *Raym.* 22. In debt upon bond for performance of covenants in a lease, the defendant pleaded performance; and afterwards in his rejoinder set forth that so much was paid in money, and so much in taxes, &c. upon demurrer, it was adjudged a *departure* from the plea; because he had pleaded performance, and afterwards set forth other matter of excuse, &c. 1 *Salk.* 221.

Debt upon bond for performance of an award, made for payment of money; if the defendant plead performance, and the plaintiff having replied and assigned a breach of non-payment, &c. the defendant rejoins that he is ready to pay the money at the day, &c. this is a *departure* from his plea; for performance is payment of the money; and payment, and ready to pay, are different issues. *Sid.* 10. 4 *Leon.* 79. In debt upon bond for non-performance of an award; the defendant pleads that the award was, that he should release all suits to the plaintiff, which he had done; the plaintiff replies that such an award was made, but that the award was further,

that the defendant should pay to the plaintiff such a sum, &c. the defendant rejoins that true it is, that by the award he was to pay the plaintiff the said sum, but that the award was also, that the plaintiff should release to the defendant all actions, &c. which he had not done; on demurrer this was held a *departure* from the plea, being all new matter. 2 *Bulst.* 39. *Godb.* 155. 1 *Nels.* 637. After *nullum fecerunt arbitrium*, the defendant cannot plead that the award is void, without being a *departure* from the former plea: and if where *nul tiel agard* is pleaded, then the award is set forth, and a joinder that it was not tendered, it is a *departure*. 1 *Lev.* 133. *Lut.* 385.

A *departure* must be always from something that is *material;* or it will not be allowed: if in trespass for taking goods, the plaintiff reply, that after the taking, the defendant converted them to his own use, this being an abuse, makes a trespass; and the conversion is either trover or trespass at the plaintiff's election, so that by his replication he may make it trespass, and be no *departure*. 1 *Salk.* 221, 222. In *circumstances* of *time*, &c. laid as to promises, the plaintiff is not tied to a precise day; for if the defendant by his plea, force the plaintiff to vary, it is no *departure* from his declaration. 1 *Nels.* 640, 641. And if another *place* be mentioned in the replication, in action of debt; as this is a personal thing, it is no *departure*, because he who is indebted to another in one place, is so in every place. *Sid.* 228.

If new matter which explains or fortifies the *bar* be *rejoined* by the defendant, it is not a *departure*. 1 *Wils.* 8. 97, 8. *Co. Lit.* 304. *a.*

A *departure* being a denial of what is before admitted, is a saying and un-saying, and for that an issue cannot be joined upon it, it is bad for the uncertainty. 1 *Lill.* 444. See further titles *Pleading*, *Novel Assignment*, *Trespass*.

DEPARTURE IN DESPITE OF THE COURT, and entry of it. See title *Default*.

DEPARTURE OF GOLD AND SILVER. The parting or dividing of those *metals*, from others that are coarser. See *stat.* 4 *H.* 7. *c.* 2.

DEPOPULATIO AGRORUM. Destroying and ravaging a country; an offence where the benefit of clergy was denied at Common Law. 2 *Hal. Pl.* 333. 12 *Rep.* 30. 3 *Inst.* 204. See title *Clergy, benefit of.*

DEPOSITION, *Depositio.*] The testimony of a witness, otherwise called a *deponent*, put down in writing by way of answer to interrogatories exhibited for that purpose, in Chancery, &c. Proof in the High Court of Chancery is by *depositions* of witnesses: and the copies of such regularly taken and published, are read as evidence at the hearing. For the purposes of examining witnesses in or near London there is an examiner's office appointed: but for such as live in the country, a commission to examine witnesses is usually granted to four commissioners, two named of each side, or any three or two of them to take the depositions there. And if the witnesses reside beyond sea, a commission may be had to examine them there, upon their own oaths; and if foreigners, upon the oaths of two skilful interpreters. And it hath been established that the deposition of an Heathen who believes in the Supreme being taken by commission in the most solemn manner according to the custom of his own country may be read in evidence. 1 *Atk.* 21.—The commissioners are sworn to take the examinations truly and without partiality, and not to divulge them till published in the Court of Chancery; and their clerks are also sworn to secrecy. The witnesses are compellable by process of *subpœna*, as in the courts of Common Law, to appear and submit to examination. And when their depositions are taken they are transmitted to the court with the same care that the answer of a defendant is sent. 3 *Comm.* 449.

After a witness is fully examined, the examinations are *read over* to him, and the witness is at *liberty to alter*, or amend any thing; after which he *signs them*, and then and not before, the examinations are complete, and *good evidence*. 1 *P. Wms.* 415. The same practice prevails in *Ecclesiastical* causes.

Where a witness was examined in a cause in Chancery, and *before signing his examination died*, the Master of the Rolls, upon advising with the Master in Chancery then in court, denied the making use of the *depositions*, as being not perfect. 1 *P. Wms.* 414.

*But* where, *after an order for publication, defendant examined* a witness, and then perceiving the irregularity (it being after publication) the defendant on the *usual affidavit* by himself, his clerk in court, and solicitor, *that they had not seen, nor would not see any of the depositions, got an order to re-examine* this witness; but before re-examination the witness died; upon affidavit of this Lord Ch. *Parker*, ordered that the defendant might make use of the *depositions*, the re-examination being prevented by the act of God. 1 *P. Wms.* 415.

*Depositions* in the Chancery after a cause is determined, may be given in evidence in a trial at bar in B. R. in a suit for the same matter, between the same parties, if the party that *deposed* be dead; but not otherwise, for if he be living, he must appear in person in court to be examined, &c. 1 *Lil. Abr.* 445.

See further as to the admission of written depositions in evidence at Common Law. *Bull. N. P.* 229. 239.—242. and this Dict. title *Evidence*.

*Depositions* of informers, &c. taken upon oath before a coroner, upon an inquisition of death; or before justices of peace on a commitment or bailment of felony, may be given in evidence at a trial for the same felony; if it be proved on oath that the informer is dead, or unable to travel, or kept away by the procurement of the prisoner; and oath must be made that the *depositions* are the same that were sworn before the coroner or justice, without any alteration. 2 *Hawk. P. C.*

*Depositions* taken before a coroner, cannot be given in evidence upon an appeal for the same death; because it is a different prosecution from that wherein they were taken; and it has been adjudged, That the evidence given by a witness at one trial, could not in the ordinary course of justice, be made use of against a criminal, on the death of such witness at another trial. 2 *H. P. C.*

The examinations of witnesses abroad, and of such as are aged or going abroad *de bene esse*, to be read in evidence, if the trial should be deferred till after their death or departure, are now very frequently effected by mutual consent in trials at Common Law, if the parties are open and candid; and this may also be done indirectly at any time, through the channel of a Court of Equity: but such a practice has never yet been adopted directly as a rule of a court of law. But by *stat.* 13 *Geo.* 3. *c.* 63. where the cause of action arises in India, and a suit is brought thereupon in any of the courts of Westminster, the Court may issue a commission to examine witnesses upon the spot, and transmit the depositions to England. See title *East India Company*.

DEPOSITION is used in the law in another sense, *viz.* To signify the depriving a person of some dignity. See titles *Degradation*, *Deprivation*.

*Deposition* is also taken for *death;* and *dies depositionis*, the day of one's death. *Litt. Dict.*

DEPRIVATION, *Deprivatio.*] A depriving or taking away; as when a bishop, parson, vicar, &c. is deposed from his preferment. Of *deprivations* there are two sorts, *deprivatio à beneficio*, and *ab officio; the deprivation à beneficio* is when for some great crime, &c. a minister is wholly *deprived* of his living: and *deprivation ab officio* is where a minister is for ever *deprived* of his orders, which is also called *deposition* or *degradation;* and is commonly for some heinous offence meriting death, and performed by the bishop in a solemn manner. *Blount.* See *Degradation*.

*Deprivatio à beneficio* is an act of the Spiritual Court, grounded upon some crime or defect in the person *deprived* by which he is discharged from his spiritual promotion or benefice, upon sufficient cause proved against him. 1 *Nels. Abr.* 641.

*Deprivation* may also be by a particular clause in some act of parliament: the *deprivation* of bishops, &c. is declared lawful by *stat.* 39 *Eliz. c.* 8. And by the King's commission, as he hath the supremacy lodged in him, a bishop may be *deprived:* for since a bishop is vested with that dignity by commission from the King, it is reasonable he should be *deprived*, where there is just cause, by the same authority: but the canons direct, that a bishop shall be *deprived* in a synod of the province; or, if that cannot be assembled, by the archbishop; and twelve bishops, at least, not as his assistants, but as judges. It has been adjudged, that an archbishop may *deprive* a bishop for simony, &c. for he hath power over his suffragans, who may be punished in the archbishop's court for any offence against their duty. 1 *Salk.* 134. See title *Bishop.*

The causes of *deprivation* are many: if a clerk obtain a preferment in the church, by simonical contract; if he be an excommunicate, a drunkard, fornicator, adulterer, infidel, schismatick, or heretick; or guilty of murder, manslaughter, perjury, forgery, &c. If a clerk be illiterate and not able to perform the duty of his church; if he is a scandalous person in his life and conversation; or bastardy is objected against him; if one be a mere layman, and not in holy orders; or under age, *viz.* the age of twenty-three years; be disobedient and incorrigible to his ordinary; or a noncomformist to the canons; if a parson refuse to use the Common Prayer, or preach in derogation of it; do not administer the Sacraments, or read the Articles of Religion, &c. See titles *Parson, Clergy.*

If any parson, vicar, &c. have one benefice with cure of souls, and take plurality, without a faculty or dispensation: or if he commit waste in the houses and lands of the church, called Dilapidations, all these have been held good causes for *deprivation* of priests. *Degg's Parson's Counseller*, 98, 99. &c. 3 *Inst.* 204. See tiles *Advowson*, II. *Chaplain, Cession.* And refusing to use the Common Prayers of the church, plurality of livings, &c. are causes of *deprivation ipso facto*, in which case the church shall be void, without any sentence declaratory; and avoidances by act of parliament need no declaratory sentence: But in other cases there must be a declaratory sentence. *Dyer*, 275. See title *Parson.*

Where a benefice is only voidable, but not void before sentence of *deprivation*, the party must be cited to appear; there is to be a libel against him, and a time assigned to answer it, and also liberty for advocates to plead, and after all a solemn sentence pronounced: though none of these formalities are required, where the living is made *ipso facto* void. *Can.* 122. If a *deprivation* be for a thing merely of ecclesiastical cognizance, no appeal lies; but the party has his remedy by a commission of review, which is granted by the King of mere grace. *Moor*, 781.

DEPUTY, *Deputatus.*] One that exercises an office, &c. in another man's right; whose forfeiture or misdemeanor, shall cause him, whose *deputy* he is, to lose his office. The Common Law, takes notice of *deputies* in many cases, but it never takes notice of under-deputies; for a *deputy* is generally but a person authorised, who cannot authorise another. 1 *Lill. Abr.* 416. A man cannot make his *deputy* in all cases; except the grant of the office justify him in it, and where it is to one to execute by *deputy*, &c.

And there is a great difference between a *deputy* and assignee of an office; for an assignee hath an interest in the office itself; and doth all things in his own name; for whom his grantor shall not answer, unless in special cases. But a deputy hath not any interest in the office, but is only the shadow of the officer, in whose name he doth all things And where an officer hath power to make assigns, he may implicitly make *deputies.* And a sheriff may make a *deputy*, or undersheriff, although he have not such express words in his patent. 9 *Rep.* 49.—*Cowel.*

A *deputy cannot make a deputy;* because it implies an assignment of his whole power, which he cannot assign over; but he may impower another to do a particular act. 1 *Salk.* 96. *Lit.* 379.

Judges cannot act by *deputy*, but are to hold their courts in person; for they may not transfer their power over to others. 2 *Hawk, P. C. c.* 1. § 9. But it has been adjudged, that recorders may hold their courts by *deputy.* 1 *Lev.* 76. The office of *Custos Brevium* and Chirographer in C. B. cannot be executed by *deputy.* 1 *Nels. Abr.* 644. A steward of a court may make a *deputy;* and acts of an under-steward's *deputy* have been held good in some cases. *Cro. Eliz.* 534.

A coroner ought not to execute his office by *deputy*, it being a judicial office of trust; and judicial offices are annexed to the person. 1 *Lil.* 446. If the office of parkership be granted to one, he may not grant this to another; because it is an office of trust and confidence. *Termes de Ley.*

A bailiff of a liberty, may make a *deputy. Cro. Jac.* 240. And a constable may make a *deputy*, who may execute the warrant directed to the constable, &c. 2 *Danv.* 482. See title *Constable.*

When an office descends to an infant, idiot, &c. such may make a deputy of course. 9 *Rep.* 47. Where an office is granted to a man and his heirs, he may make an assignee of that office; and by consequence a *deputy.*

A *Deputy* of an office, hath no interest therein, but doth all things in his master's name, and his master shall be answerable; but an assignee hath an interest in the office, and doth all things in his own name, for whom his grantor shall not answer, unless in special cases. *Termes de Ley.*

A superior officer must answer for his *deputy* in civil actions, if he is not sufficient: but in criminal cases it is otherwise, where *deputies* are to answer for themselves. 2 *Inst.* 191. 466. *Doct. & Stud. c.* 42. See title *Officer.*

DE QUIBUS SUR DISSEISIN. A writ of entry. See *F. N. B.* 191.

DER, from the Sax. *Deor. Fera.*] The names of places beginning with this word, signify that formerly wild beasts herded there together.

DERAIGN OR DEREYN, *Disrationare; dirationare.*] Seems to be derived literally from the Fr. *deraigner* or *deragner*, to confound and disorder, or to turn out of course or displace; as *deraignment* or departure out of religion. *Stat.* 33 *H.* 8. *c.* 6. And *deraignment* and discharge of their profession. *Stat.* 33 *H.* 8. *c.* 29.

In our *Common Law* this word is used diversly; but generally to *prove*, *viz.* to *deraign* that right, *deraign* the warranty, &c. *Glanv. lib.* 2. *cap.* 6. *F. N. B.* 146. If a man hath an estate in fee with warranty, and enfeoffs a stranger with warranty, and dies; and the feoffee vouches the heir, the heir shall *deraign* the first warranty, &c. *Plowd.* 7. And jointenants and tenants in common shall have aid, to the intent to *deraign* the warranty paramount. 31 *H.* 8. *cap.* 1. See *Bracton, lib.* 3. *tract.* 2. *cap.* 28. *Britton* applieth this word to a summons that they be challenged as defective, or not lawfully made, *cap.* 21. And *Skene* confounds it with our waging and making of law. See *Lex Deraisnia.*

Perhaps this word *deraign*, and the word *deraignment* derived from it, may be used in the sense of *to prove* and *approving*, by disproving of what is asserted in opposition to truth and fact.

DERELICT, *Derelictus.*] Any thing forsaken or left; or wilfully cast away. *Derelict* lands suddenly left by the sea

belong to the King: but if the sea shrink back so slowly that the gain be by little and little, *i. e.* by small and imperceptible degrees, it shall go to the owner of the lands adjoining. See 2 *Comm.* 261.

Certain *Goods derelict* (spirits and tobacco) are liable to duties of customs as if legally imported. *Stat.* 54 *Geo.* 3. *c.* 81. § 21, 22. 29. See title *Wreck.*

DERELICT (SHIP). Is a vessel forsaken at sea. *Sir Leoline Jenkins*, defines derelicts to be "boats or other vessels forsaken, or found on the seas without any person in them: of these, the Admiralty has but the custody, and the owner may recover them within a year and a day." See 1 *Robinson's Adm. Rep.* 41.

In cases of derelict ships an allowance is made in the nature of salvage of two fifths or more, where the case of salvage has been attended with danger. 4 *Rob. Adm. Rep.* 194.

DESCENDER, *Writ of formedon in.* A writ which lieth, where *a gift in tail is* made, and the *tenant in tail alienes* the land entailed, or is disseised of them and dies; the *heir in tail* shall have this writ against him, who is then the actual tenant of the freehold. *F. N. B.* 211, 212. See title *Formedon.*

## DESCENT, OR HEREDITARY SUCCESSION;

Lat. *Descensus;* Fr. *Discent;* in which latter way the term is usually spelt in all old law books.] The title whereby a man, on the death of his ancestor, obtains the freehold of such ancestor, by right of representation, as his *Heir-at-law.* —It is otherwise defined; the order or means whereby lands or tenements are derived unto any man from his ancestor.— An *Heir* is he upon whom the law casts the estate immediately on the death of his ancestor: and the estate so descending is in law called the Inheritance. See 2 *Comm.* 200. *lib.* 2. *c.* 14. from whence much of the following matter is abridged.

It may not be an useless preliminary observation, that the law of *Descents of real estates*, is totally distinct from that of the *Distribution of personal property;* for which latter see title *Executor*, III. V. 8.

*Descent* being created *by law*, and the most ancient title, it is termed the worthiest means by which land can be acquired; and an Heir is in by that, in preference to a grant, or devise, &c. which are called titles by *purchase.* It is a rule in law, that a man cannot raise a fee-simple to his own right heirs, by the name of heirs, as a *purchase*, either by conveyance or devise; for if he devise lands to one who is the heir at law the devise is void, and he shall take by *descent. Dyer*, 54, 126. And it is the same where the lands will come to the heir, either in a direct or collateral line; or where the heir comes to an estate by way of limitation, when the word *heirs* is not a word of *purchase. Ibid.* A father hath two sons by several venters, and devises his land to his wife for life, and after her decease to his eldest son; though the son doth not take the estate presently on the death of his father, he shall be in by *descent*, and not by purchase, and the devise shall be void as to him. *Style*, 148. 1 *Nels. Abr.* 645. But it is said he may make his election, and take by *devise*, if he pleases.

A man being seised of lands which he had by the mother's side, devised them to his heirs on the part of his mother; and it was adjudged, that the devisee shall take by *descent.* 3 *Lev.* 127. and when the heir takes that which his *ancestor* would have taken if living, he shall take it by *descent*, and not by purchase. 2 *Danv.* 557. But generally, where an estate is devised to the heir-at-law, attended with a charge, as to pay money debts, &c. in such case he takes by purchase, and not by *descent.* Though conditions to pay money have been construed only a charge in equity; and that they do not alter the *descent* at Common Law. 1 *Lut.* 593. 1 *Salk.* 241. See further titles *Limitation, Purchase, Estate, Will.*

If one die seised of land, in which another hath right to enter, and it descends to his heir; such descent shall take away the other's right of entry, and put him to his action for recovery thereof. *Stat.* 32 *H.* 8. *cap.* 33. *Co. Lit.* 237. But a *descent* of such things as lie in grant, as advowsons, rents, commons in gross, &c. puts not him who hath right to his action. *Co. Lit.* 237. 2 *Danv. Abr.* 561. And a *descent* shall not take away the entry of an infant; nor of a feme-covert, where the wrong was done to her during the coverture. 2 *Danv.* 563. See title *Entry.*

The *Doctrine of Descents*, or law of inheritance in fee-simple, is a point of the highest importance; and is indeed the principal object of the laws of real property in England. All the rules relating to purchases, whereby the legal course of descents is broken and altered, perpetually refer to this settled law of inheritance, as a *datum* or first principle universally known, and upon which their subsequent limitations are to work.

In order therefore to treat a subject of this universal consequence the more clearly, it seems better to lay aside such matters as will only tend to cause embarrassment and confusion. The question, who are, and who are not capable of being heirs, comes more properly under the titles *Heir, Attainder, Escheat;* which see. We may also pass over the frequent division of descents, into those by *Custom, Statute*, and *Common Law.* As to descents by *particular custom*, as to all the sons in *gavelkind*, or to the youngest in *Borough English*, see those titles, and title *Custom;* and as to descents by *statute*, or fees-tail *per formam doni*, in pursuance of the *stat. of West.* 2. see titles *Estate, Limitations, Tenure.*

As the law of Descents depends not a little on the nature of kindred, and the several degrees of consanguinity, it will be previously necessary to state, briefly, the true notion of this kindred or alliance in blood.

CONSANGUINITY, or kindred, is defined by the writers on these subjects to be *vinculum personarum ab eodem stipite descendentium;* the connexion or relation of persons descended from the same stock or common ancestor. This consanguinity is either lineal or collateral.

Lineal consanguinity, is that which subsists between persons, of whom one is descended in a direct line from the other, as between a man and his father, grandfather, and great grandfather, and so upwards, in the direct ascending line: or between a man and his son, grandson, great grandson, and so downwards in the direct *descending* line. Every generation, in this lineal direct consanguinity, constitutes a different degree, reckoning either upwards or downwards: the father is related in the first degree, and so likewise is the son; grandsire and grandson in the second; great grandsire and great grandson in the third. This is the only natural way of reckoning the degrees in the direct line, and therefore universally obtains, as well in the *civil* and *canon* as in the *Common Law.*

Collateral kindred answers to the same description: collateral relations agreeing with the lineal in this, that they descend from the same stock or ancestor; but differing in this that they do not descend one from the other. Collateral kinsmen are such then as lineally spring from one and the same ancestor, who is the *stirps*, or root, the *stipes*, trunk or common stock, from whence these relations are branched out. As if a man hath two sons, who have each a numerous issue; both these issues are lineally descended from him as their common ancestor; and they are collateral kinsmen to each other, because they are all descended from this common ancestor, and all have a portion of his blood in their veins, which denominates them *consanguineos.*

The very being of collateral consanguinity, consists in this descent, from one and the same common ancestor. Thus A. and his brother are related; Why? Because both are derived

from one father: A. and his first cousin are related; Why? Because both descended from the same grandfather; and his second cousins' claim to consanguinity is this, that they are both derived from one and the same great grandfather. In short as many ancestors as a man has, so many common stocks he has, from which collateral kinsmen may be derived.

The method of computing these degrees in the canon law, which our law has adopted (*Co. Lit.* 23.) is as follows. We begin at the common ancestor, and reckon downwards; and in whatsoever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are related to each other. Thus A. and his brother are related in the first degree; for from the father to each of them is counted only one: A. and his nephew are related in the second degree; for the nephew is two degrees removed from the common ancestor; *viz.* his own grandfather, the father of A. 2 *Comm.*

The learned Commentator then proceeds to lay down a series of *Rules*, or *Canons of inheritance*, according to which, estates are transmitted from the ancestor to the heir, with an explanatory comment.

I. THE FIRST RULE is that *Inheritances shall lineally* DESCEND to the issue of the person who last died actually seised, *in infinitum*; but shall never *lineally* ASCEND.

By law no inheritance can vest, nor can any person be the actual complete heir of another, till the ancestor is previously dead. *Nemo est hæres viventis.* Before that time the person who is next in the line of succession is called an heir apparent, or heir presumptive. *Heirs apparent* are such, whose right of inheritance is indefeasible, provided they outlive the ancestor; as the eldest son or his issue, who must by the course of Common Law be heir to the father whenever he happens to die. *Heirs presumptive* are such, who, if the ancestor should die immediately, would in the present circumstances of things be his heirs; but whose right of inheritance may be defeated by the contingency of some nearer heir being born; as a brother or nephew, whose presumptive succession may be destroyed by the birth of a child; or a daughter, whose present hopes may hereafter be cut off by the birth of a son. Nay, even if the estate hath descended, by the death of the owner, to such brother or nephew, or daughter; in the former cases, the estate shall be devested and taken away by the birth of a posthumous child; and in the latter, it shall also be totally devested by the birth of a posthumous son. *Bro. tit. Descent*, 58.

And besides this case of a posthumous child, if lands are given to a son who dies, leaving a sister his heir; if the parents have at any distance of time afterwards another son, this son shall devest the descent upon the sister, and take the estate as heir to his brother. *Co. Lit.* 11. *Doct. & Stud. d.* 2. *c.* 7. So the same estate may be *frequently* devested by the subsequent birth of nearer presumptive heirs, before it fixes upon an heir apparent. As if an estate is given to an only child, who dies; it may descend to an aunt, who may be stripped of it by an after born uncle; on whom a subsequent sister may enter, and who will again be deprived of the estate by the birth of a brother, the heir apparent. *Christian's note on 2 Comm.* 208. See tit. *Posthumous Children, Infant*, II.

It seems determined that every one has a right to retain the rents and profits which accrued whilst he was thus legally possessed of the inheritance. 1 *Inst.* 11. *in n.* 2 *Wils.* 526.—See further as to the entry of a posthumous heir, *Watkins on Descents, c.* 4.

No person can properly be such an ancestor, as that an inheritance of lands or tenements can be derived from him, unless he hath had *actual seisin* of such lands, either by his own entry, or by the possession of his own or his ancestor's lessee for years, or receiving rent from a lessee of the freehold: (*Co. Lit.* 15.) or unless he hath had what is equivalent to corporal seisin in hereditaments that are incorporeal; such as the receipt of rent, a presentation to the church in case of an advowson, and the like. *Co. Lit.* 11. But he shall be accounted an ancestor, who hath had only a bare right or title to enter, or be otherwise seized. The seisin therefore of any person, thus understood, makes him the root, or stock, from which all future inheritance by right of blood must be derived: which is very briefly expressed in this maxim, *seisina facit stipitem. Flet. l.* 6. *c.* 2. § 2.

Though it be necessary the ancestor be *seised*, yet it is not required that the seisin continue till the death of such ancestor: for if he had been seised at any time during his life, and afterwards disseised, still if he had not parted with his right or property, his heir shall inherit. 1 *Inst.* 237. *b.*—See *Watkins on Descents.* If the hereditaments descending be in the reversion or remainder expectant on an estate of freehold, the heir may obtain what will be equivalent to an actual seisin, by granting them over for life or in tail. See *post*, VI. as to *possessio fratris.*

When therefore a person dies so seised, the inheritance first goes to his issue: as if there be grandfather, father, and son, and the father purchases lands and dies; his son shall succeed him as heir, and not the grandfather, to whom the land shall never *lineally* ascend, but shall rather escheat to the lord. *Litt.* § 3. This rule, that the inheritance shall never *lineally* ascend, clearly appears to be of feudal original, and the propriety of it is well defended at some length by the learned Commentator, to whom we refer the reader desirous of investigating the subject, as a matter rather of curiosity than utility.

Though an estate cannot *lineally* ascend, the father may take his son's estate by an *intermediate descent*; for if the son has neither issue, nor brothers nor sisters, the estate will descend to an uncle, or some collateral relation, to whom the father may on his decease be the next heir. And in some cases, the father or mother may inherit immediately from a child. As if either of them are cousin to the child; a case of which nature occurs in 2 *P. Wms.* 613.; where a son died, seised in fee of land, without issue, brother or sister, but leaving two cousins, his heirs at law, one of whom was his own mother, the question was whether the mother could take as heir to her son. The Master of the Rolls was of opinion, that though the heir was also mother, this did not hinder her from taking in the capacity or relation of cousin. See 2 *Comm.* 212. *in n.*

In 1 *Inst.* 8. it is said, that if a man hath issue an elder son, born out of the King's allegiance, and after hath another son born within the realm; the younger son shall have lands by *descent* from his father in this case, and not the elder who had never any inheritable blood in him. *Co. Lit.* 8.—But if the father in this case is to be supposed a natural-born subject at the birth of the issue, the child would now be also a natural born subject by force of *stats.* 7 *An. c.* 5. 4 *Geo.* 2. *c.* 21. But the children of persons attainted of, or liable to the penalties of, treason, or in the service of a foreign state in enmity with Great Britain, are excepted from the benefit of this provision. See *stat.* 25 *E.* 3. *st.* 2. which declares that at Common Law the children of the King wherever born, may inherit. The same statute enables children born abroad to inherit, if at their birth *both* their parents are within the King's allegiance, and their mothers pass the sea, with the licence of their husbands. See 1 *Inst.* 8. *in n.* See tit. *Alien.*

*Lord Coke* also lays it down for law, that if an alien hath issue in England two sons, though these sons are *indigenæ*, subjects born, they cannot inherit to each other. But in the case of *Collingwood* v. *Pace*, this was denied to be law, and it was expressly held that such sons of aliens were inheritable to each other. See 1 *Sid.* 193. 1 *Ventr.* 413. And now by

*stat.* 11 & 12 *W.* 3. *c.* 6. natural-born subjects may derive a title by descent through their parents, though aliens; but *stat.* 25 *Geo.* 2. *c.* 39. confines the benefit of the former statute to such heirs as shall be living, and capable of taking at the death of the person last dying seised; unless such heirs happen to be daughters, and there is afterwards a son or another daughter, for which cases the statute makes a special provision. Both these acts are extended to Scotland by *stat.* 16 *Geo.* 3. *c.* 52. The principle, on which it has been adjudged that the children of an alien may be heirs as between themselves, though not to their father, seems to reach the case of children born after their father's attainder. See 1 *Inst.* 8. *in n.* —And further this Dict. titles *Alien*, *Attainder*.

II. A SECOND GENERAL RULE, or canon is, that the *male issue* shall be admitted *before the female*. Thus sons shall be admitted before daughters; or, as our law expresses it, the worthiest of blood shall be preferred. *Hal. H. C. L.* 235. As if one hath two sons, and two daughters, and dies; first the eldest son, (and in case of his death without issue) then the youngest son shall be admitted to the succession in preference to both the daughters.

The reason of this, as well as of the preceding rule, must be deduced from feodal principles: for, by the genuine and original policy of that constitution, no female could ever succeed to a proper feud, inasmuch as females were incapable of performing those military services, for the sake of which that system was established. But our law does not extend to a total exclusion of females, as the Salic law, and others, where feuds were most strictly retained: it only postpones them to males; for though daughters are excluded by sons, yet they succeed before any collateral relations.

III. A THIRD RULE, or Canon of descent, is; that where there are *two or more males* in equal degree, *the eldest son* shall inherit; but the *females all together*.

As if a man hath two sons, and two daughters, and dies his eldest son shall alone succeed to his estate, in exclusion of the second son and both the daughters; but, if both the sons die without issue before the father, the daughters shall both inherit the estate as coparceners. *Litt.* § 5. *Hal. C. L.* 238.

This rule is also of feudal original, and arose from thence on the establishment of that constitution in England, by William the Conqueror.

Yet we find, that socage estates frequently descended to all the sons equally, so lately as when Glanvil wrote, in the reign of Henry II. and it is mentioned in the *Mirror*, (*c.* 1. § 3.) as a part of our ancient constitution, that knights' fees should descend to the eldest son, and socage fees should be partible among male children. However, in Henry III.'s time, we find by *Bracton*, (*l.* 2. *c.* 30, 1.) that socage lands, in imitation of lands in chivalry, had almost entirely fallen into the right of succession by primogeniture, as the law now stands; except in Kent, where they gloried in the preservation of their ancient gavelkind tenure, of which a principal branch was the joint inheritance of all the sons; and except in some particular manors and townships, where their local customs continued the descent, sometimes to all, sometimes to the youngest son only, or in other more singular methods of succession.

A Rectory in Kent, formerly belonging to one of the monasteries dissolved by *Hen.* VIII. and by him given to a Layman to be holden in fee, by Knight's Service *in capite*: the court of C. P. held that the *Lands* were descendible according to the custom of *Gavelkind*: but the tithes according to the Common Law. *Doe d. Lushington* v. *Llandaff, Bp.* 2 *New Rep.* 491.

As to the females, they are still left as they were by the ancient law; for they were all equally incapable of performing any personal service: and therefore one main reason for preferring the eldest ceasing, such preference would have been injurious to the rest: and the other principal purpose, the prevention of the too minute subdivision of estates, was left to be considered and provided for by the lords, who had the disposal of these female heiresses in marriage. However, the succession by primogeniture, even among females, took place as to the inheritance of the crown; wherein the necessity of a sole and determinate succession, is as great in the one sex, as in the other. 1 *Inst.* 165. And the right of sole succession, though not of primogeniture, was also established with respect to female dignities and titles of honour. For if a man holds an earldom to him and the heirs of his body, and dies, leaving only daughters; the eldest shall not of course be Countess, but the dignity is in suspence or abeyance till the King shall declare his pleasure; for he, being the fountain of honour, may confer it on which of them he pleases. *Ibid.*—See titles *Abeyance*, *Peers*, *Parceners*.

IV. A FOURTH RULE, or Canon of descent, is; that the *lineal descendants, in infinitum*, of any person deceased, shall *represent* their ancestor; that is, shall stand in the same place as the person himself would have done, had he been living.

Thus the child, grandchild, or great grandchild, (either male or female) of an eldest son, succeeds before a younger son, and so *in infinitum*. *Hal. H. C. L.* 236, 7. And these representatives shall take neither more nor less, but just so much as their principals would have done. As if there be two sisters, and one dies, leaving six daughters; and then the father of the two sisters dies, without other issue: these six daughters shall take among them exactly as much as their mother would have done, had she been living; that is, a moiety of the lands in coparcenary: so that, upon partition made, if the land be divided into twelve parts, the surviving sister shall have six parts, and her six nieces, one part each.

This taking by representation, is called succession *in stirpes* according to the roots: since all the branches inherit the same share that their root, whom they represent, would have done. So if the next heirs of a man be six nieces, three by one sister, two by another, and one by a third; his inheritance by the laws of England, is divided only into three parts, and distributed *per stirpes*, thus; one third to the three eldest children who represent one sister, another third to the two who represent the second, and the remaining third to the one child who is the sole representative of her mother.

This mode of representation is a necessary consequence of the double preference given by our law, first to the male issue, and next to the first born among the males. For if all the children of three sisters were to claim *per capita*, in their own right, as next of kin to the ancestor, without any respect to the stocks from whence they sprung, and those children were partly male, and partly female, then the eldest male among them would exclude not only his own brethren and sisters, but all the issue of the other two daughters, or else the law in this instance must be inconsistent with itself, and depart from the preference which it constantly gives to the males, and the first born, among persons in equal degree. Whereas, by dividing the inheritance according to the roots, or *stirpes*, the rule of descent is kept uniform and steady; the issue of the eldest son excludes all other pretenders, as the son himself (if living) willing would have done; but the issue of two daughters divide the inheritance between them, provided their mothers (if living) would have done the same: and among these several issues, or representatives of the respective roots, the same preference to males, and the same right of primogeniture obtain, as would have obtained at the first among the roots themselves, the sons or daughters of the deceased. As 1. if a man hath two sons, A. and B. and A. dies, leaving two sons, and then the grandfather dies; now

the eldest son of A. shall succeed to the whole of his grandfather's estate: and if A. had left only two daughters, they should have succeeded also to equal moieties of the whole, in exclusion of B. and his issue. But 2. if a man hath only three daughters, C. D. and E.; and C. dies leaving two sons, D. leaving two daughters, and E. leaving a daughter and a son, who is younger than his sister: here when the grandfather dies, the eldest son of C. shall succeed to one third, in exclusion of the younger; and the two daughters of D. to another third in partnership; and the son of E. to the remaining third, in exclusion of his eldest sister. And the same right of representation, guided and restrained by the same rules of descent, prevails downwards *in infinitum*.

How far the two immediately preceding, and other cases in the course of this title may be explained by the following scheme, the student is left to determine. It may perhaps afford a hint for statements in more complicated cases of descent. For regular tables of Consanguinity and Descent, see 1 *Inst.*; *The Commentaries*; and *Watkins's Treatise on Descent*.

1. The PERSON dying seised.

First Son.——From whom descend,——Second Son.

First son.——From whom descend,——Second son.

or

Two daughters.

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2. The PERSON dying seised.

First daughter.—Second daughter.—Third daughter.

From whom descend,

Two daughters.

1st son.—2d son. A daughter.—A son.

From whom descend,

From whom descend,

King John, however, who kept his nephew Arthur from the throne, by disputing this right of representation, did all in his power to abolish it throughout the realm. *Hale H. C. L.* 217. 229. But in the time of his son King Henry III. the rule was indisputably settled in the manner here laid down, *Bract. l.* 2. *c.* 30. § 2. and so it has continued ever since. And thus much for *lineal* descents.

V. A FIFTH RULE is, that, *on failure of lineal descendants* or issue of the person last seised, the inheritance shall descend to his *collateral* relations, being of the blood of the first purchasor, subject to the three preceeding rules. Thus if A. purchase land, and it descend to B. his son, who dies seised thereof without issue; whoever succeeds to this inheritance, must be of the blood of A. the first purchasor of this family. *Co. Litt.* 12. The first purchasor, *perquisitor* is he who first acquired the estate to his family, whether the same was transferred to him by sale or by gift, or by any other method except only that of descent.

This is a rule almost peculiar to our own laws, and those of a similar feudal original; and this rule or canon cannot otherwise be accounted for than by recurring to feudal principles, which did not originally permit the descent of lands to any but one of the lineal descendants of the first purchasor, who in the case of a *feudum novum*, or estate purchased by the ancestor himself, could only be of his own offspring; so that such estate could not descend even to his brother. See this *Dict.* title *Tenures*; 1. 3.

But when the feudal rigour was in part abated, a method was invented to let in the collateral relations of the grantee to the inheritance, by granting him a *feudum novum* to hold *ut feudum antiquum*; that is, with all the qualities annexed of a feud derived from his ancestors; and then the collateral relations were admitted to succeed even *in infinitum*, because they might have been of the blood of, that is descended from, the first imaginary purchasor.

Of this nature, are all the grants of fee-simple estates of this kingdom; for there is now in the law of England, no such thing as a grant of a *feudum novum*, to be held *ut novum*; unless in the case of a fee-tail, and there this rule is strictly observed, and none but the lineal descendants of the first donee (or purchasor) are admitted; but every grant of lands in fee-simple, is with us a *feudum novum*, to be held *ut antiquum*, as a feud whose antiquity is indefinite: and therefore the collateral kindred of the grantee, or descendants from any of his lineal ancestors, by whom the lands might possibly have been purchased, are capable of being called to the inheritance.

Yet, when an estate hath really descended in a course of inheritance to the person last seised, the strict rule of the Feudal law is still observed; and none are admitted, but the heirs of those through whom the inheritance hath passed; for all others have demonstrably none of the blood of the first purchasor in them, and therefore shall never succeed. As, if lands come to A. by descent from his mother; no relation of his father (as such) shall *ever* be his heir of these lands; and, *vice versa*, if they descended from his father, no relation of his mother (as such) shall ever be admitted thereto; for his father's kindred have none of his mother's blood, nor have his mother's relations any share of his father's blood. And so, if the estate descended from his father's father, the relations of his father's mother shall for the same reason never be admitted, but only those of his father's father.

Hence the expression *heir at law* must always be used with reference to a specific estate: for if an only child has taken by descent an estate from his father, and another from his mother; upon his death without issue, these estates will descend to two different persons. So also, if his two grandfathers and two grandmothers, had each an estate, which descended to his father or mother, being only children, then these four estates will descend to four different heirs. 2 *Comm.* 222. *in n.*

This then is the great and general principle, upon which the law of collateral inheritances depends; that, upon failure of issue in the last proprietor, the estate shall descend to the blood of the first purchasor; or, that it shall result back to the heirs of the body of that ancestor, from whom it either really has, or is supposed by fiction of law to have originally descended: according to the rule laid down in the year books. *M.* 12 *Ed.* 4. 14. *Fitzherbert, Abr. t. Discent.* 2. *Brook. Ibid.* 38. and *Hale H. C. L.* 243. "That he who would have been heir to the father of the deceased, (and of course to the mother, or any other real or supposed purchasing

ancestor) shall also be heir to the son;" a maxim that will hold universally, except in the case of a brother or sister of the half blood, which exception (as we shall see hereafter) depends upon very special grounds. See *post*, VII.

VI. A SIXTH RULE, or canon is, that the *collateral heir* of the person last seised, must be his next collateral kinsman of the *whole blood.*

First, he must be his next collateral kinsman, either personally, or *jure representationis;* which proximity is reckoned according to the canonical degrees of consanguinity. Therefore, the brother being in the first degree, he and his descendants shall exclude the uncle and his issue, who is only in the second. And herein consists the true reason of the different methods of computing the degrees of consanguinity, in the civil law on the one hand, and in the canon and common laws on the other.

When the paternal and maternal lines are both admitted to the inheritance, the most remote collateral kinsman in the paternal line, will inherit before the nearest in the maternal. So that the expression that the *collateral heir*, must be the next *collateral kinsman*, is qualified by the general rules of descent, which prefer the male line to the female.

The designation of person, however, in seeking for the next of kin, will come to exactly the same end, (though the degrees will be differently numbered,) which-ever method of computation we suppose the law of England to use; since the right of representation of the parent by the issue, is allowed to prevail *in infinitum*. Indeed it may be questioned how far the introduction of the computation of kindred, either by the canon or civil law, is of use in the Common Law doctrine of Descents.

This right of representation being established, the former part of the present rule amounts to this; that, on failure of issue of the person last seised, the inheritance shall descend to the other subsisting issue of his next immediate ancestor. Thus, if A. dies without issue, his estate shall descend to his eldest brother, (if more than one) or his representatives; he being lineally descended from A.'s father his next immediate ancestor. On failure of brethren, or sisters, and their issue, it shall descend to the uncle of A. the lineal descendant of his grandfather; and so on *in infinitum*.

The *elder brother* of the whole blood shall have land by *descent*, purchased by a middle or younger brother, if such die without issue; for as to *descents* between brethren, the eldest is the most worthy of blood to inherit to them as well as to the father. *Lit.* 3. 3 *Rep.* 40.

Here it must be observed, that the lineal ancestors though (according to the first rule) incapable themselves of succeeding to the estate, because it is supposed to have already passed them, are yet the common stocks from which the next successor must spring. But though the common ancestor be thus the root of the inheritance, yet it is not necessary to *name* him in making out the pedigree or descent. For the descent between two brothers is held to be an *immediate* descent; and therefore title may be made by one brother, or his representatives, *to* or *through* another, without mentioning their common father. 1 *Sid.* 196. 1 *Ventr.* 423. 1 *Lev.* 60. 12 *Mod.* 619.

The law takes no notice of the *disability* of the father in case of *descent*, but only of the immediate relation of brothers and sisters, as to their estates; so that the inability of the father doth not hinder the *descent* between them: for example: A man had issue a son and a daughter, and was attainted of treason, and died; the son purchased lands and died without issue; and it was adjudged that notwithstanding the attainder of the father, the daughter shall take by *descent* from her brother, because the *descent* between them was immediate, and the law doth not regard the disability of the father. 4 *Leon.* 5. See 4 *Rep.* 31. 124.

Where a person seised of lands, hath issue two daughters, if one of them commits felony, after the father's death, both daughters being alive, a moiety shall *descend* to one daughter, and the other shall escheat. *Co. Lit.* 163.

*But, secondly*, the heir need not be the nearest kinsman absolutely, but only *sub modo*; that is, he must be the nearest kinsman of the *whole* blood; for, if there be a much nearer kinsman of the *half* blood, a distant kinsman of the whole shall be admitted, and the other entirely excluded: nay, the estate shall escheat to the lord, sooner than the half blood shall inherit.

A kinsman of the whole blood is he that is derived, not only from the same *ancestor*, but from the same *couple of ancestors*. For, as every man's own blood is compounded of the bloods of his respective ancestors, he is only properly of the whole or entire blood with another, who hath (so far as the distance of degrees will permit) all the same ingredients in the composition of his blood that the other hath. Thus the blood of A. being composed of those of his father and his mother, therefore his brother being from both the same parents hath entirely the same blood with A.; or, in other words, he is his brother of the whole blood. But if, after the death of A.'s father, his mother had married a second husband, and had issue by him; the blood of this issue, being compounded of the blood of A.'s mother only, on the one part, but of that of the second husband, on the other part, it hath therefore only half the same ingredients with that of A. himself; so that such issue is only A.'s brother of the half blood; and for that reason they shall never inherit to each other. So also if the father has two sons, A. and B. by different venters, or wives; these two brethren are not brethren of the whole blood, and therefore shall never inherit to each other, but the estate shall rather escheat to the lord. Nay even if the father dies, and his lands descend to his eldest son A. *who enters thereon*, and dies seised without issue, still B. shall not be heir to this estate, because he is only of the half blood to A. the person last seised: but it shall descend to a sister (if any) of the whole blood to A.; for in such cases the maxim is, that *possessio fratris facit sororem esse hæredem*, the seisin or possession of the brother makes the sister to be heir. Yet, had A. died *without entry*, then B. might have inherited; not as heir to A. his half brother, but as heir to their common father, who was the person last actually seised. *Hale H. C. L.* 238.

Of some inheritances there cannot be a seisin, or *possessio fratris:* as if the eldest brother dies before a presentation to an advowson, it will descend to the half brother, as heir to the person last seised, and not to the sister of the whole blood. 1 *Bur. Ec.* 11. So of reversions, remainders, and executory devises, there can be no seisin or *possessio fratris;* and if they are reserved or granted to A. and his heirs, he who is heir to A. when they come into possession, is entitled to them by descent: that is, the person who would have been heir to A. if A. had lived so long, and had then died actually seised. 2 *Woodd.* 256. *Fearne*, 448. 2 *Wils.* 29. and see further this title *ad finem* relative to the *descent of reversions*, &c.—But though a *possessio fratris* cannot properly be of a remainder or reversion expectant upon an estate of freehold, yet by the exertion of certain acts of ownership, as by granting them over for term of life, a *possessio fratris* of them may be made. 8 *Rep.* 95 *b.* 1 *Inst.* 15 *a;* 191 *b.*—There can be no *possessio fratris* of an estate tail; nor of honorary dignities. Nor of the descent of the crown, and its possessions; nor of a mere right. See *Watkins on Descents*, c. 1. § 4. and the authorities there cited.

That the rule of *possessio fratris* does not apply to estates tail, nor even to inheritances in fee simple, without an actual possession of the brother of the whole blood, see *Doe d. Gregory* v. *Whichelo*, 8 *Term Rep.* 211.

The total exclusion of the half blood from the inheritance being almost peculiar to our own law, is looked upon as a strange hardship by such as are unacquainted with the reasons on which it is grounded. But these censures arise from a misapprehension of the rule, which is not so much to be considered in the light of a rule of descent as of a rule of evidence; an auxiliary rule, to carry a former into execution.

To illustrate this rule by example: let there be A. and B. brothers, by the same father and mother, and C. another son, of the same mother by a second husband. Now if A. dies seised of lands, but it is uncertain whether they descended to him from his father or mother; in this case his brother B. of the whole blood, is qualified to be his heir; for he is sure to be in the line of descent from the first purchasor, whether it were the line of the father or mother. But if B. should die before A. without issue, C., the brother of the half blood, is utterly incapable of being heir; for he cannot prove his descent from the first purchasor, who is unknown; nor has he that fair probability which the law admits as presumptive evidence, since he is to the full as likely *not to be* descended from the line of the first purchasor, *as to be* descended: and therefore the inheritance shall go to the nearest relation possessed of this presumptive proof, the whole blood.

And, as this is the case in *feudis antiquis*, where there really did exist a purchasing ancestor, who is forgotten, it is also the case *in feudis novis* held *ut antiquis*, where the purchasing ancestor is merely ideal, and never existed, but only in fiction of law. Of this nature are all grants of lands in fee-simple at this day, which are inheritable as if they descended from some uncertain indefinite ancestor, and therefore, any of the collateral kindred of the real modern purchasor, (and not his own offspring only,) may inherit them, provided they be of the whole blood; for all such are, in judgment of law, likely enough to be derived from this indefinite ancestor: but those of the half blood are excluded for want of the same probability. Nor should this be thought hard, that a brother of the purchasor, though only of the half blood, must thus be disinherited, and a more remote relation of the whole blood admitted, merely upon a supposition and fiction of law; since it is only upon a like supposition and fiction, that brethren of purchasors (whether of the whole or half blood) are entitled to inherit at all.

J. A. devised all his lands to S. A. (his son by a first wife) when he should come to the age of twenty-one years, but if he should die before twenty-one, and D. A. (testator's daughter by a second wife) should be then living, he gave the same to her when she should attain twenty-one. After testator's death, S. A. died under age without issue.—The court of C. P. held that the inheritance vested in D. A. his sister of the half-blood, in preference to the uncle of S. A. of the whole blood. *Doe d. Andrew* v. *Hutton*, 3 *B. & P.* 643.

This rule, as to the exclusion of the half blood, is certainly a very fine-spun and subtle nicety: but, considering the principles upon which our law is founded, it is not an injustice, nor always a hardship; since even the succession of the whole blood was originally a beneficial indulgence, rather than a strict right of collaterals: and though that indulgence is not extended to the demi-kindred, yet they are rarely abridged of any right which they could possibly have enjoyed before. See this Dict. title *Tenures*, III. 5. The doctrine of the whole blood was calculated to supply the frequent impossibility of proving a descent from the first purchasor; without some proof of which (according to our fundamental maxim) there can be no inheritance allowed of. And this purpose it answers, for the most part, effectually enough. It seems however that in some instances, the practice is carried farther than the principle upon which it goes will warrant. It is more especially over-strained, when a man has two sons by different venters, and the estate, on his death, descends from him to the eldest, who enters, and dies without issue; in which case the younger son cannot inherit this estate, because he is not of the whole blood to the last proprietor. This, it must be owned, carries a hardship with it, even upon feudal principles: for the rule was introduced only to supply the proof of a descent from the first purchasor; but here, as this estate notoriously descended from the father, and as both the brothers confessedly sprung from him, it is demonstrable, that the half brother must be of the blood of the first purchasor, who was either the father, or some of the father's ancestors.

It is moreover worthy of observation, that the Crown, (which is the highest inheritance in the nation,) may descend to the half blood of the preceding sovereign; *Plowd.* 245. *Co. Lit.* 15. so that it be the blood of the first monarch, purchasor (or in the feudal language) conqueror, *conquæstor*, of the reigning family. Thus it actually did descend from king Edward VI. to queen Mary, and from her to queen Elizabeth, who were respectively of the half blood to each other. For, the royal pedigree being always a matter of sufficient notoriety, there is no occasion to call in the aid of this presumptive rule of evidence, to render probable the descent from the royal stock, which was formerly king William the Norman, and is now (by *stat.* 12 *Will.* 3. *c.* 2.) the princess Sophia of Hanover. Hence also it is, that in estates-tail, where the pedigree from the first donee must be strictly proved, half blood is no impediment to the descent; *Lit.* § 14, 15. because when the lineage is clearly made out, there is no need of this auxiliary proof. Also in titles of honour half blood is no impediment to the descent; but a title can only be transmitted to those who are *descended* from the first person ennobled. 1 *Inst.* 15. See this Dict. title *Peers*. How far it might be desirable to amend the law of descents in one or two instances, and ordain that the half blood might always inherit, where the estate notoriously descended from its own proper ancestor, and, in cases of new purchased lands, or uncertain descents, should never be excluded by the whole blood in a remoter degree; or how far a private inconvenience should be still submitted to, rather than a long established rule should be shaken, is for the Legislature to determine. See further 2 *Comm.* 233. *in n.*

The rule as to the whole blood, together with its illustration, amounts to this: that in order to keep the estate of A. as nearly as possible in the line of his purchasing ancestor it must descend to the issue of *the nearest couple* of ancestors that have left descendants behind them; because the descendants of one ancestor only are not so likely to be in the line of that purchasing ancestor, as those who are descended from both.

And in order to avoid the confusion and uncertainty that might arise between the several stocks wherein the purchasing ancestor may be sought for, another qualification is requisite, besides the *proximity* and *entierty*; which is that of *dignity*, or *worthiness*, of blood. For,

VII. The seventh and last rule or canon is, that *in collateral inheritances* the *male stocks* shall be preferred to the *female*; (that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those of the blood of the female, however near;) unless where the lands have, in fact, descended from a female.

Thus the relations on the father's side are admitted *in infinitum*, before those on the mother's side are admitted at all. *Litt.* § 4. And the relations of the father's father, before those of the father's mother, and so on.—This rule seems to have been established in order to effectuate and carry into execution the fifth rule, or principal canon of collateral inheritance, before laid down; that every heir must be of the blood of the first purchasor.

That this was the true foundation of the preference of the *agnati* or male stocks, in our law, will farther appear, if we consider, that, whenever the lands have notoriously descended to a man from his mother's side, this rule is totally reversed; and no relation of his by the father's side, as such, can *ever* be admitted to them: because he cannot possibly be of the blood of the first purchasor. And so, *è converso* if the lands descended from the father's side, no relation of the mother, as such shall *ever* inherit. 1 *Inst.* 14.—See *Watkins on Descent, c.* 5.

But it has been resolved, that a *fine* and *render* of lands, claimed by a party as heir at law *ex parte maternâ*, will alter the quality of the estate: so that it shall descend to the heir *ex parte paternâ*. 6 *Rep.* 63. *Carthew*, 141.

Also if a man seised of land, as heir of the part of his mother, make a feoffment and take back an estate to him and his heirs; this as a purchase, alters the *descent*, and if he die without issue, the heir of the part of the father shall inherit it. *Co. Lit.* 12.

A. seised in fee of a Copyhold of inheritance by descent *ex parte maternâ*, surrendered to the use of himself for life, remainder to such persons as he should by deed or will appoint, remainder, in default of appointment, to himself in fee. Afterwards he mortgaged and surrendered to the use of the mortgagee in fee, who on repayment, surrendered back to the mortgagor. It was held that the line of descent was broken, and the estate descended to the paternal heir. *Doe d. Harman* v. *Morgan*, 7 *Term Rep.* 103.—See *Id.* 105. that a feoffment and re-feoffment break the line of descent.

Devise of all the testator's real and personal estate and effects to his wife in trust for the education of his daughter, an only child, until twenty-one; and in case of the death of his daughter before 21, the whole of his said estate and effects to his wife: the wife died in the minority of the daughter, and the daughter afterwards died under age and without issue. The Court of C. P. held that the heir of the daughter *ex parte maternâ* was entitled to succeed by descent. *Goodtitle d. Castle* v. *White*. 2 *New Rep. C. P.* 383.

Devise to trustees, their heirs, executors, administrators, and assigns, in trust to let the freehold estates for any term they thought proper at the best improved yearly rent, to pay one third of the rents of the freehold estates to his wife for life, and one third of the personalty to her absolutely; and then to lay out the other two-thirds of the personalty in the funds; and to pay her the dividends, and the rents of two-thirds of the freehold estates, and, after the death of the wife, the other third of the rent of the freehold estates to his daughter for her own separate use, and after her death the freehold estates and two-thirds of the personal estates to the daughter's children to be equally divided amongst them, and to be paid them at the respective ages of twenty-one years; and if his daughter died without leaving issue, then his freehold estates to his wife for life; and after her death to his heir at law, as if he had died intestate. Held by the Court of K. B. that the trustees took an estate in fee, and that upon the death of the widow, who was the surviving trustee, the legal estate descended to the daughter, and upon her death without issue, vested in the heir at law *ex parte maternâ*. *Doe d. Tomkins* v. *Willan*, *T. R. K. B. Mich.* 59 *G.* 3.

*The short Result* of all the above rules and explanations is, that when a man (A.) dies seized of an estate in fee-simple, it shall—1. In the first place, descend to his *eldest son* and heir *or his issue*.—2. If his line be extinct, then to the *second* or other sons of A. respectively, in order of birth, or their issue; the *issue* of an *elder brother* being still preferred to the *person* of a *younger*, that is to say, the children of the second son, to the third son himself, and so on.—3. In default of sons, or their issue, then to all the daughters of A. together, or their issue. See *ante*, III, IV.—4. On failure of descendants from A. himself, then to the issue of his father *and* mother; the eldest brother of the whole blood, or his issue; or on failure of them, the other whole brothers of A. respectively, in order of birth, or their issue; or on failure of them the sisters of A. of the whole blood respectively, or their issue.—5. On failure of descendants from the father and mother of A. then to the issue of his grand-father and grand-mother by the father's side; still tracing the line of relationship on the father's side, till it entirely fails; when and not before, recourse must be had to the relations of his mother in the same regular successive order as in the paternal line. See more fully and accurately, 2 *Comm. c.* 14. *p.* 200—240. on the whole of this subject, which in some points seems at first inextricably intricate, but will soon unfold itself to the researches of the diligent student; who to understand many parts of it, should be intimately acquainted with the law of *Tenures*.—See that title in this Dictionary.

As to the DESCENT of REVERSIONS and REMAINDERS expectant upon estates of freehold, see *Watkins's Essay on the Law of Descents* (1793.) from whence some cursory observations have already been adopted, and the following extract from which on this part of the subject, may be deserving attention.

"The principles which apply to the descent of an estate in possession do not apply to the descent of an estate in remainder or reversion, expectant on an estate of freehold, but they apply when the particular estate is only for years; a tenant for years being considered merely as the bailiff of the freeholder, and to hold the possession for him. 1 *Inst.* 239. *b. n.* 2.

"When a reversion or remainder, expectant upon an estate of freehold, continues in a course of descent, without certain acts of ownership exerted, such reversion, &c. still continually devolves, on the death of each particular heir, to the person who can *then* make himself heir to the donor or purchasor; without any regard to the very heir of the precedent person who succeeded to it *by descent*; till when the particular estate is determined, it ultimately vests *in possession* in him, who, at *such determination*, is the right heir of such donor, purchasor, or original remainder-man. For as there was no intermediate person actually seised of such reversion or remainder, no one could be the mean of turning its descent, and becoming a new stock or *terminus*; but such stock must yet be the donor, purchasor, or remainder-man, and must so continue, (if no alienation be made) till such estate shall become vested in possession; and consequently, it will be absolutely necessary to prove, on every devolution, a descent, not from the immediate predecessor who took by *descent*, (for with him, as such, in this case, there is nothing to do) but from the donor, purchasor, or original remainder-man. Whoever, therefore, can make himself heir to such donor, &c. will be entitled to the inheritance in reversion or remainder, though expectant; but yet not so as to be capable of transmitting it to *his own* right heirs, (as such) except by granting it over; till it becomes vested in possession, by the determination of the particular estate which supported it, or whereon it was expectant, (when it would cease to be a reversion or remainder) in him who should be, at that time, the right heir of the donor, &c. which person would then become the stock of descent, and him from whom the future pedigree must run on his obtaining an *actual* seisin of it. See *Fearn's Conting. Rem.* 449. (3d *edit.*) *Co. Litt.* 11 *b.*; 14 *a*; 15 *a*. 3 *Co.* 42. *Cro. Car.* 411, 12. 8 *Co.* 96 *a*. 1 *Co.* 95, 99. *Plowd.* 56. 113. 585, 9. *Brooke, Descent*, 2. & 58. *Done*, 5. & 21. *Scire Fac.* 126. *Cro. Eliz.* 334, 5. *Dyer*, 129. *pl.* 63. See 2 *Com. Dig.* title *Copyhold*, (K. 11.) *Descent*, (C. 2.) *Robinson on Gavelk. Appendix*. *Kitch.* 215. 1 *Vez.* 174.

"So also with respect to contingencies and executory devises—Thus on a devise to G. in fee; but if he happened to die under the age of twenty-one years, leaving no issue, then to P. in fee; after the decease of the testator, P. died in the life-time of G. who afterwards died under the age of twenty-one, and without issue; it was held that the lands vested in P.'s heir at law, upon the happening of the contingency, (*viz.* on the death of G. under age, and without issue), but that the interest, while it was contingent, did not so attach in G. who was heir at law to P. on his decease, as to carry it, on his death, to *his* heir at law, who was not heir at law to P. but that it vested in that person *who was heir at law to* P. (the first purchasor) *at the time of the contingency happening*. See 2 *Wils.* 29. *Goodright and Searle;* and *cited* also in *Fearne on Con. Rem.* 448. (3d *edit.*) And see *Cro. Car.* 410. 13. *Hobart*, 33. *Plowd.* 485, 9. 3 *Com. Dig.* tit. *Descent* (C. 2.)" See *Descent*, VI.

See further as to other points concerning the doctrine of Descents, and points involved therewith, titles *Estate*, *Heir*, *Limitation*, *Remainder*, *Executory Devise*, &c.

DESCENT OF CROWN LANDS. See titles *Descent*, VI. *King*, I.

DESCENT OF DIGNITIES. See titles *Descent*, *Peer*.

DESCRIPTION, *descriptio.*] In deeds and grants there must be a *certain description* of the *lands* granted, the *places* where the *lands* lie, and of the *persons* to whom granted, &c. to make them good. But wills are more favored than grants as to those *descriptions:* and a wrong *description* of the person will not make a devise void, if there be otherwise a sufficient certainty what person was intended by the testator. 1 *Nels. Abr.* 647.

Where a first *description* of land, &c. is false, though the second is true, a deed will be void: *contra*, if the first be true and the second false. See 3 *Rep.* 2, 3. 8. 10. 28. 33, 34, &c. See titles *Deed*, *Will*.

DESERTION FROM THE ARMY. See title *Courts Martial*.

DE SON TORT DEMESNE. See *De injuriâ suâ propriâ;* and titles *Trespass*, *Pleading*.

DESPITUS. A contemptible person. *Fleta*, *lib.* 4. *cap.* 5. *par.* 4.

DESUBITO. To weary a person with continual barkings, and then to bite; which is provided against by old laws. *Leg. Alured.* 26.

DETACHIARE. To seize or to take into custody another person's goods, &c. by *attachment* or other course of law. *Cowel.*

DETAINER. See tiles *Forcible Entry* and *Detainer*.

DETERMINATION OF WILL. See title *Estate at Will*.

DETINET. See *Debt*.

DETINUE, *detinendo.*] In the Common Law; is like *actio depositi* in the Civil Law; and is a writ which lies against him, who having goods or chattels delivered to keep, refuseth to re-deliver them. In this action of *detinue* it is necessary to ascertain the thing detained in such a manner as that it may be specifically known and recovered. Therefore it cannot be brought for money, corn or the like, for that cannot be known from other money or corn; unless it be in a bag or a sack, for then it may be distinguishably marked. In order therefore to ground an action of *detinue*, which is only for the detaining, these points are necessary. See 1 *Inst.* 286. 1. That the defendant came lawfully into possession of the goods, as either by delivery to him or by finding them. [But if the goods are alleged to have come to the defendant by finding, it is sufficient for the plaintiff to prove that the goods came to the defendant by wrong; at least unless the finding be traversed. *Miles* v. *Graham*, *New Rep. C. P.* 141.] —2. That the plaintiff have a property.—3. That the goods themselves be of some value.—4. That they be ascertained in point of identity. Upon this the jury, if they find for the plaintiff, assess the several values of the several parcels detained, and also damages for the detention. And the judgment is conditional; that the plaintiff recover the said goods; or if they cannot be had, their respective values, and also the damages for detaining them. *Co. Ent.* 170. *Cro. Jac.* 681.

There is one disadvantage which attends this action, *viz.* that the defendant is herein permitted to wage his law; (that is, to exculpate himself by oath; see title *Wager of Law;*) and thereby defeat the plaintiff of his remedy; which privilege in this case is grounded on the confidence originally reposed in the bailee by the bailor, in the borrower by the lender or the like: from whence arose a strong presumptive evidence, that in the plaintiff's own opinion the defendant was worthy of credit. See 1 *Inst.* 295.

For this and other reasons the action of *detinue* is now much disused, and has given place to the action of Trover. See title *Trover;* and also title *Bailment*.

The following cases on the subject of *detinue*, may prove matter of use as well as of curiosity, and see further *Viner*, title *Detinue*, and *Bull. N. P.* 49—51.

*Detinue* may be brought for a piece of gold, of the price of 21*s.* though not for 21*s.* in money; for here is a demand of a certain particular piece. *Bull. N. P.* 50.

If a man receiving money from a banker, put part thereof into his bag, and while he is telling the rest the bag is stolen, no action of *detinue*, &c. lies; because by putting up the money, he had appropriated it to his own use. *Comb.* 475. A man lends a sum of money to another, *detinue* lies not for it, but debt: but if A. bargains and sells goods to B. upon condition to be void, if A. pays B. a certain sum of money at a day; now if A. pays the money, he may have *detinue* against B. for the goods, though they came not to the hands of B. by bailment, but by bargain and sale. *Cro. Eliz.* 867. 2 *Danv.* 510.

If a man delivers goods to A. to deliver to B., B. may have *detinue*, for the property is in him: and where he delivers them to B. and after grants them to D. he shall not have *detinue* after the grant, but the grantee shall have it. *Yelv.* 241. 1 *Bulst.* 69. When goods are delivered to one, and he delivers them over to another, action of *detinue* may be had against the second person, and if he delivers them to one that has a right thereto, yet it is said he is chargeable: also if a person to whom a thing is delivered dieth, *detinue* lieth against his executors, &c. or against any person to whom a thing comes. 2 *Danv. Abr.* 511.

A man may have a general *detinue* against another that finds his goods: though if I deliver any thing to A. to re-deliver, and he loses it, if B. finds it and delivers it to C. who has a right to the same, he is not chargeable to me in *detinue*, because he is not privy to my delivery. 7 *H.* 6. 22. 9 *H.* 6. 58.

In actions of *detinue*, the thing must be once in the possession of the defendant; which possession is not to be altered by act of law, as seisure, &c. And the nature of the thing must continue, without alteration, to entitle one to this action. *F. N. B.* 138. If I find goods, and before the owner brings his action, I sell them; or they are recovered out of my hands upon an execution, or outlawry, against the owner, &c. he cannot have *detinue* against me. 12 *E.* 4. 8. 27 *H.* 8. 13. But action of *detinue* will lie against him that finds goods, if they are wasted by wilful negligence. *Dr. & Stud.* 129.

A man buys cloth or other things of another, on a good and perfect contract; if the seller keeps the things bought, *detinue* lieth. *Dyer*, 30. 203. Where one takes my goods into his custody to keep them for me, and refuses to restore them; although he have nothing for the keeping of them, this action will lie. 4 *Rep.* 84. 29 *Ass. pl.* 28. If I deliver to one a trunk that is locked, with things in it, and keep the key myself, and something be taken out of it, writ of *detinue*

lieth not for this: but if the trunk, and all that is in it, be taken away, there it lies. 11 *Rep.* 89. 4 *E.* 3.

This action will not lie, where a man delivers goods to me, and I bid him take them again, if he refuses to do it: or where one takes my goods or cattle by wrong as a trespasser; or by way of distress for rent or as damage feasant, &c. Nor for a horse sick, when it is taken or lent; if he dies of that sickness. *Bro. Detin.* 242. 43 *E.* 3. 21. 21 *E.* 4. And if it be a ring that is delivered to another, and he breaks it, it is doubted whether action of *detinue* may lie; because the thing is altered, and cannot be returned as it was: but action on the case lieth. And although, where goods are found, and sold &c. *detinue* lies not: yet action upon the case of *trover and conversion* may be brought. 12 *E.* 4. 8. 13 *E.* 4. 22.

DETINUE OF CHARTERS. A man may have detinue for deeds and charters concerning land; but if they concern the freehold, it must be in C. B. and no other court. Action of detinue lies for charters which make the title of lands; and the heir may have a *detinue of charters*, although he hath not the land: if my father be disseised, and dieth, I shall have detinue for charters, notwithstanding I have not the land; but the executors shall not have the action for them. *New Nat. Br.* 308. If a man keep my charters from me, concerning the inheritance of my land, and I know the certainty of them, and the land; or if they be in a chest locked, &c. and I know not their certainty, I may recover them by this writ: so where lands are given to me and J. S. and my heirs, and he dies, if another gets the deeds, and if tenant in tail give away the deed of entail, and then die, his issue may bring a writ of *detinue of charters*. *Co. Lit.* 286. 1 *Rep.* 2. *F. N. B.* 138. But if the tenant in fee-simple do give away his deeds of the land, his heir may not have this action: and in case a woman great with child by her deceased husband keeps the charters from his daughter and heir that concern the land, during the time she is with child, this writ will not lie against her. 41 *E.* 3. 11.

Detinue was brought for a deed, and the plaintiff had a verdict, that the defendant detained the deed, and the jury gave 20*l.* damages, but did not find the value of the deed; and then there issued out a *distringas* to deliver the deed, or the value, and afterwards a writ of inquiry was awarded for the value: whereupon the jury found a different value from what the first verdict found; and it was adjudged good. *Raym.* 124. 1 *Nels. Abr.* 649. In *detinue of charters*, if the issue be upon the detinue, and it is found that the defendant hatb burnt the charters, the judgment shall not be to recover the charters, which it appears cannot be had; but it is said it shall be for the plaintiff to recover the land in damages. 2 *Rol. Abr.* 101. 2 *Danv. Abr.* 511. For detaining of deeds and charters concerning the inheritance of lands, or an indenture of lease, the defendant shall not wage his law, as he may in a common action of *detinue*. 1 *Inst.* 295.

DETINUE OF GOODS IN FRANK-MARRIAGE. After a divorce between, the wife shall have this writ of detinue for the goods given with her in marriage. *Mich.* 35 *E.* 1. *New. Nat. Br.* 308.

DETRACTARI. To be torn in pieces with horses.—*Apostatæ, sacrilegi et hujusmodi*, detractari *debent et comburi. Fleta, lib.* 1. *cap.* 37.

DETUNICARE. To discover or lay open to the world. *Matt. Westm.* 1240.

DEVADIATUS, OR DIVADIATUS. Is where an offender is without sureties or pledges. *Domesday.*

DEVASTAVIT, OR DEVASTAVERUNT BONA TESTATORIS. A writ against executors or administrators, for paying debts upon simple contract, before debts on bonds and specialties, &c. for in this case they are liable to action, as if they had squandered away, or *wasted* the goods of the deceased, or converted them to their own use; and are compellable to pay such debts by specialty out of their own goods, to the value of what they so paid illegally. *Dyer*, 232.

By the *stat.* 30 *Car.* 2. *c.* 7. it is enacted, That if an executor *de son tort* wastes the goods, and dies, his executors shall be liable in the same manner as their testator would have been, if he had been living. And it has been since adjudged, that a rightful executor, who wastes the goods of the testator, is in effect an executor *de son tort* for abusing his trust. 3 *Mod.* 113. And his executor or administrator is made liable to a *devastavit*, by *stat.* 4 & 5 *W. & M. c.* 24. which statute makes the *stat.* 30 *C.* 2. *c.* 7. perpetual. See *further* this Dict. title *Executor*, V. 1. VI. 2.

DEVENERUNT. A writ heretofore directed to the escheator on the death of the heir of the King's tenant under age and in custody, commanding the escheator that by the oaths of good and lawful men he inquire what lands and tenements by the death of the tenant *came to the King*. *Dyer*, 360. This writ is now disused; but see *stat.* 14 *Car.* 2. *c.* 11. for preventing frauds and abuses in his Majesty's *Customs.*

DEVEST, OR DIVEST, *devestire.*] Is opposite to *invest.* As to *invest* signifies to deliver the possession of any thing to another; so to *devest* signifieth to take it away. *Feud. lib.* 1. *cap.* 7.

DEVISE, from the Fr. *deviser*, to divide or sort into parcels.] A gift of lands, &c. by a last will and testament. The giver is called the *devisor*; and he to whom the lands are given, the *devisee.* A *devise* in writing, is in construction of law, no deed; but an instrument by which lands are conveyed.

To DEVISE, is to give by will.

The word was formerly particularly applied to bequests of land; but is now generally used for the gift of any legacies whatever.

For the law relating to *Devises*, as well of real as personal estates, see fully this Dict. title *Will.* As to executory Devises, see titles *Executory Devise, Estate, Limitation, Remainder.*

DEVOIRES OF CALEIS, Fr. *Devoir*, Duty.] The customs due to the King, for merchandise brought into or carried out of Calais; when our staple remained there.—See *stats* 34 *Ed.* 1. *c.* 18. 2 *Rich.* 2. *st.* 1. *c.* 3.

DEXTRARIUS. One at the *right hand* of another. The word *dextrarios* has been used for light horses, or horses for the great saddle; from the Fr. *destrier*, a horse for service.

DEXTRAS DARE. Shaking of hands in token of friendship; or a man's giving up himself to the power of another person. *Walsingh. p.* 332.

DIARIUM. Daily food; or as much as will suffice for the day. *Du Cange.*

DIASPERATUS. Stained with many colours. *Mon. tom.* 3. *pag.* 314.

DICA. A tally for accounts, by number of *taillees*, cuts or notches. *Lib. Rub. Scaccar. fol.* 30. [Gr. δικὰ ten.]

DICKAR, OR DICKER OF LEATHER. A quantity consisting of *ten* hides, by which leather is bought and sold. Vide *stat. antiq. de ponderibus et mensuris.* There are also *dickers* of *iron*, containing ten bars to the *dicker.* *Domesday.*

DICTORES, DICTUM. The one signifies arbitrators, the other the arbitrament. *Malms. p.* 348.

DICTUM DE KENELWORTH. An Edict, Award, Act or Statute, made for composing differences between King Henry the Third and his Barons and others, who had been in arms against him: so called, because it was made at Kenelworth, in Warwickshire, *anno* 51 or 52 *Hen.* 3.

DIEM CLAUSIT EXTREMUM. A writ which issued out of the court of Chancery to the escheator of the county, upon the death of any of the King's tenants *in capite*, to inquire by a jury of what lands he died seised, and of what value, and who was the next heir to him. This writ was to be

granted at the suit of the next heir, &c. for upon that, when the heir came of age, he was to sue livery of his lands out of the King's hands. *F. N. B.* 251.

DIES. See *Day*.

DIES DATUS. The day or time of respite given to the defendant in a suit by the court. *Broke.*—See *Day*.

DIES MARCHIÆ. The day of congress or meeting of the English and Scotch, heretofore appointed annually to be held on the *marches* or borders, to adjust all differences between them, and preserve the articles of peace. *Tho. Walsingham, in Rich.* 2. *p.* 307.

DIETA. A day's journey. *Fleta, lib.* 4. *c.* 28. *Bracton, lib.* 3. *tract.* 2. *c.* 16.

DIET, *conventus.*] A legislative assembly; as the *diet* of the Empire, of Ratisbon, &c. See this Dict. titles *Parliament, Wittenagemote.*

DIEU ET MON DROIT. God and my Right; the *motto of* the *royal arms*, intimating, that the King of England holds his empire of none but God; first given by King Rich. I.

DIEU SON ACT. Are words often used in our old law: and it is a maxim in law, That the *act of God*, or inevitable accident, shall prejudice no man. Therefore, if a house be blown down by tempest, thunder, or lightning, the lessee or tenant for life or years, shall be excused in waste: likewise he hath by the law a special interest to take timber, to build the house again for his habitation. 4 *Rep.* 63. 11 *Rep.* 82. So when the condition of a bond consists of two parts in the *disjunctive*, and both are possible at the time of the obligation made, and afterwards one of them becomes impossible by the act of God, the obligor is not bound to perform the other part. 5 *Rep.* 22. And where a person is bound to appear in court, at a certain day, if before the day he dieth, the obligation is saved, &c. See particularly relative to this term, titles *Bailment, Carrier.*

DIFFACERE. To destroy: and *diffactio* is a maiming any one. *Leg. H.* 1. *c.* 64. 92.

DIFFORCIARE RECTUM. To take away, or deny justice. *Mat. Paris. anno* 1164.

DIGEST. The book of Pandects of the Civil Law; which hath its name from its containing *Legalia præcepta excellenter digesta. Du Cange.*—See title *Civil Law.*

DIGNITY, *dignitas.*] Honour and authority; reputation, &c. *Dignities* may be divided into superior and inferior: as the titles of Duke, Earl, Baron, &c. are the highest names of *dignity:* and those of Baronet, Knight, Serjeant at Law, &c. the lowest. Nobility only can give so high a name of *dignity* as to supply the want of a surname in legal proceedings, and as the omission of a name of *dignity* may be pleaded in abatement of a writ, &c. so it may be where a peer who has more than one name of *dignity* is not named by the Most Noble. See title *Abatement.* No temporal *dignity* of any foreign nation can give a man a higher title here than that of Esquire. 2 *Inst.* 607.—See titles *Addition, Descent, Peer.*

DIGNITY ECCLESIASTICAL, *dignitas ecclesiasticalis.*] Is defined by the Canonists to be *administratio cum jurisdictione et potestatæ aliqua conjuncta;* of which there are several examples in *Duarenus, de Sacris Eccles. &c. lib.* 2. *c.* 6. *Dignitatis ecclesiasticæ*, are mentioned in the *stat.* 26 *H.* 8. *c.* 81. *&* 32. And of church *dignities, Cambden* in his *Britannia*, p. 161. reckons in England, 544.

DIGNITARIES, *dignitarii.*] Those who are advanced to any dignity Ecclesiastical; as a Bishop, Dean, Archdeacon, Prebendary, &c. But there are simple Prebendaries, without cure or jurisdiction, which are not *dignitaries.* 3 *Inst.* 155.

DIKES. See *Fens, Navigation, Powdike.*

DILAPIDATION, *dilapidatio.*] Is where an incumbent of a benefice suffers the parsonage house or out-houses to fall down, or be in decay for want of necessary reparation: or it is the pulling down or destroying any of the houses or buildings, belonging to a spiritual living, or destroying of the woods, trees, &c. appertaining to the same; for it is said to extend to the committing or suffering any wilful waste, in or upon the inheritance of the church. *Degg's Pars. Couns.* 89. It is the interest of the church in general to preserve what belongs to it for the benefit of the successors; and the old canons, and our own provincial constitutions require the clergy sufficiently to repair the houses belonging to their benefices; which if they neglect or refuse to do, the bishop may sequester the profits of the benefice for that purpose, &c. *Right's Clerg.* 143. And by the Canon Law, *dilapidations* are made a debt, which is to be satisfied out of the profits of the church; but the Common Law prefers debt on contracts, &c. before debt for *dilapidations. Hern.* 136.

The prosecution in these cases may be brought either against the incumbent himself, or against his executors or administrators; and the executor or administrator of him in whose time it was done or suffered, must make amends to the successor: and if the proceedings are against the incumbent, then they ought to be in the spiritual court. That court may also proceed against an executor, or the successor may have an action of the case or debt at the Common Law, in which action he shall recover damages in proportion to the *dilapidations.* 1 *Nels. Abr.* 656. *Pars. Couns.* 97, 98. *Carter.* 224. 3 *Lev.* 268.

It is also said to be good cause of deprivation, if the Bishop, Parson, Vicar, or other ecclesiastical person dilapidates the buildings, or cuts down timber growing on the patrimony of the church unless for necessary repairs. 1 *Ro. Rep.* 86. 11 *Rep.* 98. *Godb.* 259. And that a writ of prohibition will also lie against him in the courts of Common Law. 3 *Bulst.* 158. 1 *Ro. Rep.* 335.

By *stat.* 13 *Eliz. c.* 10. if any *Parson*, &c. shall make a gift of his goods and personal estate to defraud his successor of his remedy for *dilapidations*, such successor may have the same remedy in the spiritual court against the person to whom such gift is made, as he might have against the executors of the deceased *parson.* And by *stat.* 14 *Eliz. c.* 11. money recovered for *dilapidations*, is to be employed in the reparations of the same houses suffered to be in decay, or the party recovering shall forfeit double the value of what he receives, to the King.

If a parson suffers *dilapidations*, and afterwards takes another benefice, whereby his former benefice becomes void, his successor may have an action against him, and declare that by the custom of the kingdom he ought to pay him so much money as shall be sufficient to repair the dilapidations. 3 *Lev.* 268. In case a parson comes to a living, the buildings whereof are in decay by *dilapidations*, and his predecessor did not leave a sufficient personal estate to repair them, so that he is without remedy, he is to have the defects surveyed by workmen, and attested under their hands in the presence of witnesses, which may be a means to secure him from the incumbrance brought upon him by the fault of his predecessor. *Country Parson's Companion*, 60.

An action on the case for *dilapidations* of a prebendal house may be maintained by a succeeding prebendary against his predecessor: but when by the statutes of the church the materials are to be supplied out of the church funds, the successor shall recover only the amount of the workmanship necessary in making the repairs. *Radcliffe* v. *D'Oyly*, 2 *Term Rep.* 630. The successor may have separate actions against the executor of a preceding rector, for dilapidations to different parts of the rectory. *Young* v. *Manby*, *Term Rep. K. B.* 55 *Geo.* 3. 183. See further titles *Clergy, Parson.*

DILATORY PLEAS. Such pleas as are put in merely for *delay;* and there may be a demurrer to a *dilatory plea*, or issue may be taken on the *fact*, if false. If the plea is *true* in *fact* and *good* in *law*, and is in *abatement*, the plaintiff must

enter up judgment of *cassetur*, before he commences a new suit. If the plea is adjudged ill, on *demurrer*, there must be a *respondeas ouster*, and defendant must plead another plea. If *issue* in *fact* is taken, and found by the jury, for *plaintiff*, in *case*, &c. they assess the damages. In *debt*, the judgment for plaintiff is final, &c. The truth of *dilatory pleas* is to be made out by affidavit of the fact, &c. by *stat.* 4 *An. c.* 16. § 11.—See title *Pleading*.

DILIGIATUS. Outlawed, *i. e. de le ejectus. Leg. Hen.* 1. *c.* 45.

DILLIGROUT. Pottage formerly made for the *King's table*, on his *coronation* day: and there was a tenure in serjeanty, by which lands were held of the King, by the service of finding this pottage, at that solemnity. 39 *H.* 3.

DIMIDIETAS. Used in records for a moiety, or one half.

DIMINISHING the *coin*. See title *Coin*.

DIMINUTION, *diminutio.*] Where the plaintiff or defendant, on an appeal to a superior court, alledges that part of the record is omitted, and remains in the inferior court not certified; whereupon he prays that it may be certified by *certiorari*. *Co. Ent.* 232. 242. Of course *diminution* is to be certified on a writ of error; though if issue be joined upon the errors assigned, and the matter is entered upon record, which is made a *consilium*, in this case there must be a rule of court granted for a *certiorari* to certify *diminution*. 1 *Lil. Abr.* 245. *Diminution* cannot be alledged of a thing which is fully certified; but in something that is wanting, as want of an original, or a warrant of attorney, &c. 2 *Lev.* 206. 1 *Nels. Abr.* 658. And if on *diminution* alledged, and the plaintiff in error certify one original, &c. which is wrong; and the defendant in error certifies another that is true; the true one shall stand. *Cro. Jac.* 597. *Cro. Car.* 91.

After a writ of error brought, and the defendant hath pleaded *in nullo est erratum* he cannot afterwards alledge *diminution*; because by that plea he affirmeth or alloweth the record to be such as is certified upon the writ of error. *Godb.* 266. But in some cases, *diminution* hath been alledged, after *in nullo est erratum* pleaded, *ex gratiâ curiæ:* though not *ex rigore juris*. *Palm.* 85. And there is an instance, that the court in such a case hath awarded a *certiorari*, to inform their conscience of the truth of the record in C. B. where the defendant in error had not joined *in nullo est erratum*. 1 *Nels.* 658. —See further title *Judgment, Reversal of.*

DIMISSORY LETTERS, *literæ dimissoriæ.*] Where a candidate for holy orders has a title in one diocese, and is to be ordained in another, the proper diocesan sends his *letters dimissory* directed to some other ordaining bishop, giving leave that the bearer may be ordained, and have such a cure within his district. *Cowel.*

DIOCESE, *diocesis.*] The circuit of every bishop's jurisdiction. For this realm hath two sorts of divisions; one into shires or counties, in respect to the *temporal state;* and another into *dioceses*, in regard to the *ecclesiastical state*, of which we reckon twenty-one in *England*, and four in *Wales*. *Co. Lit.* 94. Also the kingdom is said to be divided in its ecclesiastical jurisdiction into two *provinces* of Canterbury and York; each of which provinces is divided into *dioceses*, and every *diocese* into archdeaconries, and archdeaconries into parishes, &c. *Wood's Inst.* 2.

The bounds of *Dioceses* are to be determined by witnesses and records, but more particularly by the administration of divine offices. To which purpose, there are two rules in the Canon Law: in one case, upon a dispute between two bishops upon this head, the direction is, that they proceed in the business, by ancient books or writings, and also by witnesses, reputation, and other sufficient proof: in the other case, where the question was, by whom a church built upon the confines of two *dioceses* should be consecrated, the rule laid down is, that it should be consecrated by the bishop of that city, who, before it was founded, baptized the inhabitants, and administered to them other divine offices. *Gibs.* 133.

The jurisdiction of the *city* is not included in the name of *diocese*, so saith the Canon Law: and accordingly, in citations in general visitations, directed to the clergy, it is ordered to cite the clergy of the *city and diocese*. *Gibs.* 133.

A bishop may perform divine offices, and use his episcopal habit, in the *diocese* of another, without leave; but may not perform therein any act of jurisdiction, without permission of the other bishop. *Gibs.* 133.

A clergyman dwelling in one *diocese*, and beneficed in another, and being guilty of a crime, may, in different respects, be punished in both; that is, the bishop in whose *diocese* he dwells may prosecute him; but the sentence, so far as it affects his benefice, must be carried into execution by the other bishop. *Gibs.* 134.—See titles *Bishop, Clergy, Convocation.*

DISABILITY, *disabilitas.*] An incapacity in a man to inherit any lands, or take that benefit which otherwise he might have done: which may happen four ways; by the act of an ancestor, or of the party himself, by the act of God, or of the law.

1. *Disability*, by the act of the ancestor, is where the ancestor is attainted of treason, &c. which corrupts the blood of his children, so that they may not inherit his estate. See title *Attainder, Descent.*

2. *Disability*, by the act of the party, is where a man binds himself by obligation, that upon surrender of a lease, he will grant a new estate to the lessee; and afterwards he grants over the reversion to another, which puts it out of his power to perform it.

3. *Disability*, by the act of God, is where a person is of non-sane memory, whereby he is incapable to make any grant, &c. So that if he passeth an estate out of him, it may after his death be made void; but it is a maxim in law, *that a man of full age shall never be received to disable his own person.* See title *Lunacy.*

4. *Disability*, by the act of the law, is where a man by the sole act of the law, without any thing done by him, is rendered incapable of the benefit of the law, as an alien born, &c. *Termes de Ley.* 4 *Rep.* 123, 124. 5 *Rep.* 21. 8 *Rep.* 43.—See title *Alien.*

There are also other *disabilities*, by the Common Law, of *idiotcy, infancy*, and *coverture*, as to grants, &c. And by statute in many cases: as *papists* are disabled to make any presentation to a church, &c.: *Officers* not taking the oaths, are incapable to hold offices: *Foreigners*, though naturalised, to bear offices in the government, &c. See the proper titles. A person shall not be admitted to *disable* himself to avoid an office of charge, &c. no more than a man shall be allowed to say that he was an *idiot*, &c. to avoid an act done by himself. *Carth.* 307. As to the disability of *Dissenters*, see that title, and title *Nonconformists.* As to pleas of *disability* in the person of the plaintiff, see title *Abatement.*

DISADVOCARE. To deny or not acknowledge a thing. *Hengham Magna, cap.* 4.

DISAGREEMENT. Will make a nullity of a thing, that had essence before: *and disagreement* may be to certain acts, to make them void, &c. *Co. Lit.* 380.—See title *Agreement.*

DISBOSCATIO. A turning wood ground into arable or pasture.

DISCARCARE, from *Dis and Cargo.*] To unlade a ship or vessel by taking out the cargo or goods. *Placit. Parl* 18 *Ed.* 1.—See *Carcatus.*

DISCEIT. See *Deceit.*

DISCENT. See *Descent.*

DISCHARGE. On writs and process, &c. is where a man is confined by some legal writ or authority, and doth that

which by law he is required to do; he is released or *discharged* from the matter for which he was confined. If one be arrested by a *latitat* out of B. R. and the plaintiff do not file a declaration against the defendant in prison in two terms, he shall be *discharged* on common bail. 1 *Lil. Abr.* 470. Also where a defendant on arrest is admitted to *bail*, if the bail bring in the principal before the return of the second *scire facias* issued out against them, they shall be *discharged*. If an *obligee* discharges one joint obligor, where several are jointly bound, it *discharges* the others. *March.* 129. And a man may *discharge* a *promise* made to himself, &c. *Cro. Jac.* 483.—See titles *Accord*, *Acquittal*, *Habeas Corpus*, *Satisfaction*, *Bond*, &c.

DISCLAIMER, *disclaimium*, from Fr. *clamer*, with the privative *dis*.] A plea containing an express denial, or renouncing of a thing; as if a tenant sue a *replevin*, upon the distress of the lord, and the lord avows the taking, saying the tenant holds of him as of his lord, and that he distrained for the rent not paid, or service not performed: now, if the tenant say he doth not hold of him, that is called a *disclaimer*, and the lord proving the tenant to hold of him, on a writ of right *sur disclaimer* brought, the tenant shall lose his land *Termes de Ley*.

This *Disclaimer* by a tenant, is considered as a civil crime, and punished accordingly, by forfeiture of lands to the lord, on reasons most apparently feodal. *Finch*, 270, 1. So if in any court of record, the particular tenant does any act which amounts to a virtual disclaimer; if he claims any greater estate than was granted him at the first infeodation; or takes upon himself those rights which belong only to tenants of a superior class; 1 *Inst.* 252. if he affirms the reversion to be in a stranger by accepting his fine, attorning as his tenant, collusive pleading, and the like; such behaviour amounts to a forfeiture of his particular estate. 1 *Inst.* 253. 2 *Comm.* 275. 3 *Comm.* 233.

If a writ of *præcipe* be brought against two persons for land, and one of them, the tenant, saith that he is not tenant, nor claims any thing in the lands; this is a *disclaimer* as to him, and the other shall have the whole land. *Termes de Ley.* And when a tenant hath *disclaimed* upon action brought against him, he shall not have restitution on writ of error, &c. against his own act; but is barred of his right to the land *disclaimed*. 8 *Rep.* 62. But a verbal *disclaimer* shall not take place against a deed of lands: nor shall the *disclaimer* of a wife during the coverture bar her entry on her lands. 3 *Rep.* 26.

Baron and Feme may disclaim for the wife; though if the husband hath nothing but in right of his wife, he cannot *disclaim*. 2 *Danv. Abr.* 569. Such person as cannot lose the thing perpetually in which he *disclaims*, shall not be permitted to *disclaim*: a bishop, &c. may not *disclaim*, for he cannot divest the right out of the church. Though in a *quo warranto*, at the suit of the King, against a bishop or others for franchises and liberties, if the bishop, &c. *disclaims* them, this shall bind the successors. *Co. Lit.* 102, 103. If a man be vouched because of a reversion on a lease made by himself, he cannot *disclaim*: but an heir may disclaim, being vouched upon a lease made by his ancestor. 2 *Danv.* 569.

A person may *disclaim* in the principal, and not in the incident; as he that is vouched because of a reversion, cannot *disclaim* in the reversion, saving the seignory. 40 *Ed.* 3. 27. If the lord *disclaims* his seignory in a court of record, it is extinct, and the tenant shall hold of the lord next paramount to the lord *disclaiming*. *Lit. sect.* 146.

It is said not to be necessary, that the *writ of right sur disclaimer* should be brought against the person that *disclaims*; for if it be only against him that is found tenant of the land, though he be a stranger, it is not material. 2 *Danv.* 570. By plea of *non-tenure*, nothing is disowned but the freehold, which may be good where the tenant hath the reversion in fee, and not the freehold; but when such tenant *disclaims*, or pleads non-tenure and *disclaims*, the demandant shall have the whole, as the whole is *disclaimed*. *Ibid.*

By *stat.* 21 *Jac.* 1. *c.* 16. § 5. In all actions of trespass *quare clasum fregit*, wherein the defendant shall *disclaim* any title to the land, and the trespass be by negligence or involuntary, the defendant shall be admitted to plead a *disclaimer*, and that the trespass was by *negligence* or *involuntary*, and a *tender* of *sufficient amends* before the action brought; and if the issue be found for the defendant, or the plaintiff be non-suited, the plaintiff shall be barred from the said action, and all suits concerning the same. See title *Pleading*.

Besides these *disclaimers* by tenants of lands, there are *disclaimers* in divers other cases: for there is a *disclaimer of blood*, where a person denies himself to be of the blood or kindred of another, in his *plea*. *F. N. B.* 102. And a *disclaimer of goods*, as well as lands; as if a man *disclaimeth* goods, on arraignment of felony, when he shall lose them, though he be cleared. *Standf. P. C.* 186. In Chancery, if a defendant by his answer renounces the having any interest in the thing in question, this is likewise a *disclaimer*. See title *Chancery*. And there is a deed of *disclaimer* of *executorship* of a will, &c. where an executor refuses, and throws up the same.

## DISCONTINUANCE,

Discontinuatio, from Fr. *discontinuer*, *cessare*.] An interruption or breaking off. An injury to real property, which consists in the keeping out the true owner of an estate, by a tenant whose entry was at first lawful, but who wrongfully detains the possession afterwards.

This happens when he who hath an estate-tail, maketh a larger-estate of the land than by law he is entitled to do: in which case the estate is good, so far as his power extends who made it, but no further. *Finch. L.* 190. As if tenant in tail makes a feoffment in fee-simple, or for the life of the feoffee, or in tail; all which are beyond his power legally to make, for that by the Common Law extends no farther than to make a lease for his own life: in such case, the entry of the feoffee is lawful during the life of the feoffor; but if he retains the possession after the death of the feoffor, it is an injury which is termed a *discontinuance*; the ancient legal estate, which ought to have survived to the heir in tail being gone; or at least suspended, *and for a while discontinued*. For, in this case, on the death of the alienors neither the heir in tail, nor they in remainder or reversion expectant on the determination of the estate-tail, can enter on and possess the land so aliened: but must bring their writ, and seek to recover possession by law. 3 *Comm.* 172. 1 *Inst.* 325. *F. N. B.* 191, 4.

In the case of a *Disseisin* (see that title), while the possession remains in the disseisor, it is a mere naked possession unsupported by any right; and the disseisee may restore his own possession, and put a total end to the possession of the disseisor by an entry on the land, without any previous action; but if the disseisor dies, his heir comes to the possession of the estate by a lawful title: it is the same if the disseisor aliens: the alienee comes in by a lawful title. By reason of this lawful title, the heir in the first instance, and the alience in the second, acquires a presumptive right of possession, which is so far good, that even the person disseised loses by it his right to recover the possession by entry; and can only recover it by an action at law. When the right of entry is thus lost, and the party can only recover by action, the possession is said to be discontinued. This is the *general* import of the word *discontinuance*; but in its *usual* acceptation it signifies the effect of alienations made by husbands seised in right of their wives; by ecclesiasticks seised in right of their church; or by tenants in tail; those being the three instances adduced

by *Littleton* of Discontinuance. Thus before the *stat.* 11 *H.* 7. *c.* 20. the alienation of a woman seised of an estate in dower, or of an estate of the gift of her husband, or of any of his ancestors, was said to be a discontinuance: and before the *stats.* 32 *H.* 8. *c.* 31. 14 *Eliz. c.* 8. recoveries suffered by tenants for life, tenants by the curtesy, or tenants in tail after possibility of issue extinct, or even by the feoffee of tenant for years, worked a discontinuance. See 1 *Rep.* 14.

It is to be observed, that there is a material difference between the situation or title of the alienee of any person, whose alienation makes a discontinuance, and the situation or title of the heir or alienee of a disseisor; for the heir and alienee of a disseisor immediately claim under a person coming in by a wrongful title, and their estates though not defeasible by entry, are *immediately* defeasible by action. But the alienee of every person, whose alienation is said to be a discontinuance, [or rather whose alienation causes a discontinuance,] claims by a person having a lawful estate; and the estate of the alienee is unimpeachable during the life of the alienor. It should also be observed, that a discontinuance extends to those cases only, where a person is dispossessed of an estate of freehold, and where, though he has lost his right of entry, he can still recover the possession by action. The peculiar import of the word Discontinuance, where applied to the cases mentioned by *Littleton*, is thus shortly, but forcibly expressed by *Honard*, in his Ancient Laws of the French.—"An interruption of the right, which one has on an estate, by the sale which another, charged to preserve that right, has made of it."—See 1 *Inst.* 325. *a.* and the long and learned note there on the doctrine of Discontinuance at large.

By the Common Law, the alienation of an husband who was seised in right of his wife, worked a discontinuance of the wife's estate: till the *stat.* 32 *H.* 8. *c.* 28. provided, that no act by the husband alone should work a Discontinuance of, or prejudice the inheritance or freehold of the wife: but that after his death, she or her heirs may *enter* on the lands in question. Formerly also, if an alienation was made by a sole Corporation, as a Bishop or Dean, without consent of the Chapter, this was a Discontinuance. *F. N. B.* 194. But this is now quite antiquated by the disabling *stats.* 1 *Eliz. c.* 19. 13 *Eliz. c.* 10. which declare all such alienations absolutely void *ab initio;* and therefore at present no Discontinuance can be thereby occasioned. 3 *Comm.* 172.

Having said thus much on the general nature of Discontinuance, a title which though of considerable extent in the old law, is now very much abridged by statute, the following selection on the subject may be sufficient in this place: referring the enquiring student to *Com. Dig.* title *Discontinuance*, and the other abridgements, for further information when necessary.

A *Discontinuance* taketh away an entry only; and to every *discontinuance* it is necessary there should be a devesting or displacing of the estate, and turning the same to a right; for if it be not turned to a right, they that have the estate cannot be driven to an action. *Co. Lit.* 327. And an estate-tail cannot be *discontinued*, but where he that makes the *discontinuance*, was once seised by force of the intail, where the estate-tail is executed; unless by reason of a warranty. *Lit. sect.* 637. 641. *Driver, d. Burton* v. *Hussey*, 1 *H. Blackst.* 269. Also if tenant in tail levies a fine, &c. this is no *discontinuance*, till the fine is executed; because if he dies before execution, the issue may enter. *Co. Lit.* 33. 2 *Danv. Abr.* 572.

A *Discontinuance* may be five ways, *viz. by feoffment, fine, recovery, release* and *confirmation* with warranty. 1 *Rep.* 44. A grant without livery, or a grant in fee without warranty, are no *discontinuances:* an exchange will not make a *discontinuance;* as if tenant in tail exchanges land with another, that is not any *discontinuance*, by reason no livery is requisite thereon. 2 *Danv.* 57. It is the same of a bargain and sale, &c. And an alteration of such things as lie in grant, and not in livery, works no *discontinuance;* for such grant does no wrong either to the issue in tail, or him in reversion or remainder, because nothing passeth but during the life of tenant in tail, which is lawful; and every *discontinuance* worketh a wrong. *Co. Lit.* 332.

If tenant in tail of a copyhold estate, surrenders to another in fee, this makes not any *discontinuance*, (except there be a custom for it) but the heir in tail may enter; though this hath been a great question. 1 *Leon.* 95. 2 *Danv.* 571. If there be tenant for life, remainder in tail, and remainder in tail, &c. And tenant for life, and he in the first remainder in tail levy a fine, this is no *discontinuance* of either of the remainders. 1 *Rep.* 76. But if there be tenant in tail, remainder in tail, &c. and tenant in tail enfeoffs him in reversion in fee: or where there is tenant for life, remainder in tail, reversion in fee, and tenant for life enfeoffs the reversioner; these are *discontinuances*, because there is a mean or immediate estate. 1 *Rep.* 140. *Co. Lit.* 335. 3 *Danv.* 575.

If there be tenant in tail, remainder to his right heirs, and he makes feoffment in fee, this is a *discontinuance;* though such tenant that made the feoffment, hath the fee in him. 2 *Danv.* 572. A man is tenant for life, the remainder in tail, remainder in fee: and the tenant for life makes a feoffment to him in remainder in fee: this is such a *discontinuance* of the estate tail, as produceth a forfeiture. 3 *Rep.* 59. If a tenant in tail be disseised, and after release with warranty to the desseisor, it will be a *discontinuance:* so if he release or confirm to tenant for life. *Lit. Sect.* 135. 1 *Rep.* 44. And if, where there is a tenant for life, and remainder in tail, the tenant for life levies a fine to his own use; and after tenant for life and he in remainder join in a feoffment by letter of attorney, that is a *discontinuance* of the estate-tail and the fee. *Dyer*, 327.

If tenant in tail makes a feoffment in fee upon condition, and the condition is broken, the issue may enter notwithstanding this *discontinuance. Lit.* 632. Tenant in tail grants all his estate to another, though without livery and seisin; and if that other person make a feoffment in fee, it will not be a *discontinuance* to take away the entry of him in reversion or remainder. *Lit.* 145. 1 *Rep.* 46. 10 *Rep.* 97. A lease is made for life, remainder in tail; and he in remainder in tail disseises the tenant for life, and makes a feoffment in fee, and dies without issue, and then tenant for life dieth; this is no *discontinuance* to him in reversion. *Lit.* 146. 1 *Brown.* 36. And if tenant in tail of a rent, common, advowson, or the like, grant it in fee, it is not a *discontinuance:* nor where such tenant granteth any thing out of land, &c. *Lit.* 138. *Finch's Law*, 193.

Where a tenant in tail of a manor makes a lease for life, not warranted by *stat.* 32 *Hen.* 8. *c.* 28. of part of the demesnes, this is a *discontinuance* of this parcel; and it is said makes it no parcel of the manor. 2 *Rol. Abr.* 58.

There can be no *discontinuance* by tenant in tail of the gift of the Crown, *stat.* 34 & 35 *H.* 8. *c.* 20. Nor by tenant in tail of fee-farm rents, to bar the remainder vested by the statute; *stat.* 22 & 23 *Car.* 2. *c.* 24. *s.* 6.—Some *discontinuances* at Common Law are now made bars as to the issue in tail; though they still remain *discontinuances* in some cases to him in remainder, &c. such as fines, with proclamations by *stats.* 4 *H.* 7. *cap.* 24. 32 *H.* 8. *cap.* 36. If the husband levy a fine with proclamations, and dieth, the wife must enter, or avoid the estate of the conusee within five years, or she is barred for ever, by the *stat.* 4 *H.* 7. *c.* 24. for the *stat.* 32 *H.* 8. *cap.* 28. doth help the *discontinuance*, but not the bar. *Co. Lit.* 326. Husband and wife tenant in special tail, the husband alone levied a fine to his own use, and afterwards he devised the land to his wife for life, the remainder over, rendering rent, &c. The husband dies, the wife enters and pays

the rent, and dies: in this case it was adjudged, that the fine had barred the issue in tail, but not the wife. *Dyer*, 351. The entry of the wife in this case was a disagreement to the estate of inheritance, and an agreement to the estate for life: but if the wife had not waived the inheritance, the estate tail as to the wife had remained. 9 *Rep.* 135.

If lands be given to the husband and wife, and to the heirs of their two bodies, and the husband maketh a feoffment in fee, and dieth; the wife is helped by *stat.* 32 *H.* 8. *c.* 28. and so is the issue of both their bodies, 1 *Inst.* 326. The husband is tenant in tail, the remainder to the wife in tail, the husband makes a feoffment in fee; by this, the husband, by the Common Law, did not only discontinue his own estate tail, but his wife's remainder: but by *stat.* 32 *H.* 8. *c.* 28. after the death of the husband without issue, the wife may enter by the said act. Though if the husband hath issue, and maketh a feoffment in fee of his wife's land, and his wife dieth; the heir of the wife shall not enter during the husband's life, neither by the Common Law nor by the statute. 1 *Inst.* 326.

A *Discontinuance* may be defeated, where the estate that worked it is defeated: as if a husband make a feoffment of the wife's land upon condition, and after his death, his heir enters on the feoffee for the condition broken; now the *discontinuance* is defeated, and the feme may enter upon the heir. *Co. Lit.* 336.

DISCONTINUANCE OF PLEA. Where divers things should be pleaded to, and some are omitted, this is a *discontinuance*. 1 *Nels. Abr.* 660, 661. If a defendant's plea begin with an answer to part, and answers no more, it is a *discontinuance:* and the plaintiff may take judgment by *nil dicit*, for what is not answered: but if the plaintiff plead over, the whole action is discontinued. 1 *Salk.* 139. Debt upon bond of 500*l.* the defendant as to 225*l.* part of it, pleads payment, &c. And upon demurrer to this plea, it was adjudged that there being no answer to the residue, it is a *discontinuance* as to that, for which the plaintiff ought to take judgment by *nil dicit*. 1 *Salk.* 180. Where no answer is given to one part, if the plaintiff pleads thereto, he cannot have judgment according to his declaration; for which reason it may be a *discontinuance* of the whole. 1 *Nels.* 660. But this is helped after verdict by stat. 32 *H.* 8. *c.* 30. See titles *Amendment*, *Pleading*, *Practice*.

DISCONTINUANCE OF PROCESS. This Discontinuance is somewhat similar to a nonsuit; for when a plaintiff leaves a chasm in the proceedings of his cause, as by not continuing the process regularly from day to day, and time to time, as he ought to do, the suit is discontinued; and the defendant is no longer bound to attend; but the plaintiff must begin again by suing out a new original, usually paying costs to his antagonist. Antiently by the demise of the King all suits depending in his courts were at once discontinued; but to prevent the expence as well as delay attending this rule of law, the *stat.* 1 *Ed.* 6. *c.* 7. enacts that no action shall be discontinued by such death of the King. The continuance of the suit by improper process, or by giving the party an illegal day, is properly a *mis-continuance*.

Where an action is long depending, and continued from one term to another, the *continuances* must be all entered, otherwise there will be a *discontinuance;* whereupon a writ of error may be brought, &c. 1 *Nels. Abr.* 660. If the plaintiff in a suit doth nothing, it is *a discontinuance*, and he must begin his suit again: and where it is too late to amend a declaration, &c. or the plaintiff is advised to prosecute in another court, he is to discontinue his suit, and proceed *de novo*. But a *discontinuance* of an action is not perfect till it is entered on the roll, when it is of record. *Cro. Car.* 236.

The plaintiff cannot discontinue his action after a demurrer joined; and entered; or after a verdict, or a writ of inquiry, without leave of the court. *Cro. Jac.* 35. 1 *Lill. Abr.* 473. In actions of debt or covenant, after a demurrer joined, the court will give leave to discontinue, if there be an apparent cause, as if the plaintiff through his own negligence is in danger of losing his debt: but if the demurrer be argued, then he shall not have leave to discontinue; nor where he brings another action for the same cause, and this is pleaded in abatement of the first action. *Sid.* 84.

It has been ruled, upon a motion to discontinue, that the court may give leave after a special verdict, which is not complete and final, but never after a general verdict. 1 *Salk.* 178. See *Hardw.* 200, 1. So after enquiry executed and returned. *Carth.* 81.

After issue and a verdict plaintiff cannot discontinue without consent of defendant; for if plaintiff will not enter up judgment defendant may. *Salk.* 178.—After demurrer argued and allowed, discontinuance may be allowed on payment of costs. *Str.* 76. 116. 3 *Lev.* 440.

And where a man hath a just cause of action, for a matter of any consequence, and unadvisedly demurs to a plain bar, &c. and defendant joins in demurrer, and it is argued, and the court are of opinion the plea is *good* in *law*, tho' it may be *false* in *fact*, the court will, even after giving their opinions, but before judgment given, on motion, permit the plaintiff to withdraw his *demurrer*, on payment of costs, and take issue.

The plaintiff may, if he sees occasion, discontinue before or after declaration delivered by a side bar rule on payment of Costs, *N. on R. Mich.* 10 *Geo.* 2. But in replevin the avowant cannot have such rule.

An appeal may as well be discontinued by the defect of the process or proceeding in it, as it may be by the insufficiency of the original writ, &c. For by such defect, the matter depending is as it were out of court. 1 *Lill.* 473. A *discontinuance* or miscontinuance, at Common Law, reverses a judgment given by default; and *discontinuance* upon a demurrer is error; but a miscontinuance after appearance is not so. 8 *Rep.* 150. 46 *Ed.* 3. 30.

*Discontinuance* of process is helped at Common Law by appearance: and by *stat.* 32 *H.* 8. *cap.* 30. all *discontinuances*, miscontinuances, and negligences therein, of plaintiff or defendant, are cured after verdict. See title *Amendment*.

A *discontinuance* of a former action is not complete, so as to entitle the plaintiff to arrest the defendant upon a fresh writ, until the plaintiff has taxed the costs. *Term Rep. K. B.* 54 *Geo.* 3. 153.

DISCOVERT. The law term for a woman unmarried or widow, one not within the bonds of matrimony. *Law Fr. Dict.*

DISCOVERY. The act of revealing or disclosing any matter by a defendant in his answer to a bill filed against him in a court of equity. See title *Chancery*.

To administer to the ends of justice, without pronouncing a judgment which may affect any rights, the Courts of Equity, in many cases, compel a discovery. This jurisdiction is exercised to assist the administration of justice, in the prosecution or defence of some other suit, either in the Court of Equity itself, or in some other court: and a discovery has been compelled to aid the jurisdiction of a foreign court. But if a bill is brought to aid, by a discovery, the prosecution or defence of any proceeding *not merely civil*, in any other court, as an indictment or information, a Court of Equity will not exercise its jurisdiction to compel a discovery; and the defendant may demur. 2 *Vez.* 398. And in the case of suits merely civil in a Court of ordinary jurisdiction, if that Court can itself compel the discovery required, a Court of Equity will not interfere. 1 *Atk.* 288. 1 *Vez.* 205. 2 *Vez.* 451.

A bill for a discovery must shew an interest in the plaintiff in the subject to which the required discovery relates; and such an interest as entitles him to call on the defendant for the discovery. See *Finch Rep.* 36. 44. 1 *Vern.* 399.

As the object of a Court of Equity in compelling a discovery is either to enable itself or some other court to decide on matters in dispute between the parties, the discovery sought must be material, either to the relief prayed by the bill, or to some other suit actually instituted, or capable of being instituted. If, therefore, the plaintiff does not shew by his bill such a case as renders the discovery which he seeks, material to the relief, if he prays relief; or does not shew a title to sue the defendant in some other court; or that he is actually involved in litigation with the defendant, or liable to be so; and does not also shew that the discovery which he prays is material to enable him to support or defend a suit; he shews no title to the discovery; and consequently a demurrer to the bill for such purpose will be allowed. See *Finch Rep.* 214. 1 *Vez.* 205. 2 *Vez.* 396, 9. 2 *Atk.* 388. 1 *Vern.* 204.

The situation of a defendant may render it improper for a court of equity to compel a discovery; either, 1. because the discovery may subject the defendant to *pains and penalties*, or to some *forfeiture*, or something in the nature of a forfeiture: or 2. it may hazard his title in a case where, in conscience, he has at least an equal right with the person requiring the discovery; though that right may not be clothed with a perfect legal title; as to which latter, see 1 *Vez.* 205. 3 *Atk.* 453.—It is a general rule that no one is bound to answer so as to subject himself to *punishment*, in whatever manner that punishment may arise; (as by pains and penalties, a criminal prosecution, &c.) or whatever may be the nature of the punishment. 2 *Vez.* 245. 251. 1 *Vez.* 246. 1 *Eq. Ab.* 131. *p.* 10. 1 *Atk.* 450. 2 *Atk.* 393. *Viner*, title *Usury*, Q. 4. *Toth.* 135.

But if the plaintiff alone is entitled to the penalties, and expressly waves them by his bill, the defendant shall be compelled to make the discovery; for it can no longer subject him to a penalty. 1 *Vern.* 60.—And though a discovery may subject a defendant to penalties, to which the plaintiff is not entitled, and which consequently he cannot wave, yet if the defendant has expressly covenanted not to plead or demur to the discovery sought, which is the common case with respect to servants of the East India Company, he shall be compelled to answer. 1 *Eq. Ab.* 77, 8. Where too a person, by his own agreement, subjects himself to a payment in the nature of a penalty on his doing a particular act, a demurrer, to discovery of that act, will not be allowed.

It seems however that a demurrer will be allowed to any discovery which may tend to shew the defendant guilty of any moral turpitude, as the birth of a child out of wedlock. *Park.* 163. but see 2 *Vez.* 451.—But a mother may in some cases be compelled to discover where her child was born, though it may lead to prove the child an alien. 2 *Vez.* 287, 294.

A defendant may likewise demur to a bill which may subject him to any *forfeiture of interest*; as if a bill is brought to discover whether a lease has been assigned without licence; or whether a defendant entitled during widowhood, or liable to forfeiture of a legacy in case of marriage without consent is married: or to discover any matter which may subject a defendant entitled to any office or franchise to a *quo warranto*. See *Toth.* 69. 1 *Vez.* 56. 2 *C. R.* 68. 2 *Atk.* 392. 2 *Vez.* 265. 1 *Eq. Ab.* 131. *c.* 10.

A defendant may in the same manner demur to a discovery which may subject him to any thing in the *nature* of a forfeiture; as to a discovery whether he was educated in the popish religion, by which he might incur the incapacities in *stat.* 11 & 12 *W.* 3. which the *stat.* 18 *Geo.* 3. *c.* 60. does not entirely remove: or whether a clergyman was presented to a second living which avoided the first. See 3 *Atk.* 457. 2 *Comm.* 661. 3 *Bac. Abr.* 3 *Atk.* 453.

See further this Dict. title *Chancery*.

DISCRETION, *Discretio.*] When any thing is left to any person to be done according to his *discretion*, the law intends it must be done with sound *discretion*, and according to law: and the court of B. R. hath a power to redress things that are otherwise done, notwithstanding they are left to the *discretion* of those that do them. 1 *Lil. Abr.* 477.

*Discretion* is to discern between right and wrong; and therefore whoever hath power to act at *discretion*, is bound by the rule of reason and law. 2 *Inst.* 56. 298. And though there be a latitude of discretion given to one, yet he is circumscribed, that what he does be necessary and convenient; without which no liberty can defend it. *Hob.* 158. The assessment of fines on offenders committing affrays, &c. and the binding of persons to the good behaviour, are at the *discretion* of our judges and justices of the peace. And in many cases for crimes not capital, the judges have a discretionary power to inflict corporal punishment on the offenders. Infants, &c. under the age of *discretion*, are not punishable for crimes; and want of *discretion* is a good exception against a witness. See title *Age*; and other apposite titles.

TO DISFRANCHISE. Is to take away one's freedom or privilege: it is the contrary to *enfranchise*. Corporations have power to *disfranchise* members, in certain cases. See titles *Corporation*, *Bye-Law*.

DISHERISON. A *disinheriting: stats.* 20 *Ed.* 1. *de vocatis ad Warr.* *Disherison* of the Crown.—*Stat.* 8 *Ric.* 2. *c.* 3. *Disherison* of the people.

DISMES, *Decimæ.*] The *tenth* part of all the fruits of the earth, and of beasts, or labour, due to the Clergy. It signifieth also the *tenths* of all *spiritual livings* granted to the crown, which is called a *perpetual disme*. *Stat.* 26 *Hen.* 8. *c.* 3. § 8. &c. It also formerly signified a *tax* or tribute levied on the *Temporalty*. See *Taxes*, *Tenths*, *Tithes*.

DISORDERLY HOUSES. See *Bawdy Houses*, *Riots*, *Theatres*.

DISPARAGEMENT. In the time of the old tenures; the matching an heir in marriage under his degree, or against decency. *Co. Lit.* 107. *Magn. Chart. c.* 6. See this Dict. title *Tenures*.

TO DISPAUPER. When a person by reason of his poverty is admitted to sue *in formâ pauperis*; if afterwards, before the suit is ended, the same party have any lands or personal estate fallen to him, or be guilty of any thing whereby he is liable to have this privilege taken from him, then he is put out of the capacity of suing *in formâ pauperis*, and is said to be *dispaupered*. See title *Costs*, II.

DISPENSATION. See title *Bishops*; and as to *Dispensations* to hold *pluralities*, see titles *Chaplains*, *Cession*.

DISPENSATIONS OF THE KING. If a *dispensation* by the Archbishop of Canterbury, is to be in extraordinary matters, or in a case that is new, the King and his council are to be consulted: and it ought to be confirmed under the broad seal. The King's authority to grant *dispensations* remains as it did at Common Law; notwithstanding *stat.* 25 *H.* 8. *c.* 21. *Cro. Eliz.* 542, 601. See further as to the dispensing power of the Crown by *non obstante*, &c. this Dict. title *King*.

DISPERSONARE. To scandalise or disparage. *Blount.*

DISSIGNARE. To break open a seal—*Sepulto patre testamentum* dissignatum *est*. *Neubrigensis*, *lib.* 2. *c.* 7.

DISSEISIN. From the Fr. *Dissaisin.*]

A species of injury by ouster to the freehold estate of another.—A wrongful putting out of him that is seised of the freehold. 1 *Inst.* 277. As where a person enters into lands or tenements, and his entry is not lawful, and keeps him that

hath the estate from the possession thereof. *Bract. lib.* 4. *c.* 3. And *disseisin* is of two sorts; either *single disseisin*, committed without force of arms; or *disseisin by force;* but this latter is more properly *deforcement. Brit. cap.* 42, 43.

*Seisin* is a technical term to denote the completion of that investiture, by which the tenant was admitted into the tenure, and without which no freehold could be constituted, or pass. *Disseisin* must therefore mean the turning the tenant out of his tenure and usurping his place and feudal relation.—*Lord Mansfield* in the case of *Taylor ex dem. Atkins* v. *Horde*, 1 *Burr.* 60. 5 *Bro. P. C.* 247.

Now, however, from the several statutes, first restraining and at length abolishing all military tenures, little more is left than the names of *feoffment*, *seisin*, *tenure*, *and freeholder*, without any precise knowledge of the things originally signified by those terms. *Ibid.*

In the same case *Lord Mansfield* said "Disseisin is a complicated fact, and differs from dispossessing. The freeholder by disseisin differs from a possessor by wrong.—Though the term disseisin happens to be the same, the thing signified by that word, as applied to the two cases of *actual disseisin*, or *disseisin by election*, is very different."—In this case it was attempted to support a common recovery, by supposing the tenant to the præcipe to have gained a freehold by disseisin. —The nature of a disseisin was therefore elaborately investigated by the counsel; and the idea of a freehold being gained thereby, learnedly repelled by *Lord Mansfield.* See further title *Fine.*

Disseisin therefore seems to imply the turning the tenant out of his fee, and usurping his place and relation.—To constitute an *actual disseisin* it was necessary that the disseisor had not a right of entry; (or, to use the old law expression, that his entry was not congeable;) that the person disseised was, at the time of the disseisin, in the actual possession of the lands; that the disseisor expelled him from them by some degree of constraint or force; and that he substituted himself to be tenant to the lord. But how this substitution was effected, it is diffcult, perhaps impossible, now to discover. 1 *Inst.* 266. *b. in n.;* 330 *b. in. n.* the latter a very long and abstruse note on the subject, and entering fully into the principles of the case above mentioned.

The injuries of *Abatement* and *Intrusion* (see those titles) are by a wrongful entry where the possession is vacant; but this of *Disseisin* is an attack upon him who is in actual possession, and turning him out of it. The former were an ouster from a freehold in law; this is an ouster from a freehold in deed. Disseisin may be effected either in corporeal inheritances, or incorporeal. Disseisin of things corporeal, as of houses, lands, &c. must be by entry, and actual dispossession of the freehold; *Co. Lit.* 181.; as if a man enter either by force or fraud into the house of another, and turns, or at least keeps, him or his servants out of possession. Disseisin of incorporeal hereditaments cannot be an actual dispossession, for the subject itself is neither capable of actual bodily possession, nor dispossession: but it depends on their respective natures and various kinds; being in general nothing more than a disturbance of the owner in the means of coming at, or enjoying them. But all disseisins of hereditaments incorporeal, are only so at the election and choice of the party injured; if, for the sake of more easily trying the right, he is pleased to suppose himself disseised. *Litt.* § 588, 589. Otherwise, as there can be no actual dispossession, he cannot be compulsively disseised of any incorporeal hereditaments.

And so too, even in corporeal hereditaments, a man may frequently suppose himself to be disseised, when he is not so in fact, for the sake of entitling himself to the more easy and commodious remedy, of an assise of *novel disseisin*, instead of being driven to the more tedious process of a writ of entry. *Heng. Parv. c.* 7. 4 *Burr.* 110.

The true injury of an actual or *compulsive disseisin*, according to what has been already stated, seems to be that of dispossessing the tenant, and substituting oneself to be the tenant of the lord in his stead; in order to which, in the times of pure feodal tenure, the consent or connivance of the lord, who, upon every descent or alienation, personally gave, and who therefore alone could change, the seisin or investiture, seems to have been considered as necessary. But when, in process of time, the feodal form of alienations wore off, and the lord was no longer the instrument of giving actual seisin, it is probable that the lord's acceptance of rent or service from him who had dispossessed another, might constitute a complete disseisin. Afterwards no regard was had to the lord's concurrence, but the dispossessor himself was considered the sole disseisor: and this wrong was then allowed to be remedied by entry only, without any form of law, as against the disseisor himself; but required a legal process against his heir or alienee. And when the remedy by assise was introduced under Henry II. to redress such disseisins as had been committed within a few years next preceding, the facility of that remedy induced others, who were wrongfully kept out of the freehold, to feign or allow themselves to be seised, merely for the sake of the remedy. 3 *Comm.* 169. &c.

By *Magna Charta*, 9 *Hen.* 3. *c.* 29. No man is to be *disseised* or put out of his freehold, but by lawful judgment of his peers, or by the law of the land: and by *stat.* 32 *H.* 8. *c.* 33. the dying seised of any *disseisor* of or in any lands, &c. having no right therein, shall not be a descent in law, to take away an entry of a person having lawful title of entry; except the *disseisor* hath had peaceable possession five years, without entry or claim by the person having lawful title. But if a *disseisor* having expelled the right owner, hath such peaceable possession of the lands five years without claim, and continues in possession so as to die seised, and the land descends to his heirs, they have a right to the possession thereof till the person that is owner recovers at law; and the owner shall lose his estate for ever if he do not prosecute his suit within the time limited by the statute of limitations. *Bac. Elem.* And if a *disseisee* levy a fine of the land whereof he is *disseised*, unto a stranger, the *disseisor* shall keep the land for ever; for the *disseisee* against his own fine cannot claim, and the conusee cannot enter, and the right which the *disseisee* had being extinct by the fine, the *disseisor* shall take advantage of it. 2 *Rep.* 56. But this is to be understood, where no use is declared of the fine by the *disseisee;* when it shall enure to the use of the *disseisor*, &c. by *Bridgman*, C. J. 1 *Lev.* 128.—See title *Claim Continual.*

By the *stat.* of *Gloucester*, (6 *Ed.* 1.) *c.* 1. damages were given in an assise, or writ of entry upon a *novel disseisin*, against the alienee, or him that was found tenant after the disseisor; and also in all cases where a man recovered by assise of *mort d'ancestor:* (Damages had been before given in an assise of *mort d'ancestor*, by the *stat.* of *Marlbridge*, 52 *Hen.* 3. *c.* 16. in cases where the land was recovered against the chief lord:) or upon writs of *cosinage*, aiel and besaiel, or against a tenant upon his own intrusion or act. *Booth, on real Actions.* 3 *Comm.* 187, 8. 200, 1. 2 *Inst.* 286. 10 *Co. Pinfold's case.* See also the *stats.* of *Westm.* 1. 3 *Edw.* 1. *c.* 24. *Westm.* 2. 13 *Edw.* 1. *c.* 25. 1 *Ric.* 2. *c.* 9. 1 *Hen.* 4. *c.* 8. and 4 *Hen.* 4. *c.* 8. by which double or treble damages are given upon *disseisins* in particular cases.

If a feme sole be seised of lands in fee, and is *disseised*, and then taketh husband; in this case, the husband and wife, as in right of the wife, have right to enter, and yet the dying seised of the *disseisor*, shall take away the entry of his wife after the death of the husband. *Co. Lit.* 246. If a person *disseises* me, and during the *disseisin*, he or his servants cut down the timber growing upon the land, and afterwards I reenter into the land, I shall have action of trespass against

him; for the law, as to the *disseisor* and his servants, supposes the freehold to have been always in me: but if the *disseisor* be *disseised* by another, or if he makes a feoffment, gift in tail, lease for life or years, I shall not have an action against the second *disseisor*, or against those who come in by title: for all the mesne profits shall be recovered against the *disseisor* himself. 11 *Rep.* 52. *Keilw.* 1.

A *disseisor* in assise, where damages are recovered against him, shall recover as much as he hath paid in rents chargeable on the lands before the *disseisin*. *Jenk. Cent.* 189. But if the *disseisor* or his feoffee sows corn on the land, the *disseisee* may take it whether before or after severance. *Dyer*, 31. 173. 11 *Rep.* 46. Where a man hath a house in fee, &c. and locks it and then departs; if another person comes to his house, and takes the key of the door, and says that he claims the house to himself in fee, without any entry into the house, this is a *disseisin* of the house. 2 *Danv. Abr.* 624. If the feoffor enters on the land of the feoffee, and makes a lease for years, &c. it is a *disseisin*, though the intent of the parties to the feoffment was, that the feoffee should make a lease to the feoffor for life. 2 *Rep.* 59. If lessee for years is ousted by his lessor, this is said to be no *disseisin*. *Cro. Jac.* 678.

A man who enters on another's land, claiming a lease for years, who hath not such a lease, is a *disseisor*: though if a man enters into the house of another by his sufferance, without claiming any thing, it will not be a *disseisin*. 9 *H.* 6. 21. 31. 2 *Danv.* 625. If a person enters on lands by virtue of a grant or lease that is void in law, he is a *disseisor*. 2 *Danv.* 630. A lessee at will, makes a lease for years, it is a *disseisin*, at the election of the lessor at will: but it is the *disseisin* of the lessee at will, not of the lessee for years. *Hill.* 7 *Car. B. R.* If a man enters into the land of an infant, though by his assent, this is a *disseisin* to the infant at his election. 11 *Ed.* 3. *Ass.* 87. And if a person commands another to enter upon lands, and make a *disseisin*, the commander is a *disseisor*, as well as such other: unless the command be conditional, when it may be otherwise. 22 *Ass.* 99. 2 *Danv.* 631.

If a man forces another to swear to surrender his estate to him, and he doth so, it will be a *disseisin* of the estate. So forcibly hindering a person from tilling his land, is a *disseisin* of the land. *Co. Lit.* 161. But if one enter wrongfully into the lands of another, and he accepts rent from such person, he shall not afterwards be taken for a *disseisor*. *Dyer*, 173. Where any person is disturbed from entering on land, it is a *disseisin*: a denial of a rent, when lawfully demanded, is a *disseisin* of the rent. *Co. Litt.* 153. Also hindering a distress for rent by force, or making rescous of a *distress*, are a *disseisin* of the rent. 2 *Danv.* 624, 625. An infant, or feme covert, may be a *disseisor*, but it must be by actual entry on lands, &c.

A feme covert shall not be a *disseisoress* by the act of the baron: if he *disseises* another to her use, she is not a *disseisoress*; nor if the wife agrees to it during the coverture: yet if after his death she agrees to it, she is a *disseisoress*. 2 *Danv.* 626, 627. Assises that lie against *disseisors* are called *writs of disseisin*; and there are several writs of entry *sur disseisin*, of which some are in the *per*, and others in *le post*, &c.

After all that has been here said on this head, we must conclude by observing that writs of *assise* on *disseisins* are now disused; and the feigned action of ejectment is introduced in their place. It is not amiss to be acquainted with this learning, but *trespass* and *ejectment* supply the place of almost every kind of *assise*. See those titles, and title *Assise of Novel Disseisin*.

DISSEISOR. Is in general he that *disseiseth* or puts another out of his land, without order of law: and a *disseisee* is he that is so put out. 4 *Hen.* 4. As the king, in judgment of law can do no wrong, he cannot be a *disseisor*. 1 *E.* 3. 8. A *disseisor* is to be fined and imprisoned; and the *disseisee* restored to the land, &c. by *stat.* 20 *H.* 3. *c.* 3. Where a *disseisor* is *disseised*, it is called *disseisin* upon *disseisin*. See title *Disseisin*.

DISSENTERS. Separatists from the Church and the service and worship thereof. Though the disposition of these Sectarists occasioned in former times several disabilities and restrictions (inconsistent with the spirit of true Toleration) to be laid upon them by abundance of statutes; (See *statutes* 23 *Eliz. c.* 1. 29 *Eliz. c.* 6. 35 *Eliz. c.* 1. 13, 14 *C.* 2. *c.* 1. 17 *C.* 2. *c.* 2. 22 *C.* 2. *c.* 1.) yet at length the Legislature, with a spirit of true magnanimity, extended that indulgence to *them* which they themselves, when in power, had held to be countenancing schism, and had denied to the church of England. The penalties are conditionally suspended by the *stat.* 1 *W. & M. st.* 1. *c.* 18. "for exempting their majesties' protestant subjects, *dissenting* from the church of England, from the penalties of certain laws," commonly called the *Toleration act*; which is confirmed by *stat.* 10 *An. c.* 2. and declares that neither the laws above-mentioned, nor the *statutes* 1 *Eliz. c.* 2. § 14. 3 *Jac.* 1. *cc.* 4, 5. nor any other penal laws made against Popish recusants (except the Corporation and Test Acts) shall extend to any Dissenters, other than papists, and such as deny the Trinity: Provided, 1. That they take the oaths of allegiance and supremacy; (or make a similar affirmation, being Quakers; see *stat.* 8 *Geo.* 1. *c.* 6;) and subscribe the declaration against popery; 2. That they repair to some congregation certified to, and registered in, the court of the bishop or archdeacon, or at the county sessions. 3. That the doors of such meeting-house shall be unlocked, unbarred, and unbolted; in default of which the persons meeting there are still liable to all the penalties of the former acts.

*Dissenting Teachers* in order to be exempted from the penalties of the *statutes* 13 & 14 *Car.* 2. *c.* 1. 15 *Car.* 2. *c.* 6. 17 *Car.* 2. *c.* 2. 22 *Car.* 2. *c.* 1. were also to subscribe the articles of religion mentioned in *stat.* 13 *Eliz. c.* 12. (which only concern the confession of the true Christian faith, and the doctrine of the sacraments;) with an express exception of those relating to the government and powers of the church, and to infant baptism; or if they scrupled subscribing the same, were to make and subscribe the declaration prescribed by 19 *Geo.* 3. *c.* 44. professing themselves to be Christians and protestants, and that they believe the scripture to contain the revealed will of God, and to be the rule of doctrine and practice.

Thus, though the crime of non-conformity was by no means universally abrogated, it was suspended, and ceased to exist, with regard to these *Protestant Dissenters*, during their compliance with the conditions imposed by these statutes; and, under these conditions, all persons who approved themselves no papists or oppugners of the Trinity, were left at full liberty to act as their conscience shall direct them, in the matter of religious worship.

By *stat.* 52 *G.* 3. *c.* 155. the acts 13, 14 *Car.* 2. *c.* 1. 17 *C.* 2. *c.* 2. and 22 *Car.* 2. *c.* 1. are wholly repealed.—By *stat.* 53 *G.* 3. *c.* 160. so much of 1 *W. & M. c.* 18. as excepts persons denying the Trinity from the benefit of that act, and so much of *stat.* 9 & 10 *W.* 3. *c.* 32. as imposes penalties on persons denying the Trinity, (See this Dict. title *Blasphemy*,) are repealed.—See also 57 *Geo.* 3. *c.* 70. repealing the like provisions of the Irish act, 6 *Geo.* 1. *c.* 5.

If any person shall wilfully, maliciously, or contemptuously, disturb any congregation assembled in any church, or permitted meeting-house, or shall misuse any preacher or teacher there, he shall be bound over to the sessions of the peace, and forfeit 20*l.* *Stat.* 1 *W. & M. st.* 1. *c.* 18. But by *stat.* 5 *Geo.* 1. *c.* 4. no mayor or principal magistrate must appear at any dissenting meeting with the ensigns of his office, on pain of

disability to hold that or any other office; the Legislature judging it a matter of propriety, that a mode of worship, set up in opposition to the national, when allowed to be excercised in peace, should be exercised also with decency, gratitude, and humility.—Dissenters also, who subscribe to the declaration in the *stat.* 19 *Geo.* 3. *c.* 44. are exempted (unless in the case of endowed schools and colleges) from the penalties of the *stats.* 13 & 14 *Car.* 2. *c.* 4. and 17 *Car.* 2. *c.* 2. which prohibit (upon pain of fine and imprisonment) all persons from teaching school, unless they be licensed by the Ordinary, and subscribe a declaration of conformity to the liturgy of the church, and reverently frequent the divine service *established* by the laws of this kingdom.

By *stat.* 52 *Geo.* 3. *c.* 155. § 2. no congregation for religious worship of Protestants, where more than twenty persons shall be present besides the preacher's family, shall be permitted, (unless registered under former acts), until duly certified to the bishop, &c. or to the sessions, and a due return shall be made thereof once a year to the bishop or archdeacon, and registered in the court of the bishop, &c. on penalty of 20*l.* on every person allowing any such congregation to meet in any place occupied by him. Persons preaching in any place without consent of occupiers, are liable to a penalty of 30*l.* Preacher and persons resorting to religious assemblies, certified and registered under this act, are exempted from all penalties as protestant dissenters taking the oaths under *stat.* 1 *W. & M. c.* 18. Preachers, when required, shall take the oaths and subscribe the declaration prescribed by 19 *G.* 3. *c.* 44. if they have not previously so done.—Any Protestant may require a Justice to administer such oaths &c. to him, and receive a certificate thereof.—Preachers having taken such oaths, and producing such certificate, and not following any business except a school master, exempted from offices and the militia.—Penalty on producing false certificate, 50*l.*—Door of all such religious assemblies shall not be bolted or barred.—Penalty on disturbing such religious assemblies 50*l.* for payment of which offender shall find sureties, or be committed.—The ecclesiastical jurisdiction over churches, &c. is saved; and the act does not extend to Quakers.

*Dissenters* chosen to any *parochial* or *ward* offices, and scrupling to take the oaths, may execute the office by deputy, who shall comply with the law in this behalf. *Stat.* 1 *W. & M. st.* 1. *c.* 18.—But it appears that they are not subject to fine on refusing to serve corporation offices.—For where a freeman of London was elected one of the sheriffs, but refused to take the office on account of his being a dissenter, and, as such, not having received the sacrament according to the rights of the church of England, within a year before his election, an action was brought in the Sheriff's Court, for the penalty incurred by such refusal, and a judgment recovered; which judgment was affirmed in a writ of error brought in the Court of Hustings. But the defendant having obtained a special commission of errors, the Judges Delegates reversed both judgments; and, on a writ of error in Parliament, this judgmeut of reversal was affirmed; the judges being (except one) of opinion that the defendant was at liberty to object to the *validity* of his election, on the ground of his own non-conformity. 3 *Bro. P. C.* (8vo. ed.) 465. *Harrison* v. *Evans.*

For further matter relative to Dissenters, see titles *Nonconformists, Oaths;* (wherein of the *Corporation* and *Test Acts;*) *Blasphemy, Religion, Toleration, Quakers.*

DISTILLERS. Of strong waters, spirits, &c. are subject to divers regulations under the Excise-laws, in order to avoid frauds in the revenue; for some particulars relative to which, see this Dict. title *Spirituous Liquors;* and also title *Excise.*

DISTRAIN. To distrain is to take and keep any thing in custody as a distress. See title *Distress.*



## DISTRESS.

DISTRICTIO.] The taking of a personal chattel out of the possession of the wrong-doer into the custody of the party injured, to procure a satisfaction for the wrong committed. 3 *Comm.* 6. The term *Distress* is also applied to the thing taken or distrained.

A man may take a *distress* for homage, fealty or any services; for fines and amercements, and for damage-feasant, &c. And the effect of it is to compel the party either to *replevy* the *distress*, and contest the taking in an action against the distrainer; or, which is more usual, to compound, or pay the debt or duty, for which he was distrained.

There are likewise *distresses* in actions compulsory, to cause a man to appear in court: and of these there is a *distress personal*, of a man's moveable goods, and profits of lands, &c. for contempt in not appearing after summoned; and *distresses real*, upon immoveable goods. And none shall be distrained to answer for any thing touching their freeholds, but by the King's writ. *Stat.* 52 *Hen.* 3. *c.* 1.

*Distress* is also divided into *finite* and *infinite: Finite*, is that which is limited by law, how often it shall be made to bring the party to trial of action, as once, twice, &c. And *infinite*, is without limitation, until the party appears; which is likewise applicable to jurors not appearing: then it hath had a further division into a *grand distress*, and *ordinary distress;* the former whereof extends to all the goods and chattels which the party hath within the country. *F. N. B.* 904. *Old. Nat. Br.* 43. 113. *Brit. c.* 26. *f.* 52.

Let us now consider, more particularly,

I. 1. *Who may distrain, and for what;* 2. *And what may be distrained.*
II. *At what Time, and in what Manner, generally, the Distress should be made.*
III. *Of the statutes regulating Distress.*

I. 1. THE MOST USUAL INJURY for which a distress may be taken is, that of non-payment of rent; and it may now be laid down as an universal principle, that a Distress may be taken for any kind of rent in arrear. See *post*, III.—For neglecting to do suit to the lord's court, or other certain personal service, the lord may distrain of common right. *Bro. Distress* 15. 1 *Inst.* 46.—For amercements in a Court Leet, a distress may be had of common right; but not for amercements in a Court Baron, without a special prescription to warrant it. *Brownl.* 36. Another injury, for which distresses may be taken, is, where a man finds beasts of a stranger wandering in his grounds *damage feasant;* doing him hurt or damage by treading down his grass, &c. in which case the owner of the soil may distrain them, till satisfaction made to him for the injury he has sustained.—Lastly for several duties and penalties inflicted by special Acts of Parliaments, remedy by distress and sale is given. See *post*, III.

Of common right a person may distrain for rents, and all manner of services; and for rent reserved upon a gift in tail, lease for life, years, &c. though there be no clause of *distress* in the deed, so as the reversion be in himself: but, on a feoffment in fee, a *distress* may not be taken, unless expressly reserved in the deed. *Co. Lit.* 57. 205. *Doctor and Student, cap.* 9.—See *Co. Lit.* 204.

A man grants a rent out of the manor of D. and further, that if the rent be behind, the grantee shall distrain for it in the manor of S. this is a rent in the manor of D. and only a penalty on the other manor. 1 *Shep. Abr.* 567. If a person seized of land in fee, demise it to one upon condition to pay his wife 5*l.* a year rent, and if it be behind, and in arrear, that she shall distrain for it; the wife may take a *distress* for

the rent. *Dyer*, 3. 48. There is a lord and tenant by 3*l.* rent and fealty, the lord dies, and his wife is endowed of the thirds of the seignory; here she may distrain for one pound, and the heir for two pounds: so if a rent be divided amongst parceners, each of them may have a *distress* for her part; but this may not be till the partition is made. *Bro.* 45.

If one joint-tenant make a gift in tail of the land, reserving a certain rent, and the rent be in arrear, he may not distrain the beasts of the other joint-tenant. 33 *H.* 6. 35. But if A. and B. are tenants in common, and A. leases his moiety to C. for years, rendering rent, and C. lease it to B. if the rent is behind, A. may take a *distress* of the cattle of B. his fellow tenant in common. 7 *Rep.* 23. *Moor*, 558.

A terre-tenant, holding under two tenants in common, cannot pay the whole rent to one after notice from the other not to pay it: and if he do, the other tenant in common may distrain for his share. 5 *Term Rep. K. B.* 216.

Where lessee of lands died before the expiration of the term, and his administrator continued in possession during the remainder, and after the expiration of it, a distress may be taken for rent due for the whole term, under *stats.* 32 *H.* 8. *c.* 37. 8 *An. c.* 14.—1 *H. Blackst.* 465.

To justify taking a *distress*, the party must see he hath good cause to distrain; that he have power to take the *distress*, and from the person from whom he takes it; that the thing, for the quality of it, be distrainable, and he distrain it in due time and place, &c. He who takes a *distress* for another ought to have good warrant for doing it; and must do it in his name: and a bailiff or servant may distrain for his master. 1 *Cro.* 748. 2 *Cro.* 436. *Godb.* 110. A *distress* ought to be made of such things whereof the sheriff may make replevin, and deliver again in as good plight and condition as they were at the time of the taking. *Co. Lit.* 47.

A landlord may distrain for the rent of ready furnished lodgings. 2 *New. Rep. C. P.* 224.

2. *Distresses* are to be of a thing valuable, whereof somebody hath a property; things *feræ naturæ*, as dogs, conies, &c. may not be distrained. 1 *Rol. Abr.* 664, 666. It is the same of cattle of the plough, beasts of husbandry, sheep, or horses joined to a cart, with a rider upon it. 1 *Vent.* 36.

Sheep are equally privileged with *averia carucæ*, and cannot be taken if any other distress can be found. See 2 *Inst.* 133.—But it has been adjudged that beasts of the plough may be taken for the poor's rate, under *stat.* 43 *Eliz.* because the remedy given by that and other statutes for compelling the payment of particular rates or sums of money, though called a distress, is in effect an *execution.* 1 *Burr.* 579.—See *acc. Saund.* on 22 *C.* 2. against *Conventicles* 39. referred to in *Com. Dig. Distress* (C.) but not cited in 4 *Burr.*

A horse with a rider upon his back; or a horse in an inn, or put into a common; an ax in a man's hand, cutting down wood; or any thing a person carries about him; utensils and instruments of a man's trade or profession, or the books of a scholar; corn in a mill, or goods in a market, to be sold for the use of the public; materials in a weaver's shop, for making of cloth; another person's garment in the house of a taylor, &c. are not distrainable; nor is any thing that is fixed to the freehold of a house, as a furnace, doors, windows, boards, an anvil, or mill-stone, &c. 1 *Sid.* 422. 440. *Co. Lit.* 47. 2 *Danv. Abr.* 461. 4 *Term Rep.* 565. 6 *Term Rep.* 138.

Implements of trade may be distrained for rent if they be not in actual use at the time, and if there be no other sufficient distress on the premises: and so may beasts of the plough under the same circumstances. 4 *Term Rep. K. B.* 565.

Deer in a private inclosure may be distrained. 3 *Comm.* 8. —Some have thought that a horse on which one is riding may be distrained for *damage feasant.* 2 *Keb.* 596. 1 *Sid.* 440. but the opinion was extrajudicial; and see 6 *Term Rep.* 138. that such distress cannot be made. See also *Cro. Eliz.* 549. 596. Some also have inclined to think that horses drawing a cart laden with corn, though one is riding in the cart, may be distrained for rent; and for that purpose may be severed from the cart, if the person distrained doth not choose to take the cart with the corn also, all of which, as it seems, are equally liable to the distress. See 2 *Keb.* 529. 596. *Raym.* 18. 1 *Vent.* 36. 1 *Sid.* 422. 440. in which latter book the reporter makes a query, whether the man's being on the cart, should not privilege the whole team.—If ferrets and nets in a warren be taken *damage feasant* it is good; but if they are in the hands of a man, they cannot be distrained *any more* (says the Reporter) *than a horse on which a man is*; nor can they be distrained if they are out of the warren, 2 *E.* 2. *Avowry* 182. 7 *E.* 3. *ib.* 199.—See *Vin.* title *Distress* A.

Goods, cattle, not of the plough, &c. sheaves of corn; corn in the straw, or threshed, and carts with corn, (but not victuals,) hay in a barn, or ricks of hay; money in a bag sealed, though not out of a bag, &c. may be distrained for rent: and so may cattle or goods driving to market, if put into a pasture by the way. *Co. Lit.* 47. 1 *Lutw.* 214. *Mod.* 385. Beasts of the tenant feeding on commons or wastes, appendant or appurtenant to the demised premises, may be distrained for rent. 3 *Comm.* 11.

If a driver of cattle asks leave of the lessor to put his cattle into his ground for a night, and he gives leave, as well as the lessee, yet it is said he is not concluded from distraining them for rent. 2 *Vent.* 59. 2 *Danv.* 642.

Beasts that escape into the tenant's ground may be distrained for rent, though they have not been *levant* and *couchant.* 1 *Inst.* 47. This doctrine has been objected to as too general; and several distinctions are taken, the sum of which seems to be, that if a stranger's beasts escape into another's land by default of the owner of the beasts, as by breaking the fences, they may be distrained for rent immediately, without being *levant* or *couchant*; but that if they escape there by default of the tenant of the land, as for want of his keeping a sufficient fence, then they cannot be distrained for rent or service of any kind, till they have been *levant* and *couchant*; nor afterwards by a landlord for rent on a lease, unless, on notice, the owner of the beasts neglects to remove them: though it is said that such notice is not necessary where the distress is by the lord of the fee for an ancient rent, or by the grantee of a rent charge.—See this subject argued at large in *Kemp* v. *Crewes*, 2 *Lutw.* 1573.

If A. brings yarn to his neighbour's house to weigh, it cannot be distrained by the lord. *Noy, n.* 298. *Vide* 15 *E.* 3. *Avowry* 216.—See *Noy.* 68. and S. C. in *Cro. Eliz.* 549. 596. —Cloth in a taylor's shop, or things delivered to persons in exercise of their trade cannot be distrained. 4 *Term Rep.* 569. —For other cases in which the property of strangers is privileged from distress, for the sake of trade and commerce, see *Francis* v. *Wyatt*, 3 *Burr.* 1498. In that case the question was, whether a person's chariot, which stood at a common livery stable, could be distrained for rent due, from the keeper of the livery stable; and the Court, after two arguments, appearing to be strongly inclined in favour of the distress, the owner of the chariot declined bringing the question to a third argument.

The goods of a third person, found on the premises, may be distrained by the collector of the house and window tax, for arrears under 43 *Geo.* 3. *c.* 161. though the goods are only borrowed and the person in arrear has other goods of his own on the premises sufficient to satisfy the arrears. 1 *Maul. & Sel. Rep.* 601.

The goods of a Carrier are privileged, and cannot be distrained for rent, though the waggon wherein loaded, is put into the barn of a house, &c. on the road. 1 *Salk.* 249.

Now by *stat.* 2 *W. & M. c.* 5. sheaves or cocks of corn, or corn loose or in the straw, or hay in any hovel, stack or rick,

or otherwise on the land, may be distrained for rent on demise, lease, or contract.

At Common Law *corn growing* could not be distrained, because it adheres to the freehold. 1 *Ro. Ab.* 666. *H. pl.* 4. But by *stat.* 11 *Geo.* 2. *c.* 19. Landlords are impowered to distrain all sorts of corn, grass, or other product growing on the estate demised, and to cut and gather them when ripe; and so in *Ireland* under *stat.* 56 *Geo.* 3. *c.* 88. § 16.

II. ALL DISTRESSES must be made by day; unless in the case of *damage feasant*; an exception allowed lest the beasts should escape before they are taken. 1 *Inst.* 142.

*Distresses* for rent are to be reasonable, and not excessive; and not to be taken in the King's highway, or the common street; or in the ancient fees of the church. 51 *H.* 3. *stat.* 4. 52 *H.* 3. *c.* 1, 2, 3, 4. 15. 2 *Ed.* 2. *st.* 1. *c.* 9. Except in case of an amercement in the *leet*.

All *distresses* for rent must be made on the premises, by the Common Law. And by *stat.* 8. *An. c.* 14. if any tenant fraudulently removes goods from off the premises, the landlord may in five days seize such goods wheresoever found, as a *distress* for the rent in arrear; unless the goods are sold for a valuable consideration before the seizure. By *stat.* 11 *Geo.* 2. *c.* 19. *thirty* days are allowed. And, whereas at Common Law, for rent due the last day of the term, the lessor could not distrain; because the term ended before the rent was due, and the lessee had the whole day to pay it; nor where the lessee held over his term, for rent incurred during the term. See 1 *Inst.* 47.) now, by the *stat.* 8. *An. c.* 14. where leases are expired, a *distress* may be taken, provided it be done within six months, and during the landlord's title and tenant's possession. See 1 *H. Blackst.* 5. where a distress of corn left on the premises under a custom, was held liable to distress after the expiration of the six months.

*Distresses* for services are to be on the land: but for an amercement in a leet, the *distress* may be taken any where within the hundred, as well out of the land, as on it, wherever the cattle are of him that is amerced; for the amercement charges only the person, and not the land; and for this a *distress* may be taken in the high street. 2 *Danv. Abr.* 644, 645. The lord cannot distrain for amercements in a court-baron, without a prescription; though he may in the leet: and the goods and cattle of another, may not be taken in *distress* on my ground, for an amercement, &c. set upon me in a court-leet or court-baron. 11 *Rep.* 44. 12 *H.* 7. 13. For services a *distress* cannot be taken but where the services are certain; or may be reduced to a certainty. *Co. Lit.* 96.

The landlord might not formerly break open a house to make a distress, for that is a breach of the peace. But when he was in the house, it was held that he might break open an inner door, 1 *Inst.* 161. *Comb.* 17. By *stat.* 11 *Geo.* 2. *c.* 19. (see *post*,) he may by assistance of the peace-officer, break open in the day time any place, whither the goods have been fraudulently removed, and locked up to prevent a distress; oath being first made in case it be a dwelling-house, of a reasonable ground to suspect that such goods are concealed therein. See 3 *Comm.* 11.

Trespass will not lie against a landlord, who occupied an apartment over a mill demised to his tenant, from which it was divided only by a boarded floor without any ceiling, for taking up the floor of his own apartment, and entering through the aperture to distrain. 4 *W. P. Taunton* 562.

Where a landlord comes to distrain cattle, which he sees on the tenant's ground, if the tenant, or any other, to prevent the *distress*, drives the cattle off the land, the landlord may make fresh pursuit, and distrain them: though if before the *distress*, the owner of the cattle tenders his rent, and a *distress* is taken afterwards, it is wrongful. 2 *Inst.* 107. 160.

A *distress* of cattle must be brought to the common *pound*, or be kept in an open place; and if they are put into a common pound, the owner is to take notice of it at his peril; but if in any other open place, notice is to be given to the owner, that he may feed them; and then if the cattle die for want of food, the tenant shall bear the loss; and the landlord may distrain again for his rent. 5 *Rep.* 90. *Co. Lit.* 47. 96. Where one impounds cattle distrained, he cannot justify the tying them in the pound: if he ties a beast, and it is strangled, he must answer it in damages. 1 *Salk.* 248. If the person distraining *damage-feasant* put the *distress* in a broken pound, and the *distress* escapes, he can have no action for the same: it is otherwise if from a good pound, without his default, when he may have action for the trespass. *Salk. ibid.* By *stats.* 53 *H.* 3. *c.* 4. 1 *P. & M. c.* 12. none shall drive a *distress* out of the county, on pain to be fined and amerced: and no *distress* of cattle shall be driven out of the hundred where taken to any pound, except to a pound overt in the same county, and not above three miles distant; nor shall any *distress* be impounded in several places under the penalty of 5*l.* and treble damages.

By *stat.* 11 *Geo.* 2. *c.* 19. § 10. persons distraining for rent, may impound the distress on any convenient part of the land chargeable with the distress.

After a *distress* is in the pound, it is said to be *in custodiâ legis*, so that the owner of it hath no absolute property therein; and therefore he cannot sell or forfeit it, nor may the same be taken in execution, &c. but it must be as a pledge or means to help the party distraining to his debt or duty. *Co. Lit.* 190. *Finch L.* 135. Cattle distrained may not be used, because by law they are only as a pledge; unless it be for the owner's benefit, by milking, &c. *Cro. Jac.* 148.

When a *distress* is taken of household goods, or other dead things, they are to be impounded in a house, or other pound covert, &c. And if the *distress* is damaged, the distrainer must answer it. *Wood's Inst.* 191. And they are to be removed immediately; except corn or hay, by *stat.* 2 *W. & M sess.* 1. *cap.* 5. But if a landlord doth not remove goods immediately, but quits them till another day, during which time they are taken away, it is not a rescous, for want of possession. *Mod. Ca.* 215. 1 *Nels.* 672.—See *post* III.

Where goods are unlawfully distrained, the owner may rescue them, before they are impounded; but not afterwards. *Co. Lit.* 47. But the safest way is to replevy, as there are few cases, in law, where a man is allowed to be his own judge, if any.—If lands lie in several counties, a *distress* may be made in one county for the whole rent. *Co. Lit.* 154. And if a landlord comes into a house, and seizes upon some goods as a *distress*, in the name of all the goods in the house; this is a good seizure of all. 6 *Mod.* 215.

By *stat.* 2 *W. & M. c.* 5. if any *distress* and sale be made where there is no rent due, the owner of the goods distrained shall recover double the value of the goods, and full costs. Also by the Common Law, if a lord or other person shall distrain several times for his service or rent, when none is in arrear, the tenant may have an *assise de sovent distress, &c. F. N. B.* 176.

Where a man is entitled to distrain for an entire duty, he ought to distrain for the whole at once, and not for part at one time, and part at another. 2 *Lutw.* 1532. But if he distrains for the whole, and there is not sufficient on the premises, or he happens to mistake in the value of the thing distrained, and so takes an insufficient distress, he, his executors, &c. may take a second distress to complete his remedy. *Cro. Eliz.* 13. *Stat.* 17 *Car.* 2. *c.* 7. 4 *Burr.* 590.

One warrant of distress for the amount of several duties imposed by different acts of parliament, each giving a power of distress, is legal. 7 *Term Rep. K. B.* 367.

Distresses must be proportioned to the thing distrained for. By the *stat. of Marlbridge*, 52 *H.* 3. *c.* 4, if any man

takes a great or unreasonable distress for rent arrere, he shall be heavily amerced for the same. As if the landlord distrains two oxen for 12*d.* rent, the taking of both is an unreasonable distress. 2 *Inst.* 407. But if there were no other distress nearer the value to be found, he might reasonably have distrained one of them; but for homage, fealty, or suit and service, as also for parliamentary wages (when they used to be paid) it is said no distress can be excessive. *Bro. Ab.* t. *Assise* 291. *Prerog.* 98. For as these distresses cannot be sold, the owner upon making satisfaction, may have his chattels again. 3 *Comm.* 12.

The remedy for excessive distresses is, by a special action on the *stat. of Marlbridge;* for an action of trespass is not maintainable upon this account, it being no injury at the Common Law. 1 *Vent.* 104. *Fitzgib.* 85. 4 *Burr.* 590.—See titles *Avowry, Replevin, Recaption, Rescous,* &c.

III. See furtiier as to Distress 3 *Comm.* 6. 145. and in the several abridgments titles *Distress* and *Replevin*, and also *Gilbert* on *Replevins.*—See also *stats.* 2 *Wm. & M. st.* 1. *c.* 5. 8 *An. c.* 14. 4 *Geo.* 2. *c.* 28. 11 *Geo.* 2. *c.* 19.

These statutes have made great alterations in the ancient law of distress, particularly by empowering persons who distrain for rent of any kind, to sell the distress for payment of rent in arrear, if the tenant or owner fails to replevy with sufficient security, within five days after taking of the distress and giving the tenant notice of the cause; in this case the constable is bound to assist, the goods are to be appraised by two sworn appraisers, and the overplus, if any, left in the constable's hands for the use of the owner. This improvement of the remedy by distress, was first introduced by *stat.* 2 *W. & M. c.* 5. with respect to rents due on demise, or contract; and afterwards by *stat.* 4 *Geo.* 2. *c.* 28. was extended to rents-seck, rents of assise, and chief-rents. Before these two statutes, the remedy by distress was very imperfect; for the distress was merely taken *nomine pœnæ*, to compel satisfaction, and could not be sold or used for the profit of the person distraining, except in case of the King and some few other instances.—See further as to distresses and other remedies for rent, this Dict. titles *Cessavit, Rent, Lease,* &c.

The following extracts will more fully explain the nature of distress by statute.

By *stat.* 11 *Geo.* 2. *c.* 19. if any tenant of lands or tenements shall fraudulently carry away his goods, to prevent *distress*, the landlord may, within thirty days after, distrain them wherever they shall be found, as if they had been on the premises; but no such goods shall be distrained, if sold *bonâ fide* for valuable consideration before seizure, to any person not privy to the fraud. Tenants committing such fraud, or others assisting, shall forfeit double the value of the goods carried off, to be recovered by action of debt, &c. And where they shall not exceed 50*l.* value, the landlord may exhibit a complaint before two justices of peace, who are to examine the fact, and inquire into the value of the goods, and thereupon order the offender to pay double value, leviable by *distress* and sale; and, for want thereof, commit the offender to the house of correction for six months. Landlords, or their agents may, with the assistance of a constable, seize any goods, fraudulently concealed in any house, outhouse, &c.

And in case of a dwelling-house, on oath first made to some justice, of reason to suspect that such goods are therein, may break open the same, and distrain them: they may also distrain for rent and cattle, or stock of their tenants, feeding in any common; or corn, grass, hops, fruits, &c. growing on the land, which they shall cut, gather, cure, and lay up when ripe, in *any proper place*, giving notice to the tenant within a week where lodged, and dispose thereof towards the satisfaction of the rent and charges; the appraisement to be made when cut or cured: but, if after a *distress* so taken, before the product be ripe and gathered, the tenant shall pay the rent, and charges of the *distress*, the said *distress* shall cease.

Persons may secure *distresses* lawfully taken, and sell them *upon the premises*, in like manner as may be done off the same, by 2 *W. & M. sess.* 1. *c.* 5. And any persons may go to and from the premises to view, appraise, buy, or take away the goods of the purchaser; and if a rescous be made of the *distress*, the persons aggrieved shall have the remedy given by the said statute.

*Distresses* made for rent justly due shall not be unlawful, nor distrainers be trespassers *ab initio*, for any irregularity in the disposition thereof; but the parties grieved to have satisfaction for *special damage*, in an *action* on the *case*, &c. But no tenant shall recover by such action, if *tender of amends* hath been made before the action brought. And in all actions of trespass, or on the case, relating to the entry, *distress* or sale, made by landlords for rents, the *defendants* may *plead* the *general issue;* and if the plaintiffs become non-suit, &c. shall recover double costs of suit.

If goods remain on the demised premises, after a fictitious bill of sale made of them under an execution, they are nevertheless liable to be distrained for rent. 3 *W. P. Taunton*, 400.

By *stat.* 56 *Geo.* 3. *c.* 88. § 16, 17. Tenants in *Ireland* having paid rent to their *immediate* landlord, if distrained by the *superior* landlord, may recover damages against their immediate landlord, and retain them out of the future accruing rent. By this act, as amended by 58 *Geo.* 3. *c.* 39. the powers of distress on corn, &c. growing, given in England by *stat.* 11 *Geo.* 2. *c.* 19. are extended to Ireland: and other provisions are made for the recovery of tenements from absconding, overholding and defaulting tenants.

By *stat.* 27 *Geo.* 2. *c.* 20. Justices of peace, in all cases, where they are empowered to levy penalties by any act of parliament, are, in their warrants of *distress*, to limit a time for the sale of the goods; the Constable making such *distress* may deduct the reasonable charges of detaining, keeping, and selling such *distress*, out of the money arising by the sale; and the overplus, if any, after such charges, and also the penalty or sum of money, shall be fully paid, shall be returned to the owner of the goods distrained; and the Constable, if required, shall shew the warrant to the party whose goods are distrained, and suffer a copy thereof to be taken.—This act not to alter or repeal the *stats.* 7 & 8 *W.* 3. *c.* 34. and 1 *Geo.* 1. *c.* 6. relating to *Distresses* on *Quakers* for *Tithes* and *Church Rates.*

Distress of the King. By the Common Law no subject can distrain out of his fee or seigniory: unless cattle are driven to a place out of the fee, to hinder the lord's *distress*, &c. But the king may distrain for rent service, or fee-farm, in all the lands of the tenant wheresoever they be; not only on lands held of himself, but of others: where his tenant is in actual possession, and the land manured with his own beasts, &c. 2 *Inst.* 132. 2 *Danv. Abr.* 643.

Distress of a Town. If a town be assessed to a certain sum, a *distress* may be taken in any part, subject to the whole duty. 2 *Danv.* 643.

DISTRESSES. Were pledges taken by the sheriff from those who came to fairs, for their good behaviour; which, at the end of the fair or mercat, were delivered back, if no harm was done. *Scotch Dict.*

DISTRIBUTION of Intestates' Estates; see title *Executor* V. 8.

DISTRICTIONE SCACCARII. The *stat.* 51 *H.* 3. *stat.* 5. as to *Distresses in the Exchequer* for the King's debt.

DISTRICT, *districtus.*] A territory, or place of jurisdiction; the circuit wherein a man may be compelled to appear; also the place in which one hath the power of distraining:

and where we say *hors de son fee*, out of his fee, it has been used for *extra districtum suum*. *Brit. c.* 120.

DISTRINGAS. A writ directed to the Sheriff, or other officer, commanding him to *distrain* a man for a debt to the King, &c. or for his appearance at a day affixed. There is a great diversity of this writ; which was sometimes of old called *constringas*. *F. N. B.* 138. There is also a *distringas* against Peers and persons entitled to privilege of parliament, under *stat.* 10 *Geo.* 3. *c.* 50. by which the effects (in law called the *issues*) levied may be sold to pay the plaintiff's costs. And it has been held that this statute extends to *all* writs of *distringas*. 5 *Burr.* 2726.—See titles *Process*; *Parliament*, (*privilege of.*) In *detinue* after judgment, the plaintiff may have a *distringas* to compel the defendant to deliver the goods, by repeated distresses of his chattels. 1 *Ro. Ab.* 737. *Rast. Entr.* 215.—See title *Execution*.

DISTRINGAS JURATORES. A writ directed to the sheriff, to distrain upon a *jury* to appear; and return issues on their lands, &c. for non-appearance. Where an issue in fact is joined to be tried by a *jury*, which is returned by the sheriff in a panel upon a *venire facias* for that purpose; thereupon there goes forth a writ of *distringas jurator'* to the sheriff, commanding him to have their bodies in court, &c. at the return of the writ. 1 *Lil. Abr.* 483. The writ of *distringas jur'* ought to be delivered to the sheriff so timely, that he may warn the jury to appear four days before the writ is returnable, if the *jurors* live within forty miles of the place of trial; and eight days if they live farther off. *Ibid.* 484. There may be an *alias*, or *pluries distringas jur'* where the *jury* doth not appear. See titles *Jury*, *Trial*.

DISTRINGAS NUPER VICECOMITEM. See title *Venditioni Exponas*.

DITTAY. A Scotch word introduced into our statute law since the union of England and Scotland. It is a term of art, and signifies the manner of proceeding against a criminal in the court of justiciary. There is likewise a brief or writ of *Dittay*, directed from the justice to the sheriff, the form whereof may be seen in *Skene de verb. signif.* v. *Iter.* where is shown at large the manner of proceeding by Dittay. *Termes de la ley.*

DIVEST. See *Devest.*

DIVIDENDS OF BANKRUPTS EFFECTS. See title *Bankrupt.*

DIVIDEND IN THE EXCHEQUER. Is taken for *one part* of an *indenture*. *Stat.* 10 *Ed.* 1. *c.* 11.

DIVIDEND OF STOCKS. A *dividable* proportionate share of the *interest of stocks* erected on public funds; as the *Bank*, *South-Sea*, and *India* stocks, &c. See title *Funds.*

DIVISA. Hath various significations: sometimes it is used for a *device*, award, or decree: sometimes for *devise* of a portion or parcel of lands, &c. by will: and sometimes it is taken for the bounds or limits of division of a parish or farm, &c. as *divisas perambulare*, to walk the bounds of a parish; in which sense it has been extended to the division between counties, and given name to towns, as to the *Devises*, a town in Wiltshire, situate on the confines, the *Division* of the West Saxon and Mercian kingdoms. *Leg. H.* 2. *cap.* 9. *Leg. Inæ*, *c.* 44. *Leg. H.* 1. *c.* 57. *Cowel.*

DIVORCE, *divortium; à divertendo.*] The separation of two, *de facto* married together, made by law: it is a judgment *spiritual*; and therefore, if there be occasion, it ought to be reversed in the spiritual court. *Co. Lit.* 335. And, besides sentence of *divorce*, in the old law, the woman *divorced* was to have of her husband a writing called a *bill of divorce*, which was to this effect; *viz. I promise that hereafter I will lay no claim to thee*, &c.—See title *Baron* and *Feme*, III. 2. VI. and particularly XI. See also title *Marriage.*

There are many *divorces* mentioned in our books; as *causâ præcontractûs*; *causâ frigiditatis*; *causâ consanguinitatis*; *causâ affinitatis*; *causâ professionis*, &c. But the usual *divorces* are only of two kinds, *i. e. à mensa & thoro*, from bed and board; and *à vinculo matrimonii*, from the very bond of marriage. A *divorce à mensa & thoro* dissolveth not the marriage; for the *cause* of it is *subsequent* to the marriage, and supposes the marriage to be lawful: this *divorce* may be by reason of adultery in either of the parties, for cruelty of the husband, &c. And as it doth not dissolve the marriage, so it doth not debar the woman of her dower, or bastardize the issue, or make void any estate for the life of husband and wife, &c. *Co. Lit.* 235. 3 *Inst.* 89. 7 *Rep.* 43. The woman under separation by this *divorce* must sue by her next friend; and she may sue her husband in her own name for alimony. *Wood's Inst.* 62.

A *divorce à vinculo matrimonii*, absolutely dissolves the marriage, and makes it void from the beginning, the causes of it being precedent to the marriage; as *præcontract* with some other person, consanguinity or affinity, within the *Levitical* degrees, impotency, impuberty, &c. On this *divorce* dower is gone; and if, by reason of *præcontract*, consanguinity, or affinity, the children begotten between them are bastards. *Co. Rit.* 335. 2 *Inst.* 93, 687. But in these *divorces*, the wife, it is said, shall receive all again that she brought with her, because the nullity of the marriage arises through some impediment; and the goods of the wife were given for her advancement in marriage, which now ceaseth; but this is where the goods are not spent; and if the husband give them away during the coverture, without any collusion, it shall bind her: if she knows her goods unspent, she may bring action of detinue for them; and as for money, &c. which cannot be known, she must sue in the spiritual court. *Dyer.* 62. *Nels. Abr.* 675. This *divorce* enables the parties to marry again. But in the other cases, a power for so doing must be obtained by act of parliament.

Where lands were formerly given to husband and wife; and the heirs of their bodies in *frank marriage*; if they had been afterwards *divorced*, the wife was to have her whole lands; and by *divorce* an estate tail of baron and feme, it is said may be extinct. *Godb.* 18. After a sentence of *divorce* is given in the spiritual court *causa precontractûs*, the issue of that marriage shall be bastards, so long as the sentence stands unrepealed: and no proof shall be admitted at Common-law to the contrary. *Co. Lit.* 235. 1 *Nels.* 674. In such case issue of a second marriage may inherit until the sentence is repealed. 2 *Leon.* 207. If after a *divorce à mensa et thoro*, either of the parties marry again, the other being living, such marriage is a mere nullity; and by sentence to confirm the first contract, she and her first husband become husband and wife to all intents, without any formal *divorce* from the second. 1 *Leon.* 173. Also on this *divorce*, as the marriage continues, marrying again while either party is living, hath been held to be bigamy within the *stat.* 1 *Jac. c.* 11.—*Cro. Car.* 333. 1 *Nels.* 674.

A divorce for *adultery* was anciently *à vinculo matrimonii*; and therefore in the beginning of the reign of Queen Elizabeth the opinion of the church of England was, that after a divorce for adultery, the parties might marry again; but in *Foliambe's* case *H.* 44 *El.* in the star-chamber, that opinion was changed; and archbishop *Bancroft*, by the advice of divines, held, that adultery was only a cause of divorce *à mensa et thoro*. 3 *Salk.* 138.

Sentence of *divorce* must be given in the life of the parties, and not afterwards: but it may be repealed in the spiritual court, after the death of the parties. *Co. Lit.* 33. 244. 7 *Rep.* 44. 5 *Rep.* 98. Upon the *divorce* of a man and his wife, equity will not assist the wife in recovering dower, at the husband's death, but shall leave her to the law; neither ought the spiritual court to grant her administration, she not being such a wife as is entitled to it; nor will the Chancery decree her a distributive share. *Preced. Canc.* 111, 112.

Divorces may be obtained by act of parliament: and for this purpose it is necessary that on the petition for the bill to the House of Lords, (where such bill usually originates) that an official copy of the proceedings, and definitive sentence of divorce *à mensâ et thoro*, in the Ecclesiastical Courts, at the suit of the petitioner, shall be delivered at the bar on oath.—Upon the second readingof the bill, the petitioner must attend the house to be examined at the bar, if the house think fit, whether there is any collusion respecting the act of adultery, or the divorce, or any action for Crim. Con.; and whether the wife was living apart from her husband under articles of separation. In all divorce bills must be contained a clause prohibiting the offending parties from intermarrying with each other, and evidence must be given, in the committee of the House of Commons, on the bill, that an action for damages has been brought against the seducer, and judgment for the plaintiff had thereon; or a sufficient reason given why such action was not brought, or judgment obtained. See the *Standing Orders* of the Two Houses.

DIURNALIS. See *Daywere.*

DOCKET, OR DOGGET. A brief in writing on a small piece of paper or parchment, containing the effect of a greater writing. *West. Symbol. par.* 2. *sect.* 106. And when rolls of *judgments* are brought into C. B. they are *docketted*, and entered on the *docket* of that term; so that upon any occasion you may soon find out a judgment, by searching these dockets, if you know the attorney's name. *Stat.* 4 *& 5 W. & M. c.* 20.—See title *Judgments.* Exemplification of *decrees in Chancery* and Commissions of *Bankruptcy*, are also *docketted.*

DOCTRINES, *illegal*, *asserting*, or *publishing*. See titles *Libel*, *Sedition*, *Treason.*

DOGS. The law takes notice of a greyhound, mastiff *dog*, spaniel and tumbler; for trover will lie for them. *Cro. Eliz.* 125. *Cro. Jac.* 44. A man hath a property in a mastiff; and where a mastiff falls on another dog, the owner of that dog cannot justify the killing the mastiff; unless there was no other way to save his dog, as that he could not take off the mastiff, &c. 1 *Saund* 84. 3 *Salk.* 139. The owner of a dog is bound to muzzle him if mischievous, but not otherwise: and if a man doth keep a dog, that useth to bite cattle, &c. if after notice given to him of it, or his knowing the dog is mischievous, the creature shall do any hurt, the master shall answer for it. *Cro. Car.* 254. 487. *Stra.* 1264.—See titles *Action*, *Trespass.*

By *stat.* 10 *Geo.* 3. 18. If any person shall steal *any dog or dogs*, they shall be liable to forfeit for the first offence from 30 to 20*l.* or be committed to gaol, for from twelve to six months, at the discretion of two justices—for the second offence to forfeit from 50*l.* to 30*l.* or be imprisoned for from eighteen to twelve months, *and also whipped.*—A punishment perhaps not too severe for notorious dog-stealers; but which may afford a dangerous handle for oppression: and *Burn*, title *Dogs*, seems seriously to doubt whether the statute extends to Bitches—a question that we believe has never yet been argued in a court of law.

A magistrate who convicts an unqualified person of killing game, and causes his dog to be brought for the purpose of seizing it, may order the dog to be killed, without any formal adjudication of seizure. 5 *W. P. Taunton*, 416.

Dogs now form one among the many articles, for keeping of which a tax is levied on the possessor. See this Dict. title *Taxes.*

DOG-DRAW. The manifest deprehension of an offender against venison in a *forest*, when he is found drawing after a deer by the scent of a hound led in his hand: or where a person hath wounded a deer, or wild beast, by shooting at him, or otherwise, and is caught with a *dog drawing* after him to receive the same. *Manwood*, *par.* 2. *cap.* 8.—See title *Forest.*

DOGGER. A light ship or vessel: as a *Dutch dogger*, &c. *Stat.* 31 *Ed.* 3. *cap.* 1. and *Dogger fish*, are *fish* brought in those ships. *Stat. ibid.*

DOGGER-MEN. Fishermen that belong to *dogger-ships.* 25 *H.* 8. *c.* 2.

DOITKIN, or *Doit.* Was a base coin of small value, prohibited by the *stat.* 3 *H.* 5. *c.* 1. We still retain the phrase, in common saying, when we would undervalue a man, *that he is not worth a* doit. See title *Coin.*

DO LAW, *facere legem.*] Is the same with to make law. *Stat.* 23 *H.* 8. *c.* 14.

DOLE, *dola.*] A Saxon word signifying as much as *pars* or *portio* in the Latin: and anciently where a meadow was divided into several shares, it was called a *dole meadow.* 4 *Jac.* 1. *c.* 11. See *Dalus.*

DOLEFISH. Seems to be the share of *fish*, which the *fishermen*, yearly employed in the North seas, do customarily receive for their allowance. *Stat.* 35 *H.* 8. *c.* 7.

DOLG-BOTE, *Sax.*] A recompence or amends, for a scar or wound. *Sax. Dic. LL. Aluredi Reg. cap.* 22.

DOLLAR. A piece of foreign coin, passing for about 4*s.* 6*d.* *Lex Mercat.* and see *Foreign Coin.*

DOM-BEC OR DOM-BOC, Sax. See *Dome-book.*

DOME, OR DOOM, from the Sax. *dom.*] A judgment, sentence, or decree. And several words end in *dom:* as *kingdom*, *earldom*, &c. from whence they may be applied to the jurisdiction of a lord, or a king. *Mon. Angl. tom.* 1. *fol.* 284.

DOME-BOOK, *Liber judicialis.*] A book composed under the direction of Alfred, for the general use of the whole kingdom, containing the local customs of the several provinces of the kingdom. This book is said to have been extant so late as the reign of Ed. IV; but it is now lost. It probably contained the principal maxims of the common law, the penalties for misdemeanors and the forms of judicial proceedings. Thus much at least may be collected from the injunction to observe it which is found in the laws of *Edward* the Elder, son of Alfred, *c.* 1. See also *Leg. Inæ. c.* 29. and *Spelm. in verb. Dombec.* This book was compiled by Alfred for the use of the Court Baron, Hundred and County Court, the Court Leet and Sheriff's tourn. See 1 *Comm.* 64. 4 *Comm.* 411. See post *Domesday.*

DOMESDAY OR DOMESDAY-BOOK: *Liber judiciarius, vel censualis Angliæ.*] A most ancient record, made in the time of William I. called the Conqueror, and now remaining in the Exchequer fair and legible, consisting of *two volumes*, a greater and a less; the greater containing a *survey* of all the *lands* in England, except the counties of Northumberland, Cumberland, Westmoreland, Durham, and part of Lancashire, which it is said were never surveyed; and excepting Essex, Suffolk, and Norfolk; which three last are comprehended in the lesser volume. There is also a *third book*, which differs from the others in form more than matter, made by the command of the same king. And there is a *fourth book* kept in the Exchequer which is called *Domesday;* and, though a very large volume, is only an abridgment of the others. Likewise a *fifth book* is kept in the *Remembrancer's* office in the Exchequer, which has the name of *Domesday*, and is the very same with the fourth before mentioned. Our ancestors had many *dome-books.* King Alfred had a roll which he called *Domesday;* and the *Domesday* book made by Will. I. referred to the time of Edward the Confessor, as that of King Alfred did to the time of Ethelred; see *ante*, *Dome-book.* The fourth book of *Domesday* having many pictures, and gilt letters in the beginning, relating to the time of King Edward the Confessor, this led him who made notes on *Fitzherbert's Register* into a mistake in *p.* 14. where he tells us that *liber* Domesday *factus fuit tempore regis Edwardi.*

The book of *Domesday* was begun by five justices, assigned for that purpose in each county, in the year 1081, and finished *anno* 1086. And the question whether lands are *antient demesne*, or not, is to be decided by the *Domesday* of Will. I. from whence there is no appeal: and it is a book of that authority, that even the Conqueror himself submitted some cases, wherein he was concerned, to be determined by it. The addition of *day* to this *Dome-book* was not meant with any allusion to the *final day of judgment*, as most persons have conceived; but was to strengthen and confirm it, and signifieth the judicial decisive record or book of *dooming* judgment and justice. *Hammond's Annot'*. *Camden* calls this book *Gulielmi Librum Censualem*, the *Tax-book of* King William; and it was further called *Magna Rolla Winton.* See the printed copy of *Domesday-book*, *pag.* 332. (*b.*) There is an ancient roll in Chester-castle, called *Domesday-roll. Blount.* At York, Worcester, and other Cathedrals their registers or chartularies are called *Domesday-books.* A transcript of the *Domesday-book* of W. I. has been made, and printed and published, by which the access to it is rendered more familiar to our antiquaries and historians. See *Spelm.* in verb. *Domesdei*, and this Dict. title *Tenures*, II. 1.

DOMES-MEN. Judges or men appointed to doom, and determine suits and controversies, hence *æg deme, I deem*, or judge. Suitors in a Court of a manor of Ancient Demesne, who are Judges there. Vide *Days men.*

DOMICELLUS. An obsolete Latin word, anciently given as an appellation or addition to the King's natural sons in France, and sometimes to the eldest sons of noblemen there; from whence we borrowed these additions: as several natural children of John of Gaunt, Duke of Lancaster, are stiled *domicelli* by the charter of legitimation. 20 *R.* 2. But according to *Thorn*, the *domicelli* were only the better sorts of servants in monasteries.

DOMICILE. The place where a man has his home. See title *Alien.* Personal property follows the person of the owner, and on his decease must be distributed according to the law of the county in which he was *domiciled* at the time of his death, and not according to the law of the county where such property is situate. *Bruce* v. *Bruce*, *Cases in Parliam.* 2 *Bos. & Pul.* 229. See title *Executor.*

The residence of a party for forty days constitutes a *domicile* as to jurisdiction in Scotland.—When there are two houses, which appear equally intitled to the appellation of *domicile*, the person is liable to both jurisdictions; but a person may have no *domicile*, as a soldier or travelling merchant, in which case a personal citation renders him subject to the jurisdiction of the judge within whose jurisdiction he is cited. *Bell's Scotch Law Dict.*

DOMIGERIUM. Is sometimes used to signify danger; but otherwise, and perhaps more properly, it is taken for power over another; *sub* domigerio *alicujus vel manu esse. Bract. lib.* 4. *tract.* 1. *cap.* 10.

DOMINA. A title given to honourable women, who anciently in their own right of inheritance held a barony. *Paroch. Antiq.*

DOMINANT TENEMENT. A term used in the Scotch law in the constitution of servitudes, and means the Tenement or subject in favour of which the service is constituted; as the tenement over which the servitude extends is called the *servient tenement. Bell's Scotch Law Dict.*

DOMINICA IN RAMIS PALMARUM, *Palm Sunday.*

DOMINIUM. Right or power. *Paroch. Antiq.* 498.

DOMINIUM DIRECTUM, and DOMINIUM UTILE, are terms by which the rights of the superior and vassal are distinguished in the Scotch Law. The right of superiority is termed the *dominium directum*, as being the highest and most ancient of the two. The vassal's right is termed the *dominium utile*, because under it he enjoys the whole fruits and produce of the estate.

DOMINUS. This word prefixed to a man's name, in ancient times usually denoted him a knight, or a clergyman; and sometimes a gentleman, not a knight, especially a lord of a manor.

DOMINUS LITIS in the civil law, an advocate who after the death of his client prosecuted a suit to sentence for the executor's use.

DOMO REPARANDA. Is a writ that lay for one against his neighbour by the fall of whose house he feared a damage and injury to his own. *Reg. Orig.* 153.

DOMUS CONVERSORUM. An ancient house built or appointed by King Hen. III. for such *Jews* as were *converted* to the Christian faith: but, King. Ed. III. who expelled the Jews from this kingdom, deputed the place for the custody of the rolls and records of the Chancery. See *Rolls.*

DOMUS DEI. The hospital of St. Julian in Southampton, so called. *Mon. Angl. tom.* 2. 440. A name applied to many hospitals.

DONATIO CAUSA MORTIS. *A gift in prospect of death;* a death-bed disposition; *viz.* when a person in his last sickness, apprehending his dissolution near, delivers or causes to be delivered to another the possession of any personal goods, to keep in case of his decease. See titles *Legacy*, *Will.*

DONATIVE, *donativum.*] Is a benefice merely *given* and disposed of by the patron to a man, without either presentation to, or institution by, the Ordinary, or induction by his order. *F. N. B.* 35. *Donatives* are so termed, because they began only by the foundation and erection of the *donor.* The King might of ancient time found a church or chapel, and exempt it from the jurisdiction of the ordinary; so he may by his letters patent give license to a common person to found such church or chapel, and make it *donative*, not presentable; and that the incumbent or chaplain shall be deprived by the founder and his heirs, and not by the bishop; which seems to be the original of *donatives* in England. See 2 *Comm.* 22. and this Dict. title *Advowson.*

In the case of a *Donative* the party is in full possession immediately on the nomination; and may maintain an action for money had and received against any person who receives the profits. 1 *Term Rep. K. B.* 403.

When the King founds a church, &c. *donative*, it is of course exempted from the Ordinary's jurisdiction, though no particular exemption is mentioned; and the Lord Chancellor shall visit the same; and where the King grants a licence to any common person to found a church or chapel, it may be *donative*, and exempted from the jurisdiction of the bishop so as to be visited by the founder, &c. *Co. Litt.* 134. 2 *Rol. Abr.* 230. The resignation of a *donative* must be to the donor or patron, and not to the Ordinary; and *donatives* are not only free from all ordinary jurisdiction, but the patron and incumbent may charge the glebe to bind the successor: and if the clerk is disturbed, the patron may bring *quare impedit*, &c. Also the patron of a *donative* may take the profits thereof when it is vacant. *Co. Lit.* 344. *Cro. Jac.* 63.

If the patron of a *donative* will not nominate a clerk, there can be no lapse: but the bishop may compel such patron to nominate a clerk by ecclesiastical censures; for though the church is exempt from the power of the Ordinary, the patron is not exempted: and the clerk must be qualified like unto other clerks of churches; no person being capable of a *donative*, unless he be a priest lawfully ordained, &c. *Yelv.* 61. *Stat.* 14 *Car.* 2. *cap.* 4. 1 *Lill.* 488.

There may be a *donative* of the King's gift with cure of souls as the church of the Tower of London is: and if such *donative* be procured for money, it will be within the statute of simony. *Mich.* 9 *Car. B. R.* A parochial church may be *donative*, and exempt from the Ordinary's jurisdiction. *Godolph.* 262. The church of St. Mary le Bone in Middlesex, is *donative*, and the incumbent being cited into the spiritual

court, to take a licence from the bishop to preach, pretending that it was a chapel, and that the parson was a stipendiary; it was ruled in the King's Bench that it was a *donative*; and if the bishop visit, the court of B. R. will grant a prohibition. 1 *Mod.* 90. 1 *Nels. Abr.* 676.

If a patron of a *donative* doth once present his clerk to the Ordinary, and the clerk is admitted, instituted, and inducted, then the *donative* ceaseth; and it becomes a church presentative. *Co. Lit.* 344. But when a *donative* is created by letters patent, by which lands are settled upon the parson and his successors, and he is to come in by the *donation* of the King, and his successors; in this case, though there may be a presentation to the *donative*, and the incumbent come in by institution and induction, yet that will not destroy the *donative*. 2 *Salk.* 541.

How far the nature of a *donative* is changed by having been augmented by Queen Anne's bounty, see 1 *T. R. K. B.* 397.

All bishopricks being of the foundation of the King, they were in ancient time *donative*. 3 *Rep.* 75. See title *Bishop*.

*Donatives* have two peculiar properties; one, that the presentation does not devolve to the king as in other livings when the incumbent is made a bishop. *Ca. Parl.* 184.—The other that a *donative* is within the statute of pluralities, if it is the *first* living; but if a donative is the second benefice taken without a dispensation, the first would not be void; for the words of the statute are *instituted and inducted* to any other, which are not applicable to donatives. 1 *Wood.* 330.—And therefore it seems if donatives are taken last they may be held with any other preferment.

DONIS, Statute *de*. The statute of *West.* 2. *viz.* 13 *Ed.* 1. *c.* 1. called the statute *de donis conditionalibus*. This statute revives, in some sort, the ancient feodal restraints which were originally laid on alienations; by enacting, that from thenceforth the will of the donor be observed, and that the tenements so given (to a man and the heirs of his body) should at all events go to the issue, if there were any, or if none, should revert to the donor. See 2 *Comm.* 12.; and this Dict. titles *Estate*, *Tail*, *Limitation*.

DONOR AND DONEE. *Donor* is he who gives lands or tenements to another in tail, &c. And the person to whom given is the *donee*.

DOOMSDAY. See *Domesday*.

DORTURE, *dormitorium*. The common room or chamber, where all the *Fryars*, or religious of one *convent*, slept and lay all night. *Stat.* 25 *H.* 8. *c.* 11.

DOSSALE. Hangings or tapestry.—*Mat. Par.*

DOTE ASSIGNANDA. Is a writ that lay for a widow, where it was found by office, that the King's tenant was seised of lands in fee, or fee-tail at the day of his death, and that he held of the King in chief, &c. In which case, the widow came into the Chancery, and there made oath, that she would not marry without the King's leave; whereupon she had this writ to the escheator, *to assign her dower*, &c. But it was usual to make the assignment of the dower in the Chancery, and to award a writ to the escheator, to deliver the lands assigned unto her. *Stat.* 15 *Ed.* 4. *cap.* 4. *Reg. Orig.* 297. *F. N. B.* 26. See title *Dower*.

DOTE UNDE NIHIL HABET. A writ of *dower*, that lies for the widow against the tenant, who bought land of her husband in his life-time, whereof he was solely seised in fee-simple or fee-tail, and of which she is dowable. *F. N. B.* 147.

See the law and form of the writ in *Booth's Real Actions* 166, &c. See further title *Dower*.

DOTIS ADMENSURATIONE. *Admeasurement of dower*, where the widow holds more than her share, &c. See titles *Admeasurement*, *Dower*.

DOTKIN. See *Doitkin*.

DOUBLE AVAIL OF MARRIAGE. Is the double of the value of the vassal's wife's tocher, due to the superior; because he refused a wife equal to him when offered by the superiour; but this is modified to three years rent of the vassal's free estate. *Scotch Dict.*

DOUBLE PLEA, *duplex placitum*.] Is where a defendant allegeth for himself two several matters, in bar of the plaintiff's action, when one of them is sufficient; which shall not be admitted: as if a man plead several things, the one not depending upon the other, the plea is accounted *double*, and will not be allowed; but if they mutually depend on each other, and the party may not have the last plea without the first, then it shall be received. *Kitch.* 223. And where a *double* plea that is wrong, is pleaded; if the plaintiff reply thereto, and take issue of one matter; if that be found against him, he cannot afterwards move in arrest of judgment; for by the replication it is allowed to be good. 18 *Ed.* 4. 17.

If a man pleads two or more matters, when he is compelled to shew them, it makes not the *plea double*; so it is where two distinct things are pleaded, which require but one answer: and in case a man pleads two several matters or things, and only one is material, the other being surplusage, or but matter of inducement, and needing no answer, the plea is not *double*. *Hob.* 197. Where there are several inducements to a plea, they shall not make the *plea double*: and *double pleas* are allowable in assises of *novel disseisin*, &c. but not in other actions. *Jenk. Cent.* 75.

By *stat.* 4 *Ann. c.* 16. *sect.* 4. It shall be lawful for any defendant or tenant in any action or suit, or for any plaintiff in replevin, in any court of record, with the leave of the same court, to plead as many several matters thereto, as he shall think necessary for his defence. That is, in so many separate and distinct pleas, and where there are more pleas than one. By virtue of this statute defendant is said to plead *double*, by leave of the court.—See further title *Pleading*.

DOUBLE QUARREL, *duplex querula*.] Is a complaint made by any clerk, or other, to the archbishop of the province against an inferior Ordinary, for delaying or refusing to do justice in some cause ecclesiastical; as to give sentence, institute a clerk, &c. and seems to be termed a *double quarrel*, because it is most commonly made against both the judge, and him at whose suit justice is denied or delayed: the effect whereof is, that the archbishop taking notice of the delay, directs his letters under his authentical seal to all clerks of his province, commanding them to admonish the Ordinary within a certain number of days to do the justice required, or otherwise to appear before him or his official, and there alledge the cause of his delay; and to signify to the Ordinary, that if he neither perform the thing enjoined, nor appear and shew cause against it, he himself in his *court of audience*, will forthwith proceed to do the justice that is due. *Cowel.* See *Quare Impedit*.

DOUBLES, *Fr.*] Letters patent. *St.* 14 *H.* 6. *c.* 6.

DOVE-COTE. See *Pigeon-House*.

DOVER CASTLE. The constable of *Dover castle* shall not hold plea of any foreign county within the castle gates, except it concern the keeping of the castle; nor shall he distrain the inhabitants of the ports, to plead elsewhere or otherwise than as they ought, according to the charters, &c. *Stat.* 28 *Ed.* 1. *c.* 7. See title *Cinque Ports*.

DOW. To give or *endow*, from the Latin word *Do*.

DOWAGER, *dotata*, *dotissa*.] A widow endowed; applied to the widows of Princes, Dukes, Earls, and other great personages.

DOWAGER, *Queen*.] Is the widow of the King, and as such enjoys most of the privileges belonging to her as Queen consort. But it is not high treason to conspire her death, or violate her chastity; because the succession to the crown is not thereby endangered. But no man can marry her, without a special licence from the King, on pain of forfeiting his lands and goods. 2 *Inst.* 18. See *Riley's Plac. Parl.* 672. 1 *Comm.* 223. See title *King*.

## DOWER.

DOTARIUM.] The portion which a widow hath of the lands of her husband at his decease, for the sustenance of herself, and education of her children. 1 *Inst.* 30. See title *Tenure*, III. 8.

I. *Of the several Kinds of Dower.*
II. 1. *What Woman shall be endowed;* 2. *Of what Estate.*
III. *Of the Assignment and Admeasurement of Dower.*
IV. *What shall be deemed a Bar and forfeiture of Dower.*
V. *Of the Proceedings in Dower.*

I. There were formerly five kinds of *dower* in this kingdom. 1. *Dower by the Common Law*; which is a third part of such lands or tenements whereof the husband was sole seised in fee-simple, or fee-tail, during the coverture; and this the widow is to enjoy during her life.

2. *Dower by custom*; which is that part of the husband's estate to which the widow is intitled after the death of her husband, by the *custom* of any manor or place, so long as she lives sole and chaste; and this is more than one third part, for in some places she shall have *half* the land, as by the custom of *gavelkind*; and in divers manors the widow shall have the *whole* during her life, which is called her *free bench*: but as custom may inlarge, so it may abridge *dower* to a fourth part. *Co. Litt.* 33.

3. *Dower ad ostium ecclesiæ; at the church-door*, made by the husband himself immediately after the marriage, who named such particular lands of which his wife should be endowed; and in ancient time it was taken, that a man could not by this *dower*, endow his wife of more than a third part, though of less he might: and as the certainty of the land was openly declared by the husband, the wife after his death might enter into the land of which she was endowed without any other assignment. *Co. Lit.* 34. *Lit.* § 39.

4. *Dower ex assensu patris*, which is only a species of *the dower ad ostium ecclesiæ*; which likewise was of certain lands named by a son who was the husband, *without the consent of his father* then living, and always put in writing as soon as the son was married: and if a woman thus endowed or *ad ostium ecclesiæ*, after the death of her husband, entered into the land allotted her in *dower*, and agreed thereto, she was concluded to claim any *dower* by the Common Law, *Litt.* §§ 40, 41.

5. *Dower de la pluis belle*; which was where the wife was endowed *with the fairest part* of her husband's estate.

But of all these kinds of *Dower*, the two first are now only in use.

II. 1. A Woman to be endowed must be the actual wife of the party at the time of his decease. If she be divorced *à vinculo matrimonii*, she shall not be endowed; for *ubi nullum matrimonium, ibi nulla dos. Bract. lib.* 2. *c.* 39. § 4.

But a divorce *à mensa et thoro* only, doth not destroy the dower; *Co. Litt.* 32; no, not even for adultery itself by the Common Law. By *stat. West.* 2. (13 *Ed.* 1. *c.* 34.) if a woman voluntarily leaves (which the law calls eloping from) her husband, and lives with an adulterer, she shall lose her dower, unless her husband be voluntarily reconciled to her. And in a case where John de Camoys had assigned his wife by deed, it was decided in parliament, that, notwithstanding the pretended purgation of the adultery in the spiritual court, the wife was not entitled to dower. 2 *Inst.* 435. If however, after the elopement of a wife, her husband and she demean themselves as husband and wife, it is evidence of reconciliation. *Dyer*, 106. Lady Powys's case where the reconciliation was specially pleaded and allowed.

A marriage celebrated *bona fide* in Scotland, will undoubtedly entitle the woman to *dower* in England: and the lawfulness of such a marriage may be tried by a Jury in England. 2 *H. Blackst.* 145.

It was formerly held, that the wife of an ideot might be endowed, though the husband of an ideot could not be tenant by the curtesy. *Co. Litt.* 31. But as it seems to be at present agreed, upon principles of sound sense, and reason, that an ideot cannot marry, being incapable of consenting to any contract, this doctrine cannot now take place. By the ancient law the wife of a person attainted of treason or felony could not be endowed; to the intent, says *Staundford*, (*P. C. b.* 3. *c.* 3.) that if the love of a man's own life cannot restrain him from such atrocious acts, the love of his wife and children may: though *Britton*, (*c.* 110.) gives it another turn; *viz.* that it is presumed the wife was privy to her husband's crime. However the *stat.* 1 *Ed.* 6. *c.* 12. abated the rigour of the Common Law in this particular, and allowed the wife her dower. But a subsequent *stat.* 5 & 6 *Ed.* 6. *c.* 11. revived the severity against the widows of traitors, who are now barred of their dower; (except in the case of certain treasons relating merely to the coin; *stats.* 5 *Eliz. c.* 11. 18 *Eliz. c.* 1. 8 & 9 *W.* 3. *c.* 26. 15 & 16 *Geo.* 2. *c.* 28.) but the widows of felons are not barred. The wife must be above nine years old at her husband's death, otherwise she shall not be endowed. *Litt.* § 36. See 2 *Comm.* 130.

The wife of a man who is banished shall have *dower* in his life-time; it is held otherwise, if he is professed in religion: and a jointress of a banished husband shall enjoy her jointure, in his life. *Co. Litt.* 133. *Perk.* 5. 307.

If a woman be of the age of nine years, at the death of her husband she shall be endowed of whatsoever age he is; because after the death of the husband the marriage is adjudged lawful. *Co. Litt.* 33.

The wife of a *felo de se* shall have dower. *Plowd.* 261. *a.* 262. *a.* So if the husband be outlawed in trespass, or any civil action, for this works no corruption of blood, or forfeiture of lands. *Bro.* 82. *Perk.* 388. *Co. Lit.* 31. *a.*

If a woman being a lunatick kill her husband, or any other, yet she shall be endowed, because this cannot be felony in her who was deprived of her understanding by the act of God; so though she be of sound mind, and refused to bring an appeal of his death, when he is killed by another, yet she shall be endowed; for this is only a waver of that privilege the law has given her to be avenged of her husband's murderer; so it seems if she refuses to visit and assist her husband in his sickness, yet she shall be endowed, for this is only undutifulness, which the law does not punish with the loss of her entire subsistence. *Perk.* 364, 365.

If a man take an *alien* to wife and dieth, she shall not be endowed, except the wife of the King, who shall be endowed by the law of the crown.—And if a Jew born in England marry a Jewess also born here, the husband becomes a christian, purchases lands and dies.—The wife, (not being also a christian) shall not have dower. 1 *Inst.* 31 *b*; 32 *a.*

In the notes on Mr. *Hargrave's* edition of *Co. Litt.* the latter part of the above is confirmed; as to the former there is the following remarkable note. "Anciently a woman alien was not dowable; but by special act of parliament not printed. *Rot. Parl.* 8 *H.* 5. *n.* 15. all women aliens who from thenceforth should be married to English men *by licence of the King*, are enabled to demand their Dower after the death of their husbands, to whom they should in time to come be married, in the same manner as *English* women. But this act did not extend to those married before; and therefore in *Rot. Parl.* 9 *H.* 5. *n.* 9. there is a special act of parliament to enable Beatrice countess of Arundel, born in Portugal, to demand her Dower. *Hal.* MSS: see *Acc.* 1 *Ro. Ab.* 675."—See also 9 *Vin.* 210. (8vo. ed.)

2. A Woman is now by law entitled to be endowed of all lands and tenements, of which her husband was seised in fee-

simple, or fee-tail *general* at any time during the coverture; and of which any issue, which she might have had, might, by possibility, have been heir. *Litt.* § 36. 53. Therefore if a man, seised in fee-simple, has a son by his first wife, and afterwards marries a second wife, she shall be endowed of his lands; for her issue might by possibility have been heir, on the death of the son, by the former wife. But, if there be a donee in *special tail*, who holds lands to him and the heirs of his body begotten on A. his wife; though A. may be endowed of these lands, yet if A. dies, and he marries a second wife, that second wife shall never be endowed of the lands entailed; for no issue that she could have, could, by any possibility, inherit them. *Ibid.* § 53.

But in case land be given to the husband and wife in tail, the remainder in tail to the husband, and the first wife dying without issue, he marries another wife; this second wife will be entitled to *dower* after his death. *Lit.* § 53. 40 *Ed.* 3. 4. 2 *Shep. Abr.* 63. For here he hath an estate in tail. The wife of a *tenant in common*, but not a *joint-tenant*, shall have *dower*; and she shall hold her part in common with the tenants in common. *Kitch.* 160.

A seisin in law of the husband will be as effectual as a seisin in deed, in order to render the wife dowable; for it is not in the wife's power to bring the husband's title to an actual seisin, as it is in the husband's power to do with regard to the wife's lands; which is one reason why he shall not be a tenant by the curtesy, but of such lands whereof the wife, or he himself in her right, was actually seised in deed. *Co. Litt.* 31.—The seisin of the husband, for a transitory instant only, when the same act which gives him the estate conveys it also out of him again, (as where by a fine land is granted to a man, and he immediately renders it back by the same fine,) will not entitle the wife to dower. *Cro. Jac.* 615. 2 *Rep.* 67. *Co. Litt.* 31. for the land was merely *in transitu*, and never vested in the husband, the grant and render being one continued act. But, if the land abide in him for the interval of but one single moment, it seems that the wife shall be endowed thereof. And, in short, a widow may be endowed of all her husband's lands, tenements, and hereditaments, corporeal or incorporeal, under the restrictions beforementioned; unless there be some special reason to the contrary.

Thus, a woman shall not be endowed of a castle, built for defence of the realm. *Co. Litt.* 31. 5. 3 *Lev.* 401. Nor of a common without stint; for, as the heir would then have one portion of this common, and the widow another, and both without stint, the common would be doubly stocked. *Co. Lit.* 32. 1 *Jon.* 315. Copyhold estates are also not liable to dower, being only estates at the lord's will; unless by the special custom of the manor, in which case it is usually called the *widow's free-bench*. 4 *Rep.* 22. See title *Copyhold*. But where dower is allowable, it matters not though the husband alien the lands during the coverture; for he aliens them liable to dower. *Co. Litt.* 32.

It is now settled that although the husband may be tenant by the curtesy of a trust estate of inheritance, (see title *Curtesy*,) the wife is not entitled to dower out of such an estate. 3 *P. Wms.* 229.—The reason assigned for this is, that the wife was not endowed of a use at Common Law.—And, from analogy to trusts, it has been determined that a wife shall not be endowed of an equity of redemption, where the estate was mortgaged in fee by the husband previous to the marriage. 1 *Bro. C. R.* 326.

If lands are exchanged by the husband for other lands, the wife may be endowed of which lands she will, as the husband was seised of both; though she may not be endowed of the lands given and taken in exchange. *Co. Lit.* 31.

Where the estate, which the husband hath during the marriage, is ended, there the wife shall lose her *dower*. *New Nat. Br.* 333. But of an estate-tail in lands determined, a woman shall be endowed; in like manner as a man may be tenant by the curtesy of her lands. *Co. Lit.* 31. And if a wife be endowed of her third part, and afterwards evicted by an elder title, she shall have a new writ of *dower*, and be endowed of the other lands. 2 *Danv. Abr.* 670. Though this is, where it is the immediate estate descended to the heir; and not when it is the estate of an alienee. 9 *Rep.* 17. The wife is *dowable* where lands are recovered against the husband by default or covin: and a woman, deforced of her *dower*, shall recover damages, *viz.* the value of her *dower* from her husband's death. 13 *E.* 1. 20 *H.* 3. If the husband doth not die seised, after demand and refusal to assign *dower* to her, she shall have damages from the time of the refusal. *Jenk. Cent.* 45. She shall be endowed of a reversion, expectant on a term of years; and of a rent reserved thereon. *Lutw.* 729. If the husband hath only an estate for life, *remainder to another in tail*, though the remainder over is to his heirs, the wife shall not be endowed. 2 *Danv.* 656. A woman shall not be endowed of the goods of her husband; nor of a castle, or capital messuage: but of all other lands and tenements she may. *Co. Litt.* 35.

A grantee of a rent in fee or tail dies without heir, his wife shall be endowed: but not where the rent arises upon a reservation to the donor and his heirs, on a gift in tail, and the donee dies without issue; for this is a collateral limitation. *Plowd.* 156. *F. N. B.* 149. If, during the coverture, the husband doth extinguish rents by release, &c. yet she shall be endowed of them; for, as to her dower in the eye of the law, they have continuance. *Co. Lit.* 32. And where a rent is descended to the husband, but he dies before any day of payment; notwithstanding, the wife shall be endowed of it. 1 *H.* 7. 17. If lands are given to the husband and wife in tail, and, after the death of the husband, the wife disagrees, she may recover her *dower*; for, by her waiving her estate, her husband, in judgment of law, was sole seised *ab initio*. 3 *Rep.* 27. If lands are improved, the wife is to have one third according to the improved value. *Co. Lit.* 32. And if the ground delivered her be sowed, she shall have the corn. 2 *Inst.* 81.

*Dower* is an inseparable incident to an estate in tail or fee, and cannot be taken away by condition. If one, seised in fee of lands, make a gift in tail, on condition that the wife shall not have *dower*, the condition is void. 6 *Rep.* 41. If tenant in tail die without issue, so that the land reverts to the donor; or in case he covenants to stand seised to uses, and dies, his wife will be endowed: and a devise of land by the husband to his wife by will, is no bar of her *dower*, but a benevolence. 8 *Rep.* 34. *Yelv.* 51. *Bro. Dower*, 69. See *post.* IV.

A person grants and conveys land to D. and his heirs, on condition, to re-demise the same back, &c. which afterwards he does, and dies; here D.'s widow may, nevertheless, be *endowed*. *Abr. Cas.* 217. A. is tenant in tail of lands, the remainder to B. in tail, remainder to A. in fee; if A. bargains and sells the land to C. and his heirs, the wife of the bargainee shall have *dower*, determinable upon the death of the tenant in tail. 10 *Rep.* 96. And if a feoffment be made upon condition to reinfeoff, and the feoffee take a wife, she may have her *dower* till re-infeoffment, or an entry made for not doing it: and so it is of other defeasible estates. 2 *Rep.* 59. *Perk.* § 420. If one be disseised, and after doth marry, if he die before entry, his wife shall not have *dower*: and where a person recovers land in a real action, and before his entry or execution made he dieth, the wife shall not be endowed of this land. 2 *Rep.* 56. *Perk.* 377. In these cases the husband was not actually seised, *sed qu?* for, as before observed, where there is a seisin in law, she shall be endowed. *Co. Lit.* 31, 32, &c. So that these cases depend on the construction of what is, and what is not, a *seisin* in *law*. And see post. *Div.* IV. towards the end, and *Perk.* 379, 380.

Although of copyhold lands a woman shall not be endowed, unless there be a special custom for it, yet if there be a custom to be endowed thereof, then she shall have the assistance of such laws as are made for the more speedy recovery of dower in general, being within the same mischief, and therefore shall recover damages within the statute of *Merton*. 4 *Co.* 22. *Hob.* 216. 5 *Co.* 116.

Of tithes women were not dowable till 32 *H.* 8. *c.* 7. for before that statute tithes were not a lay fee, but now they are dowable of them. *Style's P. R.* 122. 11 *Co.* 25. *Co. Lit.* 32 *a.* 159 *a.* 1 *Rol. Abr.* 682.

Of an advowson, be it appendant or in gross, a woman shall be endowed; for this may be divided as to the fruit and profit of it, *viz.* to have the third presentation. See *Perk.* 343, 344. *F. N. B.* 148. 150. *Co. Lit.* 32. *Cro. Jac.* 621. *Cro. Eliz.* 360. 1 *Rol. Abr.* 683. *Co. Lit.* 379. 3 *Leon.* 155. *Cro. Jac.* 691.

Dower is due of mines wrought during the coverture, whether by the husband or lessee for years, whether paying pecuniary rents or rents in kind, and whether the mines are under the husband's own land, or have been absolutely granted to him to take the whole stratum in the land of others. *Stoughton* v. *Leigh*.—And such dower shall be assigned by metes and bounds, if practicable, otherwise either by a proportion of the profits or separate alternate enjoyment of the whole for short proportionate periods. 1 *W. P. Taunton*, 142. 402.

III. By the old law, grounded on the feodal exactions, a woman could not be endowed without a fine paid to the lord: neither could she marry again without his licence; lest she should contract herself, and so convey part of the feud to the lord's enemy. *Mirr. c.* 1. § 3. This licence the lord took care to be well paid for; and, as it seems, would sometimes force the dowager to a second marriage, in order to gain the fine. But, to remedy these oppressions, it was provided, first, by the famous charter of *Henry* I. *A. D.* 1101. and afterwards by *Magna Charta*, *c.* 7. that the widow shall pay nothing for her marriage, nor shall be distrained to marry afresh if she chooses to live without a husband; but shall not, however, marry against the consent of the lord: and farther, that nothing shall be taken for assignment of the widow's dower, but that she shall remain in her husband's capital mansion-house for forty days after his death, during which time her dower shall be assigned. These forty days are called the widow's *quarantine*; a term made use of in law to signify the number of forty days, whether applied to this occasion or any other. The particular lands to be held in dower, must be assigned, by the heir of the husband, or his guardian; *Co. Litt.* 34, 5. not only for the sake of notoriety, but also to entitle the lord of the fee to demand his services of the heir, in respect of the lands so holden. For the heir, by this entry, becomes tenant thereof to the lord, and the widow is immediate tenant to the heir, by a kind of sub-infeudation, or under-tenancy, completed by this investiture or assignment: which tenure may still be created, notwithstanding the statute of *quia emptores*, because the heir parts, not with the fee-simple, but only with an estate for life. If the heir or his guardian do not assign her dower within the time of quarantine, or do assign it unfairly, she has her remedy at law, and the sheriff is appointed to assign it. *Co. Lit.* 34, 5. Or if the heir (being under age) or his guardian assign more than she ought to have, it may be afterwards remedied by a writ of *admeasurement* of dower. *F. N. B.* 148. *Finch L.* 314. *st. Westm.* 2. 13 *Ed.* 2. *c.* 7. If the thing of which she is endowed be divisible, her dower must be set out by metes and bounds; but if it be indivisible, she must be endowed specially; as of the third presentation to a church, the third toll-dish of a mill, the third part of the profits of an office, the third sheaf of tithe, and the like. *Co. Lit.* 32.

The assignment of the lands is for the life of the woman: and if lands are assigned to a woman for years, in recompense of *dower*, this is no bar of *dower*; for it is not such an estate therein as she should have. 2 *Danv. Abr.* 668. Also where other land is assigned to the woman, that is no part of the lands wherein she claims *dower*; that assignment will not be good or binding: And there must be certainty in what is assigned, otherwise, though it be by agreement, it may be void. 4 *Rep.* 2. 1 *Inst.* 34. If a wife accept and enter upon less land than the third of the whole, on the sheriff's assignment, she is barred to demand more, *Moor* 679. But if where a wife is entitled to *dower* of the lands of her first husband, her second husband accepts of this *dower* less than her third part, after his death she may refuse the same, and have her full third part. *Fitz. Dower*, 121.

If a wife, having right of *dower* in the land, accept of a lease for years thereof after the death of her husband, it suspends the *dower*; though not such acceptance of a lease before the husband's death, &c. for then the wife has only a *title* to have *dower*, and not an *immediate right* of *dower*. *Bro. Ca.* 372. *Jenk. Cent.* 15. A widow accepting of *dower* of the heir, against common right, shall hold it subject to the charges of her husband; but otherwise it is if she be endowed against common right by the sheriff. 2 *Danv.* 672. By provision of law, the wife may take a third part of the husband's lands, and hold them *discharged*. *Ibid.* If *dower* be assigned a woman on condition, or with an exception, the condition and exception are void. *Cro. Eliz.* 541.

Where there are three manors, one of them may be assigned to the wife in *dower* in lieu of *dower* in all three; though it is said that a third part of every manor ought to be assigned. *Moor*, 12, 47. The sheriff may asssign a rent out of the land in lieu of *dower*; and her acceptance of the rent will bar *dower* out of the same land, but not of other lands. 2 *And.* 31. *Dyer*, 91. 1 *Nels. Abr.* 680.

A woman intitled to *dower* cannot enter till it be assigned to her, and set out either by the heir, tertenant or sheriff, in certainty. 1 *Rol. Abr.* 681. *Dyer*, 343. *Plowd.* 529. *Bro.* 16. *Co. Lit.* 34 *b.* 37 *a. b.*

None can assign *dower* but those who have a freehold, or against whom a writ of *dower* lies; therefore a tenant by statute merchant, statute staple, or *elegit*, or lessee for years cannot assign *dower*, for none of these have an estate large enough to answer the plaintiff's demand. *Perk.* 403, 404. *Co. Lit.* 35. *Bro.* 63. 94. 1 *Rol. Abr.* 681. 6 *Co.* 57.

If a woman be *dowable* of land, meadow, pasture, wood, &c. and any of these be assigned in lieu of *dower* of all the rest, it is good, though it be against common right, which gives her but the third part of each, for the heir's enjoyment of the residue sufficiently accounts for her title to what she has. 1 *Rol. Abr.* 683. *Moor*, *pl.* 47. 66.

If lands whereof a woman hath no right to be endowed, or a rent out of such lands be assigned in lieu of her *dower*, this does not bar her demand of *dower*, for she having no manner of title to those lands, cannot without livery and seisin be any more than tenant at will, which is no sufficient recompence for an estate for life, which her dower was to be. *Perk.* 407. *Co. Lit.* 34. 4 *Co.* 1. *Co. Lit.* 169. *Bro.* 3.

If the heir within age assign to the wife more land in *dower* than she ought to have, he himself shall have a writ of *admeasurement* of dower at full age by the Common Law: so if too much be assigned in dower by the heir within age, or his guardian in chivalry, and the heir dies, his heir shall have such writ, to rectify the assignment; but the heir, in whose time the assignment of too much was by the guardian, cannot have such writ till his full age, because till then the interest of the guardian continues; and if any wrong be done, it is to the guardian himself, and not to the heir; if a disseisor assigns too much, the heir of the disseisee shall have *admea-*

*surement* by the Common Law. *F. N. B.* 148. 332. *Co. Lit.* 39 *a.* 2 *Inst.* 367. 7 *H.* 2. 4. See *Statutes* 13 *E.* 1. *c.* 7 & 8.

If the heir within age, before the guardian enters, assigns too much in dower, the guardian shall have a writ of *admeasurement* of dower, by the statute of *W.* 2. *c.* 7. before which statute the guardian had no remedy because the writ of *admeasurement* being a real action, lay not for the guardian, who had but a chattel; also by the same statute it is provided, that if the guardian pursue such writ seintly, or by collusion with the wife, the heir at full age shall have a writ of *admeasurement*, and may alledge the feint pleading or collusion generally. 2 *Inst.* 367.

If the wife after assignment of dower *improves* the lands, so as thereby they become of greater value than the other two parts, no writ of *admeasurement* lies; so if they be of greater value, by reason of mines open at the time of the assignment, no writ of *admeasurement* lies, because the land in quantity was no more than she ought to have; and then it is lawful to work the mines, which were open at the time of such assignment. *F. N. B.* 149. 2 *Inst.* 368. 5 *Co.* 12.

IV. Upon preconcerted marriages, and in estates of considerable consequence, tenancy in dower happens very seldom: for the claim of the wife to her dower at the Common Law, diffusing itself so extensively, it became a great clog to alienations, and was otherwise very inconvenient to families. Wherefore since the alteration of the ancient law respecting dower *ad ostium ecclesiæ*, which hath occasioned the entire disuse of that species of dower, jointures have been introduced in their stead, as a bar to the claim at Common Law.

A widow may be barred of her dower, not only by elopement, divorce, being an alien, the treason of her husband, and other disabilities before-mentioned, (see *ante* II.) but also by detaining the title deeds, or evidences of the estate from the heir, until she restores them. *Ibid.* 39. Though if she denies the detainer, and it is found against her, she loses her dower. *Hob.* 199. 9 *Rep.* 19. By the *stat. of Gloucester*, 6 *Ed.* 1. *c.* 7. if a dowager aliens the land assigned her for dower, she forfeits it *ipso facto*, and the heir may recover it by action. A woman also may be barred of her dower, by levying a fine with her husband, or suffering a recovery of the lands during her coverture. *Pig. of Recov.* 66. 2 *Rep.* 74. *Plowd.* 514.—See title *Fine and Recovery*.

But the most usual method of barring dower, is by jointures, as regulated by the *stat.* 27 *Hen.* 8. *c.* 10.

A jointure, which, strictly speaking, signifies a joint-estate, limited to both husband and wife, but in common acceptation extends also to a sole estate, limited to the wife only, is thus defined by *Coke*, 1 *Inst.* 36. "A competent livelihood of freehold for the wife, of lands and tenements; to take effect, in profit or possession, presently after the death of the husband; for the life of the wife at least." This description is framed from the *stat.* 27 *Hen.* 8. *c.* 10. commonly called the statute of *Uses*. (See title *Uses.*)—Before the making of that statute, the greatest part of the land in England was conveyed to uses; the property or possession of the soil being vested in one man, and the *use*, and profits thereof, in another; whose directions, with regard to the disposition thereof, the former was in conscience obliged to follow, and might be compelled by a court of equity to observe. Now, though a husband had the *use* of lands in absolute fee simple, yet the wife was not entitled to any dower therein; he not being *seised* thereof: wherefore it became usual, on marriage, to settle by express deed some special estate to the use of the husband and his wife, for their lives, in joint-tenancy, or jointure; which settlement would be a provision for the wife, in case she survived her husband. At length the statute of uses ordained, that such as had the *use* of lands, should, to all intents and purposes, be reputed and taken to be absolutely *seised* and possessed of the soil itself. In consequence of which legal seisin, all wives would have become dowable of such lands as were held to the use of their husbands, and also entitled at the same time to any special lands that might be settled in jointure: had not the same statute provided, that upon making such an estate in jointure to the wife before marriage, she shall be for ever precluded from her dower. 4 *Rep.* 1, 2.

But in this case, these four requisites must be punctually observed.—1. The jointure must take effect immediately on the death of the husband: 4 *Co.* 3.—2. It must be for the life of the wife herself at least, and not *pur auter vie*, or for any term of years, or other smaller estate.—3. It must be made to herself, and no other in trust for her. 1 *Inst.* 36 *b.*—4. It must be made in satisfaction of her whole dower, and not of any particular part of it, and must be so expressed to be in the deed; or it may be averred to be so. 1 *Inst.* 36 *b.* 4 *Rep.* 3. *Ow.* 33. *Cro. Eliz.* 128. *Dy.* 220. 2 *Vent.* 340. 1 *Ch. Ca.* 181.

If the jointure be made to her *after* marriage, she has her election after her husband's death as in dower *ad ostium ecclesiæ*, and may either accept it, or refuse it, and betake herself to her dower at Common Law, for she was not capable of consenting to it during coverture. (See title *Jointure.*)

So where a *devise* is expressed to be given in lieu and satisfaction of dower, or where that is the clear and manifest intention of the testator, the wife shall not have both, but shall have her choice. 1 *Inst.* 36 *b. in n.*

If, by any fraud, or accident, a jointure made before marriage proves to be on a bad title, and the jointress is evicted, or turned out of possession, she shall then, (by the provisions of the same *stat.* 27 *H.* 8. *c.* 10.) have her dower *pro tanto* at the Common Law. 2 *Comm.* 138. *c.* 8.

If a woman who is under age at the time of marriage, agrees to a jointure and settlement in bar of her dower, and of her distributive share of her husband's personal property, in case he dies intestate; she cannot afterwards waive it; but is as much bound as if she were of age at the time of the marriage. *Drury* v. *Drury*, (or *Buckingham* E. v. *Drury*) 3 *Bro. P. C.* (8vo. ed.) 492. (See title *Jointure.*)

There are some advantages attending tenants in dower that do not extend to jointresses; and so *vice versâ*, jointresses are in some respects more privileged than tenants in dower. Tenant in dower by the old Common Law, is subject to no tolls or taxes; and hers is almost the only estate on which, when derived from the King's debtor, the King cannot distrain for his debt; if contracted during the coverture. *Co. Lit.* 31 *a.* *F. N. B.* 150. But on the other hand, a widow may enter at once, without any formal process, on her jointure land, as she also might have done on dower *ad ostium ecclesiæ*, which a jointure in many points resembles; and the resemblance was still greater, while that species of dower continued in its primitive state; whereas no small trouble, and a very tedious method of proceeding, is necessary to compel a legal assignment of dower. *Co. Lit.* 36. And, what is more, though dower be forfeited by the treason of the husband, yet lands settled in jointure remain unimpeached to the widow. 1 *Inst.* 37. Wherefore Coke very justly gives it the preference, as being more sure and safe to the widow, than even dower *ad ostium ecclesiæ*, the most eligible species of any. 2 *Comm.* 135, *&c.* An additional advantage is, that a jointure is not forfeited by the adultery of the wife as dower; and Chancery will decree against the husband a performance of marriage articles, though he alledges and proves that the wife lives separate from him in adultery. *Sidney* v. *Sidney*, 3 *P. Wms.* 269, &c. and the notes to that case.

Further as to the means by which a woman may be barred of her dower.—Where a woman releases her right to him in reversion, her *dower* may be extinguished. 8 *Rep.* 151.

If a woman takes a lease for life of her husband's lands after his death, she shall have no *dower*, because she cannot demand it against herself; and if she takes a lease for years only, yet she shall not sue to have *dower* during these years, because it was her own act to suspend the fruit and effect of her *dower* during that time. *Perk.* 350. *F. N. B.* 149. *Mo. pl.* 403.

If a recovery be had against the husband by collusion, this shall not bar the wife of *dower*; as if the recovery be by confession, or reddition, which are always understood to be by collusion, the husband always acting and concurring in obtaining of them; but it seems to have been a very great doubt, whether a recovery by default should not be a bar: and the better opinion being that such recovery was a bar at Common Law, therefore the *stat. W.* 2. *cap.* 4. was made, which ordains that notwithstanding such recovery by default, &c. pleaded, the tenant shall moreover in bar of the *dower* shew his right to the tenements recovered; and if it be found that he had no right, then shall the demandant recover her *dower* notwithstanding such recovery by default against her husband. 2 *Inst.* 349. *Perk.* 376.

By *stat. W.* 2. *cap.* 4. it appears, that if the recoveror had right, then the wife is barred; therefore if the heir of the disseisor be in by descent, and the disseisee enters upon him, and marries, and the heir of the disseisor recovers by default, or reddition, in a writ of entry, in nature of an assise, and the husband dies, his wife shall not have *dower*, because he, who recovered, had right to the possession by the descent; *aliter*, if this disseisin, descent, &c. were *after* marriage, because the husband was seised before of a rightful estate during the coverture, whereof his wife had title of *dower*, which cannot be defeated by the disseisin, descent and recovery, which all happened during the coverture. *Perk.* 379, 380.

If the husband levy a fine with proclamation of his lands, and dies, his wife is bound to make her claim within five years after his death; otherwise she shall be barred of her *dower*; for though her title of *dower* was not consummate at the time of the fine levied; yet it being initiate by the marriage and seisin of the husband, the fine begins to work upon it presently after the husband's death; and if she does not claim it within five years after, she shall be barred. 2 *Co.* 93. 10 *Co.* 49. 99. 3 *Inst.* 216. *Hob.* 265. *Mo. pl.* 154. 879. *Dyer*, 224. 13 *Co.* 20.

See further as to bar of dower by jointure, devise, &c. this Dict. title *Jointure*.—And further as to forfeiture thereof by the crime of the Baron, *ante* II. and this Dict. title *Forfeiture*, I.

V. The wife is, as soon as she can after the decease of her husband, to demand her *dower*, lest she lose the value from the time of his death: and in action of *dower*, the first process is *summons* to appear: and if the tenant or defendant do not appear, nor cast an essoin, a grand *cape* lies to seize the lands, &c. By *stat.* 31 *Eliz. c.* 3. every summons on the land is to be made fourteen days before the return of the writ, and proclamation made at the church door on a Sunday, or else no *grand cape* to be awarded, but an *alias* and *pluries* summons till proclamation. But on the return of the writ of summons, the attorney for the tenant or defendant may enter with the filazer that the tenant appears and prays *view*, &c. Then a writ of view goes out, whereby the sheriff is to shew the tenant the land in question; upon the return of which writ of view, the tenant's attorney takes a declaration, and puts in a plea; the most general one is, *ne unques seizie*, &c. *viz.* that the husband was *never seised* of any estate, whereof the wife can be endowed; and when issue is joined, you must proceed to trial, as in other actions: upon trial, the jury are to give damages for the mesne profits from the death of the husband (if he die seised), for which execution shall be made out; and then you have a writ to the sheriff to give possession of a third part of the lands. The sheriff may give possession or seisin to the woman by a clod, or by grass growing on the land, or by any beast being thereon. 40 *E.* 3. *Fitz. Dower*, 48.—See *Impey's Sheriff*.

A widow may recover her *dower* with a *cessat executio*, in case there be any thing objected, precedent to the title of *dower*, &c. till that is determined. 1 *Nels.* 684. 687. 1 *Salk.* 291. Judgment in *dower* is to recover a third part of lands and tenements *by metes and bounds*. A wife may have her *writ of dower* against an heir, an alienee, a disseisor, &c. or against any one that has power to assign *dower*; if the lord enters on the land for an escheat, she may bring it against him, but to the King she must sue by petition. 9 *Rep.* 10. *Plowd.* 141. *Dyer*, 263. *Co. Lit.* 59. This writ was brought against eight persons feoffees of the husband after marriage, two confessed the action, and the other six pleaded to issue; here the demandant had judgment to recover the third part of two parts of the land, in eight parts to be divided: and, after the issue being found for the demandant against the other six, she recovered against them the third part of the six parts of the same land as her *dower*. *Dyer*, 187. *Co. Lit.* 32.

At the Common Law, before the *stat. of W.* 1. *c.* 49. if a woman had accepted any part of her *Dower*, though never so small, of any one tenant in any one county or town, she had no other remedy for the residue, but by a writ of right of *dower*; for if she brought a writ of dower, *unde nihil habet*, it was a good plea in abatement, that she had accepted such a part of such a tenant, in such a town or county; which being a great mischief to the woman is remedied by that statute, which provides that it shall be no plea in abatement, to say that she hath received part of her *dower* of any other person before the writ purchased; and this extends as well to guardian in chivalry as to the tenant of the land, because such guardian is to render her *dower*. 2 *Inst.* 261.

In case of deforcement of dower, by not assigning *any* dower to the widow within the time limited by law, she has her remedy by writ of dower *unde nihil habet*. *F. N. B.* 147. But if she be deforced of part only of her dower, she cannot then say that *nihil habet*; and therefore she may have recourse to another action by writ of right of dower: which is a more general remedy, extending either to part or the whole; and is (with regard to her claim) of the same nature as the grand writ of right is with regard to claims in fee-simple. On the other hand, if the heir (being within age) or his guardian assign her more than she ought to have, this may be remedied by a writ of admeasurement of dower. *F. N. B.* 16. 148. *Finch. L.* 314. *Stat. Westm.* 2. 13 *E.* 1. *c.* 7.

As to *damages* in *dower*, they are given by the *stat. of Merton*, *c.* 1. but that statute extends only to the possessory action of dower *unde nihil habeat*, and not to the *writ of right* of *dower*, because they are intended to be given for the *detention* of the possession; and on *writs* of *right*, where the *right* itself is questionable, no damages are given, because no wrong done till the right be determined; also that statute extends only to lands whereof the husband died seized; and therefore judgment for the damages was reversed, because the jury did not find that the husband died seised; for otherwise she shall have no damages: as if the husband aliens and takes back an estate for life, the wife shall recover *dower*, but no damages; because this dying seised was only of an estate of *freehold*; but if he makes a lease for years only, rendering rent, she shall recover a third part of the reversion, with a third part of the rent and damages, because there he died seised as the statute speaks. *Co. Lit.* 32. *Dyer*, 284. *pl.* 33. *Yelv.* 112. *Dr. & Stud. lib.* 2. *c.* 13. § 166. 2 *Inst.* 80.

Damages must be after demand of *dower*, for the heir is not bound to assign this provision till demanded, because the law casts the freehold of the whole upon him, which he cannot divide without the concurrence of the wife: but a demand *in pais* before good testimony is sufficient; and if the heir appear the first day on summons, and plead that he hath always been ready, and still is, to render her *dower*, she may plead such request, and issue may be taken upon it; but the *feoffee of the heir* cannot plead *tout temps prist*, because he had not the land all the time since the death of the ancestor, and therefore she shall recover the mesne profits, and damages against him; and if he hath not provided his indemnity and recompense against the heir, it is his own folly. *Co. Lit.* 32.

If the heir or feoffee assign *dower*, and the wife accepteth thereof, she loses her damages, because having the *dower*, which is the principal, she cannot sue for the damages, which are but consequential or accessory. *Co. Lit.* 33 *a.*

Damages are given in *dower* from the death of the husband, and to the return of the writ of inquiry, though the writ of seisin issued a year before, but was not executed. *Hardw.* 19. &c. Where there are two joint-tenants in *dower*, and one dies after judgment for damages, and his heir and the other joint-tenant bring error, the value from the time of the judgment to the affirmance cannot be recovered against the surviving plaintiff in error only. *Id.* 50.—See 2 *Stra.* 271. On a writ of *dower* damages cannot be awarded by 16 *Car.* 2. without speeding a writ of inquiry. *Hardw.* 51.

DOWL AND DEAL. A *division:* from the Brit. *Dal*, *divisio*, from the Sax. *dælan.* i. e. *dividere*, and from thence comes the word *dealing*. So the stones which are laid to the boundaries of lands are called *dowle stones*, *i. e.* such as divide the lands. *Cowel.*

DOWRY, *Dos Mulieris.*] Was in ancient time applied to that which the wife brings her husband in marriage; otherwise called *maritagium*, or marriage goods: but these are termed more properly, goods given in marriage, and the marriage portion. *Co. Lit.* 31. This word is often confounded with *Dower;* though it hath a different meaning from it.

DOZEIN. A territory or jurisdiction, mentioned in the statute of *View and Frankpledge*, *stat.* 18 *Ed.* 2.—See *Deciners.*

DOZEN PEERS. Were *twelve peers*, assigned at the instance of the *barons* in the reign of K. *H.* III. to be privy councillors to the King, or rather *conservators* of the *kingdom.*

DRACO REGIS. The standard *ensign*, or military colours, borne in war, by our ancient Kings, having the figure of a dragon painted on them. *Rog. Hoved. sub. ann.* 1191.

DRAGS. Seem to be floating pieces of timber so joined together, that by swimming on the water they may bear a burden or load of other things down a river. *Stat.* 6 *H.* 6. *c.* 15.

DRANA. A drain or water-course; sometimes written *drecca. MSS. antiq.*

DRAPERY, *Pannaria.*] Is used as a head in our old statute books, extending to the making and manufacturing of all sorts of woollen cloths. See titles *Clothiers*, *Manufacturers.*

DRAUGHTS. See *Bills of Exchange.*

DRAW-LATCHES. Were thieves and robbers: *Lambert*, in his *Eiren. lib.* 1. *cap.* 6. calls them *thieves*, *wasters*, and *roberdsmen;* the two last words are grown out of use. They are mentioned in *stats.* 5 *E.* 3. *c.* 14. and 7 *R.* 2. *c.* 5.

DRAWN-TITHES. See *Tithes*, V.

DREDGERMEN. Fishers for oysters, &c. *Stat.* 2 *Geo.* 2. *c.* 19.—See titles *Fish*, *Oysters.*

DREIT-DREIT, OR DROIT-DROIT, *jus duplicatum.*] Are words signifying formerly a double right, *viz.* of possession, and of property or interest. *Bract. lib.* 4. *cap.* 27. *Co. Lit.* 266.—See 2 *Comm.* 199. and this Dict. title *Estate.*

DRENCHES, OR DRENGES, *Drengi.*] Tenants *in capite. Mon. Angl. tom.* 2. *fol.* 598. And, according to *Spelman*, they are such as at the coming of William the Conqueror, being put out of their estates, were afterwards restored thereunto, on their making it appear that they were owners thereof, and neither *in auxilio*, or *consilio*, against him. *Spelm.*

DRENGAGE, *Drengagium.*] The tenure by which the *drenches* or *drenges* held their lands. *Trin.* 21 *Ed.* 3. *Ebor. & Northumberland. Rot.* 191.

DRIFT OF THE FOREST, *Agitatio animalium in Foresta.*] A view or examination of what cattle are in the *forest*, that it may be known whether it be surcharged or not; and whose the beasts are and whether they are commonable, &c. These *drifts* are made at certain times in the year by the officers of the *forest;* when all the cattle of the *forest* are *driven* into some pound or place inclosed, for the purposes aforementioned; and to the end it may be discovered, whether any cattle of strangers be there, which ought not to common. *Manw. par.* 2. *c.* 15. *Stat.* 32 *H.* 8. *c.* 13. 4 *Inst.* 309.—See title *Forest.*

DRINKLEAN, in some records *Potura Drinklean.*] A contribution of tenants, in the time of the Saxons, towards a *potation*, or ale, provided to entertain the lord, or his steward.

DROFDENE. Among the Saxons, a grove, or woody place, where cattle were kept; and the keeper of them was called *Drofman. Domesday.*

DROFLAND, OR DRYFLAND, *Saxon.*] A tribute or yearly payment made by some tenants to the King, or their landlords, for driving their cattle through a manor to fairs or markets. *Cowel.*

DROIT, *Right.* Is the highest writ of all other real writs whatsoever, and hath the greatest respect, and the most assured and final judgment: and therefore is called a *writ of right*, and in the old books *Droit. Co. Lit.* 158. There are divers of these writs used in our law, as

DROIT DE ADVOWSON.
DROIT DE DOWER.
DROIT DE GARDE.
DROIT PATENT.
DROIT RATIONABILI PARTE.
DROIT SUR DISCLAIMER.

} As to all which several *writs of right*, and their various uses, see *Recto*, and *Writs;* and the several titles to which these writs belong.

Also consult *Booth* on *Real Actions.*

DROIT DE ENTRIE, Right of Entry, is when one seised of land in fee, is thereof dissesed, he hath right to enter into the land, and may do so when he will, or have a writ of right against the disseisor. *Termes de Ley.* See *Entry.*

DROMONES, DROMOS, DROMUNDA. Ships of great burden; men-of-war. *Walsing. Anno.* 1292.—*Mat. Paris*, *sub. ann.* 1191.

DROVERS. Those that buy cattle in one place to sell in another: they are to be married men and householders, and be licensed, by *stat.* 5 *Eliz. c.* 12. that part of the statute directing them to be married and householders is now totally disregarded. See title *Cattle.*

DRUGGERIA. A place of *drugs*, or *drugster's* shop.

DRUNKENNESS. Is an offence for which a man may be punished in the Ecclesiastical Court, as well as by justices of peace, by statute.

By *stats.* 4 *Jac.* 1. *c.* 5. 21 *Jac.* 1. *c.* 7. if any person shall be convicted of *drunkenness* by the view of a justice, oath of one witness, &c. he shall forfeit five shillings for the first offence, to be levied by distress and sale of his goods; and, for want of a distress, shall sit in the stocks *six* hours; and, for the second offence, he is to be bound with two sureties in ten pounds each to be of the good behaviour, or be committed.

*Tippling* is a *species* of drukenness. By *stat.* 1 *Jac.* 1. *c.* 9. § 2, 3. 21 *Jac.* 1. *c.* 7. § 4. 1 *C.* 1. *c.* 4. if any innkeeper, victualler, or alehousekeeper, shall suffer any person, (except travellers, and labouring-people at their dinner hour) to continue drinking or tippling in an alehouse, &c. he shall forfeit 10*s.* to the poor, to be recovered by distress, or the party offending to be committed till payment; and disabled to keep an ale-house for three years.

By *stats.* 4 *Jac.* 1. *c.* 5. § 4. 1 *Jac.* 1. *c.* 9. 21 *Jac.* 1. *c.* 7. 1 *C.* 1. *c.* 4. the persons tippling shall forfeit 3*s.* 4*d.* or be set in the stocks for *four* hours. And an alehousekeeper tippling shall be disabled to keep an ale-house for three years. 7 *Jac.* 1. *c.* 10.

See further titles *Churchwarden, Constable.*

He who is guilty of any crime, through his own voluntary *drunkenness*, shall be punished for it as if he had been sober. *Co. Lit.* 247. 1 *Hawk. P. C.* 3. It has been held that *drunkenness* is a sufficient cause to remove a magistrate: and the prosecution for this offence, by *stat.* 4 *Jac.* 1. *c.* 5. was to be, and still may be, before justices of peace in their sessions, by way of indictment, &c.

Equity will not relieve against a bond, &c. given by a man when drunk, unless the drunkenness is occasioned through the management or contrivance of him to whom it is given. 3 *P. Wil.* 130. *in n.* 1 *Inst.* 247. *Plowd.* 19. and this Dict. titles *Bond, Fraud, Chancery.*

DRY EXCHANGE, *Cambium Siccum.*] A term invented in former times for the disguising and covering of *usury;* in which something was pretended to pass on both sides, whereas in truth nothing passed but on one side, in which respect it was called *dry. Stat.* 3 *H.* 7. *c.* 5.—See *Cowel.*

DRY MULTURES. Quantities of corn paid to a mill, whether the payers grind or not. *Scotch Dict.*

DRY RENT. A rent reserved without clause of distress. See *Rent-Seck.*

DUCES TECUM, *Bring with thee.*] Is a writ commanding a person to appear at a certain day in the Court of Chancery, and to *bring with him* some writings, evidences, or other things which the court would view. *Reg. Orig.* So *subpœnas duces tecum*, are often sued out at Common Law, to compel witnesses to produce, on trials at *Nisi prius*, deeds, bonds, bills, notes, books, or memorandums, &c. which are in their custody or power, and which relate to the issue in question. But if they are in the possession or power of the adverse party or his attorney, it is customary to give notice to the attorney to produce them, and on proof made in open court, before the judge of *Nisi Prius*, of such notice, the court generally compels the attorney or his client to produce the same, if material. If not produced, *parol* evidence may be given of their contents. See titles *Evidence, Trial.*

DUCES TECUM LICET LANGUIDUS. A writ directed to the sheriff, upon a return that he cannot bring his prisoner without danger of death, he being *adeo languidus;* then the court grants a *habeas corpus* in the nature of a *duces tecum licet languidus. Book Entr.* But this is now out of use; and where the person's life would be endangered by removal, the law will not permit it to be done.

DUCKING-STOOL. See *Castigatory.*

DUEL, *Duellum.*] In our ancient law is a fight between persons in a doubtful case for the trial of the truth. *Fleta.*—See title *Battel.* But this kind of *Duel* is disused; and what we now call a *Duel* is, a fighting between two, upon some quarrel precedent: wherein, if a person is killed, both the principal and his seconds are guilty of murder, and whether the seconds fight or not. *H. P. C.* 47. 51.

If two persons quarrel over night, and appoint to fight the next day; or quarrel in the morning, and agree to fight in the afternoon; or such a considerable time after, by which it may be presumed the blood was cooled; and then they meet and fight a *Duel*, and one kill the other, it is murder. 3 *Inst.* 52. *H. P. C.* 48. *Kel.* 56. And whenever it appears, that he who kills another in a *Duel*, or fighting on a sudden quarrel, was master of his temper at the time, he is guilty of murder; as if, after the quarrel, he fall into another discourse, and talk calmly thereon; or allege that the place where the quarrel happens is not convenient for fighting; or that his shoes are too high if he should fight at present, &c. *Kel.* 56. 1 *Lev.* 180.

If one *challenge* another, who refuses to meet him, but tells him that he shall go the next day to such a place about business, and then the challenger meets him on the road, and assaults the other; if the other, in this case, kill him, it will be only manslaughter; for here is no acceptance of the challenge, or agreement to fight: and if the person challenged refuseth to meet the challenger, but tells him that he wears a sword, and is always ready to defend himself, if then the challenger attack him, and is killed by the other, it is neither murder nor manslaughter, if necessary in his own defence. *Kel.* 56.

If one kill another in a deliberate duel, under provocation of charges against his character and conduct however grievous, it is Murder in him and his Second: and therefore the bare incitement to fight, though under such provocation, is in itself a very high misdemeanor, though no consequence ensue thereon against the peace. 3 *East's Rep.* 581.

An endeavour to provoke another to commit the misdemeanor of sending a challenge to fight, is itself a misdemeanor indictable, particularly where such provocation was given by a writing, containing libellous matter, and alleged to have been done with intent to do the party bodily harm, and to break the king's peace: the sending such writing being an act done towards procuring the commission of the misdemeanor meant to be accomplished. 6 *East's Rep.* 464.

See further titles *Murder, Challenge to Fight.*

DUES, *ecclesiastical*, non-payment of. Various *dues* to the clergy are cognisable in the spiritual court; which makes decrees for their actual payment. *Offerings, oblations*, and *obventions*, not exceeding the value of 40*s.* may, by *stat.* 7 & 8 *W.* 3. *c.* 6. be recovered in a summary way before two justices of peace.

DUKE, Lat. *Dux*, Fr. *Duc. à Ducendo.*] Signified among the ancient Romans, *ductorem exercitûs*, such as led their armies; since which they were called *duces*, and were governors of provinces, &c. In some nations the sovereigns of the country are called by this name; as the *Duke* of Savoy, &c. In England, the title of *Duke* is the next dignity to the Prince of Wales: and the first *Duke* we had in England, was Edward the Black Prince, so famed in our English histories for heroic actions, who was created *Duke* of Cornwall, in the 11th year of King Ed. III. *A. D.* 1337. After which, there were more made in such manner as that their titles descended to their posterity. They are created with solemnity, *per cincturam gladii, cappæ et circuli aurei, in capite impositionem. Cambd. Brit. p.* 166.—See title *Peer.*

DUM FUIT INFRA ÆTATEM, *While he was within age.*] A writ whereby one who had made a feoffment of his lands while an infant, when he came of full age, might recover those lands and tenements which were so aliened: and, within age, he might enter into the land, and take it back again, and by his entry, he should be remitted to his ancestor's right. *New Nat. Br.* 426. If the husband and wife alien the wife's land during the nonage of both of them, the wife, at her full age, after the death of the husband, shall have a writ of *dum fuit infra ætatem. M.* 14 *E.* 3. By this *writ* to the sheriff he shall command A. that he render to B. who is of full age, two messuages and lands, &c. which B. demised to him, *while he was within age*, as he saith; or into which the said A. hath not entered, but by C. to whom the said B. the same demised; and unless, &c. *F. N. B.* 477.—See title *Infant.*

DUM NON FUIT COMPOS MENTIS, *While he was not of sound mind.*] Is a writ that lay where a man, not of sound memory, aliened any lands or tenements, against the alienee. And he shall allege that he was not of *sane memory*; but being visited with infirmity, lost his discretion for a time, so as not to be capable of making a grant, &c. *New Nat. Br.* 449. See titles *Disability*, *Lunatic*, and *F. N. B.* 202.

DUN, *Down*, which termination is now varied into *don*. It signifies a mountain or high open place; so that the names of those towns which end in *dun*, or *don*, as *Ashdon*, &c. were either built on hills, or near them in open places. *Domesday*.

DUNSETTS. Those who dwell on hills or mountains.

DUNUM, Duna. *Dunnarium*. A down or hill. *Chart. MSS.*

DUODENA. A jury of twelve men. *Walsing.* 256.

DUODENA MANU. Twelve witnesses to purge a criminal of an offence. See titles *Jurare duodecimâ manu*; *Wager of Law*.

DUPLEX QUERELA. A process ecclesiastical. See *Double Quarrel*, *Quare Impedit*.

DUPLICATE. Is used for the second letters-patent, granted by the Lord Chancellor, in a case wherein he had before done the same; which were therefore thought void. *Cromp. Jurisd. fol.* 215. But it is more commonly a copy or transcript of any deed or writing, account, &c. or a second letter, written and sent to the same party and purpose as a former, or a copy of dispatches, for fear of a miscarriage of the first, or for other reasons. See *stat.* 4 *Car.* 2. *c.* 10. See also titles *Insolvent*, *Pawnbrokers*.

DUPLICITY in *pleading*. This must be avoided, as it begets confusion. Every plea must be simple, entire, connected, and confined to one single point: it must never be entangled with a variety of distinct independent answers to the same matter; which must require as many different replies, and introduce a multitude of issues upon one and the same point. See titles *Double Plea*, *Pleading*.

DURANTE ABSENTIA, *During absence.*] An administration granted when the executor is out of the realm, to continue in force until his return. See this Dict. title *Executor*.

DURANTE MINORE ÆTATE, *During minority.*] An infant cannot act as executor until seventeen, during which minority administration is granted. See title *Executor*.

DURDEN. A thicket of wood in a valley. *Cowel.*

DURESS, *Durities*, Constraint.] Whatever is done by man to save either life or limb, is looked upon as done by the highest necessity and compulsion. Therefore, if a man through fear of death or mayhem, is prevailed upon to execute a deed, or do any other legal act, these, though accompanied with all other requisite solemnities, may be afterwards avoided, if forced upon him by a well-grounded apprehension of losing his life, or even his limbs, in case of non-compliance. 2 *Inst.* 483.—And the same is also a sufficient excuse for the commission of many misdemeanours. The constraint a man is under in these circumstances is called in law *Duress*; of which there are two sorts, *Duress of Imprisonment*, where a man actually loses his liberty; and *Duress per minas*, (by threats,) where the hardship is only threatened and impending. If a man is under *Duress of Imprisonment*, or illegal restraint of liberty, until he seals a bond or the like, he may allege this Duress, and avoid the extorted bond. But if a man be lawfully imprisoned, and either to procure his discharge, or on any other fair account, seals a bond or deed, this is not by Duress of imprisonment, and he is not at liberty to avoid it. 2 *Inst.* 482. See this Dict. title *Prisoner*.

*Duress per minas*, is either for fear of loss of life, or else for fear of mayhem or loss of limb. And this fear must be upon sufficient reason: *non suspicio cujuslibet vani et meticulosi hominis, sed talis qui possit cadere in virum constantem. Bract. l.* 2. *c.* 5.—A fear of battery (or being beaten) though never so well grounded, is no *Duress*; neither is the fear of having one's house burned, or one's goods taken away and destroyed; because in these cases, should the threat be performed, a man may have satisfaction, by recovering equivalent damages; but no suitable atonement can be made for the loss of life or limb. 2 *Inst.* 483.—See 1 *Comm.* 131, 6.

*As to criminal cases.*—In time of war or rebellion, a man may be justified in doing many treasonable acts by compulsion of the enemy or rebels, which would admit of no excuse in time of peace. 1 *Hal. P. C.* 50. This however seems only, or at least principally, to hold as to positive crimes, so created by the laws of Society; and which therefore Society may excuse; but not as to natural offences, so declared by the laws of God. Therefore, though a man may be violently assaulted, and hath no other possible means of escaping death but by killing an innocent person: this fear and force shall not acquit him of murder, for he ought rather to die himself than escape by such means. 1 *Hal. P. C.* 51. But in such a case he is permitted to kill the assailant; for there the law of nature and self-defence have made him his own protector. 4 *Comm.* 30.—See this Dict. titles *Baron and Feme*, *Felony*, *Murder*, &c.

By the acts 37 *G.* 3. *c.* 123. 50 *G.* 3. *c.* 102. and 52 *G.* 3. *c.* 104. persons compelled to take unlawful oaths are declared not to be justified or excused, unless they declare the same (within 14 days in England, and 10 in Ireland) to some justice of the peace. See *Oaths unlawful*.

*Further as to civil cases.*—It has been adjudged, that if a man makes a deed by *Duress* done to him, by taking of his cattle, though there be no *Duress* to his person, yet this shall avoid the deed. 2 *Danv. Abr.* 686. If a person threaten another to make a deed to a third person, it is by *Duress*, and void; as if such third person had made the threatening. 2 *Inst.* 482. 3 *Inst.* 92. 4 *Inst.* 97. And where a man is imprisoned until he makes a bond at another place; if afterwards he doth it when at large, the bond is by *Duress*, and void.

If a person be arrested upon an action at the suit of another, and the cause of action is not good, if he make a bond to a stranger, it is not *Duress*; though if he make it to the plaintiff it is; and, being sued upon the bond, he may plead it was made by *Duress*; and so avoid it: also the party shall have an action for the false imprisonment itself. 1 *Rep.* 119. *Perk.* § 16. *Cromp. Jur.* 296. 1 *Lil. Abr.* 491. If the arrest is under colour of *legal process*, the action must be a *special action on the case*, not an action of *trespass vi et armis*.

If one imprisoned make an obligation by *Duress*, and after he is at large takes a defeasance upon it, this will estop him to say it was made *per Duress*. And where A. and B. by *Duress* to B. seal a bond or deed, it may be good as to A. that was never threatened. 3 *H.* 16. *Bro.* 17. *Mich.* 7 *Jac.* 1. See 43 *E.* 3. 10. 2 *Danv.* 686.

A man shall not avoid a deed by *Duress* of a stranger; for it hath been held that none shall avoid his own bond for the imprisonment or danger of any other than of himself only. *Cro. Jac.* 187. Yet a son shall avoid his deed by *Duress* of the father: and the husband shall avoid a deed made by *Duress* of the wife; though a servant shall not avoid a deed made by *Duress* of his master, or the master the deed sealed by *Duress* of his servant. 2 *Danv.* 686. If a man is taken by virtue of a process issuing out of a court that hath not power to grant it; or in custody on a false charge of felony, &c. and for his enlargement and discharge gives bond, &c. this may be avoided, as taken by *Duress*. *Cro. El.* 616. 4 *Inst.* 97. *Allen.* 92.

A statute merchant may be avoided by *audita querela*, because it was made by *Duress*, or imprisonment. A will shall be avoided by *Duress*, or menace of imprisonment. A feoff-

ment made by *Duress* is voidable, but not void. But no averment shall be taken against a deed enrolled, that it was made by *Duress*. 1 *Rol. Abr.* 862. 2 *Danv.* 685. A marriage had by *Duress* is voidable: and by *stat.* 31 *H.* 6. *c.* 9. obligations, statutes, &c. obtained of women by force, to marry the persons to whom made, or otherwise, unless for a just debt, are declared void. If a person executes a deed by *Duress*, he cannot plead *non est factum*, because it is his deed; though he may avoid it by special pleading, and judgment *Si actio*, &c. 5 *Rep.* 119. Records may not regularly be said to be made by *Duress*, and therefore shall not be avoided by this plea or pretence. 2 *Shep. Abr.* 319.—See further this Dict. titles *Fraud*, *Fine*, &c.

DURHAM. The bishoprick of *Durham* was dissolved, and the King to have all the lands, &c. by a *stat.* 7 *Ed.* 6. not printed. But this act was afterwards repealed, by *stat.* 1 *Mary*, *st.* 3. *c.* 3. and the bishoprick newly erected, with all jurisdiction ecclesiastical and temporal annexed to the County-Palatine. The justices of the County-Palatine of *Durham* may levy fines of lands in the county: and writs upon proclamation, &c. are to be directed to the bishop. *Stats.* 5 *Eliz. c.* 27. 31 *Eliz. c.* 2. Writs to elect members of parliament in the County-Palatine of *Durham* shall go to the bishop or his chancellor, and be returned by the sheriff, &c. *Stat.* 25 *Car.* 2. *c.* 9.—See further title *Counties-Palatine.*

As to the Courts of which three Counties, and the Royal Franchise of Ely, we may here insert what was there omitted. They are a species of private courts of a limited local jurisdiction, and having at the same time an exclusive cognizance of pleas in matters both of law and equity. 4 *Inst.* 213, 8. *Finch. R.* 452. In all these, as in the Principality of Wales, the King's ordinary writs issuing under the Great Seal out of Chancery, do not run; that is, they are of no force. For as, originally, all *jure regalia* were granted to the Lords of these Counties-Palatine, they had of course the sole administration of justice by their own judges, appointed by themselves, and not by the Crown. It would therefore be incongruous for the King to send his writ to direct the judge of another's court in what manner to administer justice between the suitors. But when the privileges of these Counties-Palatine were abridged by *stat.* 27 *H.* 8. *c.* 24. it was also enacted, that all writs and process should be made in the King's name, but should be tested or witnessed in the name of the owner of the franchise. Wherefore all writs whereon actions are founded, and which have current authority here, must be under the seal of their respective franchises; the two former of which, Chester and Lancaster, are now united to the Crown, and the two latter, Durham and Ely, under the government of their several bishops. And the judges of assise who sit therein, sit by virtue of a special commission from the owners of the several franchises, and under the seal thereof, and not by the usual commissions under the Great Seal of England. 3 *Comm.* 78.

A bail-bond given to the sheriff of *Durham*, under a writ issued immediately from the court of K. B. to him, is not void. though the Court-Palatine might have interposed and claimed the privilege. 6 *Term Rep. K. B.* 71.

DURSLEY. Signifies *blows* without wounding or bloodshed, vulgo *dry blows*. *Blount.*

DUSTY-FOOT. See *Court of Piepowder.*

DUTCHY-COURT OF LANCASTER. See titles *Chancellor of the Dutchy of Lancaster*, *Counties Palatine.*

DUTIES of *persons*. *Allegiance* is the *duty* of the *people*, *protection* the *duty* of the *magistrate*; yet they are reciprocally the *rights*, as well as *duties* of each other. *Allegiance* is the *right* of the *magistrate*, and *protection* the *right* of the *people*. 1 *Comm.* 123.

DUTY. Any thing that is known to be due by law, and thereby recoverable, is a duty before it is recovered; because the party interested in the same hath power to recover it. 1 *Lill.* 495.

DWELLING-HOUSE. A man may assemble people together lawfully (at least if they do not exceed eleven) without danger of raising a riot, rout, or unlawful assembly, in order to protect and defend his house; which he is not permitted to do in any other case. 1 *Hal. P. C.* 547. 4 *Comm.* 224. —See titles *Burglary*, *Riot.*

DWINED. *Consumed*; from whence comes the word *dwindle.*

DYERS. By *stat.* 3 & 4 *E.* 6. *c.* 2. no *dyer* may dye any cloth with orchel; or with Brazil, to make a false colour in cloth, wool, &c. on pain of 20*s.* By *stat.* 23 *Eliz. c.* 9. *Dyers* are to fix a seal of lead to cloths, with the letter M. to shew that they are well mathered, &c. or forfeit 3*s.* 4*d. per* yard. By *stat.* 23 *Geo.* 3. *c.* 15. several penalties are inflicted on *Dyers* who dye any cloths deceitfully, and not throughout, with woad, indico, and mather; dying blue with logwood to forfeit 20*l.* *Dyers* in London are subject to the inspection of the *Dyers' Company*, who may appoint searchers; and out of their limits, justices of the peace in sessions to appoint them; opposing the searchers incurs 10*l.* penalty.—See this Dict. titles *Labourers*, *Lien*, *Manufacturers.*

DYKE-REED, rather DYKE-REVE. An officer that hath the care and oversight of the *dykes* and *drains* in fenny countries; as of *Deeping fens*, &c. mentioned in *stat.* 16 & 17 *Car.* 2. *c.* 11.

DYRGE OR DIRGE. A mournful song over the dead; from the Teutonick *dyrke*, *laudare*, to praise and extol; whence it is a laudatory song. *Cowel.*

DYRENUM. A ditty or song.—*Venire cum toto ac pleno* dyreno; to sing harvest home. *Paroch. Antiq.* 320.

# E.



EALDING. See *Adeling*.

EALDERMAN, or *Ealdorman*.] Among the Saxons was as much as *Earl* with the Danes. *Camb. Brit.* 107. Also an *elder*, senator, &c. *Ealdermen* or *aldermen*, are now those that are associated to the mayor or chief officer in the common council of a city or borough-town. *Stat.* 24 *H.* 8. *c.* 13. See titles *Aldermen; Squire's Ang. Sax. Gov.* 107. 161. 220. *n.* 257. *n.* and *Lord Lytt. Hist. H.* 2. *v.* 215.

EALEHUS, from the Sax. *Eale*, Cervisia, and *Hus*, Domus.] An ale-house: In the laws of King Alfred we often find this word.

EARLHORDA. The privilege of assising and selling *ale and beer*. It is mentioned in a charter of King Hen. II. to the abbot of Glastonbury.

EARL, Sax. *Eorle*, Lat. *Comes*.] This it is said was a great title among the Saxons, and is the most ancient of the English peerage, there being no title of honour used by our present Nobility that was likewise in use by the Saxons, except this of *Earl*, which was usually applied to the First in the Royal Line. *Verstegan* deriveth this word from the Dutch *Ear*, *i. e.* Honour, and *Ethel*, which signifies Noble: But whencesoever it is derived, the title *Earl* was at length given to those who were associates to the King in his council and martial actions; and the method of investiture into that dignity was *per cincturam gladii*, without any formal charter of creation. *Dugdale's Warwicksh.* 302. William the First, called the Conqueror, gave this dignity in fee to his Nobles, annexing it to this or that county or province; and allotting them for the maintenance of it a certain portion of money arising from the prince's profits, for the pleadings and forfeitures of the provinces. *Camd.* And formerly one *Earl* had divers shires under his government, and had lieutenants under him in every shire, such as are now *sheriffs*; as appears by divers of our old statutes. *Cowel.*

But about the reign of King John, and ever since, our Kings have made *Earls* of counties, &c. by charter; giving them no authority over the county, nor any part of the profits arising out of it; only sometimes they have had an annual fee out of the Exchequer, &c. An *Earl*, *Comes*, was heretofore correlative with *comitatus;* and anciently there was no *Earl* but had a shire or county for his *earldom;* but of late times, the number of Earls very much increasing, several of them have chosen for their titles some eminent part of a county, considerable town, village, or their own seats, &c. Besides these local *Earls*, there are some personal and honorary; as *Earl Marshal* of England; see titles *Constable*, *Court of Chivalry;* and others nominal, who derive their titles from the names of their families. *Lex Constitutionis*, *p.* 78. Their place is next to a Marquis, and before a Viscount, and as in very ancient times, those who were created *Counts* or *Earls*, were of the blood royal; our British monarchs to this day call them in all public writings, "Our most dear Cousin:" They also originally did, and still may, use the style of *Nos.* See titles *Countee*, *Peers of the Realm*, *Sheriff.*

EARNEST. Money paid in part of a larger sum, or part of the goods delivered, on any contract, &c. which being done by way of *earnest*, the property of the goods is absolutely bound by it: and the *buyer* may recover the goods by action, as well as the *vendor* may the price of them. And by the statute of frauds, *stat.* 29 *Car.* 2. *c.* 3. no contract for sale of goods, to the value of 10*l.* or more to be valid, unless such *earnest* is made or given. See title *Frauds.*



EASEMENT, *Aisiamentum*, from the Fr. *Aise*, *Commoditas.*] Is defined to be a service or convenience which one neighbour hath of another, by *charter* or *prescription*, without profit; a way through his land, a sink, or such like. *Kitch.* 105. A person may prescribe to an *easement* in the freehold of another, as belonging to some ancient house, or to land, &c. And a way over the land of another; a gateway, water-course, or washing place on another's ground may be claimed by *prescription* as *easements*. But a multitude of persons cannot prescribe; though for an *easement*, they may plead custom. *Cro. Jac.* 170. 3 *Leon.* 254. 3 *Mod.* 294. *Lil. Abr.* 496. See title *Prescription.*

EASTER. The name of a goddess which the Saxons worshipped in the month of April, and so called, because she was the goddess of the *East*. *Blount.*—In our church it is the feast of the *Passover*, in commemoration of the sufferings of our Saviour.

## EAST-INDIA COMPANY.

A Corporation, or "UNITED COMPANY OF MERCHANTS OF ENGLAND TRADING TO THE EAST INDIES;" which name is given to them in *stat.* 6 *Ann. c.* 17. § 13. More explicitly, according to their charter, and the adjustment of their rights by *stat.* 9 & 10 *Will.* 3. *c.* 44. § 61. trading "into, and from, the East Indies, in the countries and parts of Asia and Africa, and in, to and from, the islands, ports, havens, cities, creeks, towns, and places of Asia, Africa, and America, or any of them, beyond the Cape of Good Hope, to the Straights of Magellan, where any trade or traffic of merchandise is or may be used or had, and to and from every of them."

The Laws relative to this important Company shall be considered in the following order:

I. *The* ORIGIN *and* UNION *of the Old and New* East India Companies.
II. *The* STATE *of the present* East India Company, *and the Regulations by certain Statutes, and otherwise, relating thereto.*
III. *The* RIGHTS *permanent and temporary, of the present* East India Company.
IV. STATUTES *relative to the present* East India Company.

1. THE PASSAGE by sea to the peninsula of India, and the Eastward part of the Continent of Asia, the present seats of our Asiatic trade, was not discovered till about the latter end of the 15th century; and, of the various attempts made from hence by individuals, to open a trade thither, none proved successful until Queen Elizabeth, by a Charter dated December 31, A. D. 1600, established the first incorporated Company, by the name of the *London East India Company*, the original shares were 50*l.* each, and the capital was under 400,000*l.* After a long series of disasters and losses, this Company obtained from the country powers of India, at a great expence, the privilege of a limited trade in certain parts of India and Persia; and of making small settlements, or houses of trade, called *Factories*, for the residence of their factors and servants. In those times the charters of the crown, and the powers which they conveyed, were not thought to require parliamentary sanction; nor was it till after the Restoration that the rights or authorities derived under them to the Company were first called in question.

In the year 1638, Mr. Langhorne, agent for the English East India Company, purchased the village of *Madras-patam*, with a small district on the east-coast of Coromandel, from the Hindoo Rajah, for the East India Company. This village was soon after surrounded by a wall; and a castle, called Fort Saint George, was erected there in 1640. This being a purchase, no objection was made to the circumvallation. And from this small beginning arose the extensive dominions now belonging to the East India Company, under the presidency of Madras or Fort Saint George.

In less than thirty years after these petty establishments in Bengal and Coromandel, the island of Bombay was ceded to the English, on the marriage of Charles the Second with the Princess Catherine of Portugal: this was the foundation of the Bombay government, and all its subsequent appendages on the western side of the Indian peninsula. The whole of these settlements, and every other British factory in India, (including those retained in the eastern islands after the cruel massacre of the Company's servants at Amboyna by the Dutch,) were subordinate to the Governor and Council at Surat; established there, with a supreme authority, by the East India Company in England. See *Forbes's Oriental Memoirs.*

By the interruptions, however, of speculative adventurers, called *Interlopers* who had begun to resist the exclusive claims of the Old Company under their charters, on the ground of their wanting the sanction of parliamentary authority, and by occasional failures of investments of goods from abroad, and the then not unfrequent losses of ships in their passage, the commerce of the Company was often chequered with disasters and disappointments.

Notwithstanding these discouragements, the Company formed, by degrees, various factories and houses of trade, both in India and Persia. When, by this means, they had at length, become more successful, various attempts were made to induce the Crown, and even Parliament itself, to interpose and revoke the charters of the Company; some on pretext that every man had an equal right to trade in the East as well as in the West Indies; while others hoped to effect it on proposals of terms of advantage in point of public finance, that they might themselves be erected into an exclusive Company.

Such was the state of things in 1693, when the Company, by an accidental failure in the payment of a small duty which had been imposed on their capital stock, (see *stat.* 4 *&* 5 *W. and M. c.* 15. §§ 10. 12.) gave an opening to Government to determine their charters, rendered void by that default: and, though in the same year, the Crown, to obviate all doubts, revived their powers and exclusive privileges by a new charter, the Company were obliged to submit to a condition, that their capacity of trading should in future be determinable on three years' notice. The legal obstacle to the erecting a new Company being thus removed, the *stat.* 9 *&* 10 *W.* 3. *c.* 44. was passed for borrowing two millions on a loan at 8 *per cent.* towards carrying on the war; and, as an encouragement to subscribers, it was declared, that they should be incorporated by a charter from the King into *a general society;* with liberty for each individual member to trade to India, and the other limits of the old Company's exclusive charter; so that the value of his exports exceeded not his share of this loan or capital: and that such of the subscribers as should choose to convert their subscriptions into a *joint stock*, should be at liberty so to do, and be incorporated hy a *separate charter*, by the name of *The English East India Company*, with the privilege of trading with and to the amount of such joint stock. All persons but those incorporated, and such as they should license, were prohibited from this trade, except the old Company, who had time given them to wind up their commercial affairs.

The act reserved a power to determine the charters both of the General Society, and the New Company after September, 1711, on repayment of the loan, and three years' notice.

The bulk of the subscribers having agreed to trade as a separate Company, with a joint stock, the old Company, to whose prejudice the two new corporations were to be erected, found means to become members for a very large proportion of the loan of two millions. With an interest thus acquired, they joined with the English Company, and by means of their superior knowledge and possessions, they obtained a decided influence in the general courts of the new Company, and thus paved the way to that union which afterwards took place in 1702; and which, A. D. 1708, was confirmed by parliament, by *stat.* 6 *Ann. c.* 17. By the terms of this union the warehouses at home and shipping, and also all the settlements and factories of the old Company in the East Indies, Persia, and China, including the islands of Bombay, and Saint Helena, with their dependencies, and all their rights and privileges, however derived, became vested in the United Company; except their *Body Politic*, which was surrendered to the Crown.

The curious reader may wish to learn what became of the General Society, whose members were individually authorised to trade, as far as the value of their subscriptions in goods exported from hence. All that can be discovered of them is, that though they were actually incorporated by the King's charter, and were therefore legally authorised to send ships to India or China, it does not with certainty appear that any one ship was ever fitted out by them: and that the superior advantages of being concerned in the trade to be carried on with a joint stock, were so evident, that, at the time of the union of the two Companies, out of the whole loan of two millions, only 7,200*l.* then remained the property of the separate traders of the General Society; and that this sum also was soon absorbed in the *United Company*, whose capital or trading stock, by which their dividend of profits was to be governed, thereupon became fixed at *Two Millions.*

The history of the English East India Company, and the aggrandisement of the British nation, in the remote regions of Hindostan, became generally interesting about the middle of the eighteenth century, in consequence of the unparalleled cruelty of the Nabob of Bengal, and the sufferings of the English in the Black Hole at Calcutta, an event which was soon followed by the memorable battle of Plassey, and other gallant exploits in Bengal, by Robert Lord Clive, the first of that title; which not only amply revenged the perfidious cruelty of the Mahomedan despot, but gave the company power, wealth, and territory in the finest provinces of India, where, from a set of licensed foreign merchants, they became sovereigns of the country.

The wars which subsisted at that period, between the native princes of India on the coast of Coromandel, aided by English and French troops, opposed to each other as auxiliaries, under experienced commanders of both nations, and the consequences of such interference to the British nation, are admirally related by Orme, justly styled "the elegant historian of India." The subsequent conquests by other generals, and the more recent victories in which the name of WELLESLEY is so conspicuous, have added an immense domain to the British empire. These invaluable territories, acquired by British valour, are maintained by sound policy, moderation and justice; the extent of our territorial power excites the wonder of Asia; and the effects are sensibly felt by all the maritime nations of Europe, whose consequence in India declined; until in 1812, not a single possession remained to any potentate of Europe, except Goa and some insignificant seaports belonging to the Portuguese, and the Spanish settlements at Manilla; while the British empire in India, commencing with a few Banians and factors in a mercantile warehouse, now extends over an immense territory, inhabited by upwards of sixty millions of people. See *Mill's British India.*

II. The first enlargement of the Company's term took place in 1708; (*Stat.* 6 *Ann. c.* 17;) when the United Company bargained with the Public to advance 1,200,000*l.* as a loan, but without any interest; (or, which operated as the same thing, at a reduced interest of 5 *per cent.* on the two loans conjointly;) for an extension of their term, in the exclusive trade, of fifteen years; and thus their nominal trading capital, on which the dividend was made, became advanced to 3,200,000*l.*

In 1712 the Company petitioned Parliament, (on the ground that the term which remained unexpired in their trade was too short to admit their risking the expences of regaining and securing the *pepper trade*, which had been engrossed by the Dutch,) that their corporate capacity might be continued, though the debt due to them from the Public should be redeemed. In consequence of this petition, the *stat.* 10 *Ann. c.* 28. passed, for repealing all former provisoes and powers of determining their trade or incorporation, but with power to the Public to redeem the debt at any time after September 1733. And thus the United Company were supposed to have obtained a perpetuity, as well in the exclusive trade as in all their chartered rights and capacities. They however submitted themselves in that respect to the pleasure of Parliament in 1730; when the *stat.* 3 *Geo.* 2. *c.* 14. was passed, for continuing to them their exclusive trade till 1766; for which they gave the public a premium of 200,000*l.* without any return of either principal or interest, and also agreed to a reduction of the rate of interest to 4 *per cent.* on the debt of 3,200,000*l.* and to accept of payment of the principal by instalments of 500,000*l.*

In 1744 they contracted for and obtained, by *stat.* 17 *G.* 2. *c.* 17. a further addition of fourteen years in the exclusive trade, for which they lent to the public one million at 3 *per cent.*—And, in 1750, they agreed, by *stat.* 23 *Geo.* 2. *c.* 22. to a further reduction of the rate of interest on the former debt to 3 *per cent.*

Thus grew the debt of 4,200,000*l.* from the Public to the United Company, carrying with it an annuity of 126,000. This was called the 3 *per cent.* East India annuities, and are now consolidated with the 3 *per cent. Bank* annuities. See title *National Debt.*—But the Company's capital or nominal sum, by which their dividends were governed, continued as before at 3,200,000*l.*; the million last lent having been raised by their bonds, and therefore not added to their former capital.

The next renewal, was made by contract with the public by *stat.* 21 *Geo.* 3. *c.* 65. § 9. when a further term, determinable in 1794, was granted in the exclusive trade on payment of 400,000*l.* in discharge of all claims on the Company by the Public, previous to March 1st. 1781. But it was provided that after payment of a yearly dividend of 8 *per cent.* to the holders of India stock, the surplus of all the net proceeds of their trade and revenues should be applied, ¾ to the use of the Public, and the remaining ¼ to the use of the Company.

The debts incurred by the Company, in the wars subsisting in India at and after that period, prevented any such surplus from arising; and therefore no participation of revenue took place under this act.—On the contrary, the pressure of those debts, and the compulsory clauses of an act of 1784, by which the Company were obliged to keep a stock of teas always in their warehouses, sufficient for one year's consumption, rendered it necessary for them to enlarge their actual trading capital, by new subscriptions, to 5,000,000*l.* for which they had the sanction of Parliament granted them by *stat.* 26 *G.* 3. *c.* 62. (explained by *stat.* 31 *G.* 3. *c.* 11.) and *stat.* 29 *G.* 3. *c.* 65.

In 1783 the Public agreed to forego any participation of the funds of the Company under the said *stat.* 21 *Geo.* 3. *c.* 65. until certain debts should be discharged; and by the *Relief Act* of 1784, the participation, as settled in 1781, was to be resumed as soon as the debts therein specified were paid, and the bond debt reduced to a million and a half. See *Stats.* 22 *Geo.* 3. *c.* 83. 24 *Geo.* 3. *c.* 34.

In 1793, was passed the act, 33 *G.* 3. *c.* 52. extending the term of the Company's exclusive trade (with certain modifications) for 20 years. (See *post*, IV.) and in 1813, was passed the act 53 *Geo.* 3. *c.* 155. by § 6. of which the Company's exclusive trade to any other places than China, was enacted to cease on 10th April 1814; and a further term in the exclusive trade to China, and the sole trade in *tea* between the Cape of Good Hope and the Straits of Magellan, and the possession of their territorial acquisitions and governments, determinable on three years' notice after 10th April 1831, were granted to the Company. See *post.* IV.

Having said thus much relative to the rise and progress of the Company, it may not be unacceptable to state shortly the mode of what may be called its internal œconomy.

The books of the Company are at all times open for the admission of every description of persons, natives or foreigners, who may desire to become members, and have money to adventure. It knows no distinction of professions, religions, or even sexes; and in the General Courts there is the most perfect equality; every one present has the same right with another to speak his sentiments, and give his advice. A difference is made only in voting; which, when taken by the holding up of hands, requires 500*l.* stock, and when by ballot, 1000*l.* stock for a single vote, 3000*l.* for two votes, 6000*l.* for three votes, and 10,000*l.* for four votes, which is the largest number of votes any member is allowed to possess; 2000*l.* stock qualifies any member to become a candidate for the office of a Director or Chairman.

In the beginning of the year 1794, the number of *votes* was about 1700—that of *actual voters* however not much exceeding 1400. The number of votes has probably increased since that time.

A proprietor of stock to the amount of 1000*l.* whether man or woman, native or foreigner, has a right to give a vote in the General Courts. The Directors are twenty-four in number, including the chairman and deputy chairman, who may be re-elected in turn, six each year for four years successively. (See *post.* IV.) The meetings or Courts of Directors are to be held at least once a week, but are commonly oftener, being summoned as occasion requires. Out of the body of Directors are chosen several committees, who have the peculiar inspection of certain branches of the Company's business; as the Committee of Correspondence; a Committee of Buying; a Committee of Treasury; a House Committee; a Committee of Warehouse; a Committee of Shipping; a Committee of Accounts; a Committee of Law Suits; and a Committee to prevent the Growth of Private Trade. And under *stat.* 33 *Geo.* 3. *c.* 52. a Committee of Secrecy. See *post*, IV.

By the Company's charter, 9, 10 *W.* 3. it was appointed that in all cases of an equality of votes in the general court of proprietors, or in the Court of Directors, the matter should be determined by lots: By § 77 of 53 *Geo.* 3. *c.* 155. no question shall be carried in either court, except by a majority, and an equality shall be deemed a rejection of the question: except in cases of election to offices, which shall, as before, be in such case decided by lot.

The bulk of the Company's *Exports* consists of camblets, cloth, and other woollens; metals, (particularly tin, lead, and copper;) naval and military stores; and silver in bullion.

The Company reserved to themselves the exclusive export of cloth, woollens, copper, bullion, and military stores; and also clocks, toys, and other articles ornamented with jewels.

Other articles exported from hence are chiefly purchased in India by Europeans, for their own consumption, and are carried abroad, (in what is called private trade,) by the commanders and officers of the Company's ships.—The Company may license whom they please, to trade in the East Indies. The officers and subordinates of their ships, being thirty in number for every ship, are allowed the benefit of it, both in export and import, according to their different ranks. This is called *private trade;* and what they pay for this permission, and in lieu of freight, is called *Company's duties*, and forms an article of the Company's profits. The servants abroad are also frequently permitted to remit home their fortunes in merchandize, for which they pay a freight to the Company. This latter trade is distinguished from the former by the name of *privileged trade.*

Besides this, abundance of British goods are sent to India by *illicit trade* carried on directly from Great Britain; and also by *clandestine trade* from various parts of Europe, in British ships under foreign colours.

See the *stat.* 33 *Geo.* 3. *c.* 52. *post* IV. in the 4, 5, and 6th divisions of the act as there arranged.

The goods *imported* by the Company from India consist chiefly of muslins, callicoes, and other piece goods, raw silk, cotton, indigo, pepper, salt-petre, opium, and various sorts of drugs; and from China, tea, coffee, and japan and china-ware, the other articles are comparatively of a trifling value.—Sugar has occasionally been imported in small quantities, but being at present (January 1794) subject to a heavy duty, it is in effect nearly prohibited.

The whole average amount of the customs and inland duties on the *import trade* of India and China to Great Britain, may be estimated at upward of a million *per annum;* and the sale amount thereof at nearly six millions *per annum.*

III. The temporary rights of the Company, consist: 1st. Of the sole and exclusive trade with *China:* so that none other of the King's subjects can go thither or trade there except it be by leave of the Company; or pursuant to the directions of *stat.* 53 *Geo.* 3. *c.* 155. *post* IV.—*2dly.* They have the administration of the government and revenues of the territories in India, acquired by their conquests during their term in the exclusive trade; subject nevertheless to the various checks and restrictions contained in the several statutes, which vest that administration in them.

The rights which the Company possess in *perpetuity*, are, to be a Body Corporate and Politick, with perpetual succession. See *stats*, 3. *Geo.* 2. *c.* 14. 17 *Geo.* 2. *c.* 17. 21 *G.* 3. *c.* 65.—To purchase, acquire and dispose at will of lands and tenements in Great Britain. In their charter of 10 *W.* 3. the value in Great Britain was not restricted; but by *stat.* 3 *G.* 2. *c.* 14. § 14. the value therein is not to exceed 10,000*l. per annum.*—By the charter of King William, to make settlements to any extent, within the limits of their exclusive trade; build forts and fortifications; appoint governors; erect courts of judicature; coin money; raise, train and muster forces at sea and land; repel wrongs and injuries, make reprisals on the invaders or disturbers of their peace; and continue to trade within the same limits, *with a joint stock for ever*, although their *exclusive* right of trading shall be determined by parliament. See the three statutes immediately above cited; and as to the forces, *stats.* 27 *Geo.* 2. *c.* 9. 1 *Geo.* 3. *c.* 14. 21 *Geo.* 3. *c.* 65. 28 *Geo.* 3. *c.* 8. explained by *stat.* 31 *Geo.* 3. *c.* 10. and 39 *Geo.* 3. *c.* 109.

These rights, it appears, the Company hold under the immediate authority of Parliament: they embrace all those of the old chartered Company which subsisted from the year 1600 to 1708, when, as has been already observed, they became vested or absorbed with all their fortresses, settlements and factories, and other property real and personal, in the present United Company.—They are a perpetual Corporation; and although their exclusive right to trade, and their power of administering the government and revenues of India, were to be determined, they would still remain an incorporated Company in perpetuity; with the exclusive property and possession of Calcutta and Fort William, Madras, and Fort St. George, Bombay, Bencoolen and St. Helena, and various other settlements and landed estates in India: and also a right of trading thither, with a joint stock; together with all their repositories and other conveniences adapted to their commerce and the preservation of their merchandise, both abroad and at home.

The only privileges they can be constitutionally deprived of, are, those of trading *to the exclusion* of others, and of *governing* the countries and collecting and appropriating the *revenues* of India, See *post* IV. and the Statutes there cited and abridged.

By § 93 of 53 *Geo.* 3. *c.* 155. an express saving is made, of the "undoubted sovereignty of the Crown," in and over the territorial acquisitions: and of the rights, franchises and immities of the Company.

IV. The Statutes now in force relative to the trade and concerns of the East-India Company, but the whole of which it does not seem expedient to state at large, are the following *viz.*—9, 10. *Wm.* 3. *c.* 44. continued and extended by 6 *Ann.* *c.* 17. 10 *Ann.* *c.* 28. 3 *Geo.* 2. *c.* 14. 17 *Geo.* 2. *c.* 17. 13 *Geo.* 3. *c.* 64. 19 *Geo.* 3. *c.* 61. 20 *Geo.* 3. *c.* 56. 21 *Geo.* 3. *c.* 65. 33 *Geo.* 3. *c.* 52. 53 *Geo.* 3. *c.* 155. & 54 *Geo.* 3. *c.* 34. *as to the general Establishment of the Company*—7 *Geo.* 1. *st.* 1. *c.* 5. § 32, 33. 7 *Geo.* 3. *c.* 50. 10 *Geo.* 3. *c.* 47. 23 *Geo.* 3. *c.* 22. 26 *Geo.* 3. *c.* 62. 28 *Geo.* 3. *c.* 29. 29 *Geo.* 3. *c.* 65. 31 *Geo.* 3. *c.* 11. 33 *Geo.* 3. *c.* 47. 34 *Geo.* 3. *c.* 41. 37 *Geo.* 3. *c.* 31. 44 *Geo.* 3. *c.* 3. 47 *Geo.* 3. *st.* 2. *c.* 41. 51 *Geo.* 3. *c.* 64. & 52 *Geo.* 3. *c.* 121. *as to the Interest on, and Increase of, their Capital Stock and Bond Debt:*—7 *Geo.* 3. *c.* 57. 9 *Geo.* 3. *c.* 24. 23 *Geo.* 3. *cc.* 36. 83. 24 *Geo.* 3. *c.* 34. 50 *Geo.* 3. *c.* 114. and 52 *Geo.* 3. *c.* 10. & *c.* 135. *as to Payments by the Company, and Relief or Advances to the Company:*—7 *Geo.* 3. *c.* 50. 10 *Geo.* 3. *c.* 47. 13 *Geo.* 3. *c.* 63. 17 *Geo.* 3. *c.* 8. 21 *Geo.* 3. *c.* 70. 26 *Geo.* 3. *c.* 25. 27 *Geo.* 3. *c.* 48. 36 *Geo.* 3. *cc.* 119. 127. 37 *Geo.* 3. *c.* 142. 39 *Geo.* 3. *c.* 59. 39 & 40 *Geo.* 3. *cc.* 59, 79. 41 *Geo.* 3. *U. K. c.* 21. 42 *Geo.* 3. *c.* 29. 45 *Geo.* 3. *c.* 36. 47 *Geo.* 3. *st.* 2. *c.* 68. 51 *Geo.* 3. *c.* 75. & 55 *Geo.* 3. *cc.* 64. 84. *for regulating the Affairs of the Company in India and Europe:*—24 *Geo.* 3. *st.* 2. *c.* 25. [26 *Geo.* 3. *c.* 16. repealed by 33 *Geo.* 3. *c.* 52 § 146.] 26 *Geo.* 3. *c.* 57. 28 *Geo.* 3. *c.* 8. 31 *Geo.* 3. *c.* 10. *for erecting the Board of Controul*, &c.—27 *Geo.* 2. *c.* 9. 1 *Geo.* 3. *c.* 14. 28 *Geo.* 3. *c.* 8. 31 *Geo.* 3. *c.* 10. 37 *Geo.* 3. *c.* 74. 39 *Geo.* 3. *c.* 109. 43 *Geo.* 3. *c.* 48. 50 *Geo.* 3. *c.* 87. 52 *Geo.* 3. *c.* 122. *relating to the Military Forces and Volunteers in the Company's Pay:*—6 *An.* *c.* 3. 7 *Geo.* 1. *st.* 1. *c.* 21. § 9. 18 *Geo.* 3. *c.* 36. 37 *Geo.* 3. *c.* 117. 42 *Geo.* 3. *c.* 77. 48 *Geo.* 3. *c.* 30. 53 *Geo.* 3. *c.* 155. 54 *Geo.* 3. *c.* 34. 57 *Geo.* 3. *c.* 95. *as to their exclusive Trade:*—12 *Geo.* 3. *c.* 54. 43 *Geo.* 3. *cc.* 63. 137. 46 *Geo.* 3. *c.* 85. 55 *Geo.* 3. *c.* 116. 57 *Geo.* 3. *c.* 120. & 58 *Geo.* 3. *c.* 83. *as to their Shipping:*—54 *Geo.* 3. *cc.* 36, 103. 55 *Geo.* 3. *c.* 10. *as to the Customs Duties on East India Goods.*

The following is the general effect of the statutes now in force so far as it seems necessary to particularize their several provisions.

By the *stat.* 13 *Geo.* 3. *c.* 63. "for establishing certain regulations for the better management of the affairs of the Company, as well in India as in Europe," considerable alterations were made in the constitution of the Company. It was enacted that the Court of Directors should in future be elected for four years; six members annually; but none to hold their

seats longer than four years. That no person should vote at the election of the Directors, who had not possessed their stock twelve months.—This *stat.* also increased the qualifications for a vote from 500*l.* to 1000*l.* (See *ante* II.)—The statute ordained that the Mayor's Court of *Calcutta* should in future be confined to small mercantile causes, to which only its jurisdiction extended before the territorial acquisitions. That in lieu of this Court, a new one should be established at Fort William, under the title of the Supreme Court of Judicature, consisting of a Chief Justice, and three Puisne Judges; and that these judges be appointed by the Crown. That a superiority be given to the presidency of Bengal, over the other presidencies in India. That the power of nominating and removing the Governor-General and Council at Fort William and Bengal, should be vested in the Directors. [By *Stat.* 26 *Geo.* 3. *c.* 25. it is declared that His Majesty's approbation of the appointment of the Governor-General and Council of Fort William, is not necessary.]

By 37 *Geo.* 3. *c.* 142. and 39 & 40 *Geo.* 3. *c.* 79, further regulations were made as to the Court at Calcutta, and for establishing Courts of Judicature at Madras and Bombay. Under these several acts the salaries of the judges are settled, and certain pensions are secured to them on their return to Europe.—By 47 *Geo.* 3. *st.* 2. *c.* 68. the Governor and Council at Madras and Bombay were empowered to make rules and orders for the better government of those settlements, by appointing justices of the peace, &c.

By *stat.* 24 *Geo.* 3. *sess.* 2. *c.* 25. *three* things were intended.—1. The establishing a power of *controul* in Great Britain, by which the executive government in India is connected with that over the rest of the empire.—2. The regulating the conduct of the Company's servants in India, in order to remedy the evils that had prevailed there.—3. The providing for the punishment of *crimes* which might reflect disgrace upon Great Britain.

1. Six persons are to be nominated by the King, as Commissioners for the affairs of India, of whom one of the Secretaries of State, and the Chancellor of the Exchequer for the time being shall be two, and the President is to have the casting vote if equally divided. (See *post*, *stat.* 33 *Geo.* 3. *c.* 52. *div.* 1.) New Commissioners are to be appointed at the pleasure of the Crown.—The Members of this Board of Controul are sworn to execute the several powers and trusts reposed in them without favour or affection, prejudice or malice. The Directors are to appoint the servants abroad, but power is given to the King by his Secretary of State, to recall the Governors and Members of the Councils, and all inferior Magistrates. The Council of Bengal are subjected to the direction of the Company at home; and in all cases, except those of immediate danger and necessity, restrained from acting without orders from England.

Another object of this act is, to redress the grievances of the natives of India; to provide for the payment of the debts of the Nabob of Arcot, which are a burden on his country; discriminating at the same time those which were justly incurred, from those which were forced upon him by the injustice and extortion of British oppressors: to ascertain the indeterminate rights and pretensions, on which so many differences arose between him and the Rajah of Tanjore; and to deliver the Zemindars, and other native landholders of India, from oppression; and to secure to them their possessions by permanent rules of moderation and justice. (See also *stat.* 26 *Geo.* 3. *c.* 16.)

2. A material part of this act is directed also against the abuses said to have prevailed in the civil and military departments; enjoining a thorough revisal of their establishment, together with the suppression of such places as are found to be useless, and of such expences as may be conveniently avoided. And in order to prevent any delusive show of retrenchment, or any future deviation, this reform is directed to be constantly submitted in its whole state and progress to Parliament. (See also *stats.* 28 *Geo.* 3. *c.* 8, 31 *Geo.* 3. *c.* 10.)

Cadets and writers were heretofore sent to India in such numbers as to remain a burden upon the Company's establishments. These are reduced to a certain complement not to be exceeded.

A system of succession by seniority is established by the act, to prevent the servants of the Company from rising, merely through interest without merit: leaving however to the Councils abroad the power of bringing forward, for reasons to be by them assigned, any persons of extraordinary merit or capacity. (See *post*, *Stat.* 33 *Geo.* 3. *c.* 52. *div.* 3.)

3. Security having been heretofore derived to delinquents in India, from the circumstance of their offences being committed within the territories of Indian princes, so as not to come within the cognizance of the British Government; this act provides against such evasions in future, by declaring the offence equally punishable, in whatever territory of India it is committed. The act of receiving presents, is declared to be in itself extortion, and punishable accordingly. The offences of disobeying orders, and bargaining for offices, are pronounced to be misdemeanors; and it is provided that offenders shall not compound for them with the Company; nor ever be restored to appointments in their service. Collectors and receivers are bound by oath not to receive any private gratuity over and above the legal tribute.

With a view to prevent, or more easily punish, the misconduct of the Company's servants, several regulations were made by this statute for the discovery of their property on their return to England from India; but which were all repealed by *stat.* 26 *Geo.* 3. *c.* 57. § 31.

The Attorney-General or Court of Directors may exhibit an information against any person guilty of the crime of extortion, or other misdemeanors committed in the East Indies, after January 1, 1785; which information is to be tried by Commissioners selected from both Houses of Parliament.

The election of these Commissioners is regulated by *stat.* 26 *Geo.* 3. *c.* 57. which in substance directs as follows. The Lords are to ballot for twenty-six of their house, and the Commons for forty of their number; their names are again to be put into a box, to be drawn out by lot, in presence of three Judges, (one of the Court of K. B. one of C. P. and one of the Exchequer,) and of the parties; and the defendant may *peremptorily* challenge thirteen peers and twenty commoners, and he, as well as the prosecutor, may challenge as many as they please *for cause shewn.* The first five names of the Peers, and the first seven names of the commoners, which shall be drawn without challenging, shall be returned by the three judges to the Lord Chancellor, to insert their names, with those of the three Judges, in a *special commission*, for them, or any ten of them, of whom one of the Judges always to be one, to hear and determine every such information, and pronounce judgment thereon; such judgment to be enforced by the authority of the Court of K. B. and to be effectual and conclusive to all intents and purposes whatsoever.—This, as well as the former act also, contains many other directions relative to the trial, as also relative to the dispensing justice, both in criminal and civil cases in India.

The above *stat.* 24 *Geo.* 3. *st.* 2. *c.* 25. is explained by *stat.* 28 *Geo.* 3. *c.* 8. as to the forces, (see *ante* III. and *stat.* 31 *Geo.* 3. *c.* 10.) the annual accounts (*ante* 2.) and the power of the Commissioners as to salaries and gratuities.

The *stats.* 33 *Geo.* 3. *c.* 52. & 53 *Geo.* 3. *c.* 155. being of the greatest importance on this subject, these, and their several explaining statutes are here presented in the form which seemed best adapted to elucidate the purposes for which they were passed. As they concern—1, The Controul in Great Britain.—2. The Governments abroad.—3. Patronage, and rule of

promotion.—4. The general trade.—5. Limitations on the exclusive trade to and from India.—6. What shall at present be deemed illicit or clandestine trade.—7. Appropriations of the Company's revenue.—8. The method of suing for forfeitures and penalties, and proceeding as to seizures.—9. Regulations of general justice and policy in India.—10. The statutes repealed.—11. Regulations as to the Directors, and the Company's concerns in England.

1. The act 33 *Geo.* 3. provides for the continuation of the Board of Controul in all its parts; except that the person first named in the King's Commission is to be President; and, instead of the Commissioners being limited to six Privy Councillors, the number is indefinite, resting in the King's pleasure; of which, however, the two principal Secretaries of State, and the Chancellor of the Exchequer, are to be three; and His Majesty may, if he pleases, add to the list two Commissioners not of the Privy Council.

The King may give 5000*l.* a year among such of the Commissioners as he pleases; which, together with the salary of the Secretary and Officers, and other expences of the Board, are to be paid by the India Company, and not, as formerly, by the Civil List; the whole (under various acts) not to exceed 26,000*l. per annum*, and superannuation allowances may be made to officers of the board.

Oaths are prescribed for the Commissioners and their officers. The office of a Commissioner, or chief Secretary, is not to be deemed a new office to disable them from sitting in parliament. Nor is the appointment of a Commissioner not having a salary, or of a chief Secretary, to vacate a seat. Three Commissioners must be present to form a Board.

The *Powers* of the *Board* are, in substance, as follows:—The Court of Directors are to deliver to this Board for their approbation or alteration, all minutes, orders, and resolutions of themselves, and of the Courts of Proprietors; and copies of all letters, orders, and instructions proposed to be sent abroad. None are to be sent until after such previous communication on any pretence whatever. They are to superintend, direct, and controul all acts, operations, and concerns, which relate to the civil or military government and revenues of the British territorial possessions in India, subject to the restrictions after mentioned. They and their officers are to have access to the papers and records of the Company, and to be furnished with copies or extracts of such of them as shall be required. They are also to be furnished with copies of all proceedings of General Courts, and Courts of Directors, within eight days; and with copies of all dispatches from abroad, relating to matters of government or revenue, immediately after their arrival. No orders on those subjects are to be sent by the Company to India, until approved by the Board; and when the Commissioners vary or expunge any part of the dispatches proposed by the Directors, they are to give their reasons; and all dispatches are to be returned to the Court of Directors in fourteen days. The Directors may state their objections to any alterations, and the Commissioners are to re-consider them; and if they interfere with what the Directors deem matters of Commerce, the Directors may apply to the King in Council to determine betwixt them. But the Board are restricted from the appointment of any of the Company's servants. If the Directors, on being called upon to propose dispatches, on any subject relating to government or revenue, shall fail to do so within fourteen days, the Board may originate their own dispatches on that subject.

The Board are not to authorise any increase of salaries, or any allowance or gratuity to be granted to persons employed in the Company's service, except the same shall be first proposed by the Company; and their intention and reasons for such grant are to be certified to both Houses of Parliament, thirty days before the salary can commence.

The Directors are to appoint three of their members to be a Committee of Secrecy, through whom dispatches relating to government, war, peace, or treaties, may be sent to and received from India. This Committee and their clerks to be sworn to secrecy.

Orders of Directors concerning the government or revenues of India, once approved by the Board, are not subject to revocation by the general court of proprietors.

The act 53 *Geo.* 3. *c.* 155. gives several additional powers to the Board of Controul. By § 64. &c. of this act the Directors are to order distinct accounts to be kept of their territorial, political, and commercial affairs, and to submit to the Board for their approbation a plan for such an arrangement of the accounts required by 32 *Geo.* 3. *c.* 52. Copies of all regulations, made under the acts for regulating the administration of justice at Calcutta, Madras, and Bombay, are to be laid before Parliament, together with such accounts. Duties in India on goods of the Company, are to be charged to the *debit* of the commercial account, and these together with the duties on private trade goods are to be considered as territorial revenue, and to be subject to the controul of the Board; who are also to have the control over the appropriation of any such revenues, to investments or commercial purposes: except such sums as shall be issued in India to make good home payments on account of territorial charges on Indian loans. The Court of Directors are to deliver to the Board, Copies of all proceedings, and of dispatches received relative to such appropriation; and no dispatches relative thereto are to be sent to India till approved by the Board: and the Board have two Months allowed (instead of 14 days under 33 *Geo.* 3.) to return dispatches laid before them by the Directors. The Secret Committee of the Directors are not to disclose the contents of any dispatches from their presidencies which relate to war, peace, or negociations, until authorised by the Board of controul. The Board may call for any accounts, &c. which the Directors shall furnish accordingly. Vacancies of governors and commanders in chief are to be filled by the Court of Directors subject to the royal approbation, countersigned by the president of the Board of Control. The approbation of the Board is required to the appointment of persons to civil and military officers of the Company in the East Indies. Members of council, general officers on the staff, advocate and attorney general, chaplains to the presidencies, writers, cadets and assistant surgeons, may be appointed by the Directors only.

2. The forms of government over the presidencies of Bengal, Fort St. George, and Madras, are continued in all their essential parts. For Bengal, by a *Governor-General* and three Members of Council. For each of the others, a Governor and three Members. These latter, with respect to treaties with the native powers of India, levying war, making peace, collecting and applying revenues, levying and employing forces, or other matters of civil or military government, are to be under the controul of the *Government-General* of Bengal; and are in all cases whatever to obey their orders; unless the Directors shall have sent to those settlements any orders repugnant thereto not known to the Government-general; of which, in that case, they are to give the Government-general immediate advice.

The Court of Directors are to appoint to these several governments; namely, the Governor-General, the two other Governors, and the Members of all the Councils; and likewise the Commander in Chief of all the Forces, and the three Provincial Commanders in Chief. None of the Commanders in Chief are, *ex officio*, to be of the Council, but they are not disqualified from being so if the Directors shall think fit to appoint them: and, when they are Members of the Council, they are to have precedence of the other Councillors.

The Directors may appoint to any of these offices provisionally, but without salary, till the persons appointed shall actually succeed in possession. Any vacancy of Governor General, or Governor, when no provisional successor is on the spot, is to be filled by the senior of the Civil Councillors till a successor shall arrive; and the vacant seat in Council thereby occasioned, shall be temporarily supplied from among the senior Merchans, at the nomination of the acting Governor-General, or Governor, if only one Councillor shall then remain: and on other occasions, the Governor-General and Governors may supply vacancies in Council from the list of senior Merchants, until successors duly appointed shall arrive to take their seats. In all these cases, the salaries and allowances are to follow the acting Members while in office. If the Directors fail to appoint to vacancies in two calendar months after notification thereof, the King may supply them, and the Directors shall not remove any person so appointed. In all other cases, the Directors have the power of recalling or dismissing any servants; and the like general power is vested in the Crown.

The Commander in Chief of all the Forces, when at either of the subordinate settlements is to have a seat at the Council Board, but is to have no salary in respect thereof; and if the provincial Commander is a Member of that Council, he may continue to deliberate, but his voice, shall be suspended as long as the other shall remain.

Provision is made for supplying the place of any Member of Council disabled from attending by illness.

The departure of any Governor, or Member of Government, or Commander in Chief, from India, with intent to come to Europe, or any written resignation delivered in by them, shall be deemed an avoidance of office, and the coming into any part of Europe, shall be a sufficient indication of that intent. No salary shall be payable to any officer, or his agent during absence, unless employed on actual service; and if any officer, unless absent on service, never returns, the salary is to be deemed to have ceased from the day of his quitting the settlement.

The act prescribes the order and method of conducting business, at the several Council Boards. Powers are given to the Governor General, or Governor, to act contrary to the opinions of the other Members of Council, taking upon themselves the sole responsibility.

Provision is made in case of the absence of the Governor-General, and his visiting any subordinate presidency; and in case he shall be in the field without a Council, all the governments and officers shall obey his orders, and he alone shall be responsible.

By 45 *Geo.* 3. *c.* 36. the Court of Directors may appoint the Commander in Chief on the Bengal establishment to be a Member of the Council of Fort William there, notwithstanding the office of Governor-General of Fort William, and that of Commander in Chief of all the Forces in India, shall be united in the same person.—The same act provides that such Commander shall have rank at the Board next to the Governor-General, but shall not succeed to the government in case of vacancy, unless he shall have been provisionally appointed to supply the same; but such vacancy shall be supplied by the Councillor next in rank.

All the governments are, by the act 33 *Geo.* 3. *c.* 52. laid under restrictions to prevent war or extension of dominion in India, unless hostilities against the Company or their Allies shall render war unavoidable. The Members of subordinate governments acting contrary to this act or to the directions of the Government General may be suspended or dismissed by that government, and further punished. The subordinate presidencies are also required to communicate all matters of importance to the superior government with all dispatch.

The Governor-General and other Governors, are vested with powers of apprehending persons suspected of illicit correspondence with the enemies of the Company, or of Great Britain. Witnesses are to be examined and cross-examined, and their evidence recorded; and the parties may either be tried in India, or sent home; in the latter case, the depositions of the witnesses are also to be sent home, and are to be received in evidence, subject to impeachment in respect to the competency of the witnesses.

To the acting President of the several Council Boards is given a casting vote in all cases of equality of voices.

By 42 *Geo.* 3. *c.* 29. the Company were authorised to reduce their Settlement of Fort Marlborough, (at Bencoolen in Sumatra,) to a Factory, subordinate to the Presidency of Fort William in Bengal: the servants, who thereby became supernumerary, were, under the act, transferred to Fort St. George.

By 53 *G.* 3. *c.* 155. §§ 42, 43. the Colleges and seminaries abroad are subjected to the Board of Controul. A lack of rupees is to be annually applied under the advice of the Governor General in Council, to the revival and improvement of literature, and the encouragement of the learned natives of India; subject, however, to the direction of the Board of Controul.

3. The Directors are to appoint so many cadets and writers only, as to supply vacancies according to returns from abroad. Their ages to be from fifteen to twenty-two; unless any cadet shall have been one year in the King's service, and then his age is not to exceed twenty-five years.

All shall have promotion by seniority of service only. Three years' service qualifies a civil servant for a place of 500*l.* a year—four years for one of 1500*l.*—seven years 3000*l.*—ten years 4000*l.* or upwards. None to take two offices where the joint emoluments shall exceed this rule. Two years of the time spent in the College established by the Company in England, by persons above seventeen years old, shall be reckoned as time spent in India. See *stats.* 24 *Geo.* 3. *c.* 25. 47 *Geo.* 3. *st.* 2. *c.* 68. § 7. and 53 *G.* 3. *c.* 155. § 82. 86.

Nearly the same regulations are made by 33 *G.* 3. *c.* 52. relative to receiving presents, disobedience of orders, and bargaining for offices, as have been already mentioned in *stat.* 24 *Geo.* 3. *c.* 25. *div.* 3. All the King's subjects are made amenable to all courts of competent jurisdiction abroad, and at home for all crimes committed by them in India. The Company may compound civil actions, but are absolutely restricted from compounding or remitting any judgment or sentence whatever in criminal cases.

Servants of the Company, (under the degree of a Member of Council, or Commander in Chief, after five years absence, cannot return with their rank, nor serve again, unless detained by sickness, or unless it be by leave of the Company, on a ballot of three parts in four of the General Court. In case of sickness, the Directors are the judges in the civil service; and in the military, the Directors and the Board of Controul jointly. This is qualified by § 84 of 53 *G.* 3. *c.* 155. as to Generals and Colonels commanding regiments, who, by the joint permission of the Directors and Board of Controul, may return after five years; and by § 85 of that act, restored civil servants shall rank only according to their seniority at the time of their departure from India. By § 93 the Directors are empowered to grant allowances to superannuated servants.

4. The Company's term is extended to the 10th of April, 1831, subject to be determined at or after that period, on three years' previous notice by Parliament, signified by the Speaker of the House of Commons. During this term they are to enjoy the sole, and exclusive right of trading, trafficking, and using the business of merchandize in, to, and from the dominions of the Emperor of China; and the whole sole

and exclusive right of trading and trafficking *in Tea*, in, to, and from all islands, ports, havens, coasts, cities, towns, and places between the Cape of Good Hope, and the straights of Magellan; and if the exclusive trade, thus limited, shall be hereafter discontinued, the Company are still to retain their corporate capacity, with power to trade with a joint stock, in common with other people. If, however, any new settlement shall be obtained from the Chinese government, separate from the Continent of Asia, an export trade thither is preserved, by 33 *G.* 3. to private merchants under certain regulations; and there is also a clause, in that act, to preserve to the Southern Whalers the benefit of their carrying trade into the Pacific Ocean, by the way of Cape Horn, to the northward of the Equator, limited to 180 degrees West Longitude of London: and ships from Nootka Sound are to be licensed to trade *from thence* with Japan and China, but are not to bring any goods of the produce or manufacture of those countries to Great Britain. See *ante*, III.

By 35 *Geo.* 3. *c.* 115. (continued by 42 *Geo.* 3. *c.* 20. § 6. during the continuance of the Company's exclusive right of trade under 33 *Geo.* 3. *c.* 52. and further by 53 *G.* 3. *c.* 155. § 30.) the importation of goods from India and China, and other parts within the limits of the Company's trade, is allowed in ships not of British built, or registered as such, having been taken up, and employed in the East Indies on account of the Company; and the same ships are allowed also to export goods to the East Indies as British-built ships; and this indulgence is extended to private traders.

By 42 *Geo.* 3. *c.* 77. British-built ships are permitted to carry on the Fisheries in the Pacific Ocean, which may pass through the Streights of Magellan, or round Cape Horn, &c. without licence from the East India Company, or the South Sea Company.

5. By 33 *Geo.* 3. *c.* 52. all persons were permitted to export and import goods to and from India, *in the Company's ships*; except that they shall not export military stores, ammunition, masts, spars, cordage, anchors, pitch, tar, or copper; nor import India callicoes, dimities, muslin, or other piece-goods, made or manufactured with silk or cotton, or with silk or cotton mixed, or with other mixed materials, unless it be done by leave of the Company. If the market shall not be sufficiently supplied with excepted articles, of import or export, (with an exception of military stores and copper,) the Board of Controul may open that trade also to individuals. If the Company should not export 1500 tons of copper, annually, private traders may export copper, in the Company's ships, to the amount of the deficiency.

So much of the act as required the Company to furnish private traders, with shipping, and the rate of freights thereon, &c. is repealed by 53 *G.* 3. *c.* 155. § 23.

The restrictions of the law against the Company's servants, or others, from acting as factors for foreigners, or lending money to foreign companies, or on buttomry of their ships, or assisting them with remittances by bills, were repealed by *stat.* 33 *G.* 3. *c.* 52. And all legal impediments to the recovery of debts, under any pretence that they were incurred illicitly, and against the letter of these abrogated laws, were removed; and all persons in India, not specially prohibited by the Company, or restricted by their covenants, were authorised to act as mercantile agents for any who may choose to employ them; and if there shall be a want of factors, (properly qualified and authorised) the Company are to license free merchants, with the approbation of the *Board of Controul*, so that there may be always a proper supply of agents for conducting the private trade abroad. But the becoming factors is not to exempt any persons from being amenable to the general authorities of the governments in India; and all agents are restricted from going beyond ten miles from some principal settlement without special leave.

By 37 *Geo.* 3. *c.* 97. § 22. the United States of America were allowed to trade to the British territories in India, conformable to the treaty of commerce with America, and during that treaty.

By 37 *Geo.* 3. *c.* 117. vessels of friendly countries may import into, and export from, the British possessions in India, goods permitted by the East India Directors, not contrary to treaties or law.

By *stat.* 53 *Geo.* 3. *c.* 155. any of his Majesty's subjects are allowed (after 10th April 1814) to trade to and from the United Kingdom of Great Britain and Ireland, from and to all ports and places within the Company's then existing limits, (*except China*), and to import ony goods (*except Tea*), the produce of any such places. But all persons, except the Company. or persons specially licensed by them, are prohibited from shipping any tea in the East Indies, or within the Company's limits, or importing it into the United Kingdom; and also from carrying military stores to any place on the continent of Asia, between the river Indus and the town of Malaccas, or in any island under the government of the Company, situate to the north of the Equator, or to the factory of Bencoolen.—All ships in private trade are to clear out from some port in the United Kingdom, and all goods imported in private trade are to be brought to some port in the United Kingdom, declared proper for that purpose by an Order of Council.—Other regulations are also imposed on such private trade, and a special reservation for future parliamentary provisions.—Ships engaged in the southern whale fishery, may sail between the Cape of Good Hope, and the Streights of Magellan.

6. All the old laws for preventing *Clandestine Trade* with India, and from lending to, or assisting, or being concerned with, Foreign Companies, or Foreign Traders, were by 33 *Geo.* 2. *c.* 52. repealed, and the following provisions substituted in their place: and by 53 *Geo.* 3. *c.* 155. these are extended to the clandestine trade to China, or in tea: observing that the penalties are made to extend to his Majesty's subjects of Great Britain, Ireland, Guernsey, Jersey, Alderney, Sark, Man, Faro Isles, or the Colonies, Islands or Plantations in America or the West Indies; and that all vessels and goods forfeited may be seized by any of the Company's officers in China.

Persons going unlawfully to China, and trafficking there, forfeit ships, vessels, goods, and merchandize, and double the value thereof; one-fourth to the informers, and three-fourths to the Company, they paying thereout the costs of prosecution.

Persons unlawfully going to China, shall be deemed unlawful traders, and subject to the foregoing penalties and forfeitures, and may also be prosecuted as for a crime and misdemeanor, and be liable to fine and imprisonment. One moiety of the fine goes to the King, the other to the Company if they prosecute, or else to any other informer.

Persons unlawfully resorting to China may be seized and sent home for trial; and, on arrival, they are to give bail, or be committed to prison.

Persons dismissed the service, or whose licences shall have expired, if they continue in China, are to be considered as illicit traders, and are made subject to penalties and forfeitures of goods, &c. as such.

Goods shipped clandestinely, or such as are restricted by the act, and goods unshipped at sea, shall be seized and forfeited, with double the value; and the Master, or other officer, knowingly permitting or suffering the same, shall forfeit all his wages to the Company; to be deducted out of the monies payable to the owners and be disabled from again acting in the service.

Any who shall solicit for, or accept a *foreign commission* to sail to, and trade in, India, shall forfeit 500*l.* half to the

Company, and half to the prosecutor, or the whole to the Company, if they shall prosecute.

All Governors and Councillors are prohibited from trading, except for the Company; and all Collectors, Supervisors, and others employed in the Revenues of Bengal, Bahar, and Orissa, or their agents, or any in trust for them, are prohibited from inland trade except for the Company. The judges of the Supreme Court of Judicature in Bengal are absolutely prohibited from traffic; and none, without the permission of the Company, shall trade in salt, beetle-nut, tobacco, or rice, on pain of forfeiture of the goods, and treble the value, one moiety to the Company, and the other to the prosecutor.

None shall send goods from China to the Continent of Europe by any other channel than as allowed by the act, on pain of forfeiture of double the value: but this restriction is not to extend to matters of agency, only on the account *bonâ fide* of any foreign Company, or foreign Merchant. See *Division*, 5.

By § 33. &c. of 53 *G.* 3. *c.* 155. reciting that it is the duty of this Country to promote the interest and happiness of the native inhabitants of the British dominions in India, and that such measures ought to be adopted as may tend to the introduction among them of useful knowledge, and of *religious and moral improvement;* and that in furtherance of the above objects sufficient facilities ought to be afforded by law to persons desirous of going to, or remaining in India, for those benevolent purposes, so as the authority of the local Governments as to the intercourse of Europeans be preserved, and the principles of the British Government, on which the nations of India have relied for the free exercise of their religion, be maintained: certain regulations are made for permitting persons to proceed to the East Indies, for the above or any other lawful purposes; if the Directors refuse such permission, they are to give their reasons to the Board of Controul, who may license or permit any persons to go to any places within certain bounds prescribed by § 38, 39 of the act. All persons going without licence or permission are subjected to the penalties of the act 33 *Geo.* 3. *c.* 52.

7. Appropriation. *First in India.* The territorial revenues are to be applied, in the first place, in defraying all charges of a military nature. Secondly, in payment of the interest of the debts there already, or hereafter to be, incurred. Thirdly, in payment of the civil and commercial establishments. Fourthly, towards the liquidation of the Company's territorial debt, or of the bond debt at home; or to such other purposes as the Directors, with the approbation of the Board of Controul, shall direct. And to prevent the commercial funds of the company from being exposed to embarrassments by payments made in Europe on account of territorial charges, a sum equal to such payments shall be annually applied in India for the purposes of investment or remittance. *Stat.* 53 *G.* 3. *c.* 155. § 55, 56.

*Secondly, at home.*—The net proceeds of their sales and other commercial profits are thus appropriated:—First in paying all bills of exchange;—secondly, in payment of current charges;—thirdly, in payment of dividend of 10½ per cent.—fourthly, in reduction of the Indian debt, or bond-debt at home, as the Directors and Board of Controul shall order.—The home profits shall not be liable to territorial charges, till after the dividend is provided for; except to bills and certificates for value received in India, and to interest and sinking fund on a loan of 2,500,000*l.* from the public to the Company, under 52 *G.* 3. *c.* 135. If the home funds are insufficient, after payment of the dividend, to discharge bills drawn for interest of existing Indian debts, the deficiency shall be paid as Parliament shall direct. It is provided, that money received at home on credit of bills drawn on territorial funds, or for advances in India, shall be applied to payment of territorial or political charges of the Company in Europe; and that any deficiency of commercial profits at home, to answer the annual dividend, shall be made good out of the surplus territorial revenues. Any surplus of the territorial revenues and home profits (after reduction of the Indian debt to ten millions, and of the home bonded debt to three millions) is to be applied as follows: first, in repayment of the capital of any public funds created for the Company.—Any further surplus to the amount of twelve millions is to be paid into the Exchequer, to be applied as Parliament shall direct, without any interest to be paid to the Company, but to be taken as a guarantee fund for securing the Company's stock and dividends at 10½ per cent.; and after such payment of twelve millions, one-sixth of all excess is to be the Company's, and the remaining five-sixths to be the property of the public, and disposable by Parliament. *Stat.* 53 *Geo.* 3. *c.* 155. § 57—59.

If the debts abroad, or the bond debt at home, after being reduced to the sums before limited, shall be again increased, the former appropriation is to be revived until those debts shall be again diminished to their respective standards before limited. 53 *Geo.* 3. *c.* 155. § 60.

The statute 33 *Geo.* 3. *c.* 52. recognized the rights of the Company, to a sum of 467,896*l.* 7*s.* 4*d.* in money, and 9750*l.* East India Stock, (which sums constitute the separate fund of the Company established under the act of 1781;) and it is observed that it will be more for the general interest of the Company to continue that money employed in trade, computing an interest upon it, and to make it a fund for a permanent increase to their dividend of 10*s. per cent.* than to draw it from their trading capital for any sudden distribution. And it then authorizes and limits the Company to make a dividend from this separate fund, and the interest thereof, after the rate of 10*s. per cent. per annum*, during their further term in the exclusive trade; and, at the end of the term, it gives them a power of disposing of the remainder of this fund as they shall think fit.

By 37 *G.* 3. *c.* 31. this 10*s. per cent.* was made payable out of the general profits: but by 53 *G.* 3. *c.* 155. § 62. it is again made payable out of this fund until it shall be exhausted, and then out of the general profits.

The Company are not to grant any pensions or new salaries beyond 200*l. per annum*, nor any gratuity above 600*l.* to any one person, without the consent of the Board of Controul; and they are to lay before Parliament annually a list of all their establishments abroad and at home; and also complete accounts of all their affairs, receipts and outgoings of the preceding year, with estimates of the following year; and copies of all warrants, &c. granting any salary, pension, or gratuity.

8. The statute (33 *Geo.* 3. *c.* 52.) gives a right of suing by action, bill, or information, in any of the courts of Westminster, (in which case the venue is to be laid in London or Middlesex,) or in the supreme courts of judicature in Bengal, or the Mayor's court at Madras or Bombay; and in such suits the legality of seizures of persons, ships, or goods, is made cognizable. In cases of misdemeanors, the offenders are punishable by fine and imprisonment; and if abroad, they may be sent home, as part of the punishment; and a *capias*, for arresting the accused party, is given in the first instance, which may be compounded for by bail.

For securing to the crown the duties for goods unlawfully trafficked with, in the cases of forfeiture of goods, the Attorney-General may prosecute the offenders, or their partners, by bills in a court of equity, waving penalties, and the defendants shall make full discovery of their illicit traffic upon oath, and shall be decreed to pay all the duties thereupon to government, and 30*l. per cent.* on the value of the goods to the Company, and shall be relieved against all other forfeitures. The Company may, in like manner, proceed against

offenders by bill in equity, and if they fail they shall pay costs. Defendants are to pay costs to the Crown and to the Company, when the decree shall be against them. Other usual regulations are made as to informers, pleading, &c.

9. The jurisdiction of the Supreme Court of Judicature at Fort William in causes of Admiralty, is made to extend to the High Seas at large; whereby a defect in *stat.* 13 *Geo.* 3. *c.* 63. for constituting that court is cured.

For increasing the number of magistrates in Bengal, Madras and Bombay, the supreme court of judicature in Bengal is to issue commissions of the peace, in pursuance of orders issued in council for that purpose; and any of the justices, so appointed, may, by order in council, sit also in the courts of oyer and terminer, taking the oaths of justices in England, (excepting the oath prescribed by the act of the 18 *Geo.* 2. relating to qualification by estate.) The proceedings and judgments of justices may be removed to the court of oyer and terminer by *certiorari*, but cannot be set aside for want of form, but on the merits only. The justices may also associate with the judges, in causes appealed, when called upon so to do.

The Governments abroad may appoint coroners to take inquests upon the bodies of persons coming to an untimely end and appoint fees to be paid for that duty.

The justices of the peace may appoint scavengers, and raise money by assessments, for cleansing, watching, and repairing the streets of Calcutta, Madras, and Bombay; they may also license houses for retailing spirituous liquors, and fix the limits of those towns; and none are to retail spirits but such as they shall so license, under the penalties of the laws of Great Britain.

By 47 *Geo.* 3. *st.* 2. *c.* 68. the Governor and Council at Madras and Bombay, are empowered to make regulations for the good order of those towns and their dependencies; subject to the appeal given by 13 *Geo.* 3. *c.* 63.—The Governor and Council at Bombay may make regulations for the Provincial Courts.—The Governors and Council of Madras and Bombay are made justices of peace for those towns, and empowered to issue commissions to the Company's servants to be justices of the peace in the places subordinate to the respective councils, without controul from the Governor-General and Council at Fort William.

By 37 *Geo.* 3. *c.* 142. § 28—30. British subjects are prohibited from lending any money, or being concerned in raising any, for native Princes, without the consent of the Court of Directors, or the Governor in Council at the settlement.—Persons offending may be prosecuted for a misdemeanor, and the securities are declared void.—See 46 *Geo.* 3. *c.* 133. for carrying into effect an agreement between the Company and the private creditors of the Nabobs of the *Carnatic*.

By 47 *Geo.* 3. *st.* 2. *c.* 68. &c. the several governments in India, are empowered to establish public banks there: and the Company's servants are allowed to subscribe to them. No judge of the courts there can be a director. § 8, 9, 10.

By 53 *Geo.* 3. *c.* 155. § 49—54. after reciting that no sufficient provision hath hitherto been made for the maintenance and support of a *Church-establishment* in the British territories in the East Indies, and other parts within the limits of the Company's charter, it is enacted that the King shall erect *one Bishoprick*, for the whole of the British territories in the East Indies, &c. and *three Archdeaconries*, for the three presidencies of Fort William in Bengal, Fort St. George on the Coast of Coromandel, and Bombay: the salaries of such Bishop and Archdeacons shall be paid by the Company; the jurisdiction of the Bishop to be ascertained by his patent; and after fifteen years' residence, the King may grant them pensions payable by the Company.

By 53 *Geo.* 3. *c.* 155. § 96, 97. the Governments in India are empowered to make articles of war for the native troops, and to hold courts-martial.—By § 98, &c. the Governor-General and Council at Fort William, Madras, Bombay, and Prince of Wales's Island, are empowered to impose duties, customs, and taxes, under certain regulations.—By § 101, 104. & 123. provision is made for the summary conviction and punishment by fine of British subjects being or remaining in India without or beyond the term of licence granted to them. Such persons may be sent home without being afterwards prosecuted. By § 102, 103. 105—122. several regulations are made for the administering justice in civil and criminal cases upon the principles of the law of England, as adapted to the circumstances as well of the natives as of the British Residents.

10. The Acts or parts of Acts repealed by 33 *Geo.* 3. *c.* 52. are as follows: *stat.* 9 & 10 *W.* 3. *c.* 44. § 81.—The whole of the temporary *stat.* 5 *Geo.* 1. *c.* 21. and so much of the several statutes as continued it in force.—*Stat.* 7 *Geo.* 1. *c.* 21. § 1. to § 9.—The whole of *stat.* 9 *Geo.* 1. *c.* 26.—*Stat.* 3 *Geo.* 2. *c.* 14. § 9.—*Stat.* 17 *Geo.* 2. *c.* 17. § 11.—*Stat.* 10 *Geo.* 3. *c.* 47. § 1 & 2.—*Stat.* 13 *Geo.* 3. *c.* 63. § 23. to § 29. and § 32 to § 35.—*Stat.* 21 *Geo.* 3. *c.* 65. § 29.—*Stat.* 24 *Geo.* 3. *c.* 25. § 3. 13. 29. and 31.—The whole of *Stat.* 26 *Geo.* 3. *c.* 16. and *Stat.* 26 *Geo.* 3. *c.* 57. § 32, 33.

The repeal is not to extend to offences committed before the commencement of the act, nor is it to affect the powers of the former Board of Controul, until a new one shall be appointed; nor to affect the powers given to the Board by *stats.* 28 *G.* 3. *c.* 8. 31 *G.* 3. *c.* 10. concerning the forces in India.

By 53 *Geo.* *c.* 155. § 21. so much of 31 *G.* 3. *c.* 42. is repealed as requires the Company to put up to sale or reserve for Government certain quantities of salt-petre at specific rates.—By § 22. so much 9 *W.* 3. *c.* 44. is repealed as requires goods of private traders imported to be sold by inch of candle.—By § 23. 26. so much of 33 *Geo.* 3. *c.* 52. as related to private trade in the Company's ships, and the duties payable to the Company thereon, are repealed; except as to goods deposited in the Company's warehouses.—By § 61. of the same act, so much of 33 *G.* 3. *c.* 52. as relates to any payments to be made by the Company into the Exchequer or the Bank is repealed.

The exclusive right of trading granted to the Company by 9 & 10 *W.* 3. *c.* 44. has never been put an end to, and any infringement of it is a public wrong; and though such parts of that act, as inflicted penalties, &c. were repealed by 33 *Geo.* 3. *c.* 52. which enacts that no acts, or parts of acts, thereby repealed shall be pleaded, or set up in bar of any action, &c. it is competent to underwriters, who have subscribed policies on ships trading to the East Indies, in contravention of the statute of *William* 3. to avail themselves of the illegality of such trading in an action brought on the policies. 6 *Term Rep. K. B.* 723. 1 *Bos. & Pul.* 272.

11. By 33 *Geo.* 3. *c.* 52. A special oath is prescribed to be taken in future by the Directors of the Company, prohibitory of their acting as Directors when concerned in buying from, or selling to, the Company any goods; and prohibitory of their being concerned in any shipping employed by the Company, or accepting any present for any appointment of office, or of being concerned in any private trade contrary to the act.

By 36 *Geo.* 3. *c.* 119. and *c.* 127. the Company were empowered to purchase houses and ground to enlarge their warehouses.

By 37 *Geo.* 3. *c.* 74. they were allowed to pay two regiments of infantry for defence of their houses and warehouses.

By 39 *Geo.* 3. *c.* 109. (as combined with the general annual mutiny acts) the recruiting the forces of the Company in England is regulated. Till embarkation they are governed under the mutiny acts; and afterwards, under 27 *Geo.* 2. *c.* 9. &c. See *ante*, III.

By 43 *Geo.* 3. *c.* 83. the Company were empowered to defray the expence of volunteer corps raised by them for the protection of their warehouses and property in London.

By *55 Geo. 3. c. 153. § 44.* &c. after reciting that the Company had lately established in England a college for the appropriate education of young men designed for their civil service in India; and also a military seminary for the military service, and that it was fit that they should be maintained and proper regulations made for their government; the Directors are empowered to make such regulations with the approbation of the Board of Controul.—The Bishop of London is to exercise a visitatorial jurisdiction over the college.—No person shall be appointed a writer who has not kept four terms at the college.

EASTINUS, Sax. *East-Tyne.*] An Easterly coast or country; also the *East street*, *East* side of a river, &c. *Leg. K. Ed. 1.*

EASTLAND COMPANY. This Company subsisted under a charter granted by Queen Elizabeth in 1579, for regulating the commerce into the *East country*; a name anciently given, and still continued by mercantile people, to the ports of the Baltic sea, more particularly those of Prussia and Livonia. They were by this charter to enjoy the sole trade, through the Sound, into Norway, Sweden, Poland, Lithuania, (excepting Narva, which was within the charter of the Russia Company), Prussia, and also Pomerania, from the river Oder, eastward, Dantzick, Elbing, and Koningsburgh: also to Copenhagen and Elsinore, and to Finland, Gothland, Bornholm, and Oeland. This charter was confirmed by another from Charles I. in 1629.

By the *stat. 25 Car. 2. c. 7.* the following provisions were made for laying open a very considerable part of this trade: it was declared lawful for any native or foreigner, at all times, to have free liberty to trade into and from Sweden, Denmark, and Norway, notwithstanding the charter to the Eastland Merchants, or any other charter.—And further, that every person, being a subject of this realm, might be admitted into the fellowship of merchants of Eastland on paying 40*s.* and no more. § 5, 6.—Which latter provision made the trade to the other parts within the limits of the charter easily accessible.

EAT INDE SINE DIE. Words used on the acquittal, &c. of a defendant, &c. *that he may go without day, i. e.* be dismissed. See title *Judgment.*

EAVES-DROPPERS. Persons that listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance, and presentable at the court-leet; or are indictable at the sessions, and punishable by fine, and finding sureties for good behaviour. *Kitch. of Courts*, 20. 4 *Comm.* 169. See title *Good Behaviour.*

EBDOMADARIUS. An *ebdomadary* or officer, appointed *weekly* in cathedral churches, to supervise the regular performance of divine service, and prescribe the particular duties of each person attending in the choir, as to reading, singing, praying, &c. To which purpose the *ebdomadary*, at the beginning of his week, drew, in form, a bill or writing of the respective persons, and their several offices, called *tabula*; whereupon the persons there entered were styled *intabulati*: This is manifested in the statutes of the *Cathedral Church of St. Paul*, digested by Dr. *Ralph Baldock*, Dean of *St. Paul's*, *anno* 1295. MSS.

EBEREMORTH, EBEREMORS, EBEREMURDER, *Sax.*] Bare or downright murder. *Leg. H. 1. c. 12.* See title *Aberemurder.*

ECCLESIA, *Lat.*] The place where God is served, commonly called a church: But in *law proceedings*, according to *Fitzherbert*, this word intends a parsonage; for so he expresses it in a question, whether a benefice was *ecclesia sive capella*, &c. *F. N. B. 32. 2 Inst. 363.*

ECCLESIÆ SCULPTURA. The image or sculpture of a church in ancient times, which was often cut out or cast in plate or other metal, and preserved as a religious treasure or relic, and to perpetuate the memory of some famous churches. *Mon. Ang. tom. 3. p. 309.*

ECCLESIASTICAL. Denotes something belonging to, or set apart for the church; as distinguished from *civil* or *secular*, with regard to the world.

ECCLESIASTICAL CORPORATIONS. Are where the members that compose it are *spiritual persons*. They were erected for the furtherance of religion, and perpetuating the rights of the church. See title *Corporation.*

ECCLESIASTICAL COURTS. See title *Courts Ecclesiastical.*

ECCLESIASTICAL JURISDICTION. By *stat. 37 H. 8. c. 17.* the doctors of the civil law, although they be laymen, &c. may exercise *ecclesiastical jurisdiction.*

ECCLESIASTICAL LAWS. See titles *Canon Law*, *Courts Ecclesiastical.*

ECCLESIASTICAL PERSONS, OR ECCLESIASTICS. *Ecclesiastici.*] Churchmen, persons whose functions consist in performing the service, and keeping up the discipline of the church. See title *Clergy.*

EDESTIA. From *Ædes*, used in some old charters for buildings.

EDIA. Aid or Help: Thus *Du Fresne* interprets it; but *Cowel* says it signifies *Ease.*

EDICT, *Edictum.*] An ordinance or command; a statute, *Lat. Law Dict.*

EDICTAL CITATION. In Scotch Law, a citation against a foreigner not within Scotland, but who has a landed estate there, or against a native who is out of Scotland. The citation is published at the market cross of Edinburgh, and pier and shore of Leith, and is authorised partly by necessity, partly by the idea that whoever is possessed of property there, will have left a warrant with some one to attend to his interest in that court where alone any question in relation to it can be tried.

EEL-FARES. A fry or brood of eels. *Stat. 25 H. 8.*

EFFECTUAL ADJUDICATION. A legal security for a debt on the estate of the Creditor in Scotland. See *stat. 33 Geo. 3. c. 74. § 11.*

EFFEERERS, (or *Affeerers.*) Persons appointed to set and assess fines in courts leet, &c.

EFFORCIALITER. Forcibly; as applied to military force.—*Mat. Paris, anno* 1213.

EFFRACTORES, *Lat.*] Breakers applied to *burglars*, that break open houses to steal.

EFTERS, *Sax.*] Ways, walks, or hedges. *Blount.*

EFFUSIO SANGUINIS. The mulct, fine, or penalty imposed by the old English laws for the shedding of blood, which the King granted to many lords of manors: And this privilege, among others, was granted to the abbot of Glastonbury. *Cartular.* MSS.

EGYPTIANS, *Egyptiani.*] Commonly called *Gypsies.*—These are a strange kind of common-wealth among themselves, of wandering impostors and jugglers who made their first appearance in Germany, about the beginning of the sixteenth century, and have since spread themselves all over Europe and Asia. They were originally called *Zinganees* by the Turks, from their captain Zinganeus, who, when Sultan Selim conquered Egypt, about the year 1517, refused to submit to the Turkish yoke, and retired into the desarts, where they lived by rapine and plunder, and frequently came down into the plains of Egypt, committing great outrages in the towns upon the Nile, under the dominion of the Turks. But being at length subdued, and banished from Egypt, they dispersed themselves in small parties, into every country in the known world; and as they were natives of Egypt, a country where the occult sciences, or black art, as it was called, was supposed to arrive to great perfection, and which in that credulous age, was in great vogue with persons of all religions and per-

suasions, they found the people wherever they came, very easily imposed on. *Mod. Univ. Hist. Vol.* 43. *p.* 271.

In the compass of a very few years, they gained such a number of idle proselytes, who imitated their language and complexion, and betook themselves to the same arts of chiromancy, begging and pilfering, that they became troublesome and even formidable to most of the States of Europe. Hence they were expelled from France in the year 1560, and from Spain in 1591. And the government in England, took the alarm much earlier, for in 1530, they are described by *stat.* 22 *Hen.* 8. *c.* 10. as "outlandish people, calling themselves Egyptians, using no craft or seat of merchandize, who have come into this realm, and gone from shire to shire, and place to place in great company, and used great, subtil, and crafty means to deceive the people; bearing them in hand, that they by palmestry could tell men and women fortunes; and so many times by craft and subtilty have deceived the people of their money, and have also committed many heinous felonies and robberies." Wherefore they are directed to avoid [depart] the realm, and not to return, under pain of imprisonment, and forfeiture of their goods and chattels; and, upon their trials for any felonies which they might have committed, they shall not be entitled to a jury *de medietate linguæ*. And afterwards it was enacted by *stats.* 1 & 2 *P.* & *M. c.* 4. 5 *Eliz. c.* 20. that if any such persons shall be imported into this kingdom, the importer shall forfeit 40*l*. And if the Egyptians themselves remain one month in this kingdom; or if any person, being 14 years old, whether a natural born subject or stranger, which hath been seen or found in the fellowship of such Egyptians, or which hath disguised him, or herself like them, shall remain in the same one month, at one or several times; it is felony, without benefit of clergy. And *Sir Matthew Hale* informs us, that at one Suffolk assizes, no less than thirteen gypsies were executed upon these statutes, a few years before the Restoration. But, to the honour of our national humanity, there are no instances more modern than this, of carrying these laws into execution. 4 *Comm.* 165, 6. Now by *stat.* 23 *Geo.* 3. *c.* 51. the said act of 5 *Eliz. c.* 20. is repealed. And the *stat.* 17 *Geo.* 2. *c.* 5. (see title *Vagrants*) regards them only under the denomination of rogues and vagabonds. The Scotch act 1690. *c.* 13. is understood to be still in force.

EIA, from Sax. *Eig.*] An island. *Mat. Paris, anno* 883. See *Ey*.

EJECTA. A woman ravished or deflowered; or cast forth from the virtuous. *Ejectus*, a whoremonger. *Blount*.

EJECTIONE CUSTODIÆ. *Ejectment de Garde.*] Is a writ which lieth against him that casteth out the *guardian* from any land during the minority of the heir. *Reg. Orig.* 162. *F. N. B.* 139. There are two other writs not unlike this; the one termed *ravishment de gard*, and the other *droit de gard*. See title *Guardian*.

## EJECTIONE FIRMÆ; OR EJECTMENT.

An action at law by which a person ousted or amoved from the possession of an estate for years, may recover that possession: and which action is now used as the general mode of trying disputed titles to lands and tenements.—See 3 *Comm.* 199. from whence the subsequent matter is extracted with addition from other sources.

A writ of *Ejectione firmæ*, or action of trespass in *Ejectment* lieth where lands or tenements are let for a term of years, and afterwards the lessor, reversioner, remainder-man, or any stranger, doth eject or oust the lessee of his term. *F. N. B.* 220. In this case he shall have his writ of *ejection* or *Ejectment*; to call the defendant to answer for entering on the lands so demised to the plaintiff for a term that is not yet expired and ejecting him. And by this writ the plaintiff shall recover back his term or the remainder of it, with damages.

Since the disuse of real actions, this mixt proceeding is become the common method of trying the title to lands or tenements. It is therefore necessary to delineate its history, the manner of its process, and the principles whereon it is grounded.

The writ of covenant, for breach of the contract contained in the lease for years, was anciently the only specific remedy for recovering against the lessor a term from which he had ejected his lessee, together with damages for the ouster. But if the lessee was ejected by a stranger claiming under a title superior to that of the lessor or by a grantor of the reversion, (who might at any time by a common recovery have destroyed the term,) though the lessee might still maintain an action of covenant against the lessor, for non-performance of his contract or lease, yet he could not by any means recover the term itself. *F. N. B.* 145. If the ouster was committed by a mere stranger, without any title to the land, the lessor might indeed, by a real action recover possession of the freehold, but the lessee had no other remedy against the ejector but in damages, by a writ of *ejectione firmæ*, for the trespass committed in *ejecting* him from his *farm*. But afterwards, when the courts of equity began to oblige the ejector to make a specific restitution of the land to the party immediately injured, the courts of law also adopted the same method of doing complete justice; and, in the prosecution of a writ of ejectment, introduced a species of remedy not warranted by the original writ, nor prayed by the declaration; (which are calculated for damages merely, and are silent as to any restitution;) *viz.* a judgment to recover the term, and a writ of possession thereupon. This method seems to have been settled as early as the reign of Edward IV. though it hath been said to have first begun under Hen. VII. because it probably was then first applied to its present principal use, that of trying the title of the land. *Bro. Ab. F. N. B.* 220.

The better to apprehend the contrivance, whereby this end is effected, it is to be recollected that the remedy by ejectment is, in its original, an action brought by one who hath a lease for years, to repair the injury done him by dispossession. In order therefore to convert it into a method of trying titles to the freehold, it is first necessary that the claimant do take possession of the lands, to empower him to constitute a lessee for years, that may be capable of receiving this injury of dispossession. For it would be an offence, called in our law *maintenance*, to convey a title to another, when the grantor is not in possession of the land: and indeed it was doubted at first, whether this occasional possession, taken merely for the purpose of conveying the title, excused the lessor from the legal guilt of maintenance. 1 *Ch. Rep. Ap.* 39.

When therefore a person, who hath a right of entry into lands, determines to acquire that possession, which is wrongfully withheld by the present tenant, he makes (as by law he may) a formal entry on the premises, and being so in the possession of the soil, he there, upon the land, seals and delivers a lease for years to some third person or lessee; and, having thus given him entry, leaves him in possession of the premises. This lessee is to stay upon the land, till the prior tenant, or he who had the previous possession, enters thereon a-fresh and ousts him; or till some other person (either by accident or by agreement beforehand) comes upon the land, and turns him out, or ejects him. For this injury the lessee is entitled to his action of ejectment against the tenant; or his *casual ejector*, whichever it was that ousted him, to recover back his term and damages. But where this action is brought against such a casual ejector as is before mentioned, and not against the very tenant in possession, the Court will not suffer the tenant to lose his possession without an opportunity to defend it. Wherefore it is a standing rule, that no plaintiff shall proceed in ejectment to recover lands against a casual ejector, without notice given to the tenant in possession (if

any there be) and making him a defendant if he pleases. And, in order to maintain the action, the plaintiff must, in case of any defence, make out four points before the court; *viz. Title, Lease, Entry*, and *Ouster*. First, he must shew a good *title* in his lessor, which brings the matter of right entirely before the Court; then, that the lessor, being seised or possessed by virtue of such title, did make him the *lease* for the present term; thirdly, that he, the lessee, or plaintiff did *enter* or take possession in consequence of such lease; and then, lastly, that the defendant *ousted*, or ejected him. Whereupon he shall have judgment to recover his term and damages; and shall in consequence, have a *writ of possession*, which the sheriff is to execute by delivering him the undisturbed and peaceable possession of his term.

This is the regular method of bringing an action of ejectment, in which the title of the lessor comes collaterally and incidentally before the Court, in order to shew the injury done to the lessee by this ouster. This method must be still continued in due form and strictness, (save only as to the notice to the tenant,) whenever the possession is vacant, or there is no actual occupant of the premises; and also in some other cases. But, as much trouble and formality were found to attend the actual making of the *lease, entry*, and *ouster*, a new, and more easy method of trying titles by writ of ejectment, where there is any actual tenant or occupier of the premises in dispute, was invented by the Lord Chief Justice *Rolle*. *Styl. Pract. Reg.* 108. (*edit.* 1657).

This new method entirely depends upon a string of legal fictions; no actual lease is made, no actual entry by the plaintiff, no actual ouster by the defendant, but all are merely ideal, for the sole purpose of trying the title. To this end, in the proceedings, a lease for a term of years is stated to have been made, by him who claims title, to the plaintiff who brings the action; as by *John Rogers* to *Richard Smith*, which plaintiff ought to be some real person, and not merely an ideal fictitious one, who hath no existence, as is frequently, though unwarrantably, practised. 6 *Mod.* 309. It is also stated, that *Smith* the lessee entered; and that the defendant *William Stiles*, who is called the *casual ejector*, ousted him; for which ouster he brings this action. As soon as this action is brought, and the complaint fully stated in the declaration, *Stiles*, the casual ejector, or defendant, sends a written notice to the tenant in possession of the lands, *e. g. George Saunders*, informing him of the action brought by *Smith*, and transmitting him a copy of the declaration; withal assuring him that he, *Stiles*, the defendant, has no title at all to the premises, and shall make no defence; and therefore advising the tenant to appear in court and defend his own title; otherwise he, the casual ejector, will suffer judgment to be had against him, and thereby the actual tenant, *Saunders*, will inevitably be turned out of possession. On receipt of this caution, if the tenant in possession does not, within a limited time, apply to the court to be admitted a defendant in the stead of *Stiles*, he is supposed to have no right at all; and, upon judgment being had against *Stiles*, the casual ejector, *Saunders*, the real tenant, will be turned out of possession by the sheriff.

But if the tenant in possession applies to be made a defendant, it is allowed him upon this condition; that he enter into a rule of court, to confess, at the trial of the cause, three of the four requisites for the maintenance of the plaintiff's action; *viz.* the *lease* of *Rogers* the lessor, the *entry* of *Smith* the plaintiff, and his *ouster* by *Saunders* himself, now made the defendant, instead of *Stiles*: which requisites being wholly fictitious, should the defendant put the plaintiff to prove them, he must of course be non-suited for want of evidence; but by such stipulated confession of *lease, entry*, and *ouster*, the trial will now stand upon the merits of the *title* only.

This done, the declaration is altered by inserting the name of *George Saunders* (the tenant) instead of *William Stiles*, and the cause goes down to trial under the name of *Smith* (the plaintiff) *on the demise of Rogers* (the lessor) *against Saunders*, the now defendant. And herein the lessor of the plaintiff is bound to make out a clear title, otherwise his fictitious lessee cannot obtain judgment to have possession of the land for the term supposed to be granted. But if the lessor makes out his title in a satisfactory manner, then judgment and a writ of possession shall go for *Smith*, the nominal plaintiff, who, by this trial, has proved the right of *Rogers*, his supposed lessor.

Yet, to prevent fraudulent recoveries of the possession, by collusion with the tenant of the land, all tenants are obliged by *stat.* 11 *Geo.* 2. *c.* 19. on pain of forfeiting three years' rent, to give notice to their landlords when they are served with any declaration in ejectment: and any landlord may, by leave of the court, be made a co-defendant to the action, in case the tenant himself appears to it, or, if he makes default, though judgment must be then signed against the casual ejector, yet execution shall be stayed, in case the landlord applies to be made a defendant, and enters into the common rule; a right which, indeed, the landlord had long before the provision of statute (*Styl. Pract. Reg.* 108. 111. 265. 7 *Mod.* 70. *Salk.* 257. *Burr.* 1301.) in like manner as (previous to the statute of *West.* 2. *c.* 3.) if, in a real action, the tenant of the freehold made default, the remainder-man or reversioner had a right to come in and defend the possession, lest, if judgment were had against the tenant, the estate of those behind should be turned to a naked right. *Bract. lib.* 5. *c.* 10. § 14.

A tenant to a mortgagor, who does not give him notice of an ejectment brought by the mortgagee to enforce an attornment, is not liable to the penalties of the *stat.* 11 *Geo.* 2. 1 *Term. Rep.* 647.

A third person cannot defend as landlord upon the trial of an ejectment, where it appears that the tenant in possession came in as tenant to the lessor of the plaintiff, and paid rent to him under an agreement that has expired. *Doe d. Knight* v. *Smythe* (*Lady*). *Term Rep. K. B. Mic.* 56 *Geo.* 3. 347.

Ejectment may be brought by a mortgagee, without giving notice to quit, against one who was let into possession, as tenant from year to year, by the mortgagor, after the mortgage made to the original mortgagee, but before the assignment of it to the lessor. 3 *East's Rep.* 449.

In ejectment for a chapel, the parson can only defend for a right to enter and perform divine service. *Str.* 914.—Notwithstanding 1 *Salk* 250. no man is to be admitted tenant or defendant in ejectment by the common rule, unless he hath been in possession, or received rent, and not a mere stranger. *Comb.* 209.

He who claims title shall be joined as a defendant, though the plaintiff opposes it. 1 *Salk.* 256. And, therefore, even the wife of the lessor. 1 *Salk.* 257.

The court permitted an *heir*, who had never been in possession, to come in and defend the ejectment. The father, under whom he claimed, died just after having first obtained a similar rule. 4 *Term Rep.* 122. So a mortgagee. *Comberb.* 399. As to a *cestui que trust*, see 3 *Term Rep.* 783. 4 *Term Rep.* 122.

In ejectment the legal title must prevail. *Term Rep. K. B.* ii. 682. vii. 47. Nor is there any difference in this respect between the case of an ejectment brought by a trustee against his *cestui que trust*, and an ejectment brought by any other person. 8 *Term Rep. K. B.* 122.

When ejectment is brought after a fine levied by a defendant, but before all the proclamations have been made, it is not necessary for the lessor to prove an actual entry to avoid such fine: but by the defendant's confessing lease, entry, and

ouster the merits only of the lessor's title are put in issue. 9 *East's Rep.* 17.

Where a pauper had been put into possession of a cottage 40 years before by the then overseers, and had continued in the parish pay, and the cottage had at times been repaired by the overseers; the pauper disposed of it and went away: held, that the existing overseers could not maintain ejectment for it. 14 *East Rep.* 488.

Though a purchaser for a valuable consideration may recover in ejectment, against one who claims only under a voluntary settlement, of which such purchasor had notice, yet it seems that the inadequacy of such consideration is material if it extend so far as to shew that it was only made colourably to get rid of the first settlement, and make another voluntary settlement. 16 *East Rep.* 212.

If a sheriff sell a term under a *fi. fa.* which is afterwards set aside, and the produce of the sale directed to be returned to the termor, he cannot maintain ejectment to recover his term against the vendee under the sheriff. 1 *Maul. & Selw. Rep.* 425.

The court will not, after a plaintiff has obtained judgment and possession in an undefended ejectment without collusion, and has sold part of the premises and transferred the possession, let in a landlord to defend, from whom his tenants had concealed the ejectment. 4 *W. P. Taunton*, 820.

But the court will set aside a writ of *hab. fac. poss.* executed, and let in a landlord to try an ejectment, on suggestion of collusion. 5 *W. P. Taunton*, 205.

If the new defendants, whether landlord or tenant, or both, after entering into the common rule, fail to appear at the trial, and to confess lease, entry, and ouster, the plaintiff *Smith* must indeed be there non-suited, for want of proving those requisites: but judgment will in the end be entered against the casual ejector, *Stiles*; for the condition on which *Saunders* (the tenant), or his landlord, was admitted a defendant, is broken, and therefore the plaintiff is put again in the same situation as if he never had appeared at all; the consequence of which (we have seen) would have been, that judgment would have been entered for the plaintiff, and the sheriff, by virtue of a writ for that purpose, would have turned out the tenant *Saunders*, and delivered possession to *Smith* the plaintiff. The same process therefore, as would have been had, provided no conditional rule had ever been made, must now be pursued as soon as the condition is broken.

The damages recovered in these actions, though formerly their only intent, are now usually (since the title has been considered as the principal question) merely nominal, as 1*s.* In order, therefore, to complete the remedy, when the possession has been long detained from him that had the right to it, an action of trespass also lies, after a recovery in ejectment, to recover the mesne profits which the tenant in possession has wrongfully received. Which action may be brought in the name of either the nominal plaintiff in the ejectment, or his lessor, against the tenant in possession: whether he be made party to the ejectment, or suffers judgment to go by default. In this case, the judgment in ejectment is conclusive evidence against the defendant, for all profits which have accrued since the date of the demise stated in the former declaration of the plaintiff; but if the plaintiff sues for any antecedent profits, the defendant may make a new defence. 4 *Burr.* 668.

Such is the modern way of obliquely bringing in question the title to lands and tenements, in order to try it in this collateral manner; a method which is now universally adopted in almost every case. It is founded on the same principles as the ancient writs of assize, being calculated to try the mere *possessory* title to an estate; and hath succeeded to those real actions, as being infinitely more convenient for attaining the ends of justice; because the form of the proceeding being entirely fictitious, it is wholly in the power of the court to direct the application of that fiction, so as to prevent fraud and chicane, and eviscerate the very truth of the title. The writ of ejectment and its nominal parties (as was resolved by all the judges) are judicially to be considered as the fictitious form of an action, really brought by the lessor of the plaintiff against the tenant in possession; invented, under the controul and power of the court, for the advancement of justice in many respects; and to force the parties to go to trial on the merits, without being entangled in the nicety of pleadings on either side. 4 *Burr.* 668. See also 3 *Burr.* 1294, 6.

But a writ of ejectment is not an adequate means to try the title of *all* estates, for on those things, whereon an entry cannot in fact be made, no entry shall be supposed by any fiction of the parties. Therefore an ejectment will not lie of an advowson, a rent, a common, or other incorporeal hereditaments. *Brownl.* 129. *Cro. Car.* 492. *Str.* 54. Except for tithes in the hands of lay appropriators, by the express purview of *stat.* 32 *Hen.* 8. *c.* 7. which doctrine hath since been extended by analogy to tithes in the hands of the clergy. *Cro. Car.* 301. 2 *Ld. Raym.* 789. Nor will it lie in such cases where the entry of him that hath right is taken away by descent, discontinuance, twenty years *dispossession*, or otherwise.

*More particularly, for what things ejectment will lie.* *Ejectment* ought to be brought for a thing that is certain; and if it be of a manor, the manor of A. with the appurtenances; if of a rectory, the rectory of B. &c. And so many messuages, cottages, acres of arable land, meadow, &c. with the appurtenances in the parish of, &c. For land must be distinguished, how much of one sort, and how much of another, &c. *Cro. Eliz.* 339. 3 *Leon.* 13. *Ejectment* lies of a church, as of an house called *the parish church of*, &c. And a church is a messuage, by which name it may be recovered: and the declaration is to be served on the parson who performs divine service. 11 *Rep.* 25. 1 *Salk.* 256.

A Rector may recover in ejectment against his lessee, on the ground of the lease of the rectory being avoided on account of his own non-residence, by force of the 13 *Eliz. c.* 20. and the lease to the defendant, describing him as doctor in divinity, produced by him at the trial in support of his title, is *primâ facie* evidence of his being such as he is therein described to be, so as to avoid the lease under *stat.* 21 *Hen.* 8. *c.* 13. § 3. 2 *East's Rep.* 467.

It lies *de uno messuagio sive burgagio*; but not *de uno messuagio sive tenemento*, unless it have a *vocat'* A. &c. to make it good, because of the uncertainty of the word *tenement*. 1 *Sid* 295. But for a messuage *and* tenement hath been allowed. 1 *Term Rep.* 11. So indeed for a messuage *or* tenement. 3 *Wils.* 23. 3 *Mod.* 328. 1 *Sid.* 295. but see *contra*, 1 *East's Rep.* 441, 2. It will lie for a moiety, or third part of a manor or messuage, &c. And for a chamber or room of a house well set forth. 11 *Rep.* 55. 59. 3 *Leon.* 210. It lieth *de domo*, which hath convenient certainty for the sheriff to deliver possession, &c. *Cro. Jac.* 654. It lies of a cottage or curtilage; of a coal-mine, &c. but not of a common, piscary, &c. *Cro. Jac.* 150. For underwood it lies, though a *præcipe* doth not. 2 *Roll. Rep.* 482, 483. But for *uno clauso*, or *una pecia terræ*, &c. without certainty of the acres, and their nature, it doth not lie. 11 *Rep.* 55. 4 *Mod.* 1. It lieth of a close, containing three acres of pasture, &c. Also of so many acres of land covered with water; though not *de aquæ cursu*. *Cro. Jac.* 435. 1 *Brownl.* 242. It lies for a *prebendal* stall, after collation to it. 1 *Wils.* 14.

After verdict for a messuage and tenement the court gave leave to enter the verdict according to the judge's rules for the messuage only, without obliging the lessor of the plaintiff to release the damages. 8 *E. R.* 357.

If copyhold descends by custom to all the children equally of the tenant last seised, one of the joint tenants may main-

tain an ejectment on his single demise for his own share. 12 *E. R.* 39.

If four tenants in common jointly demise, from year to year, such of them as give notice to quit may recover their several shares in ejectment on their several demises. 3 *W. P. T.* 120.

Ejectment lies by the owner of the soil for land which is part of the King's Highway, or of an acre of land, described only by the name of land, though there was a wall, and porch, and part of a house built on it. 1 *Burr.* 133.

In this action the law requires, that the thing demanded be so particularly specified, that the sheriff may certainly know what to give the possession of, if the plaintiff should recover; for the judgment is in order to execution, and the judgment would be vain, if execution could not be had of the thing specifically demanded; but in this action the judges did not confine themselves to those rules which govern the *præcipe*, but allowed some things to be recovered in this action, which could not be demanded in a *præcipe;* because, since the establishment of that real action, many things have been added and improved by art, and acquired new appellations, that are perfectly understood now by the law, which are not found in the ancient law books; and as men began to contract by new names, which were not known in the old law, so it was reasonable to suffer the remedy to follow the nature of such contracts. See 2 *Ld. Raym.* 1470. 2 *Stra.* 908. 1 *Burr.* 629.—And, in general, ejectment does not lie without showing the quantity and quality of the land, and how many acres of arable, meadow, and pasture, *&c.* 11 *Co.* 55. 1 *Salk.* 254. 4 *Mod.* 97.

An Ejectment is a *possessory* remedy, and only competent where the lessor of the plaintiff may enter; therefore it is always necessary for the plaintiff to shew that his lessor had a *right to enter*, by *proving a possession within twenty years*, or *accounting for the want of it*, under some exceptions allowed by the statute; *twenty years' adverse* possession is a *positive title* to the defendant; it is not a *bar* to the *action or remedy* for the plaintiff *only*, but takes away his right of possession. 1 *Burr.* 119. Every plaintiff must shew a right of possession as well as of property, and therefore the defendant needs not plead the statute, as in the case of actions. *Ibid.*

A judgment in ejectment is the recovery of the *possession;* (not of the *seisin* or *freehold*,) without prejudice to the *right*, as it may afterwards appear between the parties. He who enters under it in truth and substance, can only *be possessed according to right, prout lex postulat.* If the lessor have a freehold, he is in as a freeholder: if he has a chattel interest, he is *in as* a termor; and in respect of the freehold, his possession enures *according to right.* If he has no title, he is in as a trespasser; and, without any re-entry by the true owner, is liable to account for the profits. 1 *Burr.* 114.

This action of ejectment is rendered a very easy and expeditious remedy to landlords whose tenants are in arrear, by *stat.* 4 *Geo.* 2. *c.* 28. which enacts that every landlord who hath by his lease a right of re-entry in case of non-payment of rent, when half a year's rent is due, and no sufficient distress is to be had, may serve a declaration in ejectment on his tenant, or fix the same upon some notorious part of the premises, which will be valid, without any formal re-entry or previous demand of rent. And a recovery in such ejectment shall be final and conclusive, both in law and equity, unless the rent and all costs be paid or tendered within six calendar months afterwards.

The true construction upon this act is, to take off the landlord the inconvenience of his continuing always liable to an uncertainty of possession; (*from its remaining in the power of the tenant to offer him a compensation at any time, in order to found an application for relief in equity;*) and to limit and to confine the tenant to six calendar months after execution granted for his doing this; or else that the landlord shall from thenceforth hold the demised premises discharged from the lease. 1 *Burr.* 619. As to the provision of *Stat.* 11 *Geo.* 2. *c.* 19. § 16. and 57. *G.* 3. *c.* 52. in cases of tenants at rack-rent being in arrear, and deserting the premises, see this Dict. title *Rent.* Two justices of peace may, in this case, put the landlord in possession.—

Where an ejectment is brought against a tenant, for the purpose of turning him out of his farm, &c. and the tenant actually holds the premises of the lessor of the plaintiff, it is sometimes necessary to give him notice to quit possession, in order to maintain an ejectment. Here we may observe, that demises, where *no certain term* is mentioned, are held to be tenancies from *year to year*, which neither party can determine without reasonable notice to the other. This notice is, in most counties, *six months;* and it must in all such cases expire at that part of the year when the tenancy commenced; and therefore it hath been holden, that half a year's notice to quit possession must be given to such tenant; before the end of which time the landlord cannot maintain an ejectment, unless the tenant has attorned to some other person, or done some act disclaiming to hold as tenant; in which case no notice is necessary. And the same law will apply to the executor of such a tenant. 3 *Wils.* 25. See 1 *Term Rep.* 160. 4 *Term Rep.* 361.

A landlord gave notice to quit different parts of a farm at different times, which the tenant neglected to do in part; in consequence of which the landlord commenced an ejectment; and before the last period mentioned in the notice was expired, the landlord, fearing that the witness, by whom he was to prove the notice, would die, gave another notice to quit at the respective times in the following year, but continued to proceed with his ejectment: held, the second notice was no waver of the first. 2 *East's Rep.* 237.

Where a defendant in ejectment held, as to the arable lands, from Candlemas, and as to the rest of the farm from May-day, the rent being payable at Michaelmas and Lady-day, and notice to quit was given six months before May-day, and not six months before Candlemas; the plaintiff was nonsuited. See 2 *East's Rep.* 384.

Under an agreement by a tenant of a farm "to enter on the tillage-land at Candlemas, and on the house and all other the premises at Lady-day following, and that when he left the farm he should quit the same *according to the times of entry as aforesaid;*" and the rent was reserved half-yearly at Michaelmas and Lady-day: held, that notice to quit, delivered half a year before Lady-day, but less than a half year before Candlemas, was good; the taking being, in substance, from Lady-day, with a privilege for the incoming tenant to enter on the arable land at Candlemas, for the sake of ploughing, &c. 6 *East's Rep.* 120.

*After the expiration of a lease* for a *certain term*, the tenant continuing in possession is deemed a trespassor: and therefore an ejectment, which is an action of trespass, may be brought *without any notice to quit.*

But in ejectment by a landlord against a tenant, whose lease is expired, the latter is not barred from shewing that his landlord's title is expired. 4 *Term Rep. K. B.* 682.

*Points of practice relating to ejectments.* Where there is a tenant in possession, in order to proceed against him, prepare a declaration, the copy of which, *upon stamp*, you serve the tenant with; if there be more than one tenant, each must be served with a copy; but if the man is not at home, his wife will do (provided she be served on the premises, and so sworn to); this is necessary both in town and country causes. At the time of service, in all cases, it is requisite to *read over or explain the notice at the foot of the declaration to the person served.—Impey K. B.* which see at length.

The tenant's son, daughter, or servant, he being out of the way, must not be served, unless it appear to the court that

such declaration and notice came to his hands, in which case it has been held a good delivery; but if the tenant *purposely* keep out of the way to avoid being served, the court, on affidavit, will grant a rule to shew cause why that should not be deemed good service.

In case the servant, &c. be served, and motion be made that it be deemed good service, the tenant must swear that the declaration never came to his hands before the time of shewing cause, or the court will make the rule absolute. *Trin.* 30 *Geo.* 3. In this case to ground such a motion you must shew endeavours to serve him at several times, &c.

The declaration must be served before the essoign-day of every term, either in town or country, and the notice must be made to appear in the next term after delivery; but the delivery on a Sunday, or on the essoign-day of that term wherein the defendant is to appear, will not do.

If the premises be in London or Middlesex, the notice must be made to appear the first day of the next term after service, for if made generally, the tenant in possession has the whole term to appear in; but if the tenements lie in any other county, the notice must be to appear as of the next term generally.

Ejectment must be brought in the county where the lands lie, and the declaration must set forth the particular parish; and the day of the demise must be laid after the title accrues, otherwise the plaintiff will be non-suited; and the plaintiff must lay the commencement of his supposed lease, to have been precedent to the ejectment by the defendant. 1 *Sid.* 8. 2 *New Ab.* 171.

If the title of the lessor of the plaintiff accrue in Easter vacation, yet the plaintiff may deliver his ejectment as of Easter term, and shall recover thereon, because he makes up his issue, or takes judgment as of the next term: otherwise the act of the law, which supposes the bill filed as of the first day of Easter term, before a title accrued to the plaintiff, would be an act of injury to him, and delay his right; for a man ejected out of a lease made in term time, could not complain till term was over. 2 *Ventr.* 174. It must be brought within twenty years, by *stat.* 21 *Jac.* 1. *c.* 16. *Sid.* 432. See *ante*, and title *Limitation of Actions.*

It was formerly held, that a declaration in ejectment could not be altered or amended after once delivered, in the most trivial matters; but it has since been held, that an ejectment is a mere fictitious action, and the demise mere matter of form, nor does it exist, and on application, the demise was ordered to be amended; but this was to save the plaintiff from being barred by a fine, if he had been obliged to bring a new ejectment. 4 *Burr.* 2447. Therefore, as the demise may be altered, there can be no doubt but that other parts less material may also be amended; the action being invented under the control of the court, for the advancement of justice, and merely to try the right in question. 1 *Burr.* 665. The term may be amended without consent from five to ten years. *Str.* 1272. 1211.—A verdict cures a defect in setting out the title, though it cannot cure a defective title. 2 *Burr.* 1159. See title *Amendment.*

It is necessary to prove the defendant or his tenant in possession of the premises: for the rule is, that the landlord shall defend for the premises only whereof his tenants are in possession; and the party does not admit himself to be landlord of any premises which the plaintiff may make title to, but of such only as were in possession of those tenants. 1 *Wils.* 220.

A new trial may, upon proper grounds, be granted in ejectment, as well as in other cases. 4 *Burr.* 2224.

In real actions, where the freehold is recovered, the demandant has execution, by the writ of *habere facias seisnam;* in ejectment, therefore, it is but just, that a similar remedy shall be permitted to the plaintiff, who as he now has judgment to recover the possession of the land, may put the sentence of the law in execution by virtue of a writ of *habere facias possessionem*, directing the sheriff to give actual possession to the plaintiff, of the land recovered.

This writ may be sued out though the lessor of the plaintiff be dead, if tested the last day of the preceding term. 4 *Burr.* 1970. The legal relation to the day of the teste is proper to be supported in maintenance of a writ of possession on a judgment in ejectment. *Ibid.*

In *ejectment*, where there are divers defendants, and the freeholds are several, no defendant may defend for more than is in his own possession; and the plaintiff may take judgment against his *ejector* for what remains. 1 *Vent.* 355. 2 *Keb.* 524. 531.

If there be two defendants in *ejectment*, and one of them appears and confesses lease, entry, and *ouster*, but the other does not appear, in that case the plaintiff may enter a *non-pros*, or *retraxit*, against him, and go to trial, and have judgment against the other defendant. 1 *Lord Raym.* 717, 718. Also if an *ejectment* be brought against two persons, and after issue joined, one dies, and a *venire* is awarded as to the two defendants, and a verdict against two; here, upon suggestion of the death of one of them upon the roll, judgment shall be given for the plaintiff against the other for the whole: for it is said this action is grounded upon torts, which are several in their nature, and one may be found guilty and the other acquitted. *Ibid.*

Where one brings *ejectment* of land in two parishes, and the whole lies in one, he shall recover: also if a person brings *ejectment* of one acre in *B.* and part of it lies in *A.* he shall recover for such part as lies in *B.* And if one having title to a part only of lands, bringeth an *ejectment* for the whole, he shall recover his part of the lands. *Plowd.* 429. *Cro. Car.* 13.

A plaintiff shall recover only according to the right which he hath at the time of bringing his action: and one who hath title to the land in question, may on motion be made a defendant in the action with the tenant in possession, to defend his title. 1 *Nels. Abr.* 694. 1 *Lil.* 497, &c. As the possession of the land is primarily in question, and to be recovered, that concerns the tenant; and the title of the land, which is tried collaterally, that concerns some other, who may be admitted to be a defendant with the tenant: but none other is to be admitted a defendant, but he that hath been in possession, or receives the rents, &c.

If the plaintiff can prove his title accrued before the time of the demise, and that the defendant hath been longer in possession, he shall recover antecedent profits; but in such case the defendant will be at liberty to controver his title. *Bull. Ni. Pri.* 83.

Where an actual entry is necessary, the demise must be laid after it. 7 *Term Rep. K. B.* 433. An actual entry is necessary to avoid a fine, and the party so avoiding it cannot lay his demise in an ejectment to recover the mesne profits that accrued before such entry. 7 *Term. Rep. K. B.* 727. See also 1 *East's Rep.* 568.

As the plaintiff in *ejectment* is a mere nominal person, and a trustee for the lessor; if he release the action, the court may set aside the release, and he shall be committed for a contempt; so likewise if he release an action brought in his name for the mesne profits. 1 *Salk.* 260. *Skinn.* 247. If a man is made plaintiff in *ejectment* without his knowledge, and the defendant appearing, the plaintiff thereupon becomes nonsuit, after which execution is sued out against him; if it appears by his oath that he was made plaintiff without his knowledge or order, he shall be discharged. 34 *Car. B. R.* 5 *Ann.* 1 *Lil.* 500.

The lessor of the plaintiff in ejectment cannot release the action. *Doe, d. Byne* v. *Brewer. Term. Rep. K. B.* 55 *G.* 3. 300.

If there be a verdict and judgment against the plaintiff, he may bring another action of trespass and *ejectment* for the land, it being only to recover the possession, &c. wherein judgment is not final; and it is not like a writ of right, &c. where the title alone is tried. *Wood's Inst.* 547. *Trin.* 23 *Car. B. R.*

The reason of an *ejectment being never final* is not laid down in the general books on this subject, but in the notes to Eunomus, vol. iv. p. 189, it is thus ingeniously stated.—The reason why it is not or cannot be final seems to be this. That it is impossible from the *structure of the record* in this action, to plead a former, in bar of another, ejectment brought. —Because, 1. The plaintiff and defendant are nominal, and exist in most cases on record only; and consequently may be changed in a new action. But the identity both of plaintiff and defendant must be averred in pleading a former action in bar.—2. The term demised may be laid many different ways. An ejectment, however, though in its nature not final at *law*, is capable of being made so in *equity*: and the Court of Chancery will, on proper grounds, grant a perpetual injunction, and not permit the possession of lands to be disturbed by a vain incessant litigation of the same question. See 2 *Eq. Ab.* 171. *c.* 1. 243. *c.* 11. 222. *c.* 1. *Parl. Cases* (8vo.) title *Injunction*, ca. 1. 3. 2 *Stra.* 404.

Though the court may stay proceedings in a new ejectment until the costs of a former ejectment between the same parties, and also the costs of an action for mesne profits dependant thereon, are paid; yet they will not extend the rule to include the damages in the action for the mesne profits, however vexatious the proceedings of the lessors of the plaintiff may have been. 15 *East's Rep.* 233.

FORM *of the* DECLARATION *in* EJECTMENT, *by Original; against the Casual Ejector, who gives Notice thereupon to the Tenant in Possession.*

*Michaelmas, the 29th of King George the Third.*

BERKS to wit. { *WILLIAM STILES, late of Newbury, in the said county, Gentleman, was attached, to answer Richard Smith, of a plea, wherefore with force and arms he entered into one messuage, with the appurtenances, in Sutton, in the county aforesaid, which John Rogers, Esq. demised to the said Richard Smith, for a term which is not yet expired, and ejected him from his said farm, and other wrongs to him did, to the great damage of the said Richard, and against the peace of the lord the King, &c. And whereupon the said Richard, by Robert Martin his attorney, complains, that whereas the said John Rogers, on the 1st day of October, in the twenty-ninth year of the reign of the lord the King that now is, at Sutton aforesaid, had demised to the same Richard the tenement aforesaid, with the appurtenances, to have and to hold the said tenement, with the appurtenances, to the said Richard and his assigns, from the feast of Saint Michael the Archangel then last past, to the end and term of five years from thence next following, and fully to be complete and ended; by virtue of which demise the said Richard entered into the said tenement, with the appurtenances, and was possessed thereof; and the said Richard being so possessed thereof, the said William afterwards, that is to say, on the said 1st day of October, in the said twenty-ninth year, with force and arms, that is to say, with swords, staves, and knives, entered into the said tenement, with the appurtenances, in the possession of the said Richard, which the said John Rogers demised to the said Richard in form aforesaid, for the term aforesaid, which is not yet expired, and ejected the said Richard out of his said farm, and other wrongs to him did, to the great damage of the said Richard, and against the peace of the said lord the King. Whereby the said Richard saith, that he is injured and damaged to the value of 20l. And thereupon he brings suit, &c.*

*Martin, for the plaintiff,* } *Pledges of Prosecution,* { *John Doe,* *Richard Roe.*
*Peters, for the defendant,* }

*Mr. George Saunders,*

*I am informed that you are in possession of, or claim title to, the premises mentioned in this declaration of ejectment, or to some part thereof; and I, being sued in this action as a casual ejector, and having no claim or title to the same, do advise you to appear next Hilary term in his Majesty's court of King's Bench wheresoever he shall then be in England, by some attorney of that court, and then and there by a rule to be made of the same court, to cause yourself to be made defendant in my stead; otherwise I shall suffer judgment to be entered against me, and you will be turned out of possession.*

*Your loving friend,*

[Date] *William Stiles.*

The form of the declaration by bill does not differ very materially; and the above is inserted by way of elucidation, chiefly to such *tenants*, &c. as may peruse this article.

For further matter relating to Ejectment, see *Bull. Ni. Pri.* —and *Gilbert's Ejectments* by *Runnington*.

Ejectment of Ward: see *Ward*.

EJECTUM, *Ejectus maris quod è mari ejicitur:* Jet, Jetsom, Wreck, &c. See title *Wreck*.

EIGNE, Fr. *aisné*.] Eldest or first born; as bastard *eigne*, and mulier *puisne* are words used in our law for the elder a bastard, and the younger lawful born. See title *Bastard*.

EIK, *to a Reversion*. An additional loan to a mortgagor who is the reversioner of the mortgaged estate. *Bell's Scotch Dict.*

EIK, *to a Testament*.—An addition to an inventory made up by an executor. *Bell's Scotch Dict.*

EINECIA, from the Fr. *aisné*, i. e. primogenitus.] Eldership. Statute of *Ireland*, 14 *Hen.* 3. See *Esnecy*.

EIRE, or EYRE, Fr. *eire*, viz. *iter*.] Is the court of justices *itinerant*; and *justices in eyre* are those whom *Bracton* in many places calls *justiciarios itinerantes*. These justices, in ancient time, were sent with a general commission into divers counties to hear such causes as were termed *pleas of the crown*: and this was done for the ease of the people, who must else have been hurried to the King's Bench, if the cause were too high for the county court: it is said they were sent but once in every seven years. *Bract. lib.* 3. *c.* 11. *Horn's Mirror, lib.* 2. The *eyre of the forest* is the justice seat; which, by an ancient custom, was held every three years by the justices of the forest, *journeying* up and down for that purpose. *Bract. lib.* 3. *tract.* 2. *c.* 1. & 2. *Brit. c.* 2. *Cromp. Jurisd.* 156. *Manw. par.* 1. *p.* 121.—See titles *Justices in Eyre*.

ELECTION, *electio*.] In law, is when a man is left to his own free will, to take or do one thing or another, which he pleases. And if it be given of several things, he who is the first agent, and ought to do the first act, shall have the *election*: as if a person make a lease, rendering rent, or a garment, &c. the lessee shall have the election, as being the first agent, by the payment of the one, or delivery of the other. *Co. Lit.* 144. And if A. covenant to pay B. a pound of pepper or sugar, before Easter; it is at the *election* of A. at all times before Easter which of them he will pay: but if he pays it not before the said feast, then afterwards it is at the election of B. to demand, and have which he pleaseth. *Dyer*, 18. 5 *Rep.* 59. 11 *Rep.* 51.

If I give to you one of my horses in my stable, there you shall have the *election*; for you shall be the first agent, by

taking or seizure of one of them. *Co. Lit.* 145. If things granted are annual, and to have continuance, the *election* (where the law gives it him) remains to the grantor, as well after the day as before: but it is otherwise when to be performed at once. *Ibid.* When nothing passes to the feoffee or grantee before *election*, to have the one thing or the other, the election ought to be made in the life of the parties; and the heir or executor cannot make the *election:* but where an estate or interest passes immediately to the feoffee, donee, &c. there *election* may be made by them, or their heirs or executors. 2 *Rep.* 36, 37. And when one and the same thing passeth to the donee or grantee, and such donee or grantee hath *election* in what manner he will take it, there the interest passeth immediately, and the party, his heirs, &c. may make *election* when they will. *Co. Lit.* 145. 2 *Danv. Abr.* 761.

Where the *election* creates the interest, nothing passes till *election;* and if no *election* can be made, no interest will arise. *Hob.* 174. If the *election* is given to several persons, there the first *election* made by any of the persons shall stand; as if a man leases two acres to A. for life, remainder of one acre to B. and of the other acre to C. Now B. or C. may *elect* which of the acres he will have, and the first *election* by one binds the other. *Co. Lit.* 145. 2 *Rep.* 36. If a man leases two acres for life, the remainder of one in fee to the same person; and, after, licenses the lessee to cut trees in one acre, this is an *election* that he shall have the fee in the other acre. 2 *Danv.* 762. A *real election* concerning lands is descendible; and *election* of a tenant in tail may prejudice his issue. He, in remainder, may make an *election* after the death of tenant for life; but if the tenant for life do make *election*, the remainder-man is concluded. *Moor, Ca.* 247. 832.

A person grants a manor, except one close called N. and there are two closes called by that name, one containing nine acres, and the other but three acres, the grantee shall not, in this case, choose which of the said closes he will have, but the grantor shall have *election* which close shall pass. 1 *Leon.* 268. But if one grants an acre of land out of a waste or common, and doth not say in what part, or how to be bounded, the grantee may make his *election* where he will. 1 *Leon.* 30. If a man hath three daughters, and he covenants with another that he shall have one of them to dispose of in marriage; it is at the covenantor's *election* which of his daughters the covenantee shall have, and after request, she is to be delivered to him. *Moor*, 72. 2 *Danv.* 762. Where there are three coparceners of lands, upon partition the eldest sister shall have the *election:* though if she herself make the partition, she loseth it, and shall take last of all. *Co. Lit.* 166.—See title *Esnecy.*

In consideration that a person had sold another certain goods, he promised to deliver him the value in such pipes of wine as he should choose; the plaintiff must make his election before he brings his action. *Style*, 49. An *election* which of two things shall be done, ought not to be made merely by bringing an action; but before, that the defendant may know which he is to do, and it is said he is not bound to tender either before the plaintiff hath made his choice which will be accepted. 1 *Mod.* 217. 1 *Nels. Abr.* 697.

A condition of a bond is, that the obligor shall pay 30*l.* or twenty kine, at the obligee's *election*, within such a time; the obligee at his peril, is to make his *election* within the time limited. 1 *Leon.* 69. Though in debt upon bond to pay 10*l.* on such a day, or four cows at the then *election* of the obligee, it was adjudged, that it was not enough for the defendant to plead that he was always ready, &c. if the obligee had made his *election;* for he ought to tender both at the day, by reason the word *then* relates to the day of payment, *Moor*, 246. 1 *Nels.* 694, 695.

If a man hath an *election* to do one of two things, and he cannot by any default of a stranger, or of himself, or the obligee, or by the act of God, do the one; he must at his peril do the other. 1 *Lil. Abr.* 506.

Where the law allows a man two actions to recover his right, it is at his *election* to bring which he pleaseth: and when a man's act may work two ways both arising out of his interest, he hath *election* given him to use it either way. *Dyer*, 20. 2 *Rol. Abr.* 787. Action of trespass upon the case, or action of trespass *vi et armis*, may be brought against one that rescues a prisoner, at the *election* of the party damnified by the rescous. And an action on the case, or on assize, lies against him that surcharges a common, at the *election* of him that is injured thereby. 1 *Lil.* 504, 505. Also for a rent-charge out of lands, there may be a writ of annuity or distress, at the *election* of the grantee: but after the death of the grantor, if the heir be not charged, the *election* to bring annuity ceaseth. *Dyer*, 344.

A man was indicted of felony for entering an house and taking away money, and found guilty, and burnt in the hand; after which the person who lost the money brought an action of trespass against the other for breaking his house, and taking away his money; and it was held that the action would lie; for though it was at his *election* at first, either to prefer an indictment or bring an action, yet by the indictment he had made no *election*, because that was not the prosecution of the party, but of the Crown. *Style*, 347.

If a bargain and sale be made of lands, which is inrolled, and at the same time the bargainor levies a fine thereof to the bargainee, he hath his *election* to take by one or the other. 4 *Rep.* 72. A wife hath her *election* which to take of a jointure made after marriage, or her dower, on the death of the husband, and not before. *Dyer*, 358. When a lessor hath *election* to charge the lessee, or his assignee, *for rent;* if he accepts the rent of the assignee, he hath determined his *election.* 3 *Rep.* 24.

If a person hath *election* to pay or perform one of two things at a day, and he do neither of them at that day, his election is gone: and where a grant is made of two acres of land, the one for life, the other in fee, or in tail, and before any *election* the feoffee makes a feoffment of both; in this case the *election* will be gone, and the feoffor may enter upon which he will for the forfeiture. 2 *Rep.* 37. If money on a mortgage be to be paid to a man, his heirs or executors, the mortgagor hath *election* to pay it to either: and if in a feoffment it be to pay to the feoffee, his heirs or assigns, and he enfeoff another, the feoffor may pay the money to the first or second feoffee, &c. *Co. Lit* 210.

In some cases, where one hath cause of suit, he may sue one person or another at his election; for there is an election of persons, as well as of things. *Dyer*, 204. 207. A man by deed binds himself and his heirs to pay money, and dies; the obligee may choose to sue the heir, or the executors, although both of them have assets. *Poph.* 151. One may have election, when he hath recovered a debt, to have his execution by *elegit, fieri facias*, or *capias ad satisfaciendum;* but where he takes an *elegit*, and hath no fruit of it, he may resort to another writ, though the election be entered on record. *Hob.* 57. *Dyer*, 60. 369.

There is no election against the King in his grants, &c. 1 *Leon.* 30. And an act becoming void, will determine an election. *Hob.* 152. As to election with respect to one action or another, see 1 *Com. Dig.* title *Action.* And this Dict. titles *Condition, Agreement.*

Election of a Clerk of Statutes-Merchant. A writ that lies for the choice of a clerk assigned to take bonds called *statutes-merchant;* and is granted out of the *Chancery*, upon suggestion that the clerk formerly assigned is gone to dwell at another place, or is under some impediment to attend

the duty of his office, or hath not lands sufficient to answer his transgressions, if he should act amiss, &c. *F. N. B.* 164.

ELECTION OF ECCLESIASTICAL PERSONS. There is to be a free election for the *dignities* of the *church*. *Stat.* 9 *Ed.* 2. *c.* 14. And none shall disturb any person from making free election, on pain of great forfeiture. If any persons that have a voice in elections, take any reward for an election in any church, college, school, &c. the election shall be void: and if any of such societies resign their places to others for reward, they incur a forfeiture of double the sum; and the party giving it, and the party taking it, is incapable of such place. *Stat.* 31 *Eliz. c.* 6. See further titles *Bishops, Deans.*

ELECTION OF MEMBERS OF PARLIAMENT, AND ELECTION COMMITEES THEREON. See title *Parliament.*

ELECTION OF A VERDEROR OF THE FOREST, *electione viridariorum forestæ.*] A writ which lies for the choice of a *verderor*, where any of the verderors of the forest are dead, or removed from their offices, &c. It is directed to the sheriff; and, as appears by the ancient writs of this kind, the verderor is to be elected by the freeholders of the county, in the same manner as coroners. *New Nat. Br.* 366. See title *Forest.*

ELEEMOSYNA. Alms; *dare in puram et perpetuam eleemosynam*, to give in pure and perpetual alms, or *frank-almoigne;* as lands were commonly given in ancient times to religious uses. *Cowel.*—See titles *Frank almoigne; Tenure.*

ELEEMOSYNÆ. The possessions belonging to the churches. *Blount.*

ELEEMOSYNA REGIS, or *elcemosyna aratri.* A penny which King Ethelred ordered to be paid for every *plough* in England, towards the support of the *poor:* it was called *Eleemosyna Regis*, because it was first appointed by the King. *Leg. Ethelred, cap.* 1.

ELEEMOSYNARIA. The place in a religious house, where the common *alms* were reposited, and thence by the almoner distributed to the poor.

ELEEMOSYNARIUS. The almoner or peculiar officer who received the *eleemosynary* rents and gifts, and in due method distributed them to pious and charitable uses. There was such a chief officer in all the *religious houses:* and the greatest of our *English bishops* had anciently their almoners, as now the King hath. *Lindwood's Provincial, lib.* 1. *tit.* 12. —See title *Almoner.*

ELEEMOSYNARY CORPORATIONS. Corporate bodies constituted for the perpetual distribution of free alms, or bounty of the founder of them. See title *Corporation.*

ELEGIT, from the words in the writ *elegit sibi liberari*, because the plaintiff *hath chosen* this writ of execution. See 3 *Comm.* 418.] A writ of execution founded on the *stat. W.* 2. (3 *E.* 1.) *c.* 18. that lies for him who hath recovered debt or damages, or, upon a recognizance in any court against one not able in his goods to satisfy the same, directed to the sheriff, commanding him to make delivery of a *moiety* of the party's *land*, and *all his goods*, beasts of the plough excepted. And the creditor shall hold the said moiety of the land so delivered unto him, until his whole debt and damages are paid and satisfied; and during that term he is *tenant* by *elegit. Reg. Orig.* 299. *Co. Lit.* 289.

Upon an *elegit*, the sheriff is to deliver one half of all houses, lands, meadows and pastures, rents, reversions, and hereditaments wherein the defendant had any sole estate in fee, or for life, into whose hands soever the same do afterwards come; but not of a right only to land, an annuity, copyhold lands, &c. *Dyer*, 206. 7 *Rep.* 49. *Plowd.* 224. And by it the plaintiff, &c. elects *omnia bona et catalla* of the defendant, *præter boves et afros de caruca sua;* and also a moiety of all the lands which the defendant had at the time of the judgment recovered; but it ought to be sued within a year and a day after the judgment. *F. N. B.* 267.

But though, by this statute, the lands of the debtor are made liable, as well as his personal estate, yet if the creditor takes out an *elegit*, and it appears to the sheriff that there are goods and chattels sufficient of the debtor's to satisfy the debt, *he ought not to extend the lands. 2 Inst.* 395. But an *elegit* executed upon goods only, is not a *fieri facias*, for a *fieri facias* is executed by sale by the sheriff; but the *elegit* by the appraisement of the goods by a jury, and delivery to the party. 1 *Sid.* 184. 1 *Lev.* 92. 1 *Keb.* 105. 261. 465. 556. 692.

Upon this writ the sheriff is to empanel a jury, who are to make inquiry of all the goods and chattels of the debtor, and to appraise the same, and also to inquire as to his lands and tenements; and upon such inquisition the sheriff is to deliver all the goods and chattels (except the beasts of the plough), and a moiety of the lands, to the party, and must return his writ, in order to record such inquisition in that court out of which the *elegit* issued; and when the jury have found the seisin and value of the land, the sheriff, and not the jury, is to set out and deliver a moiety thereof to the plaintiff by metes and bounds. *Cro. Car.* 319.

The sheriff's return to an *elegit* stated, that he had delivered an equal moiety of a house: held that this return was void for not setting out the moiety by metes and bounds, and that the objection might be taken at *nisi prius* to an ejectment brought on the elegit. *Fenny d. Masters*, v. *Durrant*, *Term Rep. K. B. Mic.* 58 *Geo.* 3. 40.

Query? if tenant in *elegit* may not enter by virtue of the writ of elegit without a previous judgment in ejectment. *Rogers* v. *Pitcher*, 6 *W. P. Taunton*, 202.

All writs of execution may be good, though not returned, except an *elegit;* but that *must be returned* because an inquisition is to be taken upon it, and that the court may judge of the sufficiency thereof. 4 *Rep.* 65. 74. It has been ruled, that if more than a moiety of the lands is delivered on an *elegit* by the sheriff, the same is void for the whole. *Sid.* 91. 2 *Salk.* 563. And the sheriff cannot sell any thing but what is found in the inquisition; and therefore if he sell a term for years, &c. mis-recited in the inquisition, as to the commencement thereof, the sale is void. 4 *Rep.* 74.

In debt upon bond, the defendant before the trial conveyed his lands to another, &c. but he himself took the profits: notwithstanding this conveyance, a moiety of his lands was extended on an *elegit. Dyer*, 294. 3 *Rep.* 78. If two persons have each of them a judgment against one debtor, and he who hath the first judgment brings an *elegit*, and hath the moiety of the lands delivered to him in execution; and then the other judgment-creditor sues out another *elegit*, he shall have only a *moiety of that moiety*, which was not extended by the first judgment. *Cro. Eliz.* 483.

When lands are once taken in execution on an *elegit*, and the writ is returned and filed, the plaintiff shall have no other execution. 1 *Lev.* 92. And if the defendant hath lands in more counties than one, and the plaintiff awards an *elegit* to one county, and extends the lands upon the *elegit*, and afterwards files the writ, he cannot, after that, sue out an *elegit* into the other counties: but he may immediately, after entry of the judgment upon the judgment-roll, award as many *elegits*, into as many counties, as he thinks fit, and execute all, or any of them, at his pleasure. 1 *Lil. Abr.* 509. *Cro. Jac.* 246.

A man had lands in execution upon an *elegit*, and afterwards moved for a new *elegit*, upon proof that the defendant had other lands, not known to the creditor at the time when the execution was sued out; and it was adjudged, that if he had accepted of the first by the delivery of the sheriff, he could not afterwards have a new *elegit;* but when the sheriff returns the writ, he may waive it, and then have a new extent. *Cro. Eliz.* 310. 1 *Nels. Abr.* 699. *Sed qu.*

If the defendant dies in prison, so that there is no execution with satisfaction, the plaintiff shall have an *elegit* after-

wards. 5 *Rep.* 86. And if all the lands extended on an *elegit* be evicted by a better title, the plaintiff may take out a new execution. 4 *Rep.* 66. Where one having land by *elegit*, is wholly evicted out of it, he may have a further execution, either against the defendant's lands or goods, as he might have had at first; save only, he must bring a *scire facias* against the defendant, or him that comes in under him; but if the eviction be of part of the land, or for a time only, so that the plaintiff may take his full execution by holding it over; there he cannot have any new execution, by the *stat.* 32 *H.* 8. *c.* 5. 2 *Shep. Abr.* 115.

Where an *elegit* is sued upon a judgment, the levying of goods thereon, for part only, is no impediment, but the plaintiff may bring another *elegit pro residuo*, and take the lands. 1 *Lev* 92. On a *nihil* returned upon an *eligit*, there may be brought a *capias ad satisfaciendum*, or *fieri facias*. 1 *Leon.* 176. And an *elegit* may be sued after a *fieri facias* returned *nulla bona*, or where a part is levied by it; and after a *capias ad satisfaciendum* returned *non est inventus*. *Hob.* 57.

A person in execution was suffered to escape, and then he died; the land which he had at the time of the judgment may be extended, by *elegit*, upon a *scire facias* brought against his heir, as ter-tenant. *Dyer*, 271.

A man may have an assise of the land which he hath in execution by *elegit*, if he be deforced thereof. *Stat. Westm.* 2. *c.* 18. And if tenant by *elegit* alien the land in fee, &c. he who hath right shall have against him, and the alienee, an assise of *novel disseisin*. *Ibid.* At a trial at bar in C. B. the court delivered for law, that where lands are actually extended, and delivered upon an *elegit*, a fine levied on those lands, and non-claim, will bar the interest of the tenant by *elegit*. 1 *Mod.* 217.

If tenant by *elegit* be put out of possession before he hath received satisfaction for his debt, by the heir at law, &c. he may bring action of trespass, or re-enter and hold over till satisfied: but, after satisfaction received, the defendant may enter on the tenant by *elegit*. 4 *Rep.* 28. 67. Tenants by *elegit*, statutes-merchant, &c. are not punishable for waste by action of waste: but the party, against whom execution is sued, is to have a writ of *venire facias ad computandum*, &c. and there the waste shall be recovered in the debt; though it is said there is an old writ of waste in the Register, for him in reversion against tenant by *elegit*, committing waste on lands which he hath in execution. 6 *Rep.* 37. *New Nat. Br.* 130. On tenant by *elegit's* accounting, if the money recovered by the plaintiff is levied out of the lands, the defendant shall recover his land; and if more be received by waste, &c. he shall have damages. *Termes de Ley.*—See this Dict. titles *Estate*, *Extent*, *Execution*.

ELF-ARROWS. Were *flint-stones* sharpened on each side in shape of *arrow-heads*, made use of in war by the ancient Britons; of which several have been found in England, and greater plenty in Scotland, where it is said the common people imagine they drop from the clouds, or are made by the *elves* or fairies.

ELISORS, *Electors.*] In cases of challenge to the sheriff and coroners for partiality, &c. the *venire* to summon a jury shall be directed to two clerks of the Court, or two persons of the county named by the Court and sworn. And these two, who are called *Elisors*, shall indifferently name or choose the jury; and their return is final; no challenge being allowed to their array. *Fortesc. de Laud. leg. c.* 25. *Co. Lit.* 158. See title *Jury*.

ELKE. A kind of yew to make bows of. *Stat.* 32 *H.* 8. *cap.* 9.

ELOINE, from the Fr. *esloisner.*] To remove or send a great way off: in this sense it is used where it is said that if such as are within age be *eloined*, so that they cannot come to sue personally, their next friends shall be admitted to sue for them. *Stat.* 13 *Ed.* 1. *cap.* 15.

ELONGATA. Is a return of the sheriff in *replevin*, that *cattle* are not to be found, or are removed, so that he cannot make deliverance, &c. 2 *Lil. Abr.* 451. 458.

ELOPEMENT, from the Belg. *E'e matrimonium et* loopen *currere;* or more probably from the Sax. *Geleoran*, to depart; the Saxon *r* being easily perverted from its shape into a *p*. *Blount.*] Is where a married woman, of her own accord, goes away, and departs from her husband, and lives with an adulterer. See titles *Adultery*, *Baron and Feme*.

ELY. A royal franchise, or County-palatine. See title *Counties-Palatine*.

The Bishop of *Ely* has not a palatinate jurisdiction within the Isle, though exercising *jura regalia* there.—A writ of *fieri facias* directed, in the first instance, to the bailiff of the Isle of *Ely*, out of K. B. is erroneous and void, and the bailiff executing the same is guilty of a trespass against the party whose goods are taken in execution.—Process issued out of the courts at Westminster into the Isle, goes, in the first instance, to the sheriff of Cambridgeshire, who, thereupon, issues his mandate to the bailiff of the franchise. 3 *East's Rep.* 128.

EMBARGO. A prohibition upon shipping, not to go out of any port on a war breaking out, &c. See *Imbargo*.

EMBASSADOR. See *Ambassador*.

EMBEZZLEMENT: See *Servants*.

EMBLEMENTS, from the Fr. *emblavence de bled* corn sprung, or put up above ground.] The profits of sown land: but the word is sometimes used more largely, for any products that arise naturally from the ground, as grass, fruit, &c. In some cases he who sowed the *corn* shall have the *emblements;* and in others not: a lessee at will sows the land, he shall have the *emblements;* though if the lessee determines the will himself, he shall not have them, but the lessor. 5 *Rep.* 116. If lessee at will sows the land with grain, or other thing yielding annual profit, and the lessor enters before severance; yet the lessee shall have it: but where the lessee plants young fruit-trees, or other trees, or sows the land with acorns, &c. he shall not have these; and if such tenant, by good husbandry, make the grass to grow in great abundance; or sow the land with hay-seed, by which means it is increased, if the lessor enters on the lessee, the lessee shall not have it, *because grass is the natural* profit *of the soil*. *Co. Lit.* 55, 56.

Where tenant for life sows the land, and dies, his executors shall have the *emblements*, and not the lessor or him in reversion; by reason of the uncertainty of the estate. *Cro. Eliz.* 463. And if a tenant for life plants hops, and dies before severance, he in reversion shall not have them, but the executors of tenant for life. *Cro. Car.* 515. If tenant for years (if he so long live) sow the ground, and die before severance; the executor of the lessee shall have the corn: and where lessee for life leases for years, if the lessee for years sow the land, and after lessee for life dies before severance, the executor of lessee for years shall have the *emblements*. 2 *Danv. Abr.* 765.

So it is also if a man be tenant for the life of another; and *cestui que vie*, (he on whose life the land is held) dies after the corn sown, the tenant *pur auter vie* shall have the *emblements*. The same is also the rule if a life-estate be determined by the act of law. Therefore if a lease be made to husband and wife during coverture, (which gives them a determinable estate for life,) and the husband sows the land; and afterwards they are divorced *à vinculo matrimonii*, the husband shall in this case have the *emblements;* for the sentence of divorce is the act of the law. 5 *Rep.* 116. But if an estate for life be determined by the tenant's own act, (as by forfeiture for waste committed; or if a tenant, during widowhood, thinks proper to marry;)

in these and similar cases, as in that of a tenant at will determining his own tenure, the tenants shall not be entitled to take the *emblements*. 1 *Inst*. 55.

If tenant for years sows ground, and before his corn is severed, the term, which is certain expires; the lessor or he in reversion shall have the *emblements;* but he must first enter on the lands. 1 *Lil. Abr*. 511. A lessee for life or years sows the land, and after surrenders, &c. before severance, the lessor shall have the corn. 2 *Danv*. 764. If there be lessee for years, upon condition that if he commit waste, &c. his estate shall cease; if he sows the ground with corn, and after doth waste, the lessor shall have the corn. *Co. Lit*. 55. And where a lord enters on his tenant for a forfeiture, he shall have the corn on the ground. 4 *Rep*. 21.

Though if a feme copyholder for her widowhood sows the land, and before severance takes husband, so that her estate is determined, the lord shall have the *emblements;* yet if such a feme copyholder, *durante viduitate*, leases for one year according to custom, and the lessee sows the land, and afterwards the copyholder takes husband, the lessee shall have the corn. 2 *Danv*. 764. If a husband holds lands for life, in right of his wife, and sow the land, and after she dies before severance, he shall have the *emblements*. *Dyer*, 316. 1 *Nels. Ab*. 701. And where the wife hath an estate for years, life, or in fee, and the husband sows the land, and dieth, his executors shall have the corn. 1 *Nels*. 702. But if the husband and wife are joint-tenants, though the husband sow the land with corn, and dies before ripe, the wife, and not his executors, shall have the corn, she being the surviving joint-tenant. *Co. Lit*. 199.

When a widow is endowed with lands sown, she shall have the *emblements*, and not the heir. 2 *Inst*. 81. And a tenant in dower may dispose of corn sown on the ground; or it may go to her executors, if she die before severance. 2 *Inst*. 80, 81. And by the particular provisions of *stat*. 28. *H*. 8. *c*. 11. if a parson sows his glebe, and dies, his executors shall have the corn: and such parson may by will dispose thereof. 1 *Rol. Abr*. 655.

If tenant by statute-merchant sows the land, and before severance a casual profit happens, by which he is satisfied, yet he shall have the corn. *Co. Lit*. 55. Lands sown are delivered in execution upon an extent, the person to whom delivered shall have the corn on the ground. 2 *Leon*. 54. And judgment was given against a person, and then he sowed the land, and brought a writ of error to reverse the judgment, but it was affirmed; and adjudged that the recoverer shall have the corn. 2 *Bulst*. 213.

If a disseisor sows the land, and afterwards cuts the corn, but before it is carried away the disseisee enters, the disseisee shall have the corn. *Dyer*, 31. 11 *Rep*. 52. A person seised in fee of land dies, having a daughter, and his wife *privement enseint* with a son; the daughter enters and sows the land, and before severance of the corn, the son is born; in this case the daughter shall have the corn, her estate being lawful, and defeated by the act of God; and it is for the public good that the land should be sown. *Co. Lit*. 55.

A man seised in fee-simple sows land, and then devises the land by will, and dies before severance; the devisee shall have the corn; and not the devisor's executors. *Winch*. 52. *Cro. Eliz*. 61. If a person devises his lands sown, and says nothing of the corn, the corn shall go with the land to the devisee: and when a man seised of land, in fee or in tail, sows it, and dies without will, it goes to the executor, and not the heir. 10 *Ed*. 4. 1 *b*. 21 *H*. 6. 30 *a*. 37 *H*. 6. 35 *b*. A devisee for life dies, he in remainder shall have the *emblements* with the land. *Hob*. 132.

Tenant in fee sows the land, and devises it to A. for life, remainder to B. for life, and dies; A. dies before severance, B. in remainder shall have the corn, and not the executor of the first tenant for life. *Cro. Eliz*. 61. 464. Where there is a right to *emblements*, ingress, egress, and regress, are allowed by law, to enter, cut, and carry them away, when the estate is determined, &c. 1 *Inst*. 56.

EMBLERS DE GENTZ, *Fr.*] Carrying off people. *Rot. Parl*. 21 *Ed*. 3. *n*. 62.

EMBRACEOR, Fr. *embrasour*.] He that, when a matter is in trial between party and party, comes to the bar with one of the parties, having received some reward so to do, and speaks in the case; or privately labours the jury, or stands in the court to survey and overlook them, whereby they are awed or influenced, or put in fear or doubt of the matter. *Stat*. 19 *H*. 7. *cap*. 13. But lawyers, attorneys, &c. may speak in the case for their clients, and not be *embraceors:* also the plaintiff may labour the jurors to appear in his own cause; but a stranger must not do it: for the bare writing a letter to a person, or parol request for a juror to appear, not by the party himself, hath been held within the statutes against embracery and maintenance. *Co. Lit*. 369. *Hob*. 294. 1 *Saund*. 391. If the party himself instruct a juror, or promise any reward for his appearance, then the party is likewise an *embraceor*. And a juror may be guilty of embracery, where he, by indirect practices, gets himself sworn on the *tales*, to serve on one side. 1 *Lil*. 513. There are divers statutes relating to this offence and *maintenance*. See further title *Maintenance*, and *post Embracery*.—See also titles *Jury; Decies tantum*.

EMBRACERY. An attempt to influence a Jury corruptly to one side, by promises, persuasions, entreaties, money, entertainments, and the like. The punishment for the person embracing, (the Embraceor,) is by fine and imprisonment; and for the Juror so embraced, if it be by taking money, the punishment is (by various *stats. of Ed*. 3. *viz*. 5 *E*. 3. *c*. 10. 34 *E*. 3. *c*. 8. 38 *E*. 3. *c*. 12.) perpetual infamy, imprisonment for a year, and forfeiture of tenfold value. 4 *Comm*. 140. See 1 *Hawk. P. C. c*. 85. and the preceding title.

EMBRING DAYS, from *embers*, *cineres*, so called, either because our ancestors, when they *fasted*, sat in ashes, or strewed them on their heads.] Those days which the ancient Fathers called *Quatuor Tempora jejunii*, and of great antiquity in the church: they are observed on Wednesday, Friday, and Saturday next after Quadragesima Sunday, (or the first Sunday in Lent,) after Whitsunday, Holyrood-day in September, and St. Lucy's day, about the middle of December. These days are mentioned by *Britton*, *c*. 53. and other writers; and particularly in the *stat*. 2 & 3 *Ed*. 6. *c*. 19. Our almanacks call them the Ember Weeks.

EMBROIDERY. By *stat*. 22 *Geo*. 2. *c*. 36. no foreign *embroidery*, or gold or silver brocade, shall be imported, upon pain of being forfeited and burnt, and penalty of 100*l*. for each piece. No person shall sell, or expose to sale, any foreign *embroidery*, gold or silver thread, lace, fringe, brocade, or make up the same into any garment, upon pain of having it forfeited and burnt, and penalty of 100*l*. All such *embroidery*, &c. found, may be seized and burnt, and the mercer, &c. in whose custody it was found, shall forfeit 100*l*.—See titles *Manufactures; Navigation Acts*.

EMENDALS, *emenda*.] An old word still made use of in the accounts of the Society of the Inner Temple; where so much in *emendals* at the foot of an account, on the balance thereof, signifies so much money in the bank or stock of the houses, for reparation of losses or other emergent occasions: *quod restaurationem damni tribuitur*. *Spelm*.

EMENDARE, *Emendam solvere*.] To make *amends* for any crime or trespass committed. *Leg. Edw. Confess. c*. 35. Hence a capital crime, not to be atoned by fine, was said to be *inemendabile*. *Leg. Canut. p*. 2.

EMENDATIO. Hath been used for the power of *amending* and correcting abuses, according to stated rules and mea-

sures; as *emendatio panni*, the power of looking to the assize of cloth, that it be of just measure; *emendatio panis & cervisiæ*, the assizing of bread and beer, &c. privileges granted to lords of manors, and executed by their officers appointed in the court-leet, &c. *Paroch. Antiq.* 196.

EMPANEL. See *Impanel.*

EMPARLANCE. See *Imparlance.*

EMPEROR, *imperator.*] The highest ruler of large kingdoms and territories; a title anciently given to renowned and victorious generals of armies, who acquired great power and dominion. This title was formerly given to the Kings of England, as appears by a charter of King Edgar.

ENBREVER, *Fr.*] To write down in short. *Brit.* 56.

ENCAUSTUM. See *Incaustum.*

ENCHANTMENT. See *Conjuration.*

ENCHESON, old *Fr.*] An occasion, cause, or reason wherefore any thing is done. See *the ancient Statutes.*

ENCROACHMENT. See *Incroachment.*

ENDEAVOUR. Where one who has the use of his reason *endeavours* to commit felony, &c. he shall be punished by our laws, but not to that degree as if he had actually committed it: as if a man assault another on the highway, in order to a robbery, but takes nothing from him, this is not punished as a felony, because the felony was not accomplished; though, as a misdemeanour, it is liable to fine and imprisonment. 3 *Inst.* 68. 69. 161. 11 *Rep.* 98. And in this case, by *stat.* 7 *Geo.* 2. *c.* 21. the offender shall be transported. See titles *Intendment*, *Malicious Mischief*, *Robbery.*

ENDOWMENT. The bestowing or assuring of *dower* on a woman. It is sometimes used metaphorically for the settling a provision upon a parson, or building of a *church* or chapel; and the severing a sufficient portion of tithes, &c. for a vicar, towards his perpetual maintenance, when the benefice is appropriated. See *stats.* 15 *R.* 2. *c.* 6. 4 *H.* 4. *c.* 12. See *Dower*, *Tithes.*

ENEMY, *inimicus.*] Is properly an alien or foreigner, who, in a public capacity, and in an hostile manner, invades any kingdom or country; and whether such persons come hither by themselves, or in company with English traitors, they cannot be punished as traitors, but shall be dealt with by martial law. *H. P. C.* 10. 15. But the subjects of a foreign prince coming into England, and living under the protection of the King, may, if they take up arms, &c. against the government, be punished as traitors, not as alien enemies. If a prisoner be rescued by enemies, the gaoler is not guilty of an escape, as he would have been if subjects had made the rescue, when he might have a legal remedy against them. See titles *Alien*, *Escape;* and as to adhering to and succouring the King's enemies, see title *Treason.*

ENFRANCHISE, Fr. *enfranchir.*] To make free, or incorporate a man into any society, &c. It is also used where one is made a free *denizen*, which is a kind of incorporation in the *Commonwealth.*

ENFRANCHISEMENT, *Fr.* from *franchise*, i. e. *libertas.*] Is when a person is incorporated into any society or body politic; and it signifies the act of incorporating. He that by charter is made a *denizen*, or freeman of England, is said to be *enfranchised*, and let into the general liberties of the subjects of the kingdom: and he who is made a citizen of London, or other city, or free burgess of any town corporate, as he is made partaker of those liberties that appertain to the corporation, is, in the common sense of the word, a person *enfranchised.* And when a man is *enfranchised* into the freedom of any city or borough, he hath a freehold in his freedom during life; and may not, for endeavouring any thing only against the corporation, lose and forfeit the same. 11 *Rep.* 91. See title *Corporation.* A villain was said to be *enfranchised*, when he was made free by his lord, and rendered capable of the benefits belonging to freemen.

ENGLECERY, or ENGLESCHERIE, *Engleceria.*] An old word signifying the being an Englishman. When Canutus the Dane came to be King of England, he, at the request of the Nobility, sent back his army into Denmark, but kept some Danes behind to be a guard to his person; and he made a law for the preservation of his Danes, (who were often privately made away with by the English,) that if an Englishman killed a Dane, he should be tried for the murder; or if he escaped, the town or hundred where the fact was done, was to be amerced *sixty-six marks* to the King: so that after this law, whenever a murder was committed, it was necessary to prove the party slain to be an Englishman, that the town might be exempted from the amercement; which proof was called *Englecery*, or *Engleschire.* And whereas if a person were privately slain, he was in ancient time accounted *Francigena*, which word comprehended every alien, especially the Danes: it was therefore ordained, that where any person was murdered, he should be adjudged *Francigena*, unless *Englecery* were proved, and that it was made manifest he was an Englishman. The manner of proving the person killed to be an Englishman, was by two witnesses who knew the father and mother, before the Coroner, &c. *Bract. lib.* 3. *tract.* 2. *cap.* 15. *Fleta*, *lib.* 1. *cap.* 30. 7 *Rep.* 16. This *Englecery*, by reason of the great abuses and trouble that afterwards were perceived to grow by it, was utterly taken away by *stat.* 14 *Ed.* 3. *st.* 1. *c.* 4.—See 4 *Comm.* 195. and this Dict. title *Murder.*

ENGLISH. Pleas, records, bonds, and proceedings in courts of justice, to be in English. *Stat.* 4 *Geo.* 2. *c.* 26. And see *stats.* 5 *Geo.* 2. *c.* 27. 6 *Geo.* 2. *c.* 14; and this Dict. titles *Pleading*, *Process*, &c.

ENGRAVERS. See title *Literary Property.*

ENGROSSER. See *Ingrosser*, *Forestaller.*

To ENHANCE. To raise the price of goods or merchandize. See title *Forestaller.*

ENICIA PARS. See *Esnecy.*

ENPLEET. Anciently used for *implead.*—They may *enpleet* and be *enpleeted* in all courts. *Mon. Ang. tom.* 2. *fo.* 412.

ENQUETS. See *Inquest.*

ENQUIRY, Writ of. See title *Writ.*

ENSIENT, or ENSEINT. The being with child. *Law Fr. Dict.*

ENSIENTURE, or *Ensiency.* Of any woman condemned for a crime, is no ground to stay judgment; but it may be afterwards alleged against execution. 2 *Hale's Hist. P. C.* 413.

ENTAIL. See title *Tail.*

ENTENDMENT. See *Intendment.*

ENTERPLEADER. See *Interpleader.*

ENTIERTE, from the French *entierté*, entireness.] Is a contradistinction in our books to moiety, denoting the whole: and a bond, damages, &c. are said to be *entire*, when they cannot be divided or apportioned.

ENTIRE TENANCY. Contrary to *several tenancy*, and signifying a sole possession in one man; whereas the other is a joint or common possession in two or more. *Brook.*

ENTRY, Fr. *entrée*, i. e. *ingressus*, *introitus.*] Signifies the taking possession of lands or tenements, where a man hath title of *entry;* and it is also used for a *writ of possession.* This *entry* into lands is where any man enters into or takes possession of any lands, &c. in his proper person; and is an actual *entry* when made by a man's self, or by attorney by warrant from him that hath the right; or it is an *entry in law*, for a *continual claim* is an *entry* implied by law, and has the same force with it. *Lit.* § 419. There is a *right of entry*, when the party claiming may, for his remedy, either enter into the land, or have an action to recover it: and a *title of entry*, where one hath lawful *entry* given him in the lands, which

another hath, but has no action to recover till he hath entered. *Plowd.* 558. 10 *Rep.* 48. *Finch's Law*, 105.

ENTRY may be defined to be an extrajudicial and summary remedy, against certain species of injury by ouster, used by the legal owner, when another person, who hath no right, hath previously taken possession of lands or tenements. In this case, the party entitled may make a formal but peaceable entry thereon, declaring that thereby he takes possession; which notorious act of ownership is equivalent to a feodal investiture by the lord: or he may enter on any part of it in the same county, declaring it to be in the name of the whole. *Lit.* § 417. But if it lies in different counties, he must make different entries; for the notoriety of such entry or claim to the *pares* or freeholders of Westmorland, is not any notoriety to the *pares* or freeholders of Sussex. Also if there be *two* disseisors, the party disseised must make his entry on *both*; or if *one* disseisor has conveyed the lands with livery to *two* distinct feoffees, entry must be made on *both*. *Co. Litt.* 252. For as their seisin is distinct, so also must be the act which devests that seisin. If the claimant be deterred from entering by menaces or bodily fear, he may make *claim* as near to the estate as he can, with the like forms and solemnities: which claim is in force for only a year and a day. *Litt.* § 422. And this claim, if it be repeated once in the space of every year and day, (which is called *continual claim*,) has the same effect with, and in all respects amounts to, a legal entry. *Ibid.* § 419, 23.—See this Dict. title *Claim*. Such an entry gives a man seisin; or puts into immediate possession him that hath right of entry on the estate; and thereby makes him complete owner, and capable of conveying it from himself by either descent or purchase. *Co. Lit.* 15.

This remedy by entry takes place in three only of the five species of ouster, viz. *Abatement*, *Intrusion*, and *Disseisin*; for, as in these, the original entry of the wrong doer was unlawful, they may therefore be remedied by the mere entry of him who hath right. But, upon a *Discontinuance*, or *Deforcement*, the owner of the estate cannot enter, but is driven to his action: for herein the original entry being lawful, and thereby an apparent right of possession being gained, the law will not suffer that right to be overthrown by the mere act or entry of the claimant. Yet a man may enter on his tenant by sufferance: for such tenant hath no freehold, but only a bare possession; which may be defeated, like a tenancy at will, by the mere entry of the owner. But if the owner thinks it more expedient to suppose or admit such tenant to have gained a tortious freehold, he is then remediable by writ of entry, *ad terminum qui preteriit*. 1 *Inst.* 57. 237, 8. —See title *Disseisin*.

On the other hand, in case of *Abatement*, *Intrusion*, or *Disseisin*, where entries are generally lawful, this right of entry may be *tolled*, that is, *taken away*, by descent. Descents which take away entries, are, when any one, seised by any means whatsoever of the inheritance of a corporeal hereditament, dies, whereby the same descends to his heir: in this case, however feeble the right of the ancestor might be, the entry of any other person who claims title to the freehold is taken away; and he cannot recover possession against the heir by this summary method, but is driven to his action to gain a legal seisin of the estate. *Lit.* § 385. 413.

In general, therefore, no man can recover possession by mere entry on lands, which another hath by descent. Yet this rule hath some exceptions; especially if the claimant were under any legal disabilities during the life of the ancestor, either of infancy, coverture, imprisonment, insanity, or being out of the realm: in all which cases, there is no neglect or *laches* in the claimant, and therefore no descent shall bar or take away his entry. *Co. Litt.* 246. And this title of taking away entries dy descent is still farther narrowed by *stat.* 32 *Hen.* 8. *c.* 33. which enacts, that if any person disseises or turns another out of possession, no descent to the *heir* of the disseisor shall take away the entry of him that has right to the land, unless the disseisor had peaceable possession five years next after the disseisin. But the statute, on feodal reasons, does not extend to any *feoffee* or *donee* of the disseisor, mediate or immediate. *Ibid.* 256.

By the statute of limitations, 21 *Jac.* 1. *c.* 16. it is enacted, that no entry shall be made by any man upon lands, unless within 20 years after his right shall accrue. And by *stat.* 4 *& 5 An. c.* 16. no entry shall be of force to satisfy the said statute of limitations, or to avoid a fine levied of lands, unless an action be thereupon commenced within one year after, and prosecuted with effect. See further title *Claim*.

This remedy by entry must be pursued, according to *stat.* 5 *Ric.* 2. *st.* 1. *c.* 8. in a peaceable and easy manner, and not with force or strong hand. For, if one turns or keeps another out of possession *forcibly*, this is an injury of both a civil and a criminal nature. The civil is remedied by immediate restitution: which puts the ancient possessor in *statu quo*; the criminal injury or public wrong, by breach of the King's peace, is punished by fine to the King. See this Dict. titles *Fines*, *Forcible Entry*.

THE WRIT OF ENTRY is a possessory remedy which disproves the title of the tenant or possessor, by shewing the unlawful means by which he entered, or continues possession. *Finch*, *L.* 261. The writ is directed to the Sheriff, requiring him to "Command the tenant of the land, that he render [in Latin, *præcipe quod reddat*] to the demandant the land in question, which he claims to be his right and inheritance; and into which, as he saith, the said tenant had not entry, but by (or after) a *disseisin*, *intrusion*, or the like, made to the said demandant, within the time limited by law for such actions; or that upon refusal he do appear in court on such a day, to shew wherefore he hath not done it." This is the original process, the *præcipe*, upon which all the rest of the suit is grounded; wherein it appears, that the tenant is required, either to deliver seisin of the lands, or to shew cause why he will not. This cause may be either a denial of the fact, of having entered by or under such means as are suggested, or a justification of his entry, by reason of title in himself, or in those under whom he makes claim; whereupon the possession of the land is awarded to him who produces the clearest right to possess it.

The *Writs of Entry* are of divers kinds, distinguished into four degrees, according to which the writs are varied. The *first* degree is a writ of *entry sur disseisin*, that lieth for the disseisee against a disseisor, upon a disseisin done by himself; and this is called a writ of *entry* in the nature of an assise.

Second, a writ of *entry sur disseisin in le per*, against the heir by descent, who is said to be in the *per*, as he comes in *by* his ancestor; and so it is if a disseisor make a feoffment in fee, gift in tail, &c. the feoffee and donee are in the *per* by the disseisor.

Third, A writ of *entry sur disseisin in le per & cui*, where the *feoffee of a disseisor* maketh a feoffment over to another; when the disseisee shall have this writ of *entry sur disseisin*, &c. of the lands in which such other had no right of *entry* but *by* the feoffee of the disseisor, *to whom* the disseisor demised the same, who unjustly, and without judgment, disseised the demandant. 1 *Inst.* 238.

These three degrees thus state the original wrong, and the title of the tenant who claims under such wrong. If more than two degrees, (that is two alienations or descents) were past, there lay no writ of entry at the Common Law. For, as it was provided for the quietness of men's inheritances, that no one, even though he had the true right of possession, should enter upon him who had the apparent right by descent or otherwise, but he was driven to his *writ of entry* to

gain possession; so, after more than two descents, or two conveyances were passed, the demandant, even though he had the right both of possession and property, was not allowed this *possessory* action; but was driven to his *writ of right*, a long and final remedy, to punish his neglect in not sooner putting in his claim while the degrees subsisted; and for the ending of suits, and quieting of all controversies. 2 *Inst.* 153. But by the *stat. of Marlbridge*, 52 *Hen.* 3. *c.* 30. it was provided, that when the number of alienations or descents exceeded the usual degrees, a new writ should be allowed without any mention of degrees at all. And accordingly,

Fourthly, A new writ has been framed, called a writ of entry in the *post*, which only alleges the injury of the wrongdoer, without deducing all the intermediate title from him to the tenant; stating it in this manner, that the tenant had not entry, unless *after*, or subsequent to, the ouster, or injury done by the original dispossessor; and rightly concluding, that if the original title was wrongful, all claims derived from thence must participate of the same wrong. Upon the latter of these writs, it is, (the writ of entry *sur disseisin* in the *post*,) that the form of our common recoveries of landed estates is usually grounded. See title *Fine and Recovery*.

This remedial instrument of writ of entry is applicable to all the cases of ouster, except that of *Discontinuance* of tenant in tail, and some peculiar species of *Deforcements*. Such is that of the deforcement of dower, by not assigning *any* dower to the widow within the time limited by the law; for which she has her remedy by writ of *dower, unde nihil habet*. *F. N. B.* 147.—See title *Dower*.

But, in general, the writ of entry is the universal remedy to recover possession, when wrongfully withheld from the owner. It were therefore endless to recount all the several divisions of writs of entry, which the different circumstances of the respective demandants may require, and which are furnished by the laws of England, being plainly and clearly chalked out in that collection of legal forms, the *Registrum omnium Brevium*, or Register of such writs as are issuable out of the King's Courts; upon which *Fitzherbert's Natura Brevium* is a comment, which see, and the several appropriate titles in this Dict.

In the times of our Saxon ancestors, the right of possession seems to have been recoverable only by writ of entry. *Gilb. Ten.* 42. This writ was then usually brought in the County Court; and the proceedings in these actions were not then so tedious, (when the Courts were held, and process issued from, and was returnable therein, at the end of every three weeks,) as they became after the Conquest, when all causes were drawn into the King's Courts, and process issued only from Term to Term. Hence a new remedy was invented in many cases to do justice to the people, and to determine the possession in the proper counties by the King's Judges; this was the remedy by *Assise*; as to which, see title *Assise* in this Dict. and fully on this subject, 3 *Comm.* 174. 184.

Having said thus much in general on the titles *Entry* and *Writs of Entry*, subjects now in some measure rather unusual than obsolete, the following observations, extracts, &c. may be of use to the inquiring Student: should any of them seem a repetition of what has already been said, it will be generally found they state the point more at large, or on different authorities.

A *Writ of Entry* in the *per* and *cui* shall be maintained against none, but where the tenant is in by purchase or descent; for if the alienation or descent be put out of the degree upon which no writ may be made in the *per* and *cui*, then it shall be made in the *post*. *Termes de Ley*.

There are *five* things which put the writ of *entry* out of the *degrees*, viz. *intrusion*; *disseisin* upon *disseisin*; *succession*, where the disseisor was a person of religion, and his successor enters; *judgment*, when a person hath had judgment to recover against the disseisor; and *escheat*, on the disseisor's dying without heir, or committing felony, &c. on which the lord enters, &c. In all these cases, the disseisee or his heir, shall not have a writ of entry within the degrees of the *per*, but in the *post*; because they are not in by descent, or purchase. *Termes de Ley*.

Degrees as to *entries* are of two sorts, either by *act* in *law*, as in case of a descent; or by *act* of the *party* by lawful conveyance. But no estate *gained by wrong* doth make a degree; so that *abatement*, *intrusion*, &c. work not a degree; nor doth every change by lawful title, as an estate of tenant by the curtesy, by judgment, &c. or of any others that come in the *post*; though a tenancy in dower by assignment of the heir doth work a degree, because she is in by her husband; but an assignment of dower by a disseisor doth not, by reason she is in the *post*. *Co. Lit.* 239.

Though *Entry on lands* is taken away by descent on *disseisins*, or *discontinuance*, &c. yet a descent shall not take away the entry of lessee for seven years, nor of tenant by *elegit*, &c. who have but a chattel, and no freehold; otherwise it is of any estate for life, or any higher estate. *Co. Lit.* 249.

If a disseisor leases for years, and dies seised of the reversion, the *entry* of the disseisee is taken away, because he died seised of the fee and freehold: but if he had leased for life, &c. the *entry* of the disseisee would not be taken away. *Co. Lit.* 239. Where the disseisor of an infant dies seised, and after the infant comes of age, and the heir of the disseisor dies before *entry*; though he died not seised of an actual seisin, but a seisin in law; yet his dying seised takes away the *entry* of the disseisee. *Ibid.* If a disseisor makes a feoffment upon condition, and the feoffee dies seised, and the feoffer enters upon the heir for the breach of the condition, the disseisee may enter upon him; for by the *entry* of the disseisor, the descent is utterly defeated. *Lit. sect.* 409.

The title of *entry* in a feoffer, &c. that hath but a condition, cannot be taken away by any descent, because he has no remedy by action to recover the land; so that if a descent should take away his *entry*, it would bar him of his right for ever; and the condition remains, and cannot be devested and put out of possession, as the lands, &c. *Co. Lit* 240. If a man recovers lands, and after a stranger to the recovery dies seised, this shall not take away the *entry* of the recoverer; as it was but a title. 2 *Danv. Abr.* 561. But where a person recovers against another, and enters and sues execution, and after the recovere disseises him, and dies seised; this descent shall take away the entry of the recoveror, for the recovery was executed. *Ibid.*

If after recovery against tenant for life, he dies, and he in remainder enters before execution, and dies seised, the *entry* of the recoveror is not taken away. *Co. Lit.* 238. The *entry* of the tenant for life shall be good for him in remainder; and if tenant for life make a feoffment in fee, and a stranger enters for the forfeiture in the name of the reversioner, this will be good to vest the reversion in him. *Lit.* 128. 9 *Rep.* 106. If an infant under age makes a deed of feoffment, and after his full age the feoffee dies seised; or a lessee for life aliens the land, and the alienee dies seised thereof; or a devise be of lands upon condition, and the heir of the disseisor enters and dies seised: in these cases the *entry* is gone, and the parties shall be put to their action. *Lit.* 96. 9 *H.* 6. 25.

If there be tenant for life, remainder to the right heir of J. S. and the tenant for life is disseised; a descent is cast, and after J. S. dies, and tenant for life also dies: by this the *entry* of the heir of J. S. is not taken away, for his remainder was *in custodiâ legis*. 1 *Rep.* 134. Where an infant has cause of *entry*, and the descent happens while he is within age, it will not bar him of his *entry*: he that hath the right of *entry*, must be of age, within the four seas, of sound memory; and

if it be a woman, she must be sole; and if the party be under age, beyond the seas, *non compos mentis*, in prison, or a feme covert, at the time of the descent, it shall not bar. *Lit.* 147. 402. 21 *H.* 6. 17.

The whole time from a disseisin is considerable; as where feme covert is disseised, and her husband dieth, and she takes another husband, and then a descent is cast; or if one *ultra mare* be disseised, and he return into England, and then go beyond sea again, and there is a descent; here the descent will bar the *entry*, because of the *interim*. 9 *H.* 7. 24. *Dyer*, 143. 32 *H.* 8. *c.* 33.

A woman tenant in tail took husband, who made a feoffment in fee, and died, and the wife without *entry* made a lease for years; and it was held, that the freehold was not reduced by the lease, without an *entry* made. 1 *Leon. ca.* 165. The *entry* of a disseisee, when he duly makes it, shall avoid all the mesne charges by the disseisor upon the land: but right of *entry* may be lost divers ways; as by acceptance of rent, by him who hath it, and the like. 1 *Anderson*, 133. *Noy. Rep.* 7. If a man is disseised of land, whereunto a common is appendant, the disseisee cannot use the common till he enters on the land to which the common is appendant; for if the disseisee might use it, so might the disseisor, which would be a double charge on the common: yet if a person be disseised of a manor, to which an advowson is appendant, he may present to the advowson before entry on the manor. *Co. Lit.* 122.

A disseisee enters into the land, and continues therein with the disseisor, and manures it with him, claiming nothing of his first estate; or if the disseisee enters, and takes the profit, as lessee, &c. of the disseisor; it is said these will be an entry that will reduce the first estate. 2 *Danv.* 790. If the disseisee commands a stranger to put in the cattle of such stranger in the land to feed there; this is an entry in law on the land. *Co. Lit.* 245.

Where entry may be made into land, or any thing, it shall not be in the party before *entry*: if entry cannot be made, but only *claim*, then it shall be in him by *claim*; and when neither *entry* nor *claim* can be made, it shall be in him by *act* of *law*. 1 *Plowd.* 133. In case the possession of land is in no man, but the freehold in law is in the heir that enters, his general entry into one part reduces all into his actual possession: but if an entry is to devest an estate, a general entry into parcel, is good only for that part. *Co. Lit.* 15. Where an entry is in any part, it must be in the name of all: if I enfeoff a person of an acre of ground upon condition, and of another acre on condition, and both conditions are broken; here entry into one in name of both acres is not good to reduce both: but if a man make a feoffment of divers parcels upon condition that is broken, there entry into part in name of all the rest is sufficient. *Co. Lit.* 252. 9 *H.* 7. 25.

A man hath right to enter into lands in divers villages in one county, if he enter upon part of it in one village in the name of all in that county; by this he shall have possession of the whole. *Co. Lit.* 252. *Dyer*, 227. 337. If a man disseise me of one acre at one time, and another acre at another time, in the same county; my entry into one of them in the name of both is good: though it will not be good, if the disseisin be by two several persons, or if the acres lie in several counties; in which case there ought to be several entries and actions. *Co. Lit.* 252.

If he who hath right of entry into a freehold, enters into part of it, it shall be adjudged an entry into all possessed by one tenant; but if there be several tenants possessed of the freehold, there must be several entries on the several tenants. 1 *Lil. Abr.* 515, 516. Special entry into a house with which lands are occupied, claiming the whole, is a good entry as to the whole house and lands. *Ibid.* If a husband enters to the use of his wife; or a man enters to the use of an infant, or any other, where the entry is lawful; this settles the possession before agreement of the parties: though it is otherwise where a person enters to the use of one whose entry is not lawful; for this vests nothing in him till agreement, and then he shall be a disseisor. 2 *Danv.* 787. If two joint-tenants are disseised, and the disseisor aliens, and one joint-tenant enters upon the alienee to the use of both; this settles the freehold in both of them. *Ibid.* 788. But if one coparcener, &c. enters especially claiming the whole land, she gains the part of her companion by abatement; and it shall not settle any possession in the other. *Co. Lit.* 243.

The heir is to enter into lands descended to him, to intitle him to the profits. *Co. Lit.* 214. If a younger son enters on lands in fee, where the eldest son dies leaving issue; though many descents are cast in his line, yet the heirs of the eldest son may make an entry on the lands; but if the youngest son convey away the lands in fee, and the feoffee dies seised, they may not enter; nor may they enter where the younger son disseises the eldest, and dies seised. *Co. Lit.* 237. 244. *Lit. sect.* 397.

A tenant in tail hath issue two sons, and the eldest dies, leaving his wife *privement ensient* of a son, and the younger brother enters, and then the wife of the eldest is delivered of a son, he may enter upon the younger brother. 2 *Danv.* 557. See title *Descent*.

An estate of freehold will not cease, without entry or claim: also a remainder of an estate of freehold cannot cease, without entry, &c. no more than estate of freehold in possession. *Cro. Eliz.* 360. A right of entry preserves a contingent remainder. 2 *Lev.* 35. And a grantee of a reversion may enter for a condition broken. *Plowd.* 176.

A lessee must enter into lands demised to him; and though the lessor dies before the lessee enters, yet he may enter; and if the lessee dies before entry, his executors or administrators may enter. The lessee may assign over his term before entry, having *interesse termini*; but he may not take a release to enlarge his estate; or bring trespass, &c. till actual entry. Though if there be words *bargain and sell* in a lease, &c. for consideration of money, the lessee or bargainee is in possession on executing the deed, to make a release, &c. *Lit.* 59. 454. *Co. Lit.* 46. 57. 270.

Where a lessor enters on his lessee for years, the rent is suspended. 1 *Leon.* 110. But without entry and expulsion, the lessee is not discharged of his rent to the lessor, unless it be where the lessor is attainted of treason, &c. then the rent is to be paid to the King, who is in possession without entry. *Sid.* 399. 1 *Nels. Abr.* 706.

There is no need of entry to avoid an estate in case of a limitation, because, thereby, the estate is determined without entry or claim; and the law casts it upon the party to whom it is limited. If A. devises lands to B. and his heirs, and dies, it is in the devisee immediately; but till entry he cannot bring a possessory action: and where a possession vests without entry, a reversion will vest without claim. 2 *Mod. Rep.* 7, 8. A bare entry on another, without an expulsion, makes only a seisin; so that the *law will adjudge him in possession who hath the right*. 3 *Salk*, 135.

Where a person is in a house with goods, &c. the house may be entered when the doors are open, to make execution. *Cro. Eliz.* 759. But it must be averred that the goods were in the house. *Lutw.* 1428. 1434. And a man cannot enter into a house, the doors being open, to demand a debt, unless he aver that the debtor is within the house at the same time. *Cro. El.* 6. 8. So entry may be made on a tenant where rent is in arrear, to take a distress, &c. See titles *Execution*, *Rent*, *Demand*.

In order to regain possession of lands by entry, &c. the manner of entry is thus: If it be in a house, and the door is open, you go into it, and say these words,—*I do here enter*,

*and take possession of this house.* But if the door be shut, then set your foot on the groundsel, or against the door, and say the before words: and if it be land, then go upon the land, and say, *I here enter and take possession of this land*, &c. If another do it for you, he must say, *I do here enter*, &c. *to the use of* A. B. And it is necessary to make it before witnesses, and that a *memorandum* be made of it. *Litt.* 385. *Co. Lit.* 237, 238.

Where an *ejectment* will lie, the *confession*, of lease, *entry*, and ouster is sufficient in all cases, except in the case of a *fine with proclamations*, in which case it is necessary to prove an *actual entry*; and the lessor of the plaintiff directing one to deliver a declaration to the tenant in possession, will not amount to such an entry. See title *Ejectment*.

As to a power of Entry limited by way of use, see 1 *Inst.* 203, *a. in n.*

ENTRY, AD COMMUNEM LEGEM, *at the Common Law.* Is the writ of entry which lies where tenant for term of life, or for term of another's life, or by the curtesy, &c. aliens and dies; he in the reversion shall then have this writ against whomsoever is in possession of the land. *New. Nat. Br.* 461.

ENTRY, AD TERMINUM QUI PRETERIIT; *at a term that has ended.* A writ of entry anciently brought against tenant for years, who held over his term, and thereby kept out the lessor. See *New Nat. Brev.* 447, 8. But an ejectment is now the common mode of proceeding; and by *stat.* 4 *Geo.* 2. *c.* 28. tenants for term of years, &c. *holding over after demand made*, are subject to *double rent*. See titles *Rent*, *Ejectment*, *Tenant*.

ENTRY, IN CASU CONSIMILI, *in like case.* Is a writ that lies for him in reversion by *stat. W.* 2. *c.* 24. against tenant for life, or tenant by the curtesy, who aliens in fee, &c. See *Casu Consimili*.

ENTRY, IN CASU PROVISO, *in the case provided.* Where a tenant in dower aliens in fee, or for term of life, or of another's life; then he in the reversion shall have this writ, provided by the stat. of *Glouc.* 6 *Ed.* 1. *cap.* 7. by which statute it is enacted, "that if a woman alien her dower in fee, or for life, the next heir, &c. shall recover by writ of entry."—See title *Dower*. And the writ may be brought against the tenant of the freehold of the land, on such alienation, during the life of the tenant in dower, &c. *New. Nat. Br.* 456.

The above four writs of entry may all be brought either in the *per*, or in the *cui* or *post*.

ENTRY SINE ASSENSU CAPITULI. A writ of entry, that lay where a bishop, abbot, &c. aliened lands or tenements of the church, *without the assent of the chapter* or Convent. *F.N.B.* 195.

*Entry* in Scotch Law refers to the acknowledgment of the title of the heir, &c. to be admitted by the superior.

ENURE. In law, to take place or be available; it is as much as *effectum*: as for example; a release made to tenant for life, shall *enure*, and be of force and effect to him in the reversion. *Lit.*

EODORBRICE. From the Sax. *eoder*, a hedge, and *brice*, *ruptura.*] Hedge-breaking: in which sense it is mentioned in the laws of King *Alfred*, *cap.* 45.

EORLE. Sax. for *earl*, &c. though made use of by the *Danes* for *barons*. See *Earl*.

EPIMENIA. Expences or gifts. *Blount.*

EPIPHANY. The day when the star appeared to the wise men at Christ's Nativity, generally called Twelfth Day.

EPISCOPALIA. Synodals, or other customary payments from the clergy to their *bishop* or diocesan; which were formerly collected by the rural deans, and by them transmitted to the bishop.—*Mon. Ang. tom.* 3. *pag.* 61. These customary payments have been otherwise called *onus episcopale*; and were remitted by special privilege to free churches and chapels of the King's foundation, which were exempt from episcopal jurisdiction. *Ken. Gloss.*

EPISCOPUS PUERORUM. It was a custom in former times, that some lay person about a certain feast should plait his hair, and put on the garments of a *bishop*, and in them exercise episcopal jurisdiction, and do several ludicrous actions, for which reason he was called *bishop of the boys*: and this custom obtained here long after several constitutions were made to abolish it. *Mon. Ang. tom.* 3. *pag.* 169.

In an old work, printed under the title of the Processionale of the Church of Sarum, is contained the service of that church on this occasion, which appears to have taken place on the day of the *Holy Innocents*. The service is very short, and is set to music. *Blount.*—From the monuments in some of the cathedrals it appears, that the *Episcopus puerorum* was himself a boy, (generally of the choir.) His office lasted about a month; and if he died while in office, he was buried *in pontificalibus*.

EQUALITY. The law delights in *equality*; so that when a charge is made upon one, and divers ought to bear it, he shall have relief against the rest. 2 *Rep.* 25. And where a man leaves a power to his wife to give an estate among three daughters, in such proportions as she shall think fit; it has been held she must divide it *equally*; unless good reason be given for doing otherwise. *Preced. Canc.* 256. See title *Contribution*.

In equity it is a *maxim*, that "EQUALITY IS EQUITY." See *Francis's Maxims*, *fol.* 9. &c.

EQUES AURATUS, *Lat.*] Is taken for a *knight*; because anciently none but knights were allowed to beautify and gild their armour with *gold*: but this word is rather used by the *heralds* than lawyers; for *eques auratus* is not a word in our law for knight, but *miles*, and formerly *Chevalier*. 4 *Inst.* 5.

## EQUITY.

(See, *Generally*, *title* CHANCERY.)

ÆQUITAS; *quasi*, *æqualitas.*] Is defined to be a correction, or qualification of the law, generally made in that part wherein it faileth, or is too severe. In other words "the correction of that wherein the law, by reason of its universality, is deficient." 1 *Comm.* 62. It likewise signifies the extension of the words of the law to cases unexpressed, yet having the same reason; so that where one thing is enacted by statute, all other things are enacted that are of the like degree: for example; the statute of *Glouc.* gives action of waste against him that holds lands for life or years; and, by the equity thereof, a man shall have action of waste against a tenant that holds but for one year, or half-year, which is without the words of the act, but within the meaning of it; and the words that enact the one, by *equity* enact the other. *Termes de Ley.*

So that *Equity* is of two kinds; the one doth abridge and take from the letter of the law; and the other inlarge and add thereto. *Æquitas est perfecta quædam ratio, quæ jus scriptum interpretatur & emendat. Co. Lit.* 24. And statutes may be construed according to *equity*; especially where they give *remedy for wrong*, or are for *expedition of justice*, &c. *Co. Lit.* 24. 54. 76. 2 *Inst.* 106, 107. &c.

A Court of Equity cannot now be created by the King, but the same must be done by Act of Parliament. 4 *Inst*, 84.

The distinction between *Law* and *Equity*, as administered in different courts, is not at present known, nor seems to have ever been known, in any other country than England at any time—With us the *Aula regia*, which was anciently the supreme court of judicature, undoubtedly administered equal justice according to the rules of both, or either, as the case might chance to require: and, when that was broken to pieces, the idea of a Court of Equity, as distinguished from a Court of Law, did not subsist in the original plan of partition. For though Equity is mentioned by *Bracton*, *l.* 2. *c.* 7, *pl.* 23. as a thing contrasted to strict law, yet neither in that writer, nor in *Glanvill* or *Fleta*, nor yet in *Britton*, (composed under the auspices and in the name of *Edward* I. and treating particularly of courts, and their several jurisdictions,) is there a syllable to be found relating to the equitable jurisdiction of

the Court of Chancery. It seems therefore probable, that when the courts of law, proceeding merely upon the ground of the King's original writs, and confining themselves strictly to that bottom, gave a harsh or imperfect judgment, the application for redress used to be to the King in person, assisted by his privy council; (from whence also arose the jurisdiction of the Court of Requests, which was virtually abolished by *stat.* 16. *Car.* 1. *c.* 10.) and they were wont to refer the matter either to the Chancellor and a select committee, or, by degrees, to the Chancellor only, who mitigated the severity, or supplied the defects of the judgments pronounced in the courts of law, upon weighing the circumstances of the case. This was the custom not only among our Saxon ancestors, before the institution of the *Aula regia*, but also after its dissolution, in the reign of King Edward I. and perhaps during its continuance, in that of Henry II. *Ll. Ed. c.* 2. *Lamb. Arch.* 59.

When, about the end of the reign of King Edward III. uses of land were introduced, and though totally discountenanced by the courts of Common Law, were considered as fiduciary deposits, and binding in conscience by the clergy, the separate jurisdiction of the Chancery as a court of *equity* began to be established. *Spelm. Gloss.* 106. 1 *Lev.* 242. John Waltham, who was bishop of Salisbury, and Chancellor to King Richard II. (by a strained interpretation of the statute of *Westm.* 2. [13 *E.* 1. *c.* 24.] enabling the clerks in chancery to form new writs according to the special circumstances of each case,) devised the writ of *subpæna*, returnable in the court of Chancery only, to make the feoffee to uses accountable to his *cestui que use*: which process was afterwards extended to other matters wholly determinable at the Common Law, upon fictitious suggestions; for which therefore the Chancellor is, by *stat.* 17 *Rich.* 2. *c.* 6. directed to give damages to the party unjustly aggrieved. But as the clergy had long attempted to turn their ecclesiastical courts into courts of equity, by entertaining suits *pro læsione fidei*, as a spiritual offence against conscience, in case of non-payment of debts, or any breach of civil contracts, till checked by the Constitutions of Clarendon, (10 *Hen.* 2. *c.* 15.) therefore probably the ecclesiastical chancellors, who then held the seal, were remiss in abridging their own new acquired jurisdiction; especially as the spiritual courts continued to grasp at the same authority as before, till finally prohibited by the unanimous concurrence of all the judges; however, it appears from the Parliament rolls, that in the reigns of Henry IV. and V. the Commons were repeatedly urgent to have the writ of *subpæna* entirely suppressed, as being a novelty devised against the form of the Common Law. But though the statue 4 *Hen.* 4. *c.* 23. was passed, whereby judgments at law are declared irrevocable, unless by attaint or writ of error, yet in Edward IV's time, the process by bill and *subpæna* was become the daily practice of the Court, though its jurisdiction was not then nearly so extensive as at present. *Rot. Parl.* 14 *Ed.* 4. *no.* 33.

In the time of Lord Chancellor Ellesmere, (*A. D.* 1616.) arose that notable dispute between the Courts of Law and Equity, set on foot by Sir Edward Coke, then Chief Justice of the Court of King's Bench; whether a Court of Equity could give relief after or against a judgment at the Common Law. This contest was so warmly carried on, that indictments were preferred against the suitors, the solicitors, the counsel, and even a master in chancery, for having incurred a *præmunire* by questioning, in a Court of Equity, a judgment in the Court of King's Bench, obtained by gross fraud and imposition. This matter being brought before the King, was, by him, referred to his learned counsel for their advice and opinion; who reported so strongly in favour of the courts of equity, that his majesty gave judgment on their behalf. *Whitelock* of *Parl.* 2. 390. 1 *Ch. Rep. Append.* 11.

Lord *Bacon*, who succeeded Lord *Ellesmere*, reduced the practice of the court into a more regular system; his successors in the reign of Charles I. did little to improve upon his plan; till the appointment of Sir *Heneage Finch* in 1673, who became afterwards earl of Nottingham. He was a person of the greatest abilities and most uncorrupted integrity; a thorough master aud zealous defender of the laws aud constitution of his country; and endued with a pervading genius, that enabled him to discover and to pursue the true spirit of justice, notwithstanding the embarrassments raised by the narrow and technical notions which then prevailed in the courts of law, and the imperfect ideas of redress which had possessed the courts of equity. The reason and necessities of mankind, arising from the great change in property by the extension of trade, and the abolition of military tenures, cooperated in establishing his plan, and enabling him, in the course of nine years, to build a system of jurisprudence and jurisdiction, upon wide and national foundations, which have also been extended and improved by many great men, who have since presided in Chancery. See 3 *Comm.* 50—56.

The same jurisdiction is exercised, and the same system of redress pursued, in the Equity-Court of the Exchequer; with a distinction, however, as to some few matters peculiar to each tribunal, and in which the other cannot interfere.

Upon the abolition of the court of Wards, the care, which the Crown was bound to take as guardian of its *Infant Tenants*, was totally extinguished in every feodal view, but resulted to the King in his court of Chancery, together with the general protection of all other *infants* in the kingdom. *F. N. B.* 27.—When therefore a fatherless child has no other guardian, the Court of Chancery has a right to appoint one; and from all proceedings relative thereto, an appeal lies to the House of Lords. The Court of Exchequer can only appoint a guardian *ad litem*, to manage the defence of the infant, if a suit be commenced against him; a power which is incident to the jurisdiction of every court of justice. *Cro. Jac.* 641. 2 *Lev.* 163. *T. Jon.* 90. But when the interest of a minor comes before the court judicially, in the progress of a cause, or upon a bill for that purpose filed, either tribunal, indiscriminately, will take care of the property of the infant.

As to *Idiots* and *Lunatics*, the king himself used formerly to commit the custody of them to proper Committees in every particular case; but now, to avoid solicitations, and the very shadow of undue partiality, a warrant is issued by the King, under his royal sign manual, to the Chancellor, to perform this office for him: and if he acts improperly in granting such custodies, the complaint must be made to the King himself in council. 3 *P. Wms.* 108. See *Reg. Br.* 267. But the previous proceedings on the commission, to inquire whether or no the party be an idiot or a lunatic, are on the law side of the Court of Chancery, and can only be redressed (if erroneous) by writ of error in the regular course of law.

The king, as *parens patriæ*, has the general superintendance of all *Charities*; which he exercises by the Chancellor. And therefore, when necessary, the Attorney-General, at the relation of some informant (who is usually called the *relator*,) files *ex officio* an information in the court of Chancery to have the charity properly established.

By *stat.* 43 *Eliz. c.* 4. authority is given to the Lord Chancellor, and to the Chancellor of the Duchy of Lancaster, respectively, to grant commissions under their several seals, to inquire into any abuses of charitable donations, and rectify the same by decree; which may be reviewed in the respective courts of the several chancellors, upon exceptions taken thereto. But, though this is done in the petty-bag office of the court of Chancery, because the commission is there returned, it is not a proceeding at Common Law, but treated as an original cause in the court of equity. The evidence below is not taken down in writing, and the respondent, in his

answer to the exceptions, may allege what new matter he pleases; upon which they go to proof, and examine witnesses in writing upon all the matters in issue: and the court may decree the respondent to pay all the costs, though no such authority is given by the statute. And as it is thus considered as an original cause throughout, an appeal lies of course from the Chancellor's decree to the House of Peers, notwithstanding any loose opinions to the contrary. *Duke's Char. Uses*, 62. 128. 2 *Vern.* 118.

By the several statutes relating to *Bankrupts*, a summary jurisdiction is given to the chancellor, in many matters consequential or previous to the commissions thereby directed to be issued; from which the statutes give no appeal.

The jurisdiction of the Court of Chancery doth not however extend to some causes, wherein relief may be had in the Exchequer. No information can be brought in Chancery for such mistaken charities as are given to the King by the statutes for suppressing superstitious uses. Nor can Chancery give any relief against the King, or direct any act to be done by him, or make any decree disposing of or affecting his property; not even in cases where he is a royal trustee. Such causes must be determined in the Court of Exchequer, as a court of revenue; which alone has power over the King's treasure, and the officers employed in its management, unless where it properly belongs to the duchy court of Lancaster.

In all other matters, what is said of the court of Equity in the Court of Chancery will be equally applicable to the other courts of Equity. Whatever difference there may be in the forms of practice, it arises from the different constitution of their officers.—See 3 *Comm.* 426—429.

The learned Commentator then enters into a brief but comprehensive view of the general nature of Equity; to shew that in our courts it is not contrary to, but consistent with, law; a position which perhaps will be best understood by further explanation of the jurisdiction exercised by courts of equity, either as *assistant to, concurrent with,* or *exclusive of,* the jurisdiction of the courts of Common Law; which is here done in an abridgment from *Fonblanque's Treatise of Equity, pp.* 10. *&c. in n.*

EQUITY is assistant to the jurisdiction of the Courts of Law; 1st. By removing legal impediments to the fair decision of a question depending in courts of law. 2dly, By compelling a discovery, which may enable them to decide. 3dly, By perpetuating testimony, when in danger of being lost, before the matter to which it relates can be made the subject of judicial investigation. It may also be said to be assistant, by rendering the judgments of courts of law effective, as by providing for the safety of property in dispute pending a litigation; and by counteracting fraudulent judgments, &c.; and by putting a bound to vexatious and oppressive litigation.—It exercises a concurrent jurisdiction with courts of law, in most cases of fraud, accident, mistake, account, partition and dower. It claims an exclusive jurisdiction in all matters of trust and confidence; and wherever, upon the principles of universal justice, the interference of a court of judicature is necessary to prevent a wrong, and the positive law is silent. See *Mitford's Treatise on the Pleadings in Chancery.*

To pursue this division of the jurisdiction of Courts of Equity with that minuteness which is necessary to a particular acquaintance of its powers, would lead to an investigation too extensive. Some short notice shall be taken of the general objection that is urged against the claims of Courts of Equity to a concurrence of jurisdiction in some cases with Courts of Law. This concurrence of jurisdiction may, in the greater number of cases in which it is exercised, be justified by the propriety of preventing a multiplicity of suits; for as the mode of proceeding in courts of law requires the plaintiff to establish his case, without enabling him to draw the necessary evidence from the examination of the defendant, justice could never be attained at law in those cases where the principal facts to be proved by one party are confined to the knowledge of the other party. In such cases, therefore, it becomes necessary for the party, in want of such evidence, to resort to the extraordinary powers of a Court of Equity, which will compel the necessary discovery; and the court having acquired cognizance of the suit, for the purpose of discovery, will entertain it for the purpose of relief, in most cases of fraud, account, accident, and mistake; and for other reasons will entertain suits for partition and dower, though discovery be not necessary to the plaintiff's case.

The case, (and, it seems, the only case) in which fraud cannot be relieved against in equity, concurrently with courts of law, though discovery be sought, is the case of fraud, in obtaining a will; which since the case of *Kerrick* v. *Bransby*, 3 *Brown's Parl. Cas.* 358, is constantly referred to a court of law in the shape of an issue, *devisavit vel non*. That courts of equity have a concurrence of jurisdiction with courts of law, in all other matters of fraud. See *White* v. *Hussey*, *Pre. Ch.* 14. *Hungerford* v. *Earle*, 2 *Vern.* 261. *Colt* v. *Woollaston*, 2 *Pr. Wms.* 156. *Stent* v. *Baillis*, 2 *P. Wms.* 220. 2 *Comyn's Digest.* titles *Chancery, Fraud.*

The jurisdiction exercised by Courts of Equity in matters of account is, in many cases, bounded by the discovery: as where a suit is instituted for an account of waste of timber, without praying an injunction, the plaintiff cannot have a decree for relief. *Jesus College* v. *Bloome*, 3 *Atk.* 262. *Piers* v. *Piers*, 1 *Vez.* 521. But where the bill seeks an account of ore dug, the court will decree it. (*Bishop of Winchester* v. *Knight*, 1 *P. Wms.* 406.) because the working of a mine is a kind of trade. *Story* v. *Lord Windsor*, 2 *Atk.* 630. Yet, even in that case, the plaintiff must shew a possession. *Sayer* v. *Pierce*, 1 *Vez.* 232. Neither will Equity, in all cases, decree an account of mesne profits; for where a man has title to the possession of lands, and makes an entry, whereby he becomes entitled to damages at law for the time that possession was detained from him, he shall not, after his entry, turn that action at law into a suit in equity, and bring a bill for an account of the profits, except in the case of an infant, or some other very particular circumstances. *Tilly* v. *Bridges*, *Pre. C.* 252. *Owen* v. *Aprice*, 1 *Ch. Rep.* 17. The particular circumstances excepted by the *Lord Keeper*, in laying down this rule, extend to all those cases which involve an equity, which the plaintiff cannot make available at law. *Coventry* v. *Hall*, 2 *Ch. Rep.* 134. *Duke of Bolton* v. *Deane*, *Pre. Ch.* 5, 6. *Dormer* v. *Fortescue*, 3 *Atk.* 129, 30. *Townsend*, v. *Ash*, 3 *Atk.* 336. *Norton* v. *Frecker*, 1 *Atk.* 524. See also *Curtis* v. *Curtis*, *Rolls*, 2 *Bro. C. R.* 622.

The jurisdiction exercised by our courts of equity, in most cases of *accident*, presents a very striking instance of their anxiety to prevent innovation on the jurisdiction of courts of law: their interference being generally founded on some circumstance which prevents the party being relievable at law; as where a bond, or other instrument or security, is lost, equity will interfere, by compelling a discovery from the defendant, and will relieve upon such discovery; but the plaintiff is not entitled to any relief upon a mere suggestion that the bond, instrument or security is lost; but is required, for the purpose of relief, to annex to his bill an affidavit to such effect. 3 *Atk.* 17. *Mitford's Treatise*, 112. And, as a further security against innovation, it must appear that the loss of the deed or instrument obstructs the plaintiff in seeking relief at law: for the loss of a deed is not always a ground to come into a Court of Equity for relief; if there was no more in the case, although he is entitled to have a discovery of that, whether lost or not, courts of law admit evidence of the loss of a deed, proving the existence of it and its contents, just as a Court of Equity does. There are two grounds to come into equity for relief, annexing an affidavit to the bill. First,

where the deed is destroyed or concealed by the defendant: and whenever that is the case, the plaintiff is entitled to have relief in this court, upon the reason in Lord Hunsdon's case. *Hob.* 109. Another is, where the plaintiff cannot recover at law, without making profert of the deed in pleading at law. *Whitfield* v. *Fausset*, 1 *Vez.* 392. 2 *Atk.* 61.

The judgment of the Court of King's Bench in *Reed* v. *Brookman*, (3 *Term Rep.* 151.) seems to have relieved the obligee from the necessity of coming into equity, upon the mere circumstance of the bond or instrument being lost; by allowing him to state such circumstances in his declaration, as a reason for not making profert of it; but, upon this case being cited in Chancery, as furnishing an objection to the plaintiff's suit in equity, he being relievable at law, *Lord Thurlow* observed, that the Court of King's Bench having determined to give relief in a case formerly relievable only in equity, was not a reason for excluding the ancient, particular, and, at least, concurrent, jurisdiction of courts of equity. *Atkinson* v. *Leonard*, 3 *Bro. C. R.* 218. This concurrence of jurisdiction as to this kind of accident, may therefore be considered to extend to all cases in which the deed or instrument has been destroyed, or is concealed by the defendant, or has been lost by the plaintiff; though of the contents of such instrument the plaintiff has other evidence, of which he might avail himself at law. But where the relief sought in equity is upon the loss of a bill of exchange, or promissory note, the plaintiff must, by his bill, offer to give security, as an indemnity to the defendant against any demand being made upon him in respect of such lost bill or note. *Walmsley* v. *Child*, 1 *Vez.* 341.

To establish the origin of any branch of legal or equitable jurisdiction is always difficult, and seldom necessary, provided the exercise of such jurisdiction is sanctioned by the dictates of reason, and found to be conducive to the ends of substantial justice; and such will appear to be the nature and tendency of the jurisdiction exercised by our courts of equity in cases of *Partition*, upon a reference to the difficulties which obstructed the mode of proceeding at Common Law: and though many of those difficulties are removed by *stat.* 8 & 9 *W.* 3. *c.* 31. yet still, if the parties are in any degree complicated, it is extremely difficult to proceed at law, or where the tenants in possession are seised of particular estates only; for the persons entitled in remainder cannot be bound by the judgment, in a writ of partition. *Mitford's Treatise*, *p.* 110. Neither can a feme covert be bound by partition by writ, *Co. Lit.* 166 *a.* which it should seem, she may be by decree and commission in equity, *Martyn* v. *Perryman*, 1 *Ch. Rep.* 125.: on these considerations, and the almost constant occasion that the parties have for a discovery, is founded this branch of equitable jurisdiction; in the exercise of which our courts of equity are constantly governed by an anxious attention to the legal title of the plaintiff: for though, at law, it be sufficient to allege seisin, yet in equity, the plaintiff must shew his title. *Cartwright* v. *Pultney*, 2 *Atk.* 380. And if the defendant contest the legal title, the court will dismiss the bill. *Bishop of Ely* v. *Kenrick*, *Bunb.* 322. but see *Parker* v. *Gerard*, *Ambler*, 236. And as a further mean to prevent innovation and vexatious suits, courts of equity will never allow costs on bills of partition; courts of law allowing none on the proceeding by writ. *Metcalf* v. *Beckwith*, 2 *P. Wms.* 276.—*Mitford's Treatise*, 111. And this rule prevails, notwithstanding the unequal interests of the parties. *Parker* v. *Gerard*, *Ambler*, 236.—See, on this subject of Partition in Equity, also 1 *Inst.* 169. *b.* and the notes there, which are very ingeniously combated, we may say refuted, by *Mr. Fonblanque*, who sums up the result in the foregoing paragraph.

The jurisdiction of our courts of equity, in matters of *Dower*, for the purpose of assisting the widow with a discovery of the lands or title deeds, or of removing impediments to her rendering her legal title available at law, has never been doubted. But it has been questioned whether equity could give relief in those cases, in which there appeared to be no obstacle to her legal remedy. *Wallis* v. *Everard*, 3 *Ch. R.* 87. It seems now, however, to be settled, that the widow labours under so many disadvantages at law, from the embarrasments of trust terms, &c. that she is fully entitled to every assistance that a Court of Equity can give her, not only in paving the way for her to establish her right at law, but also by giving complete relief when the right is ascertained. *Curtis* v. *Curtis*, 2 *Brown C. R.* 634. and *Lucas* v. *Calcraft*, there cited. And in the exercise of this jurisdiction, courts of equity will even enforce a discovery against a purchaser for valuable consideration without notice. *Williams* v. *Lambe*, 3 *Bro. Ch. Rep.* 264. And though the widow should die before she had established her right to dower, equity will, in favour of her personal representatives, decree an account of the rents and profits of the lands, of which she afterwards appeared dowable.

With respect to the exclusive jurisdiction exercised by our courts of equity in matters of *trust*, and in those cases where the principles of substantial justice entitle the party to relief, but the positive law is silent, it seems impossible to define with exactness its boundaries, or to enumerate with precision its various principles. In the course of this work, however, a variety of instances appear, from which the wisdom of this branch of equitable jurisdiction will be fully and satisfactorily established, and to which, at present, it may be sufficient to refer. See particularly titles *Chancery*, *Fraud*, *Trust*, &c. &c.

The essential difference (says *Blackstone*) between Law and Equity principally consists in the different modes of administering justice in each, in the mode of *proof*, the mode of *trial*, and the mode of relief. Upon these, and upon two other accidental grounds of jurisdiction, *viz.* the true construction of *securities for money lent*, and the form or effect of a *trust* or *second use*, hath been principally erected that structure of jurisprudence which prevails in our courts of equity, and is inwardly bottomed upon the same substantial foundations as the system of the courts of Common Law.

As to the mode of *proof*. When facts, or their leading circumstances, rest only in the knowledge of the party, a court of equity applies itself to his conscience, and purges him, upon oath, with regard to the truth of the transaction; and that being once discovered, the judgment is the same in equity as it would have been at law. But, for want of this discovery at law, the courts of equity have acquired a concurrent jurisdiction with every other court in all matters of account. 1 *Chan. C.* 57. As incident to accounts, they take a concurrent cognizance of the administration of personal assets. 2 *P. Wms.* 145. consequently of debts, legacies, the distribution of the residue, and the conduct of executors and administrators. 2 *Chan. C.* 152. As incident to accounts, they also take the concurrent jurisdiction of tithes, and all questions relating thereto. 1 *Eq. C. Ab.* 367. of all dealings in partnership, 2 *Vern.* 277. and many other mercantile transactions; and so of bailiffs, receivers, factors, and agents. *Ibid.* 638.

From the same fruitful source, the compulsive discovery upon oath, the courts of equity have acquired a jurisdiction over almost all matters of *fraud*. 2 *Chan. C.* 46. all matters in the private knowledge of the party, which, though concealed, are binding in conscience, and all judgments at law obtained through such fraud or concealment. And this not by impeaching or reversing the judgment itself, but by prohibiting the plaintiff from taking an advantage of a judgment obtained by suppressing the truth. 3 *P. Wms.* 148. *Year book*, 22 *Ed.* IV. 37. *p.* 21. See title *Discovery*.

The mode of *trial*, is by interrogatories administered to the witnesses, upon which their depositions are taken in writing,

wherever they happen to reside. If, therefore, the cause arises in a foreign country, and the witnesses reside upon the spot; if in causes arising in England, the witnesses are abroad, or shortly to leave the kingdom; or if the witnesses residing at home are aged or infirm; any of these cases lays a ground for a court of equity to grant a commission to examine them, and (in consequence) to exercise the same jurisdiction which might have been exercised at law, if the witnesses could probably attend. See title *Depositions*.

With respect to the mode of *relief*. The want of a more specific remedy than can be obtained in the courts of law, gives a concurrent jurisdiction to a Court of Equity in a great variety of cases. To instance in executory agreements. A Court of Equity will compel them to be carried into strict execution, unless where it is improper or impossible; instead of giving damages for their non-performance. *Eq. Ca. Ab.* 16. And hence a fiction is established, that what ought to be done shall be considered as being actually done, and shall relate back to the time when it ought to have been done originally; and this fiction is so closely pursued through all its consequences, that it necessarily branches out into many rules of jurisprudence, which form a certain regular system. 3 *P. Wms.* 215. So, of waste, and other similar injuries, a Court of Equity takes a concurrent cognizance, in order to prevent them by *injunction*. 1 *Ch. Rep.* 14. 2 *Ch. C.* 32. Over questions that may be tried at law, in a great multiplicity of actions, a Court of Equity assumes a jurisdiction, to prevent the expence and vexation of endless litigation and suits. 1 *Vern.* 308. *Pre. Ch.* 261. 1 *Pr. Wms.* 672. *Stra.* 404. In various kinds of fraud it assumes a concurrent jurisdiction, not only for the sake of a discovery, but of a more extensive and specific relief. 2 *P. Wms.* 156. as by setting aside fraudulent deeds, decreeing re-conveyances, or directing an absolute conveyance merely to stand as a security. 1 *Vern.* 32. 1 *P. Wms.* 239. 1 *Vern.* 237. 2 *Vern.* 84. and thus, lastly, for the sake of a more beneficial and complete relief, by decreeing a sale of lands, a Court of Equity holds plea of all debts, incumbrances, and charges that may affect it, or issue thereout. 1 *Eq. Ca. Ab.* 337.

As to the construction of *securities* for money lent; when Courts of Equity held the penalty of a bond to be the form, and that in substance it was only as a pledge to secure the repayment of the sum *bonâ fide* advanced, with a proper compensation for the use, they laid the foundation of a regular series of determinations, which have settled the doctrine of personal pledges or securities, and are equally applicable to mortgages of real property. The mortgagor continues owner of the land, the mortgagee of the money lent upon it: but this ownership is mutually transferred, and the mortgagor is barred from redemption, if, when called upon by the mortgagee, he does not redeem within a time limited by the Court; or he may, when out of possession, be barred, by length of time, by analogy to the statute of limitations. See also titles *Bond; Mortgage; Penalty*.

The form of a *Trust*, or second use, gives the Courts of Equity an exclusive jurisdiction, as to the subject matter of all settlements and devises in that form, and of all the long terms created in the present complicated mode of conveyancing. This is a very ample source of jurisdiction: but the trust is governed by very nearly the same rules as would govern the estate in a court of law, if no trustee was interposed; 2 *P. Wms.* 645. 668, 9. And by a regular positive system established in the Courts of Equity, the doctrine of trusts is now reduced to as great a certainty as that of legal estates in the Courts of Common Law. See 3 *Comm.* 436—440.

EQUITY OF REDEMPTION, on *mortgages*. If where money is due on a mortgage, the mortgagee is desirous to bar the *equity of redemption*, he may oblige the mortgagor either to pay the money, or to be foreclosed of his equity; which is done by proceedings in the Court of Chancery. But the Chancery cannot shorten the time of payment of the mortgage-money, where it is limited by express covenant, though it may lengthen it: and then upon non-payment, the practice is to forclose the *equity of redemption* of the mortgagor. 2 *Vent.* 364.

To foreclose the *Equity*, a *bill in Chancery* is exhibited; to which an answer is put in, and a decree being obtained, a Master in Chancery is to certify what is due for principal, interest, and costs, which is to be paid *at a time prefixed by the decree*, whereupon the premises are to be re-conveyed to the mortgagor; or, in default of payment, the mortgagor is ordered to be foreclosed from all *equity of redemption*, and to convey the premises absolutely to the mortgagee.

A fine or non-claim will bar *equity of redemption*: but in a common mortgage a covenant to restrain it shall not be regarded in Chancery. 2 *Vent.* 365. If the condition of a mortgage is, that the mortgagor only should redeem during life, or that he and the heirs of his body shall do it; yet the general heir shall have the *equity of redemption*, for if the principal and interest be offered, the land is free. 1 *Vern.* 39. 190. And it is held, though a bond be conditioned, that if the money be not paid at such a time, then, for a further sum, the mortgagee shall have the land absolutely, as a purchaser, &c. in such case a man may also *redeem*. *Ibid.* 488.—See at large this Dict. title *Mortgage*.

EQUIVALENT. Commissioners are appointed by statute to examine and state the debts due to Scotland on the Union by way of *equivalent*; and provision is made for payment of the same by a yearly annuity, &c. *Stat.* 5. *Geo.* 1. *c.* 20. See title *Scotland*.

EQUUS COOPERTUS. A horse equipped with saddle and furniture. *Inq.* 16. *E.* 1.

ERECTION of lands into a Barony, Earldom, &c. See title *Peers*.

ERIACH. By the Irish Brehon law, in case of murder, the brehon or judge compounded between the murderer and the friends of the deceased who prosecuted, by causing the malefactor to give unto them, or to the child or wife of him that was slain, a recompence, which was called an *eriach*. 4 *Comm.* 313. See *Weregild*.

ERMINE, OR ERMINAGE STREET. See *Watling Street*.

ERMINS, from the Fr. *ermine*.] A fur of great value, much used in *robes* of *state*. See title *Customs*.

ERN. The names of places ending in *Ern* are said to imply a *melancholy situation*; from the Sax. *Ern*, i. e. *Locus Secretus*.

ERNES. The loose scattered ears of corn that are left on the ground, after the binding or cocking of it: It is derived from the old Teutonic *Ernde*, Harvest; *Ernden*, to cut or mow corn: hence to *ern* is, in some places, to glean. *Kennet's Gloss.*

ERRANT, *Itinerant*.] Is applied to justices of the circuit, and bailiffs at large, &c. See *Eyre*.

ERRATICUM. A waif, or stray; an *erring*, or wandering beast. *Constit. Norman. A. D.* 1080.

ERROR, Fr. *Erreur*.]

Signifies something wrong in pleading or process, &c. whereupon a writ is brought for remedy thereof, called a *Writ of Error*; in Latin, *de errore corrigendo*.

A Writ of Error is a commission to judges of a superior court, by which they are authorised to examine the record, upon which a judgment was given in an inferior court, and, on such examination, to affirm or reverse the same, according to law. *Jenk. Rep.* 25. 2 *Inst.* 40. *Yelv.* 202. *Hardw.* 340. But yet if, by the writ of error, the plaintiff therein may re-

cover, or be restored to any thing, it may be released by the name of an action. *Co. Lit.* 288 *b.* See *post Div.* II. V. There is also a writ of error to reverse a fine, and which must be prosecuted within twenty years, by *stat.* 10 & 11 *W.* 3. *c.* 14. See titles *Fine* and *Recovery.*

A Writ of Error to some superior Court of Appeal is the principal method of redress for erroneous judgments in the King's courts of record, having power to hold plea of debt or trespass above 40*s.*—It lies for some supposed mistake in the proceedings of such Court; for, to amend errors in a base court, not of record, a writ of *false judgment* lies. *Finch L.* 484. The writ of error only lies upon matter of *law*, arising on the face of the proceedings; so that no evidence is required to substantiate or support it, there being no method of reversing an error in the determination of facts, but by an attaint or a new trial, to correct the mistakes of the former verdict. See *Bro. P. C.* 8vo. ed. 515.

Formerly suitors were much perplexed by writs of error brought upon very slight and trivial grounds; as mis-spellings, and other mistakes of the clerks, all which are now effectually helped by the statutes of amendment and jeofails; and particularly by *stat. 5 Geo.* 1. *c.* 13. it is enacted, that all writs of error, wherein there shall be any variance from the original record, or other defect, may be amended by the Court, and made agreeable to the record: and where any verdict hath been given in any action, suit, &c. in any of the Courts at Westminster, or other court of record, the judgment thereon shall not be stayed or reversed for any defect or fault in form or substance in any bill, writ, &c. or for variance in any such writs from the declaration and other proceedings; but this statute not to extend to any appeal of felony or process, on indictment, information, and appeal. Such writ of error to be brought and prosecuted with effect within twenty years, by *stat.* 10 & 11 *W.* 3. *c.* 14.—*Stat.* 16 & 17 *C.* 2. *c.* 8. enacts, that in all actions, real, personal, or mixed, the death of either party between verdict and judgment shall not be alledged for error.—By *stat.* 25 *Geo.* 3. *c.* 80. imposing a stamp duty on warrants of attorney, it is provided, that no action shall be stayed, nor any judgment, sentence, &c. reversed, by reason of omission or defect in the entering, or filing of record, the memorandum or minute directed. By these and other statutes, all trifling exceptions are so thoroughly guarded against, that writs of error cannot now be maintained, but for some material mistake assigned. See titles *Amendment; Judgment.*

If a writ of error be brought to reverse any judgment of an inferior court of record, where the damages are less than 10*l.*: or if it is brought to reverse the judgment of any superior court after verdict, he that brings the writ, or that is plaintiff in error, must (except in some peculiar cases) find substantial bail; to prevent delays by frivolous pretences of appeal; and for securing payment of cots and damages. See title *Costs.* And as to bail in such cases, see *stats.* 3 *Jac.* 1. *c.* 8. 13 *C.* 2. *st.* 2. *c.* 2. 16 & 17 *C.* 2. *c.* 8. 19 *G.* 3. *c.* 70.

A writ of error lies from the inferior courts of record in England into the King's Bench, and not into the Common Pleas. *Finch L.* 480. *Dy.* 250. And before *stat.* 23 *Geo.* 3. *c.* 28. it lay from the King's Bench in Ireland to the King's Bench in England. It likewise may be brought from the Common Pleas at Westminster to the King's Bench, and then from theKing's Bench the cause is removable to the House of Lords. From proceedings on the law side of the Exchequer, a writ of error lies into the Court of Exchequer-Chamber, before the Lord Chancellor, Lord Treasurer, and the Judges of K. B. and C. P. and from thence it lies to the House of Peers. From proceedings in K. B. in debt, detinue, covenant, account, case, ejectment, or trespass, originally begun there by bill, (except where the King is a party,) it lies to the Exchequer-Chamber, before the Justices of C. P. and Barons of the Exchequer; and from thence also to the House of Lords. *Stat.* 27 *Eliz. c.* 8.—But where the proceedings in K. B. do not first commence therein by bill, but by original writ sued of out of Chancery, this takes the case out of the general rule laid down by the statute; so that the writ of error then lies, without any intermediate stage of appeal, directly to the House of Lords, the dernier resort for the ultimate decision of every civil action. 1 *Ro. Rep.* 264. 1 *Sid.* 424. 1 *Saund.* 346. *Carth.* 180. *Comb.* 295.—Each Court of Appeal, in their respective stages, may, upon hearing the matter of law in which the error is assigned, reverse or affirm the judgment of the inferior courts; but none of them are final, save only the House of Peers, to whose judicial decisions all other tribunals must therefore submit, and conform their own. See 3 *Comm.* 406.—411.

*In criminal cases* also, judgments may be reversed by writ of error; which lies from all inferior criminal jurisdictions to the Court of K. B. and from K. B. to the House of Peers: It may be brought for notorious mistakes in the judgment or other parts of the record; as where a man is found guilty of perjury, and receives the judgment of felony, or for other less palpable errors, such as any irregularity, omission, or want of form, in the process of outlawry or proclamations; the want of a proper addition to the defendant's name, according to the statute (see title *Abatement*); for not properly naming the sheriff, or other officer of the court, or not duly describing where his county-court was held: for laying an offence committed in the time of the late King, to be done against the peace of the present; and for many other similar causes, which (though allowed out of tenderness to life and liberty) are not much to the credit or advantage of national justice. See titles *Outlawry; Indictment*, &c.

These writs of error to reverse judgments in cases of misdemeanors, are not to be allowed of course, but on sufficient probable cause shewn to the Attorney-General; and then they are understood to be grantable of common right, *et ex debito justitiæ.* But writs of error to reverse attainders in capital cases are allowed only *ex gratiâ*, and not without express warrant under the King's sign manual, or at least by the consent of the Attorney-General. 1 *Vern.* 170, 5. Those therefore can rarely be brought by the party himself, especially where he is attainted for an offence against the State; but they may be brought by his heir or executor after his death. But the easier and more effectual way, is to reverse such attainder by Act of Parliament. See titles *Attainder; Judgment.*

Having said thus much generally, we may now proceed particularly to inquire,

I. 1. *By whom, against whom; and* 2. *at what time this Writ may be brought.*
II. 1. *In what Cases it will lie; and* 2. *how it is to be brought.*
III. *In what Court it is to be brought.*
IV. *How Errors are to be assigned; and what may be assigned for Error. See ante* II. 1.
V. *What Defence may be made by a Defendant in Error.*
VI. *Of the Judgment to be given on a Writ of Error.*

I. 1. Any person damnified by *error* in record, or that may be supposed to be injured by it, may bring a writ of *error* to reverse it, whether he be a party or no; but principal and bail cannot join in a writ of *error.* And where there are several defendants, if one of them release the *errors*, he may be summoned and severed, and the others may reverse the judgment. 6 *Rep.* 26. *Hob.* 72.

Judgment against two, one brought a writ of *error*, and held it should be quashed with costs; that it could not be

amended, and that if the other party would not join, the defendant who chose to bring a writ of *error*, must proceed by summons and severance. *Hardw.* 135, 136.

Defendants having agreed under a consolidation rule not to bring any writ of error, cannot do so, though there be manifest error in the record. 1 *H. Blackst.* 21.

No person can reverse a thing for *error*, unless the *error* be to his prejudice. 5 *Rep.* 38. One in remainder may have writ of *error* upon judgment given against tenant in tail: But he in reversion or remainder shall not have writ of *error* in the life-time of tenant for life, on judgment given against such tenant, because they cannot be parties grieved in his time. 2 *Nels. Abr.* 712.

No person can bring a writ of *error* to reverse a judgment who was not party or privy to the record, or who was not injured by the judgment, and therefore to receive advantage by the reversal thereof. 1 *Rol. Abr.* 747. *Dyer* 90.

So a writ of *error* does not lie against any but him who is party or privy to the first judgment, his heirs, executors, or administrators. 1 *Rol. Abr.* 747. *Dyer* 90.

And therefore, on a judgment for recovery of land, the writ must be brought against him who was party to the judgment, although he hath nothing in the land, and not against the tenant; and on such writ the judgment may be reversed; but there must go a *scire facias* against all the tertenants. 1 *Rol. Abr.* 749. 1 *Rol. Rep.* 302.

Upon this rule, that none shall have a writ of *error* to reverse a judgment, but he who is privy to, or hath some prejudice thereby, it hath been resolved, that if one hath lands on the part of his mother, and loseth them by erroneous judgment, and dies, the heir of the part of the mother shall have the writ of *error*. 1 *Leon.* 261. 2 *Sid.* 56. See *Owen* 68. *Godb.* 377.

So the younger son, when entitled to the land by the custom of *Borough* English, shall bring the writ of *error*, and not the heir at Common Law: for this remedy descends with the land. *Owen* 68. 1 *Leon.* 261. 4 *Leon.* 5.

So if there be an erroneous judgment in the case of tenant in tail-female, the issue female, and not the son, shall bring a writ of *error*. *Dyer* 90. 1 *Leon.* 261. 1 *Rol. Abr.* 747.

So if a man settles land to the use of himself and the heirs of his body, the remainder to his own right heirs, and dies, leaving issue only a daughter, who levies a fine, and dies without issue, and J. S. brings a writ of *error* as cousin and collateral heir of the daughter, yet he shall never reverse the fine; for there could no right descend to him from the daughter, because she had but an estate-tail, which determined by her death without issue; and it does not appear that the remainder in fee was in the daughter as right heir, wherefore J. S. shall not reverse the fine, *quia de non apparentibus et non existentibus eadem est ratio*, especially in a court of judicature, where the judges can take notice of nothing that does not come judicially before them, and appear in the pleading. *Dyer* 89. *Cro. Eliz.* 469. 3 *Lev.* 36.

If there be several parties to an erroneous fine, they shall all join with the party that is to enjoy the land, though they themselves can have nothing; and this is said to be necessary only by way of conformity. 1 *Rol. Abr.* 747. *Dyer* 89.

But if tenant for life, and he in remainder in fee, (being an infant,) join in a fine, the infant alone may bring error for the error in respect of the person of the infant, which is the cause of the action for him, and for no other. 1 *Leon.* 31. *Cro. Eliz.* 115.

A writ of *error* may be brought by him that is made party by the law, though he was not originally party to the suit, as he who comes in as a vouchee. 1 *Rol. Abr.* 748. 755.

*Stat.* 8. 9 *W.* 3. *c.* 11. § 7. applies to writs of error, &c. therefore a writ of error does not abate by the death of one of several plaintiffs in error. *Clarke* v. *Rippon*, *Term Rep. K. B. East.* 58 *G.* 3. 586.

If a man is indicted for felony, and thereupon a *capias* and *exigent* are awarded, but he dies before attainder, his administrators may have *error* upon this award of the *exigent*, because by the award of the *exigent*, his goods were forfeited; and this is *ad grave damnum*, &c. though the principal judgment can never be given. 11 *Co.* 41 *b.*

Writ of *error* lies in B. R. to reverse a *fine* levied in the Common Pleas, and to cancel the same if it be erroneous: And if there be not an original, or not proper writs of covenant, or if there be any fraud, &c. writ of *error* may be brought to make the fine void. *Co. Lit.* 9. See titles *Fine* and *Recovery*.

2. It was formerly holden that a writ of *error* could not be brought before the judgment given; and if it bore *teste* before, it was no *supersedeas*, for the words of the writ are, *Si judicium redditum sit*, &c. 1 *Rol. Abr.* 749. But it seems now agreed, that a writ of *error* that bears *teste* before the judgment is good; and this is the usual course for preventing and superseding execution: but the judgment must be given before the return of the writ. *March* 140. 1 *Vent.* 255. *Moor* 461. 3 *Keb.* 308. 1 *Vent.* 96. *Latch.* 133, and see 1 *Term Rep.* 279, and *New Rep. C. P.* i. 298.

But a writ of *error*, that bears *teste* before any plaint entered, is not good. *March* 140.

So where the defendant, upon an indictment of barretry, brought a writ of *error* bearing *teste* before the assise: it was disallowed, because, if such practice should obtain, it would disappoint all proceedings there. 1 *Vent.* 255. 3 *Keb.* 308.

The allowance of a writ of error may be served before the plaintiff is entitled to sign final judgment. 2 *Bos. & Pul.* 137. But the allowance of the writ of error, previous to the judgment being signed, is an irregularity permitted for the convenience of the party: for the judgment in the action is the true foundation of the writ of error. 2 *Bos. & Pull.* 479.

The court of K. B. will not infer that a writ of error was sued out for delay, because it was sued out before final judgment signed. And though it should be made returnable before final judgment, it will still operate as a supersedeas upon the judgment, which, when signed in the same Term, relates back to the first day thereof. 5 *East's Rep.* 145.

A *writ of* error *cannot be brought* after twenty years. *Hardw.* 345. The statute of limitations must be pleaded to a writ of *error*, as well as to an original action. *Id.* 346. See *Limitation of Actions; Recovery.*

II. 1. Writ of *error* will not lie in the Exchequer-Chamber on judgment in replevin in B. R. nor on judgment in action of *scandalum magnatum*. 2 *Nels.* 708, 709. But on judgment in replevin in C. B. there may be writ of *error* brought in B. R. The *stat.* 27 *Eliz. c.* 8. (see *post Div.* III.) is only to relieve on the merits of the cause, as it stood on the first judgment.

Error *de recordo quod coram vobis residet* lies in the court of B. R. for *errors* in fact in the judgment of the same court; as non-age of the parties, want of an original, &c. which doth not proceed from the *error* of the judges; and this writ is allowed without bail. *Cro. Jac.* 254. And *errors* in fact may be corrected in C. B. the same term, without this writ, which lies not in the Exchequer-Chamber. *Ibid.* 620.

If judgment is given in B. R. in civil actions, a writ of *error* will not lie in the same court, only for *errors* in fact triable by a jury; but upon a judgment in criminal cases, *error* will lie in B. R. whether the *error* be in fact or in law; though it lies also in Parliament. 3 *Salk.* 147.

Where a judgment in C. B. is affirmed upon a writ of *error* in B. R. and afterwards a *scire facias* is brought on that judgment, and the plaintiff hath judgment thereon, no writ of

*error* lieth in the Exchequer-Chamber, because the record was not in B. R. by bill, but by writ of *error*. 1 *Roll. Rep.* 261. 3 *Salk.* 148.—See 1 *Salk.* 263.

Writ of *error* cannot be brought on any record which is not a judgment. 1 *Salk.* 145.—Nor upon an interlocutory judgment. 6 *East's Rep.* 333.

The Court of B. R. having allowed the sufficiency of a return to a writ of *mandamus*, and therefore refused to grant a peremptory writ, the party applying brought his writ of error in Parliament. Held that no writ of error lay in this case, it being merely an *award* of the court, and not a strict formal *judgment*. 3 *Bro. P. C.* (8vo. ed.) 505.

The Court of C. P. have held, that, though writ of error may lie on a judgment of nonsuit, yet the Court will, on motion to take out execution, grant it, as such writ of error must be evidently merely for the purpose of delay and vexation. 1 *H. Black. Rep. Rep.* 432.

No writ of *error* will lie of any judgment that is not given in a court of record; nor of a judgment given in an inferior court, as the county-court, &c. *Co. Lit.* 288. *b.* Nor of a decree or sentence in Chancery proceeding according to equity. 37 *H.* 6. *Bro. Error.* 95. 1 *Rol. Abr.* 744. But of a judgment given in the limited Court of Chancery, called the Petty Bag, which proceeds according to the Common Law, and holds plea of *scire facias* for repeal of the King's letters patent, &c. a writ of *error* lies in B. R. 1 *Rol. Ab.* 744. *Dyer* 315. 4 *Inst.* 80. *Plow.* 393.

*Error* lies for variance between the original writ and declaration, or want of an original: and where proceedings are so erroneous, as not to be amended; for faults in verdicts, executions, &c. or when any thing material is omitted in a judgment, writ of *error* lies, and the judgment shall be reversed: so where the styles of inferior courts are wrong, or insufficiently named, &c. their judgments may be reversed. But where faults are small, they sometimes pass as *vitium clerici*. 2 *Nels. Abr.* 714, 715, 721, &c. 728.

By the practice of the Court of Common Pleas, a defendant coming in by *capias utlagatum* the same term in which an *exigent* is returnable, may avoid the outlawry without a writ of *error*, by shewing that he purchased a *supersedeas* out of the same court, and delivered it to the sheriff before the *quinto exactus*, &c.; or by shewing any other matter apparent on record, which makes the outlawry erroneous, as the want of an original, or the omission of process, or want of form in a writ of proclamation, &c. or a return by a person appearing not to be sheriff, or a variance between the original and *exigent*, or other process, or the want of such addition as is required by *stat.* 1 *H.* 5. *c.* 5. 2 *Hawk. P. C.* 659—651. 1 *Rol. Abr.* 742, 3.—And see *stat.* 5 *Eliz. c.* 23. §§ 13, 14.

If one be attainted upon an erroneous indictment, he cannot be relieved but by writ of *error*, for the judgment being *quod suspendatur*, &c. which is the judgment of law due for the offence, it must be presumed to have been given, for that he was guilty of the offence; but if judgment of acquittal is given upon such indictment, the King need bring no writ of *error*; but the offender may be newly indicted, for the judgment being *quod eat sine die*, &c. may be given as well for the insufficiency of the indictment, as for the party's innocence. 3 *Inst.* 214.

Also any judgment whatsoever, given by persons who had no good commission to proceed against the person condemned, may be falsified, by shewing the special matter, without writ of *error*, because it is void; as where a commission authorizes to proceed on an indictment taken before A. B. C. and twelve others, and by colour thereof the commissioners proceed on an indictment taken before eight persons only. 1 *Inst.* 231. 2 *Hawk. P. C.* 459.

If one is attainted of felony, and after, by relation of a general pardon, the felony is pardoned, he shall be discharged, for he hath no remedy by writ of *error* to reverse the attainder. 6 *Co.* 5. *a.*

On error brought on a judgment of conviction for felony at the sessions, the Court will only look to the record of conviction, although the justices return also the record of a former acquittal. 1 *Maul & Sel. Rep.* 183.

Wherever a new jurisdiction is erected by act of parliament, and the court or judge, that exercises this jurisdiction, acts as a court or judge of record, according to the course of the Common Law, a writ of *error* lies on their judgments; but where they act in a summary method, or in a new course different from the Common Law, there a writ of *error* lies not, but a *certiorari*. 1 *Salk.* 263. See title *Certiorari*.

2. *Error in the King's Bench* is thus prosecuted: the cursitor of the county makes out the writ of *error* from a *præcipe*, or copy of the declaration left with him; which is to be allowed with the clerk of the *errors*, and a certificate of the allowance of the writ must be served on the attorney of the defendant in *error*. The proceedings are by *scire facias ad audiendum errores* against the plaintiff in the action, wherein judgment was obtained; and the writ of *error* being received by the sheriff to whom directed, he is to give notice to the plaintiff in *error* to shew cause why execution should not be on the judgment, and make a return to that purpose; then a rule is to be given with the clerk of the rules, for the plaintiff in *error* to assign his errors by such a day, which if he shall not do before the rule is out, the plaintiff in the original action may take out execution against him.

Two things are requisite to make a writ of error a *Supersedeas* of Execution; *viz.* the Allowance, (*i. e.* the delivery of the writ to the clerk of the errors;) and putting in bail. If the writ of error be allowed before judgment, the time for putting in bail, four days, runs from the judgment; if after judgment, from the time of the allowance. 1 *Bos. & Pull.* 478.

If the plaintiff in *error* assign *errors* in the record, then the defendant must plead *in nullo est erratum*, and thereupon enter the cause with the clerk of the papers, for the *errors* to be argued; and paper books for the counsel and judges are to be made out, &c. If some part of the record be not returned, a *certiorari* must be prayed to bring it into court; and if matters of fact are alleged in *error*, as non-age, death of the plaintiff, &c. a proper plea must be made thereto, and issue thereupon taken and tried, as in any other issue: but if only matters of law are assigned, the *errors* are argued by counsel on both sides, and the judgment is either reversed or affirmed: and when judgment is affirmed, the defendant in *error* may proceed against the defendant in the action, by taking out execution on the *affirmetur*, or bringing action of debt on the judgment; or he may prosecute the bail by *scire facias* upon their recognizance. But it is said by some, that an assignment of *errors* in *fact* and in *law*, is bad on demurrer; by others, that the assignment of *error* in law may stand, and the fact be considered as nothing. *Sed quere*, Where this is an *error* in fact, if the writ of *error* ought not to be *coram vobis residens*, i. e. in the court where the judgment was given. In this case, however, we must except the *want of warrants of attorney*, &c. which are *facts*; and it is every day's practice to assign such, with *errors* in law; and the usual course is, if defendant in *error* does not pray a *certiorari*, for the plaintiff to pray it.

When a judgment is reversed or affirmed in the Exchequer-Chamber, the transcript of the record thereof will be remitted back to the Court of K. B. to be entered up at the end of the judgment there: and if such judgment shall be affirmed in the Exchequer-Chamber, yet a writ of *error* may be brought thereupon returnable in parliament.

If you would bring a *writ of error in parliament* to reverse a judgment in B. R. there must be a petition to the King for his warrant, which petition has the allowance of the Attorney-

General, and then the King writes on the top of it *Fiat Justitia*; whereupon a writ of *error* is made out by the clerk of the *errors*. And then the Lord Chief Justice of B. R. carries the record, and a transcript thereof, up to the House of Lords in full Parliament, and after they are examined there, leaves the transcript with the Lords, but brings back the record: and this being done, the attorney for the defendant in *error*, gets some Lord to move that the plaintiff in *error* may assign his *errors*; but if for the plaintiff, motion is to be made, that upon his assigning *errors*, the defendant may appear and make his defence, and counsel be heard on both sides: then, after the judgment is either affirmed or reversed, the clerk of the parliament remands the transcript of the record into B. R: with the affirmation or reversal thereof, to be entered upon the record of the said court, which court, if affirmed, awards execution, &c. *Dyer*, 385.—See *Cowp.* 843.

A writ of *error* in parliament is made returnable immediately; or on a prorogation to the next session, and it doth not determine by a prorogation. But if a parliament is *dissolved* before the *errors* are heard, it is otherwise. And on motion, execution hath been granted in B. R. on a judgment in such a case, the record being never out of the court. *Raym.* 5. 2 *Nels. Abr.* 731.

Where a writ of error was brought in B. R. in the lifetime of Geo. I. but was not argued till after the accession of Geo. II. when the judgment was affirmed, on a writ of error in parliament, this judgment was reversed; it being held that the first writ of error, *the King being sole plaintiff in the cause*, was absolutely abated. This was the case of the Deanery of Armagh in Ireland. 3 *Bro. P. C.* (8vo. ed.) 507.

The party bringing the writ of *error* is to cause the roll where the judgment is entered, to be marked with the word *error* in the margin, that the other party may have notice on the record that the writ of *error* is brought, and this marking of the roll, on giving notice thereof, is as it were a *supersedeas* in itself to hinder execution: though a *supersedeas* is to be made out, allowed and left with the sheriff of the county; and the plaintiff's attorney is not obliged to search the record, whether writ of *error* is brought or not; but may make out execution upon the judgment, if no *supersedeas* be taken forth, or he hath no notice of the writ of *error*. *Trin.* 24 *Car. B. R.*

On a writ of *error* of a judgment in the Common Pleas, or other inferior court, in every adversary suit, the record itself shall be removed, that it may remain as a precedent and evidence of the law in the like cases. 1 *Rol. Abr.* 753. 5 *Co.* 39.

But in the case of a fine the transcript only is removed, for fines are only a more solemn acknowledgment or contract of the parties, and therefore are no memorials of the law, and need only be affirmed or vacated; if the former, the contract stands as it was; if the latter, the justices of B. R. may send for the fine itself, and reverse it, or they may send a writ to the treasurer and chamberlain to take it off the file; besides, should the record itself be removed and affirmed, it could not be ingrossed for want of a chirographer in B. R. 1 *Rol. Abr.* 752. 1 *Bendl.* 51. *Dyer*, 89. *Godb.* 248. 2 *Rol. Rep.* 233. *F. N. B.* 20.—See titles *Fine of Lands*, *Recovery*.

If the judges of the Common Pleas, or other judges upon a writ of *error*, will not certify all the record, the party that sues the writ of *error* may allege diminution of the record, and pray a writ to the justices that certified the record before, to certify the whole record. *F. N. B.* 25, *a*. But diminution cannot be alleged upon a writ of *error* brought upon a judgment in any inferior court. 1 *Sid.* 40.—Yet see *infra*.

By *stats.* 3 *Jac.* 1. *c.* 8. 13 *Car.* 2. *st.* 2. *c.* 2. 16 & 17 *C.* 2. *c.* 8. § 3. he that brings writ of *error*, to reverse a judgment in a *superior* court in all cases *after a verdict*, or in any *action* of *debt*, upon *bond for payment of money only*, or on a *contract*, must put in good sureties to prosecute his writ of *error* with effect, and pay the debt and damages if judgment be affirmed: and by *stat.* 19 *Geo.* 3. *c.* 70. § 5. this is extended to writs of error to reverse judgments in inferior courts where the damages are under 10*l.* If bail be not put in, on the writ of *error* brought upon a judgment in the courts at Westminster, in those cases where bail is required, the writ of *error* is no *supersedeas* to the execution; though such writ is in being, until a *nolle prosequi* is entered, or judgment affirmed, &c. And it is the same where insufficient bail is given, on rule to put in better bail, or justify those put in, which if the plaintiff doth not do, execution is ordered upon the judgment, with a *non obstante* to the writ of *error*, &c. *Mich.* 9 *W.* 3. *B. R.*—See further title *Supersedeas*.

A plaintiff in *error* is, in the time appointed by the rule for that purpose, to certify the record into B. R. or the court will grant a *nolle prosequi* on the writ of *error*. *Mich.* 22 *Car. B. R.*—See *post Div.* V.

The court will not let the plaintiff in *error* quash his own writ of *error*; though they may grant leave to discontinue it. 5 *Mod.* 67. If a verdict is for a defendant in *error*, and judgment is affirmed, costs are allowed by *stat.* 3 *Hen.* 7. *c.* 10. on occasion of the delay of execution. And by *stat.* 4 & 5 *An. c.* 16. upon quashing writs of *error*, for defect or variance from the record, &c. the defendant is to have costs as if judgment were affirmed. When a writ of *error* is not *in delay of execution*, as where it is brought after the execution is executed, the plaintiff shall not have damages and costs. *Cro. Jac.* 636.

When a writ of *error* is brought to reverse a judgment in an inferior court, though the record is not certified as it ought, yet execution cannot be sued; but on certificate of the neglect, &c. a writ of *execution of the judgment* may be issued. 1 *Lil. Abr.* 526. Upon a writ of *error*, if the clerk below will certify the record wrong, action on the case lies against him; and if he make no return, the plaintiff may have the writ of *execution* out of Chancery. *Mod. Cas.* 245.

If erroneous judgment be for the defendant in an inferior court, and it is reversed in B. R. and the merits appear for the plaintiff, he shall have judgment; but if the merits be against the plaintiff, the defendant shall have new judgment, in like manner as in the Exchequer-Chamber; for the judges are to *reform*, as well as to affirm or reverse. 7 *Mod.* 2, 3. If a writ of *error* to reverse a judgment be discontinued for want of prosecution, execution cannot be had upon the judgment, until the discontinuance is certified from the court where discontinued. 1 *Lil.* 518. If a writ of *error* is brought to remove a record of a judgment given in C. B. and the plaintiff in *error* leaves the record there, without removing it before the return of the writ; or in case there be a longer return day than is convenient in the writ of *error*, as if it is purchased the beginning of Michaelmas term, and made returnable in Hilary term; the court may award execution, although the writ of *error* be delivered. *Jenk. Cent.* 180. *Dyer*, 245.

III. Erroneous judgments given in the court of B. R. were only reformed by the parliament till *stat.* 27 *Eliz. cap.* 8. By that statute, a writ of *error* lies out of the Chancery upon all judgments given in the King's Bench, when the suit is by bill, (except the King is a party to the suit,) returnable in the Exchequer-Chamber, before the Judges of the Common Pleas, and Barons of the Exchequer, &c. who may examine the *errors*, and reverse or affirm the judgment; other than for *errors*, concerning the jurisdiction of the court, or want of form in writs, pleadings, &c. and after the *errors* are examined, and judgment affirmed or reversed, the record is sent back to the King's Bench, to proceed and award execution; but if the suit is by original writ, or where the King is party, writ of *error* lies only in parliament.

A *qui-tam* action of debt is a civil suit. *Cowp.* 382. And a writ of *error* on it lies from the King's Bench to the Exchequer-Chamber. *Doug.* 353.—See title *Exchequer.*

Not only on reversing or affirming a judgment, the Exchequer-Chamber is to send back the record into B. R: but also if the plaintiff in the writ of *error* is nonsuit, or if the suit is discontinued in the Court of Exchequer-Chamber, the record shall be sent back: and the Court of Exchequer shall give costs and damages to the plaintiff in the original action for his delay, &c. though if the plaintiff in *error* was plaintiff in the original action, there no costs can be given. 2 *And.* 122. 2 *Nels. Abr.* 707.

Where a writ of *error* determines in the Exchequer-Chamber by abatement or discontinuance, the judgment is not given in B. R. till a *remittitur* is entered. 1 *Salk.* 261. The Exchequer-Chamber doth not award a *sci. fac. ad audiend. errores;* but notice is given to the parties concerned. 1 *Vent.* 34.

The court of parliament is the supreme court, where, anciently, causes of great consequence, as between the *Magnates Regni*, were heard and determined: hence the *dernier* resort is to the House of Lords, to which a writ of *error* lies; and therefore, if a writ of *error* be brought of a judgment in the King's Bench into the Exchequer-Chamber, and there the judgment is reversed; yet a writ of *error* lies of such judgment into parliament, and the lords may reverse such second judgment. *Show. Parl. Cas.* 24. 110. 1 *Vent.* 334. *Raym.* 330. 2 *Jon.* 99. 2 *Lev.* 232.

So a writ of *error* lies into parliament upon a judgment in B. R. either in a cause brought there by writ of *error*, or originally commenced there. 1 *Rol. Abr.* 745.

And though upon a judgment in the King's Bench, since the *stat.* 27 *Eliz. cap.* 8. the party may elect either to bring a writ of *error* in the Exchequer-Chamber, or in parliament; yet if the cause commenced in the King's Bench by *original writ*, there lies no writ of *error* but into parliament; also if he elects to bring *error* in the Exchequer-Chamber regularly, he cannot after bring *error* in parliament upon the first judgment. 1 *Saund.* 346. *Carth.* 180. *S. P.*—See 2 *Rol. Abr.* 492. 2 *Lev.* 232.

But it is expressly provided, by *stat.* 27 *Eliz. c.* 8. that judgment given in the Exchequer-Chamber shall not be final, but that an appeal may be brought thereon in parliament, as before the statute was used in erroneous judgments in K. B.

By *stat.* 31 *Eliz. c.* 1. any three of the judges may proceed in hearing such writs of *error* in the Exchequer-Chamber, but the judgment must be given by six at least. And see *stats.* 16 *Car.* 2. *c.* 2. and 20 *Car.* 2. *c.* 4. for avoiding delays in judgments in that court.

To reverse a judgment given in the Court of Common Pleas, the writ of *error* is made returnable in the King's Bench, and *error* is not to be brought in parliament: but where a writ of *error* is brought in B. R. upon a judgment given in C. B. and the judgment is reversed or affirmed in B. R. the party grieved may have writ of *error* from B. R. returnable in parliament. *Stat.* 31 *Eliz. c.* 1. 1 *Lil. Abr.* 519. 521. Erroneous judgment in the Court of Exchequer is to be examined by the Lord Chancellor, &c. with some of the justices, and such other sage persons as they think fit; and if any *error* be found, they shall correct the rolls, and send them into the Exchequer, in order to make execution, &c. *Stat.* 31. *Ed.* 3. *cap.* 12.

No writ of *error* lies in *Banco* or *Banco Regis*, upon a judgment given within the *five ports;* but by custom such judgment is examinable by bill in nature of a writ of error, *coram domino custode seu gardiano quinque portum apud curiam suam de Shepway.* 4 *Inst.* 224.—See title *Cinque Ports.*

If a judgment be given in the court of stannaries of the Dutchy of Cornwall, no writ of *error* lies upon this in *Banco* or *Banco Regis*, because it hath not been used; but of this there may be an appeal to the guardian of the Stannaries, and from him to the Prince; and when there is no Prince, to the King's Privy Council. 1 *Rol. Abr.* 745.—See 4 *Inst.* 230. 2 *Danv. Abr.* 304.

Upon a judgment given in the Hustings in London, a writ of *error* lies at St. Martin's before certain justices. 1 *Rol. Abr.* 745. 1 *Lev.* 309. 2 *Saund.* 253. *S. P.* and upon a judgment of the said justices, a writ of *error* lies in parliament. See 2 *Leon.* 107.—See title *Dissenters.*

In Wales, from the Great Sessions, a writ of *error* lay in *personal* actions to the council of the Marches of Wales; and if they gave an erroneous judgment, it was final; for *stat.* 34 & 35 *H.* 8. *c.* 16. ordained this writ to the council there; and no writ of *error* was granted of such erroneous judgment: upon *errors* in *real* or *mixed* actions, however, in Wales, writ of *error* lay into the King's Bench. *Jenk. Cent.* 71. And so now it does in *personal* actions by *stat.* 1 *W. & M. c.* 27.—See title *Courts of Wales.*

In some cases a writ of *error* lies in the same court wherein the record is.

If upon a judgment in B. R. there be *error* in the process, or through the default of the clerks, it shall be reversed in the same court by writ of *error* sued there before the same justices. *F. N. B.* 21. *Poph.* 181. 1 *Rol. Abr.* 746.

So if one is indicted of treason or felony in B. B. or being indicted elsewhere, the indictment is removed in B. R. and by process of that court he is erroneously outlawed, and so returned; a writ of *error* may be brought in B. R. for the reversal thereof. 3 *Inst.* 214.

Also if an erroneous judgment in point of law be given in B. R. upon an indictment in London, a writ of *error* may be brought in the same court; for though in civil cases *error* does not lie in the same court, unless for a matter of fact; yet in criminal cases it lies as well for an *error* in law as fact. 1 *Sid.* 208.

But if an erroneous judgment be given, and the *error* lies in the judgment itself, and not in the process, a writ of *error* does not lie in B. R. of such judgment. 1 *Rol. Abr.* 746.

Under the acts for the union of Great Britain and Ireland, (see title *Ireland*) writs of *error* and appeal before that time determinable in the Irish House of Lords, are to be decided in the House of Lords of the united kingdom.

By an Irish act 40 *Geo.* 3. a court of Exchequer-Chamber is established in Ireland, similar to that in England under the statutes 27 *Eliz. c.* 8, *&c.*

IV. The parties, upon the removal of the record by the writ of *error*, have no day in court given to either of them; so that if the plaintiff in *error* delay to sue forth his *sci. fac. ad audiend. errores*, the defendant hath no way to compel him, but by suing out a *scire facias quare executionem non*, &c. And if thereupon the plaintiff in *error* doth not plead that his *errors* are assigned, but suffer judgment to pass upon two *nihils*, no *errors* afterwards assigned shall prevent execution. *Carth* 41. The *sci. fac. ad audiendum errores* is only used in B. R. In the Exchequer-Chamber *notice* is given. It is said the usual practice is, that the defendant in the writ of *error*, by consent, doth voluntarily take notice of the assignment of *errors*, and this consent is testified by his pleading *In nullo est errat'*, and then there is no occasion for a *scire facias ad audiend. error'*. *Ibid.*

*Errors* are to be assigned in the term, or the writ of *error* will be quashed. 1 *Lil. Abr.* 524. When the record is in court by writ of *error*, the plaintiff in *error* is to assign his *errors;* and may have a *scire facias* before the record is entered: and the manner of assigning *errors*, according to the ancient practice, is to put a bill into court, and say in the bill, *in hoc erratum est*, &c. shewing in certain in what things. *F. N. B.* 20. The assignment of *error*, *in omnibus erratum*, is not good; for the judgment is founded upon the original writ, count, pleading, issue, process, trial, and so is manifold. *Jenk. Cent.* 84. *Errors* in *law*, not assigned in the record, may be assigned after a *scire facias ad audiend' errores;* as

the record is in the court: but it is not so of a warrant of attorney, which is an *error* in *fact*, and not upon a record. *Ibid.* 140. 5 *Rep.* 37.

If one in execution brings *error*, he ought to assign the *errors* in his proper person: and in cases of outlawry for felony, *errors* sufficient must be certainly alleged in writing, before the writ of *error* is allowed. *Jenk. Cent.* 165. 179. Where a recovery is had, and *error* brought, if the original writ doth not abate by death: but is abateable only, as by entry into the land pending the writ, or coverture, acquisition of a dignity, a partial array returned, aid denied, &c. that should have been pleaded, and were not: these shall not be assigned for *error*; for they are waved. 9 *Rep.* 47. 21 *H.* 6. 29.

The assigning general *errors* is to say that the declaration, &c. is not sufficient in law: and that judgment was given for the plaintiff where it ought to have been for the defendant: and the *errors* of a judgment are now to be assigned on the record, to appear with it to the court.

If the plaintiff in *error* assigns *errors* in *fact*, and *errors* in *law*, which are not assignable together, and the defendant in *error* pleads *in nullo est erratum*; this is a confession of the *error* in *fact*, and the judgment must be reversed, for he should have demurred for the *duplicity*. *Style*, 69. 1 *Lev.* 76. *Salk.* 268. 6 *Mod.* 113. 206.

Also if an *error* in *fact* be well assigned, *in nullo est erratum* is a confession of it, for the defendant ought to have joined issue upon it, so as to have it tried by the country. 1 *Sid.* 93. *Raym.* 59. Because, in *nullo est erratum* is in the nature of a *demurrer*, which confesses the fact, if well pleaded, or well assigned.

But if an *error* in *fact* be ill assigned, *in nullo est erratum* is no confession of it; as if it be assigned, that such a one at the time of the return of the *venire* was not sheriff, and the record be removed into B. R. by *certiorari*, there *in nullo est erratum* is no confession of that *error*, because the record is not in court, that being no part of the record, for the plea is *in nullo est arratum in recordo*. *Cro. Jac.* 12. 29. 521. *Raym.* 231. *Cro. Car.* 421. 1 *Rol. Ab.* 758.

So if the plaintiff in *error* assigns an *error* in *fact*, *viz.* that the defendant, who was an infant, did not appear by guardian; but by attorney, and concludes with *hoc paratus est verificare*, instead of concluding to the country, as he ought to do, though the defendant in *error* pleads *in nullo est erratum*, yet it shall not amount to a confession, but shall be taken only for a *demurrer*. *Yelv.* 58.

Also if an *error* in *fact*, that is not assignable, be assigned, and *in nullo est erratum* be pleaded, it is no confession; as if it be assigned, that such a day there was no court of Common Pleas sitting, because that is against the record, and in such case *in nullo est erratum* is only a *demurrer*; so if a man says he did not appear, and the record says he did, *in nullo est erratum* it is no confession, but a *demurrer*, because it is against the record. *Cro. Car.* 12. 29. 52. *Yelv.* 58. *Raym.* 231. 1 *Vent.* 252. 3 *Keb.* 259. 1 *Lev.* 76.

It has been held that an *error* in *fact* cannot be assigned in the Exchequer-Chamber: though, by some authorities, *errors* in *fact* may be assigned as *errors* in *law*. 2 *Mod.* 194. 2 *Nels. Abr.* 708.

By *stat.* 20 *Car.* 2. *c.* 6. in actions real, personal, and mixed, the death of either party between verdict and judgment shall not be alleged for *error*.

It seems a general rule, that nothing can be assigned for *error* that contradicts the record; for the records of the courts of justice being things of the greatest credit, cannot be questioned but by matters of equal notoriety with themselves; wherefore, though the matter assigned for *error* should be proved by witnesses of the best credit, yet the judges would not admit of it. 1 *Rol. Abr.* 757.

An original writ of the same term, in which final judgment is given, will not warrant that judgment, if it appear upon the same record, that there have been proceedings of a preceding term. 1 *Wils.* 181.

Hence it is, that in a writ of *error* to reserve a fine, the plaintiff cannot assign, that the *conusor died before* the *teste* of the *dedimus*, because that contradicts the record of the conusance taken by the commissioners, which evidently shews that the conusor was then alive, because they took his conusance after they were armed with the commission, and the *dedimus* issued. *Dyer*, 89. 1 *Rol. Abr.* 757.—See title *Fine and Recovery*.

V. The defendant in *error* may plead a release of all *errors*, or a release of all suits, and these pleas, if found for him, will for ever bar the plaintiff in *error*. 1 *Rol. Abr.* 788.

So where by a writ of *error*, the plaintiff shall recover, or be restored to any *personal* thing, as debt, damage, or the like, a release of *all actions personal* is a good plea; and when *land* is to be recovered or restored in a writ of error, a release of *actions real* is a good bar; but where by a writ of *error* the plaintiff shall *not* be restored to *any personal* or *real thing*, a release of all actions *real* or *personal* is no bar. *Co. Lit.* 288, *b.* 8 *Co.* 152. 1 *Rol. Abr.* 788. 2 *Rol. Abr.* 405.

Also if a man loses in a real action, and he releases all his right to the land, and so where there is a fine levied, this shall bar him of his writ of *error*; for no person can bring a writ of *error* to reverse a judgment that is not intitled to the land, &c. for the courts of law will not turn out the present tenant, unless the demandant can make out a clear title; *possession always carrying with it the presumption of a good title till the right owner appears.* 1 *Rol. Abr.* 747, 788. *Dyer*, 90, *a.* 3 *Leo.* 36. *Cro. Eliz.* 469. 1 *Rol. Abr.* 789. If the tenant, pending a *præcipe* against him, aliens in fee, and after judgment is given against him, and he brings a writ of *error*; this feoffment is not any bar to the writ, because he was privy to the judgment after. 1 *Rol. Abr.* 788. *Bridge.* 77. 1 *Rol. Rep.* 306. In a writ of *error* to reverse a common recovery, it is no good plea that the plaintiff, pending the writ of *error*, hath entered into part, for before the possession was taken from him, he might have *error* to reverse the judgment, though not to have restitution. 1 *Lev.* 72.—See title *Fine and Recovery*.

In a *sci. fac.* against a ter-tenant, he may plead a release of *error*, though he be not privy to the judgment. 9 *H.* 6. 48. *Bro.* 9 *S. C.*

But the ter-tenants cannot plead in abatement of the writ of *error*, but only in bar as a release, &c. in maintenance of their title. 1 *Lev.* 72.

After *in nullo est erratum* pleaded, the party affirms the record to be perfect, and he his foreclosed to say there is *error* in it: though the court is not restrained from examining into it. 1 *Salk.* 270. The judges are not bound to search for *errors* in the record, which were not assigned; but may if they will; and if they find *error* they ought to reverse the judgment. *Jenk. Cent.* 159.

VI. A judgment, *as being an entire thing*, cannot be reversed in part, and stand good as to other part; or be reversed as to one party, and remain good against the rest: though if there be *error* in awarding execution, the execution only shall be reversed, and not the judgment. *Hob.* 90. *Carth.* 235. If judgment is entered against joint-defendants, when one of them is dead, the judgment shall be reversed for *error* as to all of them; for in such case the plaintiff ought to make a special entry of the death of the party, with *Nihil ulterius versus eum fiat*, and then taking judgment only against the others. *Ibid.* 149.

The Court of Exchequer-Chamber have not any authority, but to reverse or affirm the judgment, &c. for they cannot

make execution. *Cro. Eliz.* 108. But where judgment is given for the defendant, and the plaintiff brings a writ of *error*; if the judgment is reversed, the court which reverses the judgment shall give judgment for the plaintiff as the other court ought to have done. *Yelv.* 117, 118.

When a record is removed into K. B. from a County-Palatine court by a writ of error, and that writ is non-prossed, the court of K. B. will award execution. 3 *Term Rep. K. B.* 657.

Where judgment for the defendant on a special verdict is reversed in the Exchequer-Chamber, that court on motion, will give a final judgment for the plaintiff. 1 *Bos. & Pull.* 30.

In the Exchequer-Chamber after reversal of a judgment, &c. in B. R. the court gave judgment that the plaintiff recover, &c. but because they wanted power to award a writ of inquiry, which was necessary, being on a demurrer, therefore it was sent back into B. R. for the execution of that writ, and thereupon to give final judgment: but if the judgment is against the plaintiff in B. R. upon a special verdict and that judgment is reversed in the Exchequer-Chamber, there being no writ of inquiry requisite, the Court of Exchequer-Chamber doth not only give judgment of reversal, but a complete judgment for the plaintiff in the action. *Carth.* 181.

The Court of Exchequer-Chamber is bound to allow double costs to the defendant in error, on the affirmance of a judgment of K. B. 2 *H. Black.* 284.—But interest is in their discretion. *Id.* and 2 *Bos. & Pull.* 219.—That court will allow interest to a defendant in error under *stat.* 3 *H.* 7. *c.* 10. on a judgment of non-pros, as well as on a judgment of affirmance. Such interest is now allowed at the rate of *5l. per cent.* instead of *4l. per cent.* as formerly. 1 *Bos. & Pull.* 29.

The court gave interest on affirmance in error of a judgment for the proceeds of stock fraudulently sold out by one holding a power of attorney to sell. *Mitchell* v. *Minikin*, 4 *W. P. Taunton*, 117.

If erroneous judgment be had by consent of parties, it may be reversed in the Exchequer Chamber; for *consent of parties may not change the law;* but if the consent is entered upon and made part of the record it may be good. *Hob.* 5. *Cro. Eliz.* 664. The reversal in the Exchequer-Chamber is *res judicata:* no writ of *error* lies upon such judgment, except in parliament; and it is by six judges at least, by *stats.* 27 *Eliz. c.* 8. 31 *Eliz c.* 1.

When judgment is given in B. R. for the plaintiff in *error*, there shall be only a *judicium revocetur*, &c. entered with costs: if for the defendant in *error*, that the plaintiff *nil capiat per breve suum de errore.* The Chief Justice of B. R. &c. or the eldest judge ought to allow a writ of *error*, which is in judgment of law a *supersedeas* until the *errors* are examined, and the judgment affirmed or reversed. *Cro. Jac.* 534. As a plaintiff having erroneous judgment may reverse it, and new judgment may be given for him; so if a judgment is reversed, the plaintiff may bring a new action for the same cause. 1 *Lev.* 310. Where a judgment is pleaded in bar of another action, &c. and judgment given on that plea; writ of *error* may be had to reverse the second judgment. *Cro. Eliz.* 503. *Jenk. Cent.* 259. And debt lies upon a judgment in B. R. after a writ of *error* brought, which is only a *supersedeas* to the execution. 1 *Lev.* 153. But the court will stay proceedings in such action on giving judgment.

In a writ of *error* upon a judgment in trespass against several, if the judgment be erroneous, because one of the defendants was within age, and appeared by attorney, the judgment shall be reserved *in toto* against all. 1 *Rol. Abr.* 776. *Cro. Jac.* 289. 303. *Allen*, 74, 75 *Style*, 121. 125. 406.

If judgment be given for the plaintiff on one count in a declaration, and a distinct judgment for the defendant on another, and the defendant bring a writ of error to reverse the judgment on the first count, the Court of Error cannot examine the legality of the judgment on the second count, no error being assigned on that part of the record. 6 *Term Rep. K. B.* 200.

A writ of error in Parliament may be non-prossed without carrying over the transcript to the court of error. 1 *Maul & Selw. Rep.* 101.

See further as to the proceedings on a Writ of Error, *Impey's Pract. K. B.*

ERTHMIOTUM. An ancient word for a meeting of the neighbourhood to compromise differences among themselves; it is mentioned in *Leg. Hen.* 1. *c.* 57.

ESBRANCATURA, from the Fr. *esbrancher.*] Cutting off branches or boughs in forests, &c. *Hoved.* 784.

ESCALDARE. To scald: *Escaldare porcos*, was one of our ancient *tenures in serjeanty;* as appears by the inquisition of the serjeancies and knights fees in the 12th and 13th years of King John, within the counties of Essex and Hertford. *Lib. Rub. Scaccar' MS.* 137.

ESCAMBIO, derived from the Span. *cambier* to change.] Was a licence granted to make over bills of *exchange* to another beyond the sea; for by the *stat.* 5 *R.* 2. *c.* 2. no merchant ought to exchange or return money beyond sea without the King's licence. *Reg. Orig.* 194. See title *Exchange, Bill of Exchange.*

## ESCAPE.

Escapium, from the Fr. *eschapper*, i. e. *effugere*, to fly from.] A violent or privy evasion out of some lawful restraint; as where a man is arrested or imprisoned, and gets away before he is delivered by due course of law. *Staundf. P. C. cap.* 26, 27.—*Termes de Ley.* See also title *Rescue.*

Escapes are either (A.) in *civil*, or (B.) in *criminal*, cases.

### (A.) As to Escapes in Civil Cases.

I. 1. *Where the party shall be said to be* legally committed, *so that the suffering him to go at large will be adjudged an Escape;* 2. *What* Degree *of* Liberty, *or* going *at* large, *shall be deemed an* Escape; 3. *What* Persons *are* answerable *for an* Escape.

II. *Of the difference between* voluntary *and* negligent *Escapes; and Escapes on* Mesne Process, *and* Execution.

III. 1. *Of the nature of the* Action *to be brought for an* Escape; and 2. *Of the manner of laying it.*

IV. *Of the* Party's Defence *sued for the* Escape; *and therein of pleading* fresh Suit.

I. 1. It seems agreed as a general rule, that wherever a sheriff or other officer hath a person in custody, by virtue of an authority from a court which hath jurisdiction over the matter, that the suffering such a person to go at large is an escape, for he cannot judge of the validity of the process or other proceedings of such court, and therefore cannot take advantage of any errors in them; hence the law allows him, in an action of false imprisonment, to plead such authority, which will excuse him, though it be erroneous; but if the court has no jurisdiction of the matter, then all is void, and consequently the officer not punishable for suffering a person taken upon such void authority to escape. *Moor*, 274. *Dyer*, 66. 175. 306. *Poph.* 203. 1 *Leon.* 30. 5 *Co.* 64. 8 *Co.* 141. *b.* *Cro. Jac.* 280. 289. 2 *Bulst.* 64. 237. 256. If a *ca. sa.* issue after a year and a day, without suing out a *scire facias*, this error will not excuse the sheriff in an escape. *Cro. Car.* 288. *Sulk.* 273. But though a sheriff may not take advantage of an erroneous process, yet he shall of a void process, on which it is no escape to let a prisoner go.

If at the petition of A. and the rest of the creditors of B. a commission under the statutes against bankrupts is issued out against B. and thereupon the commissioners sit and offer interrogatories to C. and he refuses to be examined, and by

them is thereupon committed to prison, and the gaoler suffers him to escape, as the commissioners had sufficient authority to commit, and A. was prejudiced by the escape, he may maintain an action against the gaoler. 1 *Rol. Rep.* 47. *Moor* 834 *pl.* 1123. *S. C.*

The sheriff cannot be charged with an escape before he had the party in *actual* custody by a legal authority; and therefore if an officer, having a warrant to arrest a man, see him shut up in a house, and challenge him as his prisoner, but never actually have him in his custody, and the party get free, the officer cannot be charged with an escape. *Bro. Escape* 22.

But if A. is arrested, and in the *actual* custody of the sheriff, and afterwards another writ is delivered to him at the suit of J. S. upon the delivery of the writ, A., by construction of law, is immediately in the sheriff's custody, without an actual arrest; and if he escapes, the plaintiff may declare that he was arrested by virtue of the second writ, which is the operation it has by *law*, and not according to the *fact*. 5 *Co.* 89. But where the sheriff, not having *actually* arrested a defendant, but accepted the undertaking of an attorney to put in bail, who put in bail, and the sheriff had returned a *cepi corpus*, held *per* Lord Mansfield at Surry assizes, summer 1775, in Hodgson and Akerman, Esq. that the sheriff was not liable, upon a writ of *non est inventus*, on another process, to an action, either for an *escape* or a false return, or for negligence in not taking the defendant, no actual negligence being proved; and the plaintiff was nonsuited.

*Note*, the writ returned *cepi corpus* was a *latitat*, returnable three or four days after the other process, which was an original, but that difference was not, in this case, considered as material.

If a person out upon bail renders himself in discharge of his bail, and a *reddidit se* is entered in the judge's book, and a *committitur* filed in the office, and the prisoner afterwards escapes; yet if no notice was given to the marshal of such render, nor no entry made of the commitment in his book, the prisoner shall not be deemed in custody so as to charge the marshal with an escape; but it seems this matter cannot be insisted upon after trial. 1 *Salk.* 272, 3. *Vide post.*

It hath been held, that entering a *committitur* upon the roll was not sufficient to charge the marshal with any escape, without proving an actual imprisonment: but that proving the party to be actually in prison, though there be no entry made in the marshal's book, is sufficient. 1 *Sid.* 220. 1 *Keb.* 775.

And now, for the greater security of creditors, and the better to enable them to prove the actual custody of the prisoner, it is enacted, by *stat.* 8 & 9 *W.* 3. *c.* 27. § 9. "That if any one, desiring to charge any person with any action or execution, shall desire to be informed by the marshal or warden, or their respective deputies, or by any other keeper of any other prison, whether such person be a prisoner in his custody, or not, the said marshal or warden, or such other keeper, shall give a true note in writing thereof, to the person so requesting the same, or to his lawful attorney, upon demand at his office for that purpose, or in default thereof, shall forfeit the sum of 50*l.* and if such marshal or warden, or their respective deputy, &c. exercising the said office, or other keeper, &c. of any other prison, shall give a note in writing that such person is an actual prisoner in his or their custody, every such note shall be taken as a sufficient evidence that such person was at that time a prisoner in actual custody."

A *committitur* upon the roll is good evidence in escape, without an entry in the marshal's book. *Ld. Raym.* 705.

2. Every person in prison by process of law is to be kept *in salvâ et arctâ custodia*, in order to compel them the more speedily to pay their debts, and make satisfaction to their creditors. *Plowd.* 36. 3 *Co.* 44. 2 *Inst.* 381. 1 *Rol. Abr.* 806.

If therefore a defendant *being taken in execution*, be afterwards seen at large, for any the shortest time, even before the return of the writ, this is an escape. 2 *Bl. Rep.* 1048. and see 1 *Bos. & Pull.* 24. that a defendant so taken in execution cannot be allowed to go about even with an officer.

Persons in the King's Bench and Fleet prisons are to be actually detained within the said prisons; and if they escape action of debt lies against the warden, &c. 1 *R.* 2. *c.* 12. But now the marshal or warden grant the liberty of the rules to such as they think proper, (not criminally charged,) on proper security. Keepers of those prisons suffering prisoners, either upon contempt or mesne process, or in execution, to be out of the rules, (except on rule of court, &c.) are guilty of an *escape*; and persons conniving at an *escape* shall forfeit 500*l.* &c. by 8 & 9 *W.* 3. *c.* 27. And by this statute, where any prisoner in execution *escapes*, the creditor may have any other new execution against him.

If the bailiff of a liberty, who has the return and execution of writs, remove a prisoner taken in execution to the county-gaol, situated out of the liberty, and there deliver him into the custody of the sheriff, this is an escape for which an action of debt lies. 2 *Term Rep.* 5.

By *stat.* 5 *An. c.* 9. if any person in custody, for *not performing any decree in Chancery, &c. escape*, the party for whom the money is decreed may have the same remedy against the sheriff, as if the prisoner had been in custody on *execution*. A prisoner in execution should not be allowed to go out of the gaol; for if he goes out, though he returns again, it is an *escape*. 3 *Rep.* 43, 44. 2 *Inst.* 360. 381. And yet in London, by special custom there, in some cases the prisoner may go abroad with his keeper, and it will be no *escape*. *Ibid.*—See *Hob.* 202. Where the justice of the court, and plaintiff in the suit, agree that the prisoner shall be at liberty, and he go out and return at his time, it is no *escape*: but this may not be without the sheriff's consent. *Dyer*, 275.

If a plaintiff by word license the sheriff to deliver the prisoner, no action will lie for this as an escape. 27 *H.* 8. 24.

If there be an *escape* by the plaintiff's consent, when he did not intend it, the law is hard that the debt should be thereby discharged; as where one was in execution in B. R. and some proposals being made to the plaintiff in behalf of the prisoner, seeing there was some likelihood of an accommodation, the plaintiff consented to a meeting in a certain place in London, and desired the prisoner might be there, who came accordingly: this was held to be an *escape* with the plaintiff's consent, and he could never after be in execution at his suit for the same matter. 2 *Mod.* 136.

It hath been adjudged no *escape* to let a prisoner go where the sheriff hath the prisoner in custody, if it be before the return of the writ: it is sufficient if the officer have the party at the return of the writ, &c. *Moor*, 299. 1 *Salk.* 401. 2 *Nels.* 739, 740. See *post*, II. Yet it hath been held, that where a *habeas corpus* is granted to bring a person into court, if the sheriff on the way let him go at large in the county, or carry him round about a great way, &c. it will be an *escape*. 1 *Mod.* 116. And an *escape* in one place is an *escape* in all places; for a prisoner being once *escaped*, and at large, it shall be intended he is confined to no place. 1 *Lil. Abr.* 537. Committing the *marshal* of the Marshalsea to prison, was held an *escape* in law of all the prisoners there. See *Style* 375.

A sheriff who carries a prisoner taken in execution to a lock-up house within his own bailiwick, and keeps him there 14 days before the return of the writ, is not thereby guilty of an *escape*. 4 *W. P. Taunton*, 608.

If a woman, warden of the Fleet prison, marries her prisoner, or if a sheriff, &c. marries a woman in execution with him, in either case it will be deemed an escape in law. *Plowd.* 17.

If a man hath judgment against two persons, and both are taken in execution, if the sheriff suffer one of them to escape, he shall be answerable for the whole debt, though he hath one of them still in custody. 1 *Rol. Abr.* 810. But in an action on *the case*, tried before Lord Mansfield, in Surry, for an escape of one of two defendants, under very favourable circumstances for the officer, his Lordship left it to the jury whether they would find the whole of plaintiff's debt in damages, or only half; and the jury found only half.

By *stat.* 8 & 9 *Will.* 3. *cap.* 27. *sect.* 8. it is enacted, "That if the marshal or warden for the time being, or their respective deputy or deputies, or other keeper or keepers of any other prison or prisons, shall, after one day's notice in writing given for that purpose, refuse to show any prisoner committed in execution to the creditor at whose suit such prisoner was committed or charged, or to his attorney, every such refusal shall be adjudged to be an *escape* in law."

3. In *civil actions* the sheriff is to answer for the escape of his bailiff: as the bailiff is for that of his servant: and action on the case lies against the sheriff for an escape upon mesne process, *because the plaintiff is prejudiced in his suit by it. Cro. Eliz.* 623, 625. 1 *Danv. Abr.* 183.—See also *Cro. Jac.* 419. *Dyer*, 241.—See *Bull. Ni. Pri.* 59, 60. Where a person is in custody on mesne process, and being outlawed after judgment at the suit of another, the judgment-creditor brings a warrant on a *capias utlagatum*, and delivers it to the sheriff's officer, who hath him in custody; if the officer afterwards permits the person to escape, though he refuse to execute the warrant, the sheriff is chargeable in action on the case. 5 *Rep.* 89.

Where one has the custody of a gaol of freehold or inheritance, and commits it to another person, who is insufficient, the superior is answerable for all escapes suffered by his inferior; but if the inferior be sufficient, the action should be brought against him, and not against the superior. See 9 *Co.* 98. 2 *Jon.* 60. 2 *Lev.* 158. 1 *Vent.* 314. 2 *Mod.* 119. 4 *Rep.* 98.

Also by *stat.* 8 & 9 *W.* 3. *cap.* 27. *sect.* 11. it is enacted, "That the offices of marshal of the King's Bench prison and warden of the Fleet shall be executed by the several persons to whom the inheritance of the prisons, prison-houses, &c. of the said prisons, or either of them, shall then belong respectively, in his or their respective proper person, &c. or by their sufficient deputies; for which deputies, and for all forfeitures, escapes, and other misdemeanors in their offices by such deputies permitted, &c. the said person in whom the aforesaid inheritances respectively are, shall be answerable; and the profits and inheritances of the said offices shall be sequestered, &c. to make satisfaction for such forfeitures, escapes, &c. respectively, as if permitted, &c. by the persons themselves, in whom the respective inheritance of the said prisons shall then be."

A prisoner escapes out of the King's Bench, or Marshalsea, or the Fleet; the keeper of the prison out of which he escaped is to be charged with it; but if the escape be from either of the Compters, the action must be brought against the sheriffs of London. *Dyer*, 278. 3 *Rep.* 52.

Action of escape against the warden of the Fleet for an escape upon *mesne process*; the prisoner returns to the Fleet the same day, and the plaintiff afterwards proceeds to final judgment against him, yet the action lies against the warden. 1 *Wils.* 293. In an escape upon mesne process out of the borough court, brought in B. R. against the bailiff thereof, the defendant shall not take advantage in B. R. of any error in the process below. 1 *Wils.* 255.

Action of escape will not lie against the executor or administrator of a sheriff, &c. for an escape, because it was *personal*, and *moritur cum persona*: but it may be otherwise if there be a judgment recovered against the sheriff before he died. *Dyer*, 322. See *post*, III. 2.

If there are two sheriffs of the same place, and an action of escape is brought against them both, if one of them dies, yet the writ shall not abate; for it being in nature of a trespass, and merely personal, the party can only have remedy against the survivor. *Cro. Eliz.* 625. But the death should be suggested. By *stat.* 8 & 9 *W.* 3. *c.* 11. *sect.* 7, the death of one plaintiff or defendant, where the action will survive *to*, or *against* the survivor, shall not abate the suit. But the death must be suggested on the roll. See title *Abatement*.

An old sheriff omits turning over a prisoner in execution to the new sheriff, it is said to be an *escape*; so where there are two executions against a man, and in the indenture of turning over mention is made but of one, &c. 3 *Rep.* 71.

A sheriff who takes a bail bond, and on enquiry denies that he has taken one, cannot be therefore sued for an *escape*. 5 *W. P. Taunton*, 325.

The sheriff having a writ against G. B. arrested M. B. who was the real debtor, and at the time of contracting the debt had represented himself as G. B. The Court of K. B. held that the sheriff having been informed of these circumstances while he had the real debtor in his custody, was not *bound* to detain him, and therefore that an action would not lie against him for an *escape*. *Morgans* v. *Bridges*, *Term Rep. K. B. Tr.* 58 *Geo.* 3. 647.

II. There are two kinds of escapes; *voluntary* and *negligent*: *Voluntary*, is when one arrests another for felony, or other crime, and lets him go by consent; in which case the party that *permits the escape* is esteemed guilty of the crime committed, and must answer for it: *Negligent escape*, is when one is arrested, and afterwards escapes against the will of him that arrested him, or had him in custody; and is not pursued by fresh suit, and taken again before the party pursuing hath lost sight of him. *Cromp. Jus.* 36. And for these negligent escapes, the gaoler, &c. is to be fined. One *negligent* escape will not amount to a forfeiture of a gaoler's office, as one *voluntary* one will; but many negligent escapes will do it: and the fine for suffering a negligent escape of a person *attainted*, was by the Common Law of course 100*l.* and in other cases at the discretion of the court. 3 *Lev.* 288. 2 *Lev.* 81.—See *post* as to *Escapes in Criminal Cases*.

If any prisoner escapes who was in execution, his creditors may retake him by *cap. ad satisfac.* or bring action of debt on the judgment, or a *scire facias* against him, &c. 1 *Vent.* 269. 3 *Salk.* 160. If a man escapes with the consent of the gaoler, in a civil case, he cannot retake him. 3 *Rep.* 32. 52. 1 *Sid.* 330. But the plaintiff may retake him at any time. *Stat.* 8 & 9 *W.* 3. *c.* 27.

If the plaintiff permit the prisoner to escape, he cannot afterwards retake him; and if the body and goods, &c. of a conusor are taken in execution upon a statute-merchant, if the conusee agree that he shall go at large, it is a discharge of the whole execution, and the conusor shall have his lands again: it is otherwise if the sheriff had permitted him to escape, the execution on the lands would not be discharged. 2 *Nels. Abr.* 737.

A difference is to be observed between *permissive* and *negligent* escapes, *with respect to the sheriff*; for if a sheriff suffer a prisoner voluntarily to go at large, the sheriff cannot retake him even upon fresh suit; and if he does, the prisoner may have an action of trespass against him. *Carter*, 212.

An escape from the rules of the King's Bench prison, without the Marshal's knowledge, is not a *voluntary* escape. 2 *Term Rep.* 126.

If the marshal of the King's Bench, or warden of the Fleet, or any other who hath the keeping of prisons in fee, suffer a voluntary escape, it is a forfeiture of the office. 3 *Mod.* 146. *Carter*, 212. And there is likewise a farther penalty of 500*l.* added by 8 & 9 *W.* 3. *c.* 27. above-mentioned.

B. being in custody, at the suit of A., in a joint action against B. and C., B. justifies bail in an action entitled by mistake A. v. B., and a rule so entitled is served on the marshal of K. B. who thereupon discharges B. out of custody; he not being charged in custody in any more than one action at the suit of A; the court of K. B. held that the marshal was liable in an action for an escape. 5 *East's Rep.* 292.

There is this difference between an escape on *mesne process* and *execution;* if the sheriff arrest a person on *mesne process*, and he is rescued by J. S. he may return the rescue, and such return is good, and no action of escape lies against him after such return; but the court will issue process against such rescuer, or fine him; for in this case, though the sheriff may, yet he is not obliged to raise the *posse comitatûs*. 1 *Rol. Abr.* 807. 1 *Jon.* 207. 1 *Rol. Rep.* 388. 3 *Lev.* 46. But after judgment on a *capias ad satisfaciendum*, the sheriff *cannot return a rescue*, for in such case the sheriff is obliged to raise the *posse comitatûs*, if needful, and therefore, if he return a rescue, an *action of escape* lies, or a new *capias;* for the return of an ineffectual execution is as none. 1 *Rol. Abr.* 837. *Cro. Car.* 240, 255. 8 *Co.* 42.—See *Ni. Pri.* 59, 60. and 6 *Rep.* 51. *Cro. Eliz.* 868. and this Dictionary, title *Rescue*.

If a sheriff having arrested a defendant on mesne process, keep him in his custody after the return of the writ, and then carry him to prison, he is not liable to an action on the case as for an escape; if the jury find that the plaintiff has not been delayed or prejudiced in his suit. 5 *Term Rep. K. B.* 37.

III. 1. At Common Law the plaintiff had no remedy against the sheriff for an escape, whether upon mesne process or in execution, but by special action upon the case. 2 *Inst.* 382. 1 *Show.* 176. 2 *Saund.* 34. *Hard.* 30.

But now by an equitable construction of *Westm.* 2. 13 *E.* 1. *cap.* 11. action of *debt* is given against the sheriff; and see 2 *H. Black.* 108. and by *stat.* 1. *Rich.* 2. *cap.* 12. against the warden of the Fleet, (which extends to all gaolers and keepers of prisons, though infants or feme coverts. 2 *Inst.* 382.) for escapes in *execution*.

The plaintiff, at his election, may maintain either an action *upon the case*, or *debt*, for an escape in *execution*. *Cro. Jac.* 361. 533. 619. *Cro. Eliz.* 877. *Dyer*, 278, *b.* See 1 *Jon.* 144. 1 *Sid.* 364. *S. C.*

If a prisoner in custody upon a *capias utlagatum* is suffered to escape, the plaintiff may either maintain an action *qui tam* against the sheriff, or bring an action of debt against him, in his own right. *Cro. Jac.* 361. 533. 619. *Cro. Eliz.* 877.

An action of escape is not a local action, and therefore if one escape out of the *Marshalsea*, which is in Surrey, the action may be laid in Middlesex. *Dyer.* 278, *b.* See 1 *Jon.* 144. 1 *Sid.* 364. *S. C.*

It is usual now, on an escape on *mesne process*, to declare against the sheriff, &c. in *case;* on *execution*, in *debt*.

The distinction seems now to be thus settled.—If a sheriff or gaoler suffers a prisoner, who is taken upon mesne process, to escape, he is liable to an action *on the case*. *Cro. Eliz.* 625. *Comb.* 69.—But if, after judgment, a gaoler or sheriff permits a debtor to escape, who is charged in execution for a certain sum: the debt immediately becomes his own, and he is compellable by action of *debt*, being for a sum liquidated and ascertained, to satisfy the creditor his whole demand. 2 *Inst.* 382.

In debt against the sheriff or gaoler for an escape, the jury cannot give a less sum than a creditor would have recovered against the prisoner, *viz.* the sum indorsed on the writ, and the legal fees of execution. 2 *Term Rep.* 126.

The nominal plaintiff in ejectment, in whose name the mesne profits have been recovered, may sue for an escape of the defendant in execution thereon 2 *Maul. & Selw. Rep.* 473.

An action of *debt* will lie against the gaoler for the escape of a prisoner in execution, though the escape was without his knowledge; in such case he can avail himself of nothing but the act of God, or the king's enemies as an excuse. 2 *H. Blackst.* 103.

2. In this action it is not necessary to set forth all the formalities required by law in other cases. *Cro. Eliz.* 877. See 2 *Show.* 424.

Therefore, if upon a judgment obtained by the testator, the executor brings a *scire facias*, and has judgment, whereupon a *capias ad satisfac.* issues, and B. is arrested, and suffered to escape, the plaintiff in an action against the sheriff for this escape, may declare briefly upon the judgment in the *scire facias*, without shewing the gradual proceedings at length, as is usually done in an action of debt upon a judgment. *Carth.* 148, 149. 3 *Mod.* 324. *S. C. Cro. Eliz.* 877.

So if a defendant is arrested on a *special capias*, founded on an *original* returnable in B. R. in action for his escape, it is not necessary to set forth the original.

If the plaintiff declares that he sued out a writ of execution against J. S. without setting forth any judgment, and that the defendant suffered him to escape; this is an incurable fault; for by this means he lost the benefit of pleading *nul tiel record*, which he might do if the plaintiff had set forth the judgment. 1 *Saund.* 37, 38. 1 *Lev.* 191. and 1 *Sid.* 306. *S. C.* See title *Debt*.

If A. recovers against B. as executor, and has him in execution, and the sheriff suffers him to escape, the action must be brought as executor in the *detinet* only, and not in the *debet* and *detinet*. 1 *Lutw.* 893. *Comb.* 114. *S. C.*

If the plaintiff declares, that the prisoner was committed, and escaped, but does not say, *prout patet per accordum;* yet, upon a general demurrer, this shall be good; for the gist of the action was the escape, and the commitment only inducement. 2 *Salk.* 565. 5 *Mod.* 8. *S. C.* See 3 *Lev.* 393.

If in escape the plaintiff declares, that he had J. S. and his wife in execution, and that the defendant suffered them to escape, and the jury find specially, that the husband only was taken in execution (it being for a debt due from the wife before coverture), and that he escaped; this is sufficient, and the plaintiff shall have judgment; for the substance of the issue is found, though not pursuant to the declaration. 1 *Sid.* 5.

So in an action on the case for the escape of A. where the jury found that A. was taken by J. S. the former sheriff, and not by the defendant, the present sheriff; but finding that he was legally in his custody, and that he suffered him to escape, the plaintiff had judgment. *Cro. Jac.* 380.

An administratrix may maintain an action in her own name against the marshal for the escape of a prisoner in execution on a judgment obtained by her as administratrix. 2 *Term Rep.* 126.

Under a count for a *voluntary* escape, the plaintiff may give evidence of a *negligent escape:* and the defendant may plead a re-taking on a fresh pursuit to such count without traversing the voluntary escape. *Id. Ibid.*

In debt for an escape against the sheriff, the indorsement of *non est inventus* on the *ca. sa.* is sufficient evidence of its having been delivered to him. But a legal arrest must be proved in such action. *Cowp.* 63.

By the *stat.* 8 & 9 *W.* 3. *cap.* 27. *sect.* 12. it is enacted, "That it shall be lawful for any person having cause of action against the warden of the Fleet prison, upon bill filed in the courts of Common Pleas or Exchequer against the warden, and a rule being given to plead thereto, to be out eight days at most after filing such bill, to sign judgment against the warden, unless he plead to the bill within three days after such rule is out."

IV. If the prison takes fire, by means whereof the prisoners escape, this shall excuse the sheriff, and he may well plead it. 1 *Rol. Abr.* 808.

So if the prison is broke by the *King's enemies*, this shall excuse the sheriff, for he can have no remedy over against them. 4 *Co.* 14. 1 *Rol. Abr.* 808.

But if the prison was broke by *rebels* and *traitors*, the King's subjects, this shall not excuse him, for he may have his remedy over against these. *Ibid.*

In an action of debt against a gaoler for the escape of a prisoner in execution, (which action will lie though the escape were without the knowledge or fault of the gaoler,) in such case the gaoler can avail himself of nothing but the act of God or the King's enemies as an excuse. 2 *H. Blackst.* 168.

When a prisoner tortiously escapes from the custody of the gaoler, he may be retaken; and the sheriff, &c. may pursue a person escaping into that or any other county; and if he retakes the prisoner on fresh pursuit before action brought, it shall excuse the sheriff, for there the prisoner shall be said to be in execution still. 3 *Rep.* 44. *Cro. Jac.* 657. 1 *Jon.* 144. 1 *Rol. Abr.* 808. And where the sheriff is to answer the debt and damages for such escape, he shall have his counter-remedy against the party escaping; and may take him at any time and place, and imprison him till he hath satisfied the sheriff as much as he hath paid to the plaintiff; or he may bring an action upon the case against the prisoner, and so relieve himself. 5 *Rep.* 52. *Cro. Eliz.* 393.

It was formerly held that the sheriff, &c. might give fresh pursuit in evidence, and need not have pleaded it. See 1 *Mod.* 116. 1 *Sid.* 13.

But now, by *stat.* 8 & 9 *W.* 3. *cap.* 27. *sect.* 6. it is enacted, "That no retaking on fresh pursuit shall be given in evidence, unless the same be specially pleaded; nor shall any special plea be allowed, unless oath be first made in writing by the defendant, and filed in the proper office of the respective courts, that the prisoner, for whose escape such action is brought, did, *without his consent, privity, or knowledge*, make such escape; and if such affidavit shall at any time afterwards appear to be false, and the defendant shall be convicted thereof by due course of law, he shall forfeit the sum of 500*l.*" See title *Sheriff.*

A voluntary return of a prisoner, after an escape, before action brought, is equivalent to a retaking on a fresh pursuit: but it must be pleaded. 2 *Term Rep.* 126.

Plea that *if* the prisoner escaped several times (without specifying them) he returned as often, is bad. 1 *Bos. & Pull.* 413.

A bailiff who has arrested a prisoner on mesne process, may retake him before the return of the writ, though he voluntarily permitted him to escape immediately after the arrest. 2 *Term Rep. K. B.* 172.

In an action against the sheriff for the escape of a prisoner on mesne process the plaintiff was nonsuited, because he could not prove any debt against the prisoner. 4 *Term Rep. K. B.* 611.

Bail put in after the term in which the writ is returnable, is not an answer to an action against the sheriff for an escape brought before bail was put in. *Moses* v. *Norris, Term Rep. K. B. Mic.* 56 *Geo.* 3. 397.

## (B.) Escapes in Criminal Cases.

[See 37 *Geo.* 3. *c.* 140. § 6. by which the laws touching escape of felons under sentence of death are applied to offenders under sentence of a naval court-martial, if allowed the benefit of a conditional pardon.]

I. 1. *What shall be deemed an* Escape; 2. *where it shall be adjudged* Voluntary, *and where* Negligent.

II. *Where the Prisoner may be* re-taken *after an* Escape; *and where the* Escape *is excused by such a* Re-taking, *or by* Killing *the Prisoner if he cannot be re-taken.*

III. 1. *How the* Officer *suffering an* Escape *is to be* indicted; *and* 2. *how the* Escape *is to be* tried *and* adjudged.

IV. *Of the* Punishment *of*, 1. voluntary, *and* 2. negligent Escapes: *and* 3. *Of Persons* aiding *and* assisting *Prisoners to attempt their Escape.*

I. 1. A man must be committed to prison by lawful *mittimus*; or breach of prison and escaping is not felony. If a party is committed for treason, to break prison and escape is but felony; but if a prisoner let out traitors it will be treason. *H. P. C.* 109. 2 *Inst.* 590. Where one is imprisoned for petit larceny, or killing a man *se defendendo*, &c. to break prison and escape is not felony; and if a prison be set on fire, not by the privity of the prisoner, he may break prison for the safety of his life. 2 *Inst.* 590. A gaoler refusing to receive a person arrested by the constable for felony, whereby he is let go, is guilty of an escape; but there must be an actual arrest; which arrest must be justifiable to make an escape; for if it be for a supposed crime, where no crime was committed, and the party is neither indicted nor appealed, &c. it is no escape to suffer a person to go at large. *Fitz. Coron.* 224. *Bro. Esca.* 27, 28. If a private person arrest another for suspicion of felony, he is to deliver him to a public officer, who ought to have the custody of him; for if he let him go it will be an escape. 2 *Hawk. P. C. c.* 19. And if no officer will receive him, he is to deliver him to the township where arrested, or get him bailed.

A. a mere private man, knows B. to have committed felony, and there upon arrests him; he is lawfully in custody of A. until he be discharged, by delivering him to a constable or common gaol; and therefore if he voluntarily suffers such person to escape, though he were no officer, nor B. indicted, it is felony in A. But it is otherwise if he never takes him, nor attempts it, and lets him go. 1 *Hale's Hist. P. C.* 591. Justices of peace in their sessions are empowered to inquire of escapes of persons arrested, and imprisoned for felony. *Stat.* 1 *R.* 3. *c.* 3.

2. There can be no doubt, but that wherever an officer, who hath the custody of a prisoner charged with and guilty of a capital offence, doth knowingly give him his liberty, with an intent to save him either from his trial or execution, he is guilty of a voluntary escape; and thereby involved in the guilt of the same crime of which the prisoner was guilty and stood charged with. And it seems to be the opinion of Sir Matthew Hale, that in some cases an officer may be adjudged guilty of such escape, who hath not such intent, but only means to give his prisoner that liberty which, by the law, he hath no colour of right to give him.

Thus, to bail a person not bailable by law is a negligent escape. *Plowd.* 476.

If the gaoler so closely pursue the prisoner, who flies from him, that he retake him without losing sight of him, the law looks on the prisoner so far in his power all the time, as not to adjudge such a flight to amount at all to an escape; but if the gaoler once lose sight of the prisoner, and afterwards retake him, he seems, in strictness, to be guilty of an escape; and *à fortiori* therefore, if he kill him in the pursuit, he is in like manner guilty, though he never lost sight of him, and could not otherwise take him, not only because the King loses the benefit he might have had from the attainder of the prisoner, by the forfeiture of his goods, &c. but also because the public justice is not so well satisfied by the killing him in such an extra-judicial manner. 2 *Hawk. P. C. c.* 19. See *post, Div.* II.

II. It seems to be clearly agreed by all the books, that an officer making a fresh pursuit after a prisoner, who hath escaped through his negligence, may retake him at any time after, whether he find him in the same or in a different county. And it is said generally in some books, than an officer who hath negligently suffered a prisoner to escape, may retake him wherever he finds him, without mentioning any fresh pursuit; and indeed, since *the liberty gained by the prisoner is wholly owing to his own wrong*, there seems to be no reason he should take any manner of advantage from it. But where a gaoler hath *voluntarily* suffered a prisoner to escape, it is said by some that he can no more justify the retaking him, than if he had never had him in custody before, because by his own free consent he hath admitted, that he hath nothing to do with him.

Wherever a prisoner, by the negligence of his keeper, gets so far out of his power that the keeper loses sight of him, the keeper is finable at the discretion of the court, notwithstanding he retook him immediately after; for it seems agreed, that this is to be adjudged a negligent escape, which implies an offence, and consequently that it must be punishable. It is true, indeed, that in an action against a gaoler for suffering one arrested in a civil action to escape, it is a good excuse for the gaoler, that, before the action brought, he took the prisoner upon *fresh suit*, which is well maintained by shewing that he pursued him *immediately* after notice of the escape, though it were some hours after it, and retook him; but it does not from hence follow, that the like excuse will serve for the negligent escape of a *criminal*, because this is an offence against the public, but the other is only a private damage to the party: neither will it be an hardship to the officer to be exposed to such punishment as the court, in discretion, shall think fit to impose upon him for the negligent escape of a criminal, as it would be to be liable to an action of escape: for suffering a person in his custody, in a civil action, to escape; for that in the former case the court would moderate his fine according to the circumstances of the whole matter, and would certainly mitigate, if not wholly excuse it, if he should appear to have taken all reasonable care: but in the other case, if he should be liable to an action, his judgment would not lie in the discretion of the court, but he would be bound to pay the whole debt for which the party was in custody, if the escape should be adjudged against him. However it is certain, that it will be no advantage to a gaoler to re-take his prisoner after he has been fined for the escape, as is shewn in the precedent section of *Hawk. P. C.* also it is clear that he cannot execute himself by killing a prisoner in the pursuit, though he could not possibly retake him; but must, in such case, be contented to submit to such fine as his negligence shall appear to deserve. 2 *Hawk. P. C. c.* 19.

III. 1. The indictment must expressly shew, that the party was actually in the defendant's custody for a crime, action, or commitment for it; and that it is not sufficient to say that he was in the defendant's custody, and charged with such a crime; for that a person in custody may be so charged, and yet not be in custody by reason of such charge: and it seems also, that every such indictment must expressly shew that the prisoner went at large. Also it seems necessary to shew the time when the offence was committed, for which the party was in custody, not only that it may appear that it was prior to the escape, but also that it was subsequent to the last general pardon. Also it seems clear, that every indictment for a voluntary escape must allege that the defendant *felonicè & voluntariè A. B. ad largum ire permisit*; and must also shew the species of the crime for which the party was imprisoned; for it is not sufficient to say in general, that he was in custody for felony, &c.

The crime of the prisoner escaping, for which the gaoler is answerable, must be such as it was at the time of the escape; as where a person is committed for dangerously wounding another, it is trespass only, and not felony, till the party wounded is dead: and he who suffers another to escape, who was in custody for felony, cannot be arraigned for such escape as for felony, until the principal is attainted, but he may be indicted and tried for misprision before the attainder of the principal. And in high treason it is said the escape is immediately punishable, whether the party escaping be ever convicted or not. 2 *Hawk. P. C. c.* 19. See post, IV, 1.

2. Where persons, being present in a court of record, are committed to prison by such court, the keeper of the gaol is bound to have them always ready, whenever the court shall demand them of him; and if he shall fail to produce them at such demand, the court will adjudge him guilty of an escape, without any further inquiry, unless he have some reasonable matter to alledge in his excuse; as that the prison was set on fire, or broke open by enemies, &c. for he shall be concluded, by the record of the commitment, to deny that the prisoners were in his custody. 2 *Hawk. P. C. c.* 19.

As to other prisoners who are not so committed, but are in the custody of a gaoler, sheriff, constable, or other person, by any other means whatsoever, it seems agreed, that the person who has them in custody is in no case punishable for their escape, except in some special cases, until it be presented; for by *stat. West.* 1. *c.* 3. it is enacted, that "Nothing be demanded nor taken, nor levied by the sheriff, nor by any other, for the escape of a thief or felon, until it be judged for an escape by the justices in eyre; and that he who does otherwise, shall restore to him or them that have paid it, as much as he or they have taken or received, and as much also unto the King."

It hath been adjudged, that this statute restrains not the court of King's Bench from receiving such presentments; for that its jurisdiction includes in it that of justices in eyre, and this court is itself the highest court of eyre. 2 *Hawk. P. C. c.* 19.

It is further enacted by *stat.* 31 *Ed.* 3. *c.* 14. "That the escape of thieves and felons, and the chattels of felons and of fugitives, and also escapes of clerks convicts, out of their ordinary's prison, from thenceforth to be judged before any of the King's justices, shall be levied from time to time, as they shall fall, as well of the time past as time to come." By which it seems to be implied, that other justices, as well as those in eyre, may take cognizance of escapes; and it is certain, that justices of gaol-delivery may punish justices of peace for a negligent escape, in admitting persons to bail, who are not bailable. 2 *Hawk. P. C. c.* 19.

And it is further enacted, by *stat.* 1 *Rich.* 3. *cap.* 3. "That justices of peace shall have authority to inquire, in their sessions, of all manner of escapes of every person arrested and imprisoned for felony."

Wherever an escape is fineable, the presentment of it is traversable; but where the offence is amerciable only, there the presentment is of itself conclusive; such amercements being reckoned among those *minima de quibus non curat lex*; and this distinction seems to be well warranted by the old books. 2 *Hawk. P. C. c.* 19.

IV. 1. *A voluntary escape* amounts to the same kind of crime, and is punishable in the same degree, as the offence of which the party was guilty, and for which he was in custody, whether it be treason, felony, or trespass; and whether the person escaping were actually committed to some gaol, or under an arrest only, and not committed; and whether he were attainted, or only accused of such crime, and neither indicted nor appealed: and it is said to be no excuse of such escape, that the prisoner had been acquitted on an indict-

ment of death, and only committed till the year and day be passed, to give the widow or heir of the deceased an opportunity of bringing their appeal. 1 *Hawk. P. C. c.* 19.

But the officer cannot be thus punished till the original delinquent hath actually received judgment, or been attainted upon verdict, confession, or outlawry of the crime for which he was so committed or arrested: otherwise it might happen that the officer might be punished for treason or felony, and the person arrested and escaping might be acquitted of the charge against him. But, before the conviction of the principal party, the officer thus neglecting his duty may be fined and imprisoned for a misdemeanor. 1 *Hal. P.C.* 588, 589. 2 *Hawk. P. C. c.* 19.

Also such an escape, suffered by one who wrongfully takes upon him the keeping of a gaol, seems to be punishable in the same manner as if he were never so rightfully entitled to such custody; for that the crime is in both cases of the very same ill consequence to the public; and there seems to be no reason that a wrongful officer should have greater favour than a rightful, and that for no other reason, but because he is a wrongful one. 2 *Hawk. P. C. c.* 19.

Also if the warrant of a commitment do plainly and expressly charge the party with treason or felony, but in some other respect be not strictly formal, yet it seems that it may be probably argued, that the gaoler suffering an escape is as much punishable, as if the warrant were perfectly right. 2 *Hawk. P. C. c.* 19.

None shall suffer capitally for the crime of another; so that a principal gaoler is only fineable for a voluntary escape suffered by his deputy. 2 *Hawk. P. C. c.* 19.

2. Whoever *de facto* occupies the office of gaoler is liable to answer for a *negligent escape;* and it is no way material whether his title to the office be legal or not. 2 *Hawk. P. C. c.* 19. A sheriff is as much liable to answer for an escape suffered by his bailiff, as if he had actually suffered it himself, and the court may charge either the sheriff or bailiff for such an escape; and if a deputy gaoler be not sufficient to answer a negligent escape, his principal must answer for him; but if the gaoler who suffers an escape have an estate for life or years in the office, it is not agreed how far he in reversion is liable to be punished. 2 *Hawk. P. C. c.* 19.

Wherever a person is found guilty upon an indictment, or presentment, of a negligent escape of a criminal actually in his custody, he ought to be condemned in a certain sum to be paid to the King, which seems most properly to be called a Fine.

It hath been holden, that a negligent escape may be pardoned by the King before it happens, but that a *voluntary* one cannot so be pardoned. 2 *Hawk. P. C. c.* 19.

And it seems by the Common Law, the penalty for suffering the negligent escape of a person attainted, was of course 100*l.* and for suffering such escape of a person indicted, and not attainted, was 5*l.*; but if the person escaping were neither attainted nor indicted, it seems that it was left to the discretion of the court to assess such a reasonable forfeiture as should seem proper; and if the party had twice escaped, it seems that the penalties above-mentioned were of course to be doubled; yet it seems that the forfeiture was to be no greater for suffering a prisoner, committed on two several accusations, to escape, than if he had been committed but on one. 2 *Hawk. P. C. c.* 19.

As to the manner offences of this kind are punishable by statute, it is recited by *stat. 5 Ed.* 3. *c.* 8. "That persons indicted of felonies in times past, had removed the indictments before the King, and there yielded themselves, and by the marshals of the King's Bench had been incontinently let to bail, and after had done many evil deeds, &c." And thereupon it is enacted, "That if any such prisoner be wandering out of prison, by bail, or without bail, and that he be found at the King's suit, or at the suit of the party, the marshal which shall be found thereof guilty, shall have half a year's imprisonment, and be ransomed at the King's will; and the justices shall thereof make inquiry when they see time; and as to the marshals, it shall be done within the verge that which reason will. And in case that the marshals suffer, by their assent, such prisoners to escape, they shall be at law, as before the time of the statute they had been. And the King intendeth not by this statute to lose the escape, where he ought to have the same."

By *stat.* 56 *Geo.* 3. *c.* 23. § 44, 45. if any person having the custody of any convict confined in the general Penitentiary at Milbank near Westminster, who shall negligently permit any such convict to escape, shall be guilty of a misdemeanor punishable by fine and imprisonment.

Also it is enacted by *stat.* 19 *H.* 7. *c.* 10. "That every sheriff have the custody of the King's common gaols during the time of his office, except all gaols whereof any person or persons have the keeping of estates of inheritance.—And that all letters patent made for term of life, or years, of the keeping of the said gaols, &c. shall be annulled and void."—The penalties for escapes inflicted by the subsequent part of this statute are expired.

3. By *stat.* 16 *Geo.* 2. *c.* 31. it is enacted, That persons who any ways assist a prisoner, committed for *treason* or *felony*, to attempt his escape from any gaol, shall be adjudged guilty of *felony* and be transported; and if the prisoner be committed for petit larceny, or other inferior offence, or upon process for 100*l.* debt, &c. the offenders are liable to fine and imprisonment. And where any person *conveys any arms, instrument, or disguise*, to a prisoner in gaol for *felony*, &c. or for his use, without the privity of the gaoler, in order to an escape, though no escape be actually made, it is likewise *felony* and *transportation*. Also if one assist any prisoner to escape from any constable, or other officer or person in whose custody he is, by virtue of a warrant of commitment for felony, it is declared to be the like offence.

See also *stat.* 6 *Geo.* 1. *c.* 23. § 5. 24 *Geo.* 3. *c.* 56. where to assist felons convict to make their escape from the persons to whom they are delivered to be transported is felony without clergy. See 3 *P. Wms.* 439.

The indictment of the above *stat.* 16 *Geo.* 2. *c.* 31. must state that the instruments were conveyed to the prisoner with a design to effectuate his escape. But no indictment can be maintained on this statute for contributing to the escape of a prisoner committed on suspicion only. See *Leach's Hawk. P. C.* ii. *c.* 21. § 11.

By *stats.* 13 *Geo.* 3. *c.* 31. 44 *Geo.* 3. *c.* 92. and 45 *Geo.* 3. *c.* 92. to render more easy the apprehending and bringing to trial offenders escaping from one part of the United Kingdom to the other, and also from one county to the other, it is enacted, That offenders escaping from England to Scotland, or from Great Britain to Ireland, or *vice versa*, may be apprehended and conveyed back to the place from whence they escaped. By the said act 44 *Geo.* 3. *c.* 92 offenders escaping with stolen goods from one part to another of the United Kingdom, may be tried in the place where the goods shall be found in their custody, and receivers in the place where they receive. By 54 *Geo.* 3. *c.* 186. all warrants issued in England, Scotland, or Ireland, may be executed in any part of the United Kingdom.

By the said acts 13 *Geo.* 3. *c.* 31. 44 *Geo.* 3. *c.* 92. and 45 *Geo.* 3. *c.* 92. persons committing offences in one county may be pursued and apprehended in any other county. See titles *Justices, Ireland.*

By *stat.* 52 *Geo.* 3. *c.* 156. for the more effectual punishment of persons aiding *Prisoners of War* to escape from his majesty's dominions, it is enacted that every person who shall aid and assist any alien enemy, being a prisoner of war

in his majesty's dominions, whether confined in any prison, or suffered to be at large in any place, to escape from prison or from his majesty's dominions if at large on his parole, shall be guilty of felony, and punishable by transportation for life, or fourteen years or seven years. Persons assisting any prisoner on parole in quitting the place where he is, though not assisting him in quitting the coast, shall be considered as aiding in his escape. Persons owing allegiance to his majesty aiding the escape of prisoners when on the high seas are declared equally punishable.

See further, relative to this subject of assisting prisoners to escape, this Dict. title *Rescue*, and 2 *Hawk. P. C. c.* 21.

See further, as connected with the general subject of Escape, titles *Gaol*, III. *Rescue*.

Escape-Warrant. If any person committed or charged in custody in the King's Bench or Fleet prison, in execution, or on mesne process, &c. go at large; on oath thereof before a judge of the court where the action was brought, an *escape-warrant* shall be granted, directed to all sheriffs, &c. throughout England, to retake the prisoner, and commit him to gaol where taken, there to remain till the debt is satisfied: and a person may be taken on a *Sunday* upon an *escape-warrant*. *Stat.* 1 *Ann. c.* 6. And the judges of the respective courts may grant warrants, upon oath to be made before persons commissioned by them to take affidavits in the country, (such oath being first filed) as they might do upon oath made before themselves. 5 *Ann. c.* 9.

A sheriff ought not to receive a person taken on *escape-warrant*, &c. from any but an officer; not from the rabble, &c. which is illegal. 3 *Salk.* 149. A person being arrested and carried to Newgate by virtue of an *escape-warrant*, moved to be discharged, because he said he was abroad by a day-rule when taken; but it appearing by *affidavit* that he was taken upon the *escape-warrant* before the court of B. R. sat that morning, they refused to set him at liberty. 2 *Ld. Raym.* 927.

ESCAPIO QUIETUS. He that by charter is *quietus de escapio*, is delivered from that punishment, which by the laws of the forest, lieth upon those whose beasts are found within the land where forbidden. *Crompt. Jurisd.* 196.

ESCAPIUM. Hath been used for what comes by chance or accident. *Cowel.*

ESCEPPA. A *scepp*, or measure of corn. *Mon. Ang. tom.* 1. *p.* 382. See *Sceppa*.

ESCHEAT. *Escaeta:* from the old French *eschoir*, to fall or happen.] The casual descent, in the nature of forfeiture, of lands and tenements within his manor to a lord; either on failure of issue of the tenant dying seised, or on account of the feleny of such tenant. See this Dict. title *Tenure*, II. 7.

*Blackstone* defines it "an obstruction of the course of descent, and a consequent determination of the tenure, by some unforeseen contingency, in which case the land naturally results back, by a kind of reversion, to the original grantor, or lord of the fee." 2 *Comm. cap.* 15.

Escheats are frequently divided into those *propter defectum sanguinis*, and those *propter delictum tenentis;* but both species may be included under the first denomination; since he that is attainted suffers an extinction of his blood, as well as he that dies without relations. See *Fleta. lib.* 6. *c* 1.

Inheritable blood is wanting, 1. When the tenant dies without any relations on the part of any of his ancestors. 2. When he dies without any relations on the part of those ancestors from whom his estate descended. 3. When he dies without any relations of the whole blood. When he is attainted for treason or felony.—In all these cases the lands escheat to the lord.—See titles *Descent*, *Attainder*. *Bastards* and *Aliens* cannot inherit.



Great care must be taken to distinguish between forfeiture of lands to the King, and this species of escheat to the lord; which, by reason of their similitude in some circumstances, and because the crown is very frequently the immediate lord of the fee, and therefore entitled to both, have been often confounded together. But, in fact, escheat operates in subordination to this more ancient and superior law of forfeiture. 2 *Inst.* 64. *Salk.* 85. See title *Forfeiture, Tenure.*

The doctrine of escheat upon attainder, taken singly, is this; that the blood of the tenant, by the commission of any felony; (under which denomination all treasons were formerly comprised. 3 *Inst.* 15. *Stat.* 25 *Ed.* 3. *c.* 2. § 12.) is corrupted and stained, and the original donation of the feud is thereby determined. Upon the thorough demonstration of which guilt, by legal attainder, the feudal covenant and mutual bond of fealty are held to be broken, the estate instantly falls back from the offender to the lord of the fee, and the inheritable quality of his blood is extinguished and blotted out for ever. In consequence of which corruption and extinction of hereditary blood, the land of all felons would immediately revest in the lord, but that the superior law of forfeiture intervenes, and intercepts it in its passage: in case of treason, for ever; in case of other felony, for only a year and a day. 2 *Inst.* 36. See title *Tenure*, II. 7.

It has been holden, that a saving against the *corruption of blood* in a statute concerning *felony*, doth by consequence save the land to the heir, so as not to *escheat;* because the *escheat* to the lord for *felony* is only *pro defectu tenentis*, occasioned by the corruption of blood: but it hath been adjudged, that a saving against the corruption of blood, in a statute concerning *treason*, doth not save the land to the heir: for in *treason* the land goes to the King by way of *immediate forfeiture*. 3 *Inst.* 47. 1 *Salk.* 85.

Inheritances of things not lying in tenure, as of rents, commons, &c. cannot *escheat* to the lord, because there is *no tenure;* nor *descend*, by reason the *blood is corrupted:* though they are forfeited to the *King* by an *attainder* of *treason*, and the *profits* of them shall be also *forfeited* to the *King* on *attainder* of *felony* during the life of the offender: and after his death it is said the *inheritance shall be extinguished*. 2 *Hawk. P. C. c.* 49. which see.

In cases of escheat, the blood of the tenant being utterly corrupted and extinguished, it follows, not only that all that he has at the time of his offence committed shall escheat from him, but also that he shall be incapable of inheriting any thing for the future. This farther illustrates the distinction between forfeiture and escheat. If therefore a father be seised in fee, and the son commits treason and is attainted, and then the father dies: the land shall escheat to the lord, because the son by the corruption of his blood, is incapable to be heir, and there can be no other heir during his life, but nothing shall be forfeited to the King, for the son never had any interest in the lands to forfeit. *Co. Lit.* 13. In this case the escheat operates, and not the forfeiture; but in the following instance the forfeiture works, and not the escheat. As where a new felony is created by act of parliament, and it is provided (as is frequently the case) that it shall not extend to corruption of blood; here the lands of the felon shall not escheat to the lord, but yet the profits of them shall be forfeited to the King for a year and a day, and so long after as the offender lives. 3 *Inst.* 47. See titles *Attainder*, *Forfeiture.*

Husband and wife, tenants in special bail; the husband is attainted of treason and executed, leaving issue; on the death of the wife the lands shall *escheat*, because the issue in tail ought to make his conveyance by father and mother, and from the father he cannot by reason of the attainder. *Dyer*, 322. If tenant in fee-simple is attainted of treason, and executed, upon his death the fee is vested in the King,

without office found; yet he must bring a *scire facias* against the tertenants; lands shall never *escheat* to a lord of whom they are holden, until office found. 3 *Rep.* 10.

*Escheat* seldom happens to the lord for want of an heir to an estate; but when it doth, before the lord enters, the *homage jury* of the lord's court ought to *present* it. 2 *Inst.* 36. Land shall *escheat* to the lord where heirs are born *after attainder* of *felony*. 3 *Rep.* 40. Though if the King pardon a felon *before* conviction, the lord shall not have his lands by *escheat;* for the lord hath no title *before attainder*. *Owen*, 87. 2 *Nels. Abr.* 744. If, on *appeal* of death or other felony, process is awarded against the party, and pending the process he conveyeth away the land, and after is outlawed, the conveyance is good to defeat the lord of his *escheat:* but if where a person is *indicted* of felony, pending the process against him, he conveys away his land, and afterwards is outlawed, the conveyance shall not prevent the lord of his *escheat*. *Co. Lit.* 13. See further this Dict. titles *Attainder*, *Corruption of Blood*, *Forfeiture*.

As a consequence of this doctrine of escheat, all lands of inheritance immediately revesting in the lord, the wife of the felon was liable to lose her dower, till the *stat.* 1 *Ed.* 6. *c.* 12. and still by *stat.* 5 & 6 *Ed.* 6. *c.* 11. the wife of one attaint of high treason shall not be endowed. See title *Dower*.

There is one singular instance in which lands held in fee-simple are not liable to escheat to the lord, even when their owner is no more, and hath left no heirs to inherit them. And this is the case of a Corporation; for if that comes by any accident to be dissolved, the donor or his heirs shall have the land again in reversion, and not the lord by the escheat; which is perhaps the only instance where a reversion can be expectant on a grant in fee simple absolute. See title *Corporation*.

It has been decided that where a *cestui que trust* dies without heirs, the *trust* does not escheat to the Crown, so that the lands may be recovered in a court of equity by the King; but that the trustee shall hold them for his own benefit. *Burgess* v. *Wheate*, 1 *Black. Rep.* 123.

ESCHEATOR, *escaetor.*] Was an officer appointed by the *Lord Treasurer*, &c. in every county, to make inquests of titles by *escheat;* which inquests were to be taken by good and lawful men of the county, impannelled by the sheriff. *Stats.* 14 *Ed.* 3. *c.* 8. 34 *Ed.* 3. *c.* 13. 8 *H.* 6. *c.* 16. These *escheators* found officers after the death of the King's tenants, who held by knight-service, or otherwise of the King; and certified their inquisitions into the Exchequer; and *Fitzherbert* called them officers of record. *F. N. B.* 100. No *escheator* could continue in his office above one year: and whereas, before the statute of *Westm.* 1. *c.* 24. *Escheators*, sheriffs, &c. would seize into the king's hands the freehold of the subjects, and thereby disseise them; by this act it is provided that *no seizure* can be made of lands or tenements into the King's hands, *before office found*. 2 *Inst.* 206. And *no lands can be granted before* the King's title is *found by inquisition*. *Stat.* 18 *H.* 6. *c.* 6. The *office of escheator* is an ancient office, and was formerly of great use to the crown; but having its chief dependance on the *court of wards*, which is taken away by act of parliament, it is now in a manner out of date. 4 *Inst.* 225. There was anciently an officer called *Escheator of the Jews*. *Claus.* 4 *Ed.* 1. *m.* 7.

ESCHECCUM. A jury or inquisition. *Matt. Paris. Anno* 1240.

ESCHIPARE. To build or equip.—*Du Cange*. See *Eskippamentum*.

ESCROW. A deed delivered to a third person, to be the deed of the party making it, upon a *future* condition, when a certain thing is *performed*, and then it is to be delivered to the party to whom made. It is to be delivered to a stranger, mentioning the condition; and has relation to the first delivery. 2 *Rol. Abr.* 25, 26. *Co. Lit.* 31. A delivery as an *escrow* signifies, in fact, as a *scrowl* or writing, which is not to take effect as a *deed*, till the condition be performed. *Co. Lit.* 36. See title *Deed*, II. 7.

Where the vendor of a leasehold estate delivered the conveyance as an *Escrow*, to take effect on payment of the residue of the purchase money, the court of C. P. held that the property in the title deeds of the estate was so vested in the vendee, that the vendor obtaining possession of them, and pawning them, &c. did not confer on the pawnee any right of detaining them after tender of the residue of the purchase money. *Hooper* v. *Ramsbottom*, 6 *W. P. Taunton*, 12.

ESCUAGE. See title *Tenure*, II. 3.

ESCURARE. To scour or cleanse. *Charta Antiqua.*

ESGLISE, *Fr.*] A church; in the old books a division containing the law relative to *advowsons*, *churchwardens*, &c. *L. Fr. Dict.*

ESSINGÆ. The *Kings of Kent*, so called from the first King *Ochta*, who was surnamed *Ese:* he was grandfather of King Ethelbert.

ESKETORES, fron the Fr. *escher.*] Robbers or destroyers of other men's lands and fortunes.—*Plac. Parl* 20 *Ed.* 1.

ESKIPPAMENTUM. *Skippage*, tackle or ship furniture. *Sir Rob. Cott.*

ESKIPPER, *Fr.*] To ship, and *eskipped* is used for shipped. *Cromp. Jur. Cur.*

ESKIPPESON. Shipping or passage by sea. Humphrey Earl of Bucks, in a deed dated 13 Feb. 22 *H.* 6. covenants with Sir Philip Chetwind, his lieutenant of the castle of Calais, to give him allowance for his soldiers, *skippeson* and *reskippeson*, *viz.* passage and re-passage by ship.

ESLISORS. See *Elisors*.

ESNECY, *æsnecia. Enitia pars dignitas primogeniti.*] A private prerogative allowed to the eldest *coparcener*, where an estate is descended to daughters for want of heir male, to choose first after the inheritance is divided. *Fleta. lib.* 5. *c.* 10. *Jus æsneciæ* is *jus primogenituræ;* in which sense it may be extended to the eldest son, and his issue, holding first: In the statute of *Marlebridge cap.* 9. it is called *initia pars hæreditatis*. *Co. Lit.* 166. See title *Election*.

ESPERONS. Spurs, *esperons de or*, gilt spurs. 7 *Co. Rep.* 13.

ESPERVARIUS. Fr. *espervier.*] A sparrow-hawk. *Chart. Forest. cap.* 4.

ESPLEES, *expletiæ*, from *expleo.*] The products which ground or land yield; as the hay of the meadows, the herbage of the pasture, corn of the arable; rent and services, &c. And of an advowson, the taking of tithes in gross by the parson; of wood, the felling of wood; of an orchard, the fruits growing there; of a mill, the taking of toll, &c. These and such like issues are termed *esplees*. And it is observed that in a writ of right of land, advowson, &c. the demandant ought to allege in his count, that he or his ancestors took the *esplees* of the thing in demand; otherwise the pleading will not be good. *Termes de Ley*. Sometimes this word hath been applied to the farm, or lands, &c. themselves.—*Plac. Parl.* 30 *Ed.* 1.

ESPOUSALS, *sponsalia.*] Are a contract or mutual promise between a man and woman to marry each other; and where marriages may be consummated, *espousals* go before them. Marriage or matrimony is said to be an *espousal de præsenti*, and a conjunction of man and woman in a constant society. *Wood's Inst.* 57. See title *Marriage*.

ESQUIRE, from the Fr. *Esqu.* and the Lat. *Scutum*, in Greek σκυτος, which signifies an hide of which *shields* were anciently made and afterwards covered.] An *Esquire* was

originally he who attending a knight in the time of war, did carry his *shield*, whence he was called *Escurier* in French, and *Scutifer* or *Armiger*, (*i. e.* armour-bearer) in Latin.

*Hotoman* saith, that those whom the French call *Esquires* were a military kind of vassals, having *jus sculi*, *viz.* liberty to bear a shield, and in it the ensigns of their family, in token of their gentility or dignity: but this addition hath not now for a long time had any relation to the office or employment of the person to whom it hath been attributed, as to carrying of arms, &c. but has been merely a title of dignity, and next in degree to a knight.

A sheriff of a county being a superior officer, retains the title of *Esquire* during his life; in respect of the great trust he has in the common-wealth. The chiefs of some ancient families are *esquires* by prescription. *Blount.*

Esquires and Gentlemen are confounded together by *Sir Edward Coke*, 2 *Inst.* 668. He there observes that every Esquire is a Gentleman, and a gentleman is defined to be one *qui arma gerit*, who bears coat armour; the grant of which adds gentility to a man's family. It is indeed a matter somewhat unsettled what constitutes the distinction, or who is a real Esquire: for it is not an estate, however large, that confers this rank upon its owner. *Camden*, who was himself a herald, distinguishes them the most accurately. And he reckons up four sorts of them. 1. The eldest sons of knights and their eldest sons in perpetual succession. 2. The eldest sons of younger sons of peers, and their eldest sons in like perpetual succession; both which species of esquires *Spelman* calls *armigeri natalitii*; as he denominates the sons themselves of peers *armigeri honorarii*.—3. Esquires created by the King's letters patent or other investiture, and their eldest sons; see post *Esquires of the King*. 4. Esquires by virtue of their offices; as justices of the peace and others who bear any office of trust under the crown: [if styled Esquires by the King in their commissions and appointments.] To these may be added esquires of Knights of the Bath, each of whom constitutes three at his installation; and all foreign, nay Irish peers; for not only these, but even the eldest sons of peers of Great Britain, though frequently titular lords, are only esquires in law, and must so be named in all legal proceedings.—Barristers at law seem also now in full possession of the title of Esquire, though originally, as it should seem, attained by usurpation; and being perhaps nearly the same kind of unnecessary addition to their superior degree, as if it were to be annexed or prefixed to that of M.A. or LL.D.

The Court of C. P. however refused to hear an affidavit read, because a Barrister named in it was not called Esquire. 1 *Wils.* 224.—See 1 *Comm.* 406. and the notes there. *Spelm. Gloss.* 43. and this Dict. title *Precedency*.

Esquires of the King. Are such who have the title by *creation*: these, when they are created, have put about their necks a collar of *S.S.* and a pair of *silver spurs* is bestowed on them: and they were wont to bear before the Prince in war a *shield* or lance. There are four *esquires of the King's body*, to attend on his Majesty's person. *Camd.* 111. These are now disused.

ESSENDI QUIETUM DE TOLONIO. A writ *to be quit of toll*; it lies for citizens and burgesses of any city or town that by charter or prescription ought to be exempted from *toll*, where the same is exacted of them. *Reg. Orig.* 258. See titles *Toll*, *Corporation*, *London*.

ESSOIGN, or ESSOIN. *Essonium*, Fr. *Essoine—Essonzic* Scotch.] An excuse for him that is summoned to appear and answer to an action, or to perform suit to a court baron, &c. by reason of sickness and infirmity, or other just cause of absence. It is a kind of imparlance, or craving of a longer time, that lies in real, personal, and mixed actions: and the plaintiff as well as the defendant shall be *essoigned* to save his default. *Co. Lit.* 131. For the mode of entering an Essoin, see *Rast.* 520.

The causes that serve to *essoin*, and the *essoins* are divers, under these heads. 1. *Essoin de ultra mare*, whereby the defendant shall have forty days. 2. *De terrâ sanctâ*, where defendant shall have a year and a day. 3. *De malo veniendi*, which is likewise called the *common essoign*. 4. *De malo lecti*, wherein the defendant may by writ be viewed by four knights. 5. *De servitio Regis*: *Bract. lib.* 5. *Britton*, *cap.* 122. *Fleta*, *lib.* 6. And besides the common *essoign de malo veniendi*, *i. e.* by falling sick in coming to the court, and other *essoins* abovementioned, there were several other excuses, to save a default in *real* actions; as constraint of enemies, the falling among thieves, floods of water, and breaking down of bridges, &c. 2 *Co. Inst.* 125.

After issue joined in dower, *quare impedit*, &c. one *essoin* only shall be allowed. *Stat.* 52 *H.* 3. *c.* 13. And in writs of assise, attaints, &c. after the tenant hath appeared, he shall not be *essoigned*; but the inquest shall be taken by default. *St.* 3 *Ed.* 1. *c.* 42. *Essoin ultra mare* will not be allowed, if the tenant be within the four seas; but it shall be turned to a default, *c.* 44. There is no *essoin* permitted for an appellant. *St.* 13 *Ed.* 1. *c.* 28. Nor doth *essoin* lie where any judgment is given; or the party is distrained by his lands; the sheriff is commanded to make him appear; after the party is seen in court, &c. 12 *Ed.* 2. *st.* 2.

An *essoin de servitio Regis* lies not when the party is a woman; in a writ of dower; where the party hath an attorney in his suit, &c. *Ibid.* The *essoign* day in court is regularly the first day of the term; but the fourth day after is allowed of favour. 1 *Lill.* 540. 569. 1 *Inst.* 135. 3 *T. R.* 185. A corporation (defendants) are not entitled to an essoin. And the court discourages essoins, and will be glad to use any means to prevent such delay of the defendant. 2 *Term Rep.* 16. 2 *Wils.* 164. An essoin lies not on a capias to arrest; and the plaintiff may declare and sign judgment, if no plea. 2 *Str.* 1194.

There cannot be an essoign in a personal action; and if, on the return of a writ in a personal action the defendant cast an essoign, which is not adjourned to a particular day, and it is not quashed, and the plaintiff deliver his declaration on the first day of the following term, the defendant is not entitled to an imparlance. 2 *Term Rep. K. B.* 16.

Essoin Day of the Term. The first return in every term, is, properly speaking, the first day in that term: and thereon the court sits to take *essoins*, or excuses for such as do not appear according to the summons of the writ; wherefore this is usually called the *essoin day* of the term. But the person summoned hath three days' grace, beyond the return of the writ in which to make his appearance, and if he appears on the *fourth* day inclusive, the *quarto die post*, it is sufficient. 3 *Comm.* 277. 3 *Term Rep. K. B.* 185. See title *Term*.

Essoin de Malo Villæ. Is when the defendant is in court the first day; but gone without pleading, and being afterwards surprised by *sickness*, &c. cannot attend, but sends two *essoiners*, who openly protest in court that he is detained by sickness in such a *village*, that he cannot come, *pro lucrari et pro perdere*; and this will be admitted, for it lies on the plaintiff to prove whether the *essoin* is true or not.

Essoins and Proffers. Words used in the statute 38 *H.* 8. *c.* 21. See *Profer*.

ESTABLISHMENT OF DOWER. Is the assurance or settlement of *dower*, made to the wife by the husband on marriage: and *assignment of dower* signifies the setting it out by the heir afterwards, according to the establishment. *Brit. cap.* 102, 103. See title *Dower*.

ESTACHE. From the Fr. *Estacher*, to fasten.] A bridge, or stank of stone and timber. *Cowel.*

ESTANDARD, or *Standard.* An ensign for horsemen in war. See *Standard.*

ESTANQUES; Wears, or Kiddles in rivers. See *Magna Charta, &c.*

## ESTATE.

Fr. *Estat.* Lat. *Status.*] That title or interest which a man hath in lands or tenements, &c.

An *Estate* in lands, tenements, and hereditaments, (says *Blackstone*) signifies such interest as the tenant hath therein; so that if a man grants all *his estate* in *Dale* to A. and his heirs, every thing that he can possibly grant shall pass thereby. *Co Lit.* 345. It signifies the [*state*] condition, or circumstance in which the owner stands with regard to his property. And, to ascertain this with precision and accuracy, estates may be considered in a threefold view; first, with regard to the *quantity of interest* which the tenant has in the tenement; secondly, with regard to the *time* at which that quantity of interest is to be enjoyed; and thirdly, with regard to the *number* and *connections* of the tenants.

First, with regard to the *quantity of interest* which the tenant has in the tenement, this is measured by its duration and extent. Thus, either his right of possession is to subsist for an uncertain period, during his own life, or the life of another man; to determine at his own decease, or to remain to his descendants after him; or it is circumscribed within a certain number of years, months, or days; or, lastly, it is infinite and unlimited, being vested in him and his representatives for ever. And this occasions the primary division of estates into such as are *freehold*, and such as are *less than freehold.*

An estate of freehold, *liberum tenementum*, or frank-tenement, is defined by *Britton*, *c.* 32. to be "the *possession* of the soil by a freeman." And *St. Germyn*, (*Dr. & Stud. b*, 2. *d*, 22.) tells us, "that the possession of the land is called, in the law of England, the frank-tenement, or freehold." Such estate therefore, and no other, as requires actual possession of the land is, legally speaking, *freehold:* which actual possession can, by the course of the Common Law be only given by the ceremony called livery of seisin, which is the same as the feodal investiture. And from these principles we may extract this description of a *freehold;* that it is such an estate in lands as is conveyed by livery of seisin; or, in tenements of an incorporeal nature, by what is equivalent thereto. And accordingly it is laid down by *Littleton*, § 59. that where a freehold shall pass, it behoveth to have livery of seisin. As therefore estates of inheritance and estates for life, could not, by Common Law, be conveyed without livery of seisin, these are properly estates of freehold; and, as no other estates were conveyed with the same solemnity, therefore [no others are properly freehold estates. 2 *Comm.* 103, 104.

*Mr. Christian*, in his note on the above passage, says; a *freehold estate* seems to be any estate of inheritance, or for life, in either a corporeal or incorporeal hereditament, existing in or arising from real property of free tenure; that is, now, of all which is not copyhold. The learned Commentator himself has elsewhere informed us, that "tithes and spiritual dues are freehold estates, whether the land out of which they issue are bond or free; being a separate and distinct inheritance from the lands themselves." And, in this view, they must be distinguished and excepted from other incorporeal hereditaments issuing out of lands, as rents, &c. which in general will follow the nature of their principal, and cannot be freehold, unless the stock from which they spring be freehold also. 1 *Blackst. Tracts*, 116.

Estates of freehold may then be considered, either as estates *of inheritance*, or estates *not of inheritance.* The former are again divided into inheritances *absolute*, otherwise called *fee-simple*, and inheritances *limited;* one species of which is usually called *fee-tail.*

As to estates and tenants in fee-simple, see this Dict. titles *Fee and Fee-simple*, *Tenure*, III. 5.

*Limited Fees*, or such estates of inheritance as are clogged and confined with conditions or qualifications of any sort, may be divided into two kinds. 1. *Qualified* or *base fees.* 2. *Fees conditional;* so called at the Common Law, and afterwards *fees tail*, in consequence of the statute *de donis.* As to these latter, see this Dict. titles *Tail* and *Fee Tail*, *Tenures.*—A base or qualified Fee is such a one as has a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end. As in the case of a grant to A. and his heirs *tenants of the manor of Dale;* in this instance, whenever the heirs of A. cease to be tenants of that manor, the grant is entirely defeated. This estate is a fee, because, by possibility, it may endure for ever in a man and his heirs: yet, as that donation depends upon the concurrence of collateral circumstances, which qualify and debase the purity of the donation, it is therefore a qualified or base fee. 2 *Comm.* 109. See 1 *Inst.* 27.

Of estates of freehold, not of inheritance, but *for life* only, some may be called *conventional*, as being expressly created by the act of the parties; others are merely legal, or created by construction and operation of law. See title *Freehold.*—As to estates for life, expressly created by deed or grant, see this Dict. title *Life Estate.*—As to the estate of tenant in tail after possibility of issue extinct, see title *Tail, and Fee-Tail.* As to tenant by the *Curtesy*, and Tenant in *Dower*, see those titles.

Of *estates less than freehold* there are three sorts; 1. Estates for years. 2. Estates at will: as to both which see this Dict. title *Lease.* 3. Estates by sufferance: as to which, see this Dict. title *Sufferance.*

Besides these several divisions of estates, in point of interest, another species may be mentioned, *viz. Estates upon Condition;* as to which, see at large title *Condition*, and titles *Mortgage*, *Statute-Merchant*, *Statute-Staple*, *Elegit.*

According to the above division, Estates are considered solely with regard to their duration, or the *quantity of interest* which the owners have therein. With regard to *the time of their enjoyment*, when the actual receipt of the rents and profits begins, Estates may be considered as either in *possession* or *expectancy.*—Of expectancies, there are two sorts; one created by the act of the parties, called a *Remainder;* the other by act of law, called a *Reversion.*—Of estates in possession, (which are sometimes called estates executed, whereby a present interest passes to and abides in the tenant, not depending on any subsequent circumstance or contingency, as in the cases of estates *executory*) little or nothing is to be peculiarly observed; all the estates already spoken of, and treated of under the titles referred to, are of this kind. But the doctrine of estates in expectancy contains some of the nicest and most abstruse learning in the English law.—And as to so much of it as relates to *Remainders* and *Reversions* see this Dict. under those titles, and titles *Executory Devise*, *Limitation.*

Estates, with regard to the certainty, and the time of the enjoyment of them, are distinguished by *Fearne* in the introduction to his Essay on Contingent Remainders and Executory Devises, into, 1. Estates *vested in possession.* 2. Estates *vested in interest*, as reversions; vested remainders; such executory devises, future uses, conditional limitations, and other future interests as *are not* referred to, or made to depend on, a period or event that is *uncertain.* 3. Estates *contingent;* as Contingent Remainders; and such executory devises, future uses, conditional limitations, and other future interests as

are referred to, or made to depend on an event that is *uncertain*.—An estate is *vested* when there is an *immediate fixed right* of present or future enjoyment.—An estate is *vested in possession* when there exists a *right* of *present enjoyment*.—An estate is *vested in interest* when there is a *present fixed right of future enjoyment*. An estate is contingent when a *right* of enjoyment is to accrue on an event which is *dubious* and *uncertain*.

With respect to the number and connections of their owners, the tenants who occupy and hold them, Estates of any quantity or length of duration, whether in actual possession or expectancy, may be held in four different ways; *severalty*, in *joint-tenancy*; in *coparcenary*; in *common*.—He that holds lands in severalty, or is sole tenant thereof, is he that holds them in his own *right* only, without any other being joined or connected with him in point of interest during his estate therein. This is the most common and usual way of holding an estate; and all estates are supposed to be of this sort, unless where they are expressly declared to be otherwise; and in laying down general rules and doctrines, they are usually applied to such estates as are held in severalty. As to estates in joint-tenancy, in coparcenary, and in common, see titles *Joint Tenants*, *Parceners*.

As to the title to estates, see this Dict. *Title*; and the references there; and as to the different nature of estates, according to their several tenures, see this Dict. title *Tenure*.

*Estates* are acquired divers ways; *viz.* by *descent* from a father to the son; &c. *Conveyance*, or grant from one man to another; by *gift* or *purchase*; *deed* or *will*: and a fee-simple is the largest *estate* that can be in law. 1 *Lil.* 541.

*Estates* are *real* of lands, &c. or *personal*, of goods or chattels; otherwise distinguished into *freeholds*, that descend to the heir, and chattels which go to the executors: some *estates* are made by the words of *deeds*, and others made by *law*; as an *estate* in *frank marriage* given to a cousin, makes a gift in tail.

Also there is an *estate* that is *implied*, where tenant in tail bargains and sells his land to a man and his heirs; by this he hath an *estate descendible*, and determinable upon the death of the tenant in tail. *Co. Lit.* 10 *Rep.* 97. If I give lands in *Dale* to a certain person for life, and after to his *heirs* or *right heirs*, he hath the *fee-simple*; and if it be to his *heirs male*, he will have an *estate-tail*. 1 *Rep.* 66. A man grants to one and his heirs and assigns for his life, and a year over; this is an *estate* for life only. 39 *E.* 3. 25. *Lit.* 46. If a lease be made, and not expressed for what number of years, it is an *estate* at *will*. 2 *Shep. Abr.* 81.

The word *estate* generally in *deeds*, grants, and conveyances, comprehends the whole in which the party hath an interest or property, and will pass the same. 3 *Mod.* 46. A person in *possession* of an *estate* mortgaged in *fee*, by will gave it to his two daughters and their heirs; one of them married, and then died: and it being a question, whether her share should be held *real* or *personal estate*, and go to the heir, or her husband administrator? It was adjudged for the heir; for here the mortgaged lands shall descend as other lands of inheritance, and be subject to the same rules. *Preced. Canc.* 266. In such case, if the mortgage in *fee* be paid off, the money shall be considered as land, and belong to his heirs, as the *estate* in the land would have done. *Ibid.* See tit. *Mortgage*.

*How far the acceptance of one Estate shall destroy another.*

If a lessee for term of twenty years, *accepts* of a lease of the same land for ten years, by the lessee's *acceptance* of the new lease, the term of twenty years is determined in law. 2 *Rol. Abr.* 469.

Lease for years to R. B. rendering rent: the next year a lease was made of the same lands to the lady P. for ninety-nine years; the next year the said lands were demised to the said R. B. for forty-one years, who accepted the lease, but that did not extinguish his first lease; because the lessor, by making the intermediate lease to the lady P. had only a reversion, and could not afterwards give any interest to R. B. But if it had not been for this intermediate lease, then the acceptance of the second lease for forty-one years had been a surrender of the first. *Hutt.* 104.

If a man hath a lease for years, which is good in law, and afterwards accepts a new lease of the same lands, which is void in law, this is no surrender in law of the good lease. *Hutt.* 105. *Baker* v. *Willoughby*; *Mills* v. *Whitewood*, *ibid.* S. P.

A man, in consideration of a marriage to be had with M. R. made an estate to her for life of certain lands, in full satisfaction of her dower; afterwards they married, and the husband died, and the widow brought a writ of dower against the heir, who pleaded in bar the acceptance of the estate for life: adjudged no good plea; for such acceptance did not bar her of her dower at the Common Law, because she had no title of dower when the acceptance was made; and besides, no collateral acceptance can bar any right of inheritance or freehold. See 4 *Rex.* 1. *Vernon's* case, and this Dict. title *Dower*.

A man made a lease of a manor for thirty years, excepting the wood, &c. and afterwards made a lease of the woods to the same lessee for sixty years, and a third lease to him of the manor for thirty years, without any exception; resolved, that by the acceptance of this future lease, the lease for sixty years was surrendered; because, by such acceptance, the lessee had affirmed, that the lessor had authority to make a new lease. 5 *Rep.* 11. *Ive's* case.

In a special verdict in trespass, the case was, a lease was made to husband and wife for their lives; and afterwards they accepted a new lease for themselves and their son: *habendum* to all three of them, *a die datûs indenturæ* for the term of their lives, with a letter of attorney to make livery; adjudged, that the acceptance of a second lease, to commence *a die datûs*, was a surrender of the first, and this by the express agreement in writing of the lessees themselves; for otherwise the lessor had no power to make a new lease. *Moor*, 686.

ESTOPPEL, from the Fr. *Estouper*, i. e. *Oppilare*, *obstipare*.] An impediment or bar to a right of action arising from a man's own act: or where he is forbidden by law to speak against his own deed, for by his act or acceptance he may be *estopped* to allege or speak the truth. *F. N. B.* 142. *Co. Lit.* 332. If a person is bound in an obligation by the name of A. B. and is afterwards sued by that name on the obligation; now he shall not be received to say in abatement, that he is misnamed, but shall answer according to the obligation, though it be wrong; and forasmuch as he is the same person that was bound, he is *estopped*, and forbidden in law to say contrary to his own deed; otherwise he might take advantage of his own wrong, which the law will not suffer. *Termes de ley.* If a man enters into a bond, with condition to give to another all the goods which are devised to him by the father; in this case the obligor is estopped to plead that the father made no will; but he may plead that he had not any goods devised to him by his father. 1 *Nels. Abr.* 751.

So on bond conditioned to perform the covenants in a certain indenture mentioned, the defendant is estopped from pleading that no such indenture was executed. 2 *Bos. & Pull.* 299. But see 3 *Term Rep. K. B.* 438, that the defendant may plead such plea as tends to shew there was no consideration for the bond. See also 3 *Term Rep.* 439. 441.

In a deed, all the parties are estopped to say any thing against what is contained in it: it stops a lessee to say that the lessor had nothing in the land, &c. And parties and privies are bound by *estoppel*. *Lit.* 58. *Co. Lit.* 352. 4 *Rep.* 53.

None but privies and parties shall regularly have advantage by *estoppels:* But if a man makes a lease of part a term, whereby he is estopped; and after assign away the term, the assignee will be estopped also. 30 *H.* 6. 2. 4 *Rep.* 56. In *estoppels*, both parties must be estopped; and therefore, where an infant or feme covert makes a lease, they are not estopped to say, *that it is not their deed*, because they are not bound by it; and *as to them* it is void. *Cro. Eliz.* 36. See title *Deed.* And though *estoppels* conclude parties to deeds to say the truth, yet jurors are not concluded, who are sworn *ad veritatem de et super præmissis dicendam:* For they may find any thing that is out of the record; and are not estopped to find truth in a special verdict. 4 *Rep.* 53. *Lut.* 705.

An *estoppel* shall bind only the heir, who claims the right of him to whom the *estoppel* was. 8 *Rep.* 53. Acceptance of rent from a disseisor by the disseisee, may be an *estoppel:* And a widow accepting less than her thirds for dower, is an *estoppel, &c.* 2 *Danv. Abr.* 130. 671.

Our books mention three kinds of *estoppel, viz.* By matter of *record*, by matter in *writing*, and by matter in *pais.* *Co. Lit.* 352. If a feoffment be made to two, and their heirs, and the feoffor afterwards levies a fine to them, and the heirs of one of them; this will be an *estoppel* to the other to demand fee-simple according to the deed; *for the fine shall enure as a release.* 6 *Rep.* 7. 44. Tenant in tail suffers a recovery, that his issue may avoid; he himself shall be estopped and concluded by it, and may not demand the land against his own recovery. 3 *Rep.* 3.

The taking of a lease by indenture of a man's own land, whereof he is seised in fee, is an *estoppel* to claim the fee during the term. *Moor Ca.* 323. *And.* 121. A lease is made to one man for eighty years, and then to another by deed indented for the same term, this second lease may be good by way of *estoppel:* And if the first determine by surrender, forfeiture, &c. the second lessee shall have the land. *Co. Rep.* 155. If a lessor, at the time of making the lease, hath nothing in the land, but after he gets it by purchase or descent, it is a good lease by *estoppel. Dyer*, 256. *Plowd.* 344. *Co. Lit.* 47. A recital in a deed shall not estop a person, unless it be of a particular fact, or where it is material; when it may be an *estoppel. Cro. Eliz.* 362.

The lord, by deed indented, reciting that his tenant holds of him by such services, whereas he doth not, confirms to the tenant, saving the services; it is no *estoppel* to the tenant. 35 *H.* 6. 33. *Plowd.* 130. If one make a deed by *duress* of imprisonment, and when he is at large makes a defeasance to it: he is estopped to say it was *per duress. Bro. Defeas.* 17. Where the condition of a bond is in the *particularity*, as to infeoff J. S. of the manor of D. or to pay such a sum of money as he stands bound to pay to W. S. or to stand to the sentence of J. S. in a matter of tithes in question between them; here the party is estopped to deny any of these things, which in the condition he did grant; But if a condition be in the *generality*, to enfeoff one of all his lands in D. or to be nonsuit in all actions, &c. it is no estoppel. *Dyer.* 196. 18 *Ed.* 4. 5*b*.

If a man in pleading confess the thing he is charged with he cannot afterwards deny it: Though a plaintiff shall not be estopped to allege any thing against that which before he hath said in his writ or declaration; and one may not be estopped by the record upon which he was nonsuited. 21 *H.* 7. 24. 2 *Leon.* 3. 17.

An *estoppel* ought to be *certain* and *affirmative*, and a matter alleged that is not traversable, shall not estop; one may not be estopped by acceptance before his title accrued; an *estoppel* must be insisted and relied on; and where there is *estoppel* against *estoppel*, it puts the matter at large. *Co. Lit.* 352. *Hob.* 207. *Estoppels* are to be pleaded relying on the *estoppel*; without demanding judgment *si actio, &c.* 4 *Rep.* 53. See title *Pleading.*

If a verdict be found on any fact or title, distinctly put in issue in an action of trespass, such verdict may be pleaded by way of estoppel in another action between the same parties or their privies, in respect of the same fact or title 3 *East's Rep.* 346.

If the heir apparent of a *copyholder* in fee surrender in the life time of his ancestor, and *survive* him, the heir of such surrenderor is not estopped by that surrender of his ancestor from claiming against the surrenderee. *Goodtitle* v. *Morse*, 3 *Term Rep. K. B.* 365.

Devisees of contingent remainders in a copyhold not being in the seisin cannot make a surrender of their interest, nor will such surrender operate by estoppel against the parties or their heirs. *Doe, d. Blacksell,* v. *Tomkins*, 11 *East's Rep.* 185.

ESTOVERS. See title *Common of Estovers.* This word hath been taken for any kind of sustenance; as *Bracton* uses it, for that sustenance or allowance, which a man committed for felony is to have out of his lands or goods for himself and his family during his imprisonment. *Bract. lib.* 3. *tract.* 2. *cap.* 18. And the *stat.* 6 *Ed.* 1. *cap.* 3. applies it to an allowance in meat, clothes, &c. In which sense it has been used for a wife's alimony.

ESTOVERIIS HABENDIS, Writ *de.* A writ at Common Law, for a woman divorced from her husband, *a mensâ & thoro*, to recover her *alimony*, sometimes called her *estovers.* 1 *Lev.* 6. See title *Baron and Feme.*

ESTRAY, *Extrahura*, from the old Fr. *Estrayeur.*] Is any valuable animal that is not wild, found within a lordship, and whose owner is not known. In which case, if it be tried and proclaimed according to law, in the church, and two nearest market-towns, on two market days, and is not claimed by the owner within a year and a day, it belongs to the king; and now, most commonly, by grant of the crown, to the lord of the liberty. *Brit. cap.* 17.

It has been suggested that the true reason of the law thus giving the estray to the king or his grantee, and not to the finder, is, that the owner has thus the best chance of having his property restored to him; and it lessens the temptation to commit thefts, as it prevents a man from pretending that he had found as an estray, what he had actually stolen: or according to the vulgar phrase, that he had found which never was lost.

Any beasts may be estrays, that are by nature tame or reclaimable, and in which there is a valuable property, as *sheep*, *oxen*, *swine*, and *horses.*—But animals upon which the law sets no value, as a dog or cat: and animals *feræ naturæ*, as a bear or wolf, cannot be considered as estrays. 1 *Comm.* 298. Swans may be *estrays*, but no other fowl, and are to be proclaimed, &c. 1 *Rol. Abr.* 878. If the beast stray to another lordship within the year, after it hath been an *estray*, the first lord cannot re-take it, for until the year and day be past, and proclamation made as aforesaid, he hath no property; and therefore the possession of the second lord is good against him. *Cro. Eliz.* 716. *Finch. L.* 177. If the cattle were never proclaimed, the owner may take them at any time: And where a beast is proclaimed as the law directs, if the owner claim it in a year and a day, he shall have it again, but must pay the lord for keeping. 1 *Rol. Abr.* 879. *Finch.* 177. But if any person finds and takes care of another's property, not being intitled to it as an estray, the owner may recover it or its value, without paying the expences of keeping. 2 *Blackst. Rep.* 1117.

An owner may seize an *estray*, without telling the marks, or proving the property, (which may be done at the trial, if contested,) and tendering amends generally is good in this case, without shewing the particular sum; because the owner of the *estray* is no wrong-doer, and knows not how long it has been in the possession of the lord, &c. which

makes it different from trespass, where a certain sum must be tendered. 2 *Salk.* 686. In case of an *estray* the lord ought to make a demand of what the amends should be for the keeping; and then if the party thinks the demand unreasonable, he must tender sufficient amends; but if what he tenders is not enough, the lord shall take issue, and it is to be settled by the jury. *Noy*, 144. A beast *estray* is not to be used in any manner, except in case of necessity; as to milk a cow or the like, but not to ride an horse. *Cro. Jac.* 148. 1 *Rol.* 673. *Estrays of the Forest* are mentioned in the statute of 27 *H.* 8. *cap.* 7. The *King's cattle* cannot be *estrays* or forfeited, &c.

ESTREAT, *Extractum.*] The true extract, copy, or note, of some original writing or record, and especially of *fines*, *amercements*, &c. entered on the rolls of a court, to be levied by the bailiff or other officer. *F. N. B.* 57. 76. See *stats. Westm.* 1 & 3 *Ed.* 1. *c.* 45. *Westm.* 2. 13 *Ed.* 1. *c.* 8. 27 *Ed.* 1. *st.* 1. *c.* 2. 3 *H.* 7. *c.* 1. 22 & 23 *Car.* 2. *c.* 22. (4 & 5 *W. & M. c.* 24. § 4.) 3 *Geo.* 1. *c.* 15. § 12.

ESTRECIATUS, *Streightened*, applied to roads. *R. Hoveden, p.* 783.

ESTREPE, Fr. *Estropier.*] To make spoil in lands to the damage of another, as of the reversioner, &c.

ESTREPEMENT, *Estrepamentum* from the Fr. *Estropier*, *mutilare*, or from the Lat. *Extirpare.*] Any spoil made by tenant for life, upon any lands or woods, to the prejudice of him in reversion; it also signifies the making land barren by continual ploughing. *Stat.* 6 *Ed.* 1. *cap.* 13. It seems by the derivation that *estrepement* is the unreasonable drawing away the heart of the ground, by ploughing and sowing it continually, without manuring or other good husbandry, whereby it is impaired: and yet *estropier* signifying *mutilare*, may no less be applied to the cutting down trees, or lopping them further than the law allows. In ancient records, we often find *vastum & estrepamentum facere;* to make *strip* and *waste.*

This word is used for a writ, which lies in two cases; the one, by the *stat. of Glouc.* 6 *E.* 1. *c.* 13. when a person having an action depending, as a *formedon*, writ of right, &c. sues to prohibit the tenant from making waste during the suit: the other is for the demandant, who is adjudged to recover seisin of the land in question, after judgment and before execution sued by the writ of *habere facias possessionem*, to prevent waste being made till he gets into possession. *Reg. Orig.* 76. *Reg. Judic.* 33. *F. N. B.* 60, 61. 3 *Inst.* 328.

In suing out these two writs, this difference was formerly observed; that in actions merely possessory, where no damages are recovered, a writ of *estrepement* might be had at any time *pendente lite*, nay, even at the time of suing out the original writ or first process: but in an action where damages were recovered, the demandant could only have a writ of *estrepement*, if he was apprehensive of waste, after verdict had; for with regard to waste done before the verdict was given, it was presumed the jury would consider that in assessing the damages. *F. N. B.* 60, 61. But now it seems to be held by an equitable construction of the *stat. of Glouc.* and in advancement of the remedy, that a writ of *estrepement* to prevent waste, may be had in every stage, as well of such actions wherein damages are recovered, as of those wherein only possession is had of the lands; for perhaps the tenant may not be able to satisfy the demandant his full damages. *Ib.* 61. And therefore now in an action of waste itself to recover the place wasted, and also damages, a writ of *estrepement* will lie as well before as after judgment. For the plaintiff cannot recover damages for more waste than is contained in his original complaint; neither is he at liberty to assign or give in evidence any waste made after suing out the writ: it is therefore reasonable that he should have this writ of *preventive* justice, since he is in his present suit debarred of any further remedy. 5 *Rep.* 115.

If a writ of *estrepement* forbidding waste, be directed and delivered to the tenant himself, as it may be, and he afterwards proceeds to commit waste, an action may be carried on upon the foundation of this writ, wherein the only plea of the tenant can be, *non fecit vastum contra prohibitionem;* and if upon verdict it be found that he did, the plaintiff may recover costs and damages; or the party may proceed to punish the defendant for the contempt. *Moor*, 100.

As a writ of *estrepement* may be directed either to the tenant and his servants, or to the sheriff; if it be directed to the tenant and his servant, and they are duly served with it, if they afterwards commit waste, they may be committed to prison for this contempt of the writ. But it is said not to be so when directed to the sheriff, because he may raise the *posse comitatus* to resist them who make waste. *Hob.* 85. Though it hath been adjudged, that the sheriff may likewise imprison offenders if he be put to it; and that he may make a warrant to others to do it. 5 *Rep.* 115. 2 *Inst.* 329.

The writ of *estrepement* lies properly where the plaintiff in a real action shall not recover damages by his action; and as it were supplies damages; for damages and costs may be recovered for waste after the writ of *estrepement* is brought. See *Moor*, 100. 2 *Inst.* 328. If tenants commit waste in houses assigned a feme for dower, on her bringing action of dower, writ of *estrepement* lies. 5 *Rep.* 115. See *Cro. Eliz.* 114. *Moor*, 622. But pending a *writ of partition between coparceners*, if the tenant commit waste, this writ will *not* be granted; because there is *equal interest between the parties*, and the writ will not lie, but where the interest of the tenant is to be disproved. *Goldsh.* 50. 2 *Nels. Abr.* 754.

In the Chancery, on filing of a bill, and before answer, the court will grant an injunction to stay waste, &c. 1 *Lil.* 547. See titles *Chancery*, *Waste.*

ETATE PROBANDA. See *Ætate.*

ETHELING or ÆTHELING, *Sax.*] Signifies noble; and among the English Saxons, it was the title of the prince, or the king's eldest son. *Camden.* See *Adeling.*

EVASION, *Evasio.*] A subtle endeavouring to set aside truth, or to escape the punishment of the law; which will not be endured. If a person says to another that he will not strike him but will give him a pot of ale to strike first, and accordingly he strikes, the returning of it is punishable; and if the person first striking be killed, it is murder; *for no man shall evade the justice of the law by such a pretence to cover his malice.* 1 *H. P. C.* 81. No one may plead ignorance of the law to *evade* it, &c.

EVENINGS. The delivery at *even* or night of a certain portion of grass or corn, &c. to a customary tenant, who performs the service of cutting, mowing, or reaping for his lord, given him as a gratuity or encouragement. *Kennet's Gloss.*

EVESDROPPERS. See *Eaves-droppers.*

EVICTION, from *evinco*, to overcome.] A recovery of land, &c. by form of law. If land is evicted, before the time of payment of rent, on a lease, no rent shall be paid by the lessee. 10 *Rep.* 128. Where lands taken on extent are evicted or recovered by better title, the plaintiff shall have a new execution. 4 *Rep.* 66. If a widow is evicted of her dower or thirds, she shall be endowed in the other lands of the heir. 2 *Danv. Abr.* 670. And if on an exchange of lands, either party is evicted of the lands given in exchange, he may enter on his own lands. 4 *Rep.* 121.

## EVIDENCE.

EVIDENTIA.] Proof by testimony of witnesses, on oath; or by writings or records.

It is called *Evidence*, because thereby the point in issue in a cause to be tried, is to be made *evident* to the jury; for *probationes debent esse* evidentes & *perspicuæ. Co. Lit.* 283.

# EVIDENCE.

The *evidence* to a jury ought to be upon the oath of witnesses; or upon matters of record, or by deeds proved, or other like authenticated matter. 1 *Lil. Abr.* 547. And *evidence* containeth testimony of witnesses, and all other proofs to be given and produced to a jury for the finding of any issue joined between parties. *Co. Lit.* 283.

The system of evidence, as now established in our courts of Common Law, is very full, comprehensive, and refined: a summary of the law on the subject is here presented.

The nature of the present work will not allow room for the numberless niceties and distinctions of what is, or is not, legal *evidence* to a jury. A few of the general heads and leading maxims relative to this point, as well in civil as criminal cases, together with some observations on the manner of giving Evidence, are first selected.

Evidence, as has been already remarked, signifies that which demonstrates, makes *evident* or clear, or ascertains the truth of the very fact or point in issue, either on the one side or on the other; and no evidence ought to be admitted to any other point. Therefore upon an action of debt, when the defendant denies his bond by the plea of *non est factum*, and the issue is, whether it be the defendant's deed or no, he cannot give a release of this bond in Evidence, for that does not destroy the bond, and therefore does not prove the issue which he has chosen to rely upon, *viz.* that the bond has no existence.

Again; Evidence in the trial by jury is of two kinds, either that which is given in proof, or that which the jury may receive by their own private knowledge.—As to the latter, see title *Jury*.—The former, or *Proofs*, (to which in common speech the name of Evidence is usually confined,) are either written, or *parol*, that is by word of mouth. Written proofs, or Evidence, are, 1. Records; and, 2. Ancient deeds of 30 years standing, which prove themselves; but 3. Modern deeds; and, 4. Other writings must be attested and verified by parol evidence of witnesses. And the one general rule that runs through all the doctrine of trials is this, that the best evidence the nature of the case will admit of shall always be required, if possible to be had; but if not possible, then the best evidence that can be had shall be allowed. For if it be found there is any better evidence existing than is produced, the very not producing it is a presumption, that it would have detected some falsehood that at present is concealed. Thus, in order to prove a lease for years, nothing else shall be admitted, but the very deed of lease itself, if in being; but if that positively be proved to be burnt or destroyed, (not relying on any loose negative, as that it cannot be found, or the like,) then an attested copy may be produced; or *parol* evidence given of its contents. So, no evidence of a discourse with another will be admitted, but the man himself must be produced; yet in some cases, (as in proof of any general customs, or matters of common tradition or repute,) the courts admit of *hearsay* evidence, or an account of what persons deceased have declared in their lifetime; but such evidence will not be received of any particular facts. So too, books of accounts, or shop-books, are not allowed of themselves to be given in evidence for the owner, but a servant who made the entry may have recourse to them to refresh his memory: and, if such servant (who was accustomed to make those entries) be dead, and his hand be proved, the book may be read in evidence. *Bull. N. P.* 282, 283. *Salk.* 285. But as this kind of evidence, even thus regulated, would be much too hard upon the buyer at any long distance of time, the *stat.* 7 *Jac.* 1. *c.* 12. (the penners of which seem to have imagined that the books of themselves were evidence at Common Law,) confines this species of proof to such transactions as have happened within one year before the action brought; unless between merchant and merchant in the usual intercourse of trade. For accounts of so recent a date, if erroneous, may more easily be unravelled and adjusted.

With regard to *parol* Evidence, or *Witnesses*; there is a process to bring them in by writ of *subpœna ad testificandum*; which commands them, laying aside all pretences and excuses, to appear at the trial, on pain of one hundred pounds to be forfeited to the king; to which the *stat.* 5 *Eliz. c.* 9. has added a penalty of 10*l.* to the party aggrieved, and damages equivalent to the loss sustained by want of his evidence. But no witness, unless his reasonable expences be tendered him, is bound to appear at all; nor if he appears, is he bound to give evidence till such charges are actually paid him: except he resides within the bills of mortality, and is summoned to give evidence within the same. This compulsory process, to bring in unwilling witnesses, and the additional terrors of an attachment in case of disobedience, are of excellent use in the thorough investigation of truth.

All witnesses, of whatever religion or country, that have the use of their reason, are to be received and examined, except such as are *infamous*, or such as are *interested* in the event of the cause. All others are *competent* witnesses; though the jury, from other circumstances, will judge of their *credibility*. Infamous persons are such as may be challenged as jurors, *propter delictum*: and therefore shall never be admitted to give evidence to inform that jury, with whom they were too scandalous to associate. Interested witnesses may be examined upon a *voir dire*, if suspected to be secretly concerned in the event; or their interest may be proved in court. Which last is the only method of supporting an objection to the former class; for no man is to be examined to prove his own infamy. And no counsel, attorney, or other person, intrusted with the secrets of the cause by the party himself, shall be compelled, or perhaps allowed, to give evidence of such conversation or matters of privacy, as came to his knowledge by virtue of such trust and confidence: but he may be examined as to mere matters of fact,—as the execution of a deed or the like, which might have come to his knowledge without being intrusted in the cause. *Bull. N. P.* 284. 1 *Vent.* 97.

One witness (if credible) is *sufficient* evidence to a jury of any single fact; though, undoubtedly, the concurrence of two or more corroborates the proof. Yet our law considers that there are many transactions to which only one person is privy; and therefore does not *always* demand the testimony of two, as the civil law requires.

Positive proof is always required, where from the nature of the case it appears it might possibly have been had. But, next to *positive* proof, *circumstantial* evidence, or the doctrine of *presumptions*, must take place: for when the fact itself cannot be demonstratively evinced, that which comes nearest to the proof of the fact is the proof of such circumstances which either *necessarily* or *usually* attend such facts; and these are called presumptions, which are only to be relied upon till the contrary be actually proved. *Stabitur præsumptione donec probetur in contrarium. Co. Lit.* 373. Violent presumption is many times equal to full proof; for there those circumstances appear, which *necessarily* attend the fact. *Ibid.* 6. As if a landlord sues for rent due at *Michaelmas* 1754, and the tenant cannot prove the payment, but produces an acquittance for rent due at a subsequent time, in full of all demands, this is a violent presumption of his having paid the former rent, and is equivalent to full proof; for though the actual payment is not proved, yet the acquittance in full of all demands is proved, which could not be without such payment; and it therefore induces so forcible a presumption, that no proof shall be admitted to the contrary. *Gilb. Evid.* 161. *Probable* presumption arising from such circumstances as *usually* attend the fact, hath also its due weight; as if, in a suit for rent due in 1754, the tenant

proves the payment of the rent due in 1755, this will prevail to exonerate the tenant; (*Co. Lit.* 373.) unless it be clearly shewn that the rent of 1754, was retained for some special reason, or that there was some fraud or mistake: for otherwise it will be presumed to have been paid before that in 1755, as it is most usualy to receive first the rents of longest standing. *Light*, or rash presumptions, have no weight or validity at all.

The oath administered to the witness, is not only that what he deposes shall be true, but that he shall also depose the *whole* truth: so that he is not to conceal any part of what he knows, whether interrogated particularly to that point or not. And all this evidence is to be given in open court, in the presence of the parties, their attorney, the counsel, and all by-standers; and before the judge and jury: each party having liberty to except to its competency, which exceptions are publicly stated, and by the judge are openly and publicly allowed or disallowed, in the face of the country. And if either in his directions or decisions he mis-states the law by ignorance, inadvertence, or design, the counsel on either side may require him publicly to seal a *bill of Exceptions*; stating the point wherein he is supposed to err: See title *Bill of Exceptions*.—Or if the legal effect of a record or other evidence is doubted, this may be tried on a *Demurrer to Evidence*: see that title.—3 *Comm.* 367—372.

The true theory of Evidence is admirably explained in *Bull. Ni. Pri.* part VI. from *Gilbert's Law of Evidence*; and it concludes with taking a view of all the general Rules of Evidence together, from whence the following abstract is given.

1. The first general rule is that the best evidence must be given that the nature of the thing is capable of. The true meaning of this rule is that no such evidence shall be brought as *ex naturâ rei* supposes still a greater evidence behind, in the party's possession or power; for such evidence is altogether insufficient and proves nothing. But if it is proved that an original deed, will, &c. is in the hands, of the adverse party, or is destroyed without default of the party who ought to produce it, a copy will be admitted; because then such copy is the best evidence.

2. No person interested in the *question* can be a witness. There is no rule in more general use, and none that is so little understood. See 1 *Term Rep.* 302. And there are some exceptions to it, *e. g.* 1. A party interested will be admitted in a criminal prosecution in most instances; 2. he may be admitted for the sake of trade and the common usage of business; as porters, apprentices, &c. to prove delivery of goods, &c. though it tend to clear themselves of neglect. See 3 *Term Rep.* 29. *Str.* 647. 1083. 3. Where no other evidence is reasonably to be expected. 4. Where he acquires the interest by his own act, after the party who calls him as a witness has a right to his evidence. 5. Where the possibility of interest is very remote. See 1 *Term Rep.* 163, 164. and more at length, this title, Div. II. 1.

By *stat.* 46 *Geo.* 3. *c.* 37. it is expressly declared, that a witness cannot by law refuse to answer a question relevant to the matter in issue, (the answering of which has no tendency to accuse himself, or to expose him to penalty or forfeiture of any nature whatsoever,) by reason only, or on the sole ground that the answering of such question may establish or tend to establish that he owes a debt, or is otherwise subject to a civil suit, either at the instance of his Majesty, or of any other person or persons.

3. The third general rule is, that hearsay is no evidence. —For no evidence is to be admitted but what is upon oath, and if the first speech were without oath, another oath that there was such a speech makes it no more. Besides, if the speaker be living, it is not the best evidence. But hearsay has been admitted in corroboration of a witness's testimony.

4. In all cases where a general character or behaviour is put in issue, evidence of particular facts may be admitted; but not where it comes in collaterally.

5. *Ambiguitas verborum latens verificatione suppletur, nam quod ex facto oritur ambiguum, verificatione facti tollitur.*

6. In every issue the affirmative is to be proved. A negative cannot regularly be proved, and therefore it is sufficient to deny what is affirmed until it be proved: but when the affirmative is proved, the other party may contest it with opposite proofs, of some matter or propesition totally inconsistent with what is affirmed.

In general, where the issue is on the life or death of a person once existing, the proof lies on the party asserting the death. 2 *East's Rep.* 312.—But see *stat.* 19 *Car.* 2. *c.* 6. *post*, II. 3.

Where the law presumes the affirmative of any fact, the negative of such fact must be proved by the party averring it in pleading. 3 *East's Rep.* 192.

7. No evidence need be given of what is agreed by the pleadings. For the jury are only sworn to try the matter in issue between the parties, so that nothing else is properly before them.

8. Whensoever a man cannot have the advantage of the special matter by pleading, he may give it in evidence on the general issue. See title *Pleading*.

9. If the substance of the issue be proved, it is sufficient. As to this, see also titles *Pleading*; *Modo et Forma*.

The doctrine of Evidence IN CRIMINAL CASES is, in most respects, the same as that upon civil actions. There are however a few leading points, wherein by several statutes and resolutions a difference is made between civil and criminal evidence.

1. In all cases of *High Treason*, Petit Treason, and Misprision of Treason, by *stats.* 1 *Ed.* 6. *c.* 12. and 5 & 6 *Ed.* 6. *c.* 11. *two* lawful witnesses are required to convict a prisoner; unless he shall willingly and without violence *confess* the same. By *stat.* 1 & 2 *P. & M. c.* 10. a further exception is made as to treasons in counterfeiting the King's seals or signatures, and treasons concerning coin current within this realm; and more particularly by *c.* 11. the offences of importing counterfeit foreign money current in this kingdom, and impairing, counterfeiting, or forging any current coin. The *stats.* 8 & 9 *W.* 3. *c.* 25. 15 & 16 *Geo.* 2. *c.* 28. in their subsequent extensions of this species of treason do also provide, that the offenders may be indicted, arraigned, tried, convicted, and attainted, by the like evidence, and in such manner and form, as may be had and used against offenders for counterfeiting the King's money. But by *stat.* 7 *W.* 3. *c.* 3. in prosecutions for these treasons to which that act extends, the same rule (of requiring *two* witnesses) is again enforced; with this addition, that the *confession* of the prisoner, which shall countervail the necessity of such proof, must be in *open court*. In the construction of which act it hath been holden, that a confession of the prisoner, taken out of court, before a magistrate or person having competent authority to take it, and proved by two witnesses, is sufficient to convict him of treason. *Foster*, 240. 244. But hasty unguarded confessions, made to persons having no such authority, ought not to be admitted as evidence under this statute. And indeed, even in cases of felony at the Common Law, they are the weakest and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promises of favour, or menaces; seldom remembered accurately, or reported with due precision; and incapable in their nature of being disproved by other negative evidence. By the same *stat.* 7 *W.* 3. *c.* 3. it is declared that both witnesses must be to the same overt act of treason; or one to one overt act, and the other to another overt act of the same species of treason, and not

of distinct heads or kinds: and no evidence shall be admitted to prove any overt act not expressly laid in the indictment. See 2 *State Trials*, 144. *Foster*, 235. And therefore in Sir John Fenwick's case, in King William's time, where there was but one witness, an act of parliament, (*stat.* 8 *W.* 3. *c.* 4.) was made on purpose to attaint him of treason, and he was executed. 5 *State Trials*, 40. But, in almost every other accusation, one positive witness is sufficient; except in cases of indictments for perjury, where one witness is not sufficient, because then there is only one oath against another. 10 *Mod.* 194.

2. From the reversal of colonel Sydney's attainder by act of parliament in 1689, (8 *State Trials*, 472.) it may be collected that the *mere similitude* of hand-writing in two papers shewn to a jury, without other concurrent testimony, is no evidence that both were written by the same person; (2 *Hawk. P. C.* 431.) yet undoubtedly the testimony of witnesses, well acquainted with the party's hand, that they believe the paper in question to have been written by him, is evidence to be left to a jury. *Lord Preston's case*, *A. D.* 1690. 1694. 4 *State Trials*, 463. *Francia's case*, *A. D.* 1716. 6 *State Trials*, 69. *Layer's case*, *A. D.* 1722. *Ibid.* 279. *Henzey's case*, *A. D.* 1758. 4 *Burr.* 644.—See *post*, II. 3.

All presumptive evidence of felony should be admitted cautiously: for the law holds that it is better that ten guilty persons escape, than that one innocent suffer. And Sir Matthew Hale, in particular, lays down two rules most prudent and necessary to be observed. 1. Never to convict a man for stealing the goods of a person unknown, merely because he will give no account how he came by them, unless an actual felony be proved of such goods: and, 2. Never to convict any person of murder or manslaughter, till at least the body be found dead: on account of two instances he mentions, where persons were executed for the murder of others, who were then alive, but missing. 2 *Hal. P. C.* 200.

Lastly, it was an ancient and commonly received practice, (1 *State Trials*, *passim*) that as counsel was not allowed to any prisoner accused of a capital crime, so neither should he be suffered to exculpate himself by the testimony of any witnesses. And therefore it deserves to be remembered to the honour of Mary I. that she first desired such evidence to be received in a court of justice. Afterwards in one particular instance (when embezzling the queen's military stores was made felony by *stat.* 31 *Eliz. c.* 4.) it was provided that any person, impeached for such felony, "should be received and admitted to make any lawful proof that he could, by lawful witness or otherwise, for his discharge and defence;" and in general the courts grew so heartily ashamed of a doctrine so unreasonable and oppressive, that a practice was gradually introduced of examining witnesses for the prisoner, but not upon oath. 2 *Bulst.* 147. *Cro. Car.* 292. The consequence of this still was, that the jury gave less credit to the prisoner's evidence, than to that produced by the Crown. *Sir Edward Coke* protests very strongly against this tyrannical practice: declaring that he never read in any act of parliament, book, case, or record, that in criminal cases the party accused shall not have witnesses sworn for him; and therefore there is not so much as *scintilla juris* against it. 3 *Inst.* 79. See also 2 *Hal. P. C.* 283. and his Summary, 264. And the House of Commons were so sensible of this absurdity, that in the bill for abolishing hostilities between England and Scotland, (*Stat.* 4 *Jac.* 1. *c.* 1.) when felonies committed by Englishmen in Scotland were ordered to be tried in one of the three Northern counties, they insisted on a clause, and carried it against the efforts of both the Crown and the House of Lords, against the practice in the courts of England, and the express law of Scotland, "that in all such trials for the better discovery of the truth, and the better information of the consciences of the jury and justices, there shall be allowed to the party arraigned the benefit of such credible witnesses to be examined upon oath, as can be produced for his clearing and justification. At length, by *stat.* 7 *W.* 3. *c.* 3. the same measure of justice was established throughout all the realm, in cases of treason within the act: and it was afterwards declared by *stat.* 1 *Ann. st.* 2. *c.* 9. that in *all cases* of treason and felony, all witnesses *for* the prisoner should be examined upon oath, in like manner as the witnesses *against him*. 4 *Comm.* 356—360.

Having given the foregoing general view, more minute information on this subject may be thus classed;

I. Of written *Evidence: Wherein of matters of Record, as also of Writings under Seal, and other Writings and Depositions in Chancery or other Courts.*

II. Unwritten Evidence: *Wherein*—
1. *Who may be Witnesses.*
2. *Of the Number of Witnesses, and of compelling them to appear; as also of the Manner of their giving Evidence.*
3. *Of parol, presumptive, and hear-say Evidence.*

I. *Evidence by records and writings*, is where acts of parliaments, statutes, judgments, fines and recoveries, proceedings of courts, and deeds, &c. are admitted as *evidence*. A general act of parliament may be given in *evidence*, and need not be pleaded; and of these the printed statute-book is good *evidence:* but in the case of a private act, a copy of it is to be examined by the records of parliament, and is to be pleaded. *Trials per pais*, 177. 232.

Local or personal acts of parliament printed by the King's printer may be produced in evidence, if they have a clause inserted in them for that purpose. See title *Statutes*.

The Gazette has been held evidence of all acts of state. 5 *Term Rep.* 436.—So the articles of war, printed by the King's printer have been held evidence of such articles. 5 *T. R.* 442. 446.

Journals and other proceedings in the House of Commons have been held to be no *evidence*. *State Trials*, *vol.* 3. 470. but see page 800 of the same volume.—Journals of the House of Lords have been held evidence to prove an address of the Lords to the King, and the King's answer. 5 *Term. Rep. K. B.* 455.—A history of England, or printed trial, may not be read as *evidence*. 1 *Lill.* 557. *Camden's Britannia* was not allowed as *evidence:* but it has been held that an history may be *evidence* of the general history of the realm, though not of a particular custom, &c. *Skinner's Rep.* 623.

An exemplification of the inrolment of letters patent under the great seal, may be pleaded in *evidence*. 3 *Inst.* 173. This exemplification is a copy or transcript of *letters patent* made from the inrolment thereof, and sealed with the great seal. But neither an exemplification nor *constat* was pleadable at Common Law, because there was only the tenor of an inrolment; and the tenor of a record is not pleadable, but they are now pleadable by *stats.* 3 & 4 *E.* 6. *c.* 4. 13 *Eliz. c.* 6.

A patent may be exemplified under the great seal in Chancery; and also any record or judgment in any of the courts at Westminster, under the proper seal of each court: all which exemplifications may be given in evidence to a jury. 1 *Lill.* 583. *Shep.* 134. A rule made, or writ filed, in any court at Westminster, may be exemplified in the court where made or filed. But nothing but matter of record ought to be exemplified. 3 *Inst.* 173.

Records and inrolments prove themselves; and a copy of a record or inrolments sworn to, may be given in *evidence*. *Co. Lit.* 117. 262. A transcript of a record in another court

may be given in *evidence* to a jury. 1 *Lil. Abr.* 551. There is a difference between pleading a record, and giving the record in *evidence;* if it be pleaded, it must be *sub pede sigilli*, or the judges cannot judge thereof: though where it is given in *evidence*, if it be not under the seal, the jury may find the same, if they have other good matter of inducement to prove it. *Style's Rep.* 22.

To prove a copy of a record it is sufficient to prove that the paper agrees with what the officer of the court read as the contents of the record: it is not necessary for the persons examining to exchange papers, and read them alternately. 2 *W. P. Taunton*, 52. *but query?*

A Fine or Recovery may be given in *evidence*, without vouching the roll of the recovery; for the part indented is the usual *evidence* that there is such a fine; but it is said *the fine ought to be shewn with the proclamations under seal.* 10 *Rep.* 92. 2 *Rol. Abr.* 574.

By *stat.* 14 *Geo.* 2. *c.* 20. where any person has purchased or shall purchase for a valuable consideration, any estate, whereof a recovery was necessary to complete the title, such person, and all claiming under him, having been in possession from the time of such purchase, shall and may after the end of 20 years from the time of such purchase, produce in *evidence* the deed, making a tenant to the *præcipe*, and declaring the uses; and the deed so produced (the execution thereof being duly proved) shall be deemed sufficient evidence that such recovery was duly suffered, in case no record can be found of such recovery, or the same should appear not regularly entered. Provided the person making such deed had a sufficient estate, and power to make a tenant to the *præcipe*, and to suffer such common recovery.

A record of an inferior court hath been rejected in *evidence*, and the party put to prove what was done: And proceedings of county courts, courts baron, &c. may be tried by a jury; for it hath been adjudged that they cannot be proved by the rolls, but by witnesses. *Lit.* 75. But court rolls of a court baron, when shewn, are good *evidence;* and in many cases, *copies* of the court rolls are allowed as *evidence*. *Trials per pais*, 178. 228.

An ancient Customary of a Manor, delivered down with the court rolls from steward to steward, although not signed by any person, is good evidence to prove the course of descent within the manor. 1 *Term Rep. K. B.* 466.

An entry in the court-rolls of a manor, stating the mode of descent of lands in the manor, is admissible evidence of the mode of descent, although no instances of any person's having taken according to it be proved. 5 *T. R. K. B.* 26.

Parchment writings preserved among the muniments of a manor, purporting to be signed by several copyholders of the manor, stating that an unlimited right of common had been found inconvenient, and they had agreed to stock the common in a restricted manner, were admitted as evidence of reputation as to the general right of common. 13 *East's Rep.* 10.

A surrender of and admittance to a copyhold may be proved by the original entries on the court rolls without shewing a copy stamped as required by law. 16 *East's Rep.* 208.

Inrolment of a deed is proved on certifying it by an examined attested copy; though inrolment of a deed which needs no inrolment, or by which the estate does not pass, is only evidence to some purposes. 3 *Lev.* 387.

By *stat.* 10 *An. c.* 18. where any bargain and sale inrolled is pleaded with a *profert*, the party to answer such profert may produce a copy of the inrolment.

With respect to the production of *Deeds* in evidence, the general rule is, that the deed itself must be given in evidence, and must be proved by one witness at the least. But if the opposite party produce the deed on notice, it shall be read without any proof of the execution. *Bull N. P.* 254. 2 *Term Rep.* 41, 3 *W. P. Taunton*, 60.

But where an instrument was produced at the trial by one of the parties, in consequence of a notice from the other, which appeared to have been executed by the party producing it and others, and to be attested by a witness, the court held that the production of it in that manner did not dispense with the necessity of proving the instrument by the subscribing witness, though unknown before to the party calling for it. 8 *East's Rep.* 548.

An ancient deed proves itself, where possession has gone accordingly: but later deeds must be proved by witnesses. *Co. Lit.* 6.

An old deed proved to have been found among deeds and *evidences* of lands, may be given in *evidence* to a jury; though the executing of it cannot be proved and made out. 3 *Salk.* 153. A deed may be good *evidence*, though the seal is broken off; and where a deed is burnt, &c. the judges may allow it to be proved by witnesses, that there was such a deed, and this be given in *evidence*. 1 *Lev.* 25.

Every instrument, to the signing of which there is a witness, must be proved by that witness, if living and to be found: or by proving the hand-writing of the witness, in case he is dead, or domiciled in a foreign country, or cannot be found, so that there may be a presumption of his death. See 7 *T. Rep. K. B.* 266. 1 *Bos. & Pul.* 360. 2 *East's Rep.* 183. 250.

A deed, though sealed and delivered, if not stamped according to act of parliament, cannot be pleaded or given in *evidence* in any court. See *stat.* 5 & 6 *W. & M. cap.* 21. and several subsequent statutes; the latter of which extend to bills, notes, receipts, agreements, &c. And these stamps have been frequently the means of detecting forgeries; for the Stamp-Office put secret marks on the stamps, which from time to time are varied: so that where a deed is forged of a date antecedent, it may easily be discovered by stamps being upon it not in use at the time it bears date. A deed cannot be proved by a counterpart of it or copy, if the original is in being, and may be had; though it may be when the original cannot be procured. *Co. Lit.* 225. 10 *Rep.* 92. The counterpart of an ancient deed hath been allowed to be given in *evidence*. *Mod. Cas.* 225. But it hath been held that the counterpart of a deed, without other circumstances, is not sufficient *evidence;* unless in case of a fine, when a counterpart is good *evidence* of itself. 1 *Salk.* 287.

Where a deed was *cancelled* by fraud, that being proved, it was allowed to be *evidence* in an action under the deed. *Hetl.* 138. The recital of a deed is no *evidence* without shewing the deed, or proving that there was such a deed, and it is lost. *Co. Lit.* 352. *Vaugh.* 74. Recital of a lease, in a deed of release, is good *evidence* that there was such a lease against the releasor, and those claiming under him, but not against others, except there be proof that there was such a lease. 1 *Salk.* 286. A settlement set forth in a bill in Chancery, and admitted in the answer; and where it was proved that the deed was in the possession of such a one, &c. hath been adjudged a good *evidence* of the deed of settlement where not to be found. 5 *Mod.* 384.

The probate of a will, when it concerns personal estate only, may be given in *evidence:* but where title of lands is claimed under a will, the original will must be shewn, not the probate: though if the will be proved in the Chancery, copies of the proceedings there will be *evidence*. 2 *Rol. Abr.* 687. *Trials per pais*, 234. 1 *Salk.* 286. and *Raym.* 335. In certain cases the Ledger-book of the Ecclesiastical Court in which the will is entered, is sufficient evidence, being a roll or record of the court. *Bull. N. P.* 245, 6.

The original book of acts directing letters of administration to be granted, with the surrogate's fiat for the same, is evidence of the title of the party to whom the administration is directed to be granted of the intestate's effects, without producing the letters of administration themselves, notwithstand-

ing subsequent letters of administration granted to another, the first not being recalled. 8 *East's Rep.* 187.

A bill in Chancery has been admitted as slight *evidence* against the complainant: but see 7 *Term Rep. K. B.* 2. that it is no evidence of the matters stated in it, not even of those on which the prayer for relief is founded; except perhaps in the instance of a family pedigree set forth in the bill. 7 *T. R.* 2. *n. a.* An answer in Chancery is *evidence* against the defendant himself, though not against others. 1 *Vent.* 66. *Trials per pais*, 167. But see 4 *East's Rep.* 53. and 2 *Bos. & Pull.* 548. When a party gives an answer in Chancery in *evidence* at a trial, though he insist to read only such a part of it, yet the other side may require to have the whole read. 5 *Mod.* 10. As in case of a writing permitted to be read to prove one part of an *evidence*, which may be read to prove any other part of the *evidence* given to the jury.

Depositions of witnesses in Chancery between the same parties may be given in *evidence* at law, if the witnesses are dead, and the bill and answer proved. *Trials per pais*, 167. 207. 234. Regularly depositions in Chancery, of a witness, may not be given in *evidence* if he be alive; unless he be in another kingdom, not subject to the dominion of our King. *Ibid.* 359. But depositions in Chancery, after answer between the same parties, may be read as *evidence*, though the witnesses are not dead, if they cannot be found on search. *Shower*, 3. 1 *Salk.* 278. Depositions in Chancery *in perpetuam rei memoriam*, are not to be given in *evidence*, so long as the parties are living. 1 *Salk.* 286. And it hath been adjudged that these depositions to perpetuate testimony, on a bill exhibited, shall not be admitted as *evidence* at a trial at law, except an answer be put in. *Raym.* 335. If depositions are taken out of the realm, he who makes them is supposed there still, and they shall be read as *evidence;* but if it appears he is in England, they cannot be read, but he must come in person. 1 *Lill.* 555. Things done beyond sea may be given in *evidence* to a jury; and the testimony of a public notary, of things done in a foreign country, will be good *evidence.* 6 *Rep.* 47.

Depositions cannot be given in evidence against any person who was not party to the suit; and the reason is, because he had not liberty to cross-examine the witnesses; and it is against natural justice that a man should be concluded in a cause to which he never was a party. *Hardr.* 22. 472. *Bunb.* 50. *pl.* 84.—91. *pl.* 148.—321. *pl.* 403. 9 *Mod.* 229. *Carth.* 181. *Vern.* 113. *Gilb. Evid.* 62. *Ch. Prec.* 212. See this Dict. title *Depositions.*

The answer of the obligor of a bond to a bill filed for a discovery, in which he admitted the bond to have been executed by him, is only secondary evidence, and cannot be received as evidence *per se* of the execution, without proving that due diligence had been used to discover who the subscribing witness was, who was alleged to be unknown. *Call* v. *Dunning*, 4 *East's Rep.* 53.

Depositions made in an ancient suit instituted against a former lord of a manor by a copyholder, were held to be admissible evidence for the lord of the manor in a subsequent suit. *Freeman* v. *Phillips*, *Term Rep. K. B. Hil.* 56 *G.* 3. 486.

Depositions were admitted in evidence, though framed on leading interrogatories of a nature not admissible in a trial. *Williams* v. *Williams*, *Term Rep. K. B. Hil.* 56 *Geo.* 3. 497.

Upon a plea of *plene administravit*, plaintiff in order to shew assets, gave in evidence a copy of an answer in Chancery by a person of the same name as defendant, and sustaining the character of executor to a person of the same name as his testator; held that on the face of such copy there was *prima facie* presumptive evidence of identity. *Henwell* v. *Lyon*, *Term Rep. K. B. Mic.* 59 *G.* 3. 182.

Depositions in the Ecclesiastical courts may not be given in *evidence* to a jury at a trial; but a sentence may in a cause of tithes, &c. And the sentence of the Spiritual court is conclusive *evidence* in causes *within their jurisdiction.* 1 *Salk.* 290. 2 *Nels. Abr.* 761.

Depositions before a coroner are admitted as *evidence*, the witnesses being dead. 1 *Lev.* 180. Likewise they have been admitted where a witness hath gone beyond sea. 2 *Nels. Abr.* 760. The confession of a prisoner before a magistrate, &c. may be given in *evidence* against him. See 2 *Hawk. P. C.* 46. and the notes there. The examination of an offender need not to be on oath, but must be subscribed by him, if he confesses the fact; and then be given in *evidence* upon oath by the justice of the peace who took the same. The examination of others must be on oath, and proved by the justice or his clerk, &c. as to their *evidence*, if they are dead, unable to travel, or kept away by the prisoner. *H. P. C.* 19. 162. *Kel.* 18. 55. *Wood's Inst.* 647.

The examination of an informer before a justice, taken on oath, and subscribed, may be given in *evidence* on a trial if he be dead, or not able to travel, &c. which is to be made out on oath. 2 *Hawk. P. C. c.* 46.

A parish certificate of more than thirty years date, acknowledging the pauper's grandfather and father to belong to the appellant parish, produced by a rated inhabitant of the appellant parish, is evidence. 2 *Maul. & Selw. Rep.* 337.

By *stats.* 1 & 2 *P. & M. c.* 13. 2 & 3 *P. & M. c.* 10. Justices of peace shall examine persons brought before them for felony and those who brought them, and certify such examination to the next gaol-delivery: but the examination of the prisoner shall be without oath, and the others upon oath; and these examinations shall be read against an offender upon an indictment, if the witnesses be dead. *Bull. N. P.* 242.

The examination of a pregnant woman taken before a justice of peace under *stat.* 6 *Geo.* 2. *c.* 31. is admissible evidence on application to the quarter sessions to make an order of filiation on the putative father, if the woman die before such application is made; and if not contradicted, ought to be conclusive. 5 *Term Rep. K. B.* 373.

A verdict against one, under whom either the plaintiff or defendant claims, may be given in *evidence* against the party so claiming; but not if neither claim under it. *Mich.* 1656, *B. R.* In ejectment where the plaintiff hath title to several lands, and brings action of ejectment against several defendants, if he recovers against one, he shall not give that verdict in *evidence* against the rest. 3 *Mod.* 141.

In an action on a foreign judgment, it is not sufficient to prove the judge's hand-writing subscribed to it, without proving that the seal affixed thereto is the seal of the court. *Henry* v. *Adey*, 3 *East's Rep.* 221.

The judgment book is no evidence of the judgment entered therein, though the record has not been made up, and though the party interested in proving the judgment be no party to the action. 2 *New Rep.* 474.

In a court of Common Law, a decree in Chancery is no *evidence.* Letters may be produced as *evidence* against a man, in treason, &c. Although a witness swear to the hand and contents of a letter, if he never saw the party write, he shall not be allowed as *evidence. Skin.* 673. In general cases the witness should have gained his knowledge from seeing the party write; but under some circumstances, that is not necessary; as where the hand-writing to be proved is of a person residing abroad, one who has frequently received letters from him in a course of correspondence would be admitted to prove it, though he had never seen him write. So where the antiquity of the writing makes it impossible for any living witness to swear he ever saw the party write. On an indictment for writing a treasonable libel, proof of the hand-writing is sufficient, without proof of the actual writing. *Bull. N. P.* 236.

There is no difference between civil actions and criminal prosecutions as to the evidence of papers.—In neither case is the party bound to produce evidence against himself: but even in a criminal prosecution notice may be given to him to produce papers in his possession; and in case of his refusal or neglect, other evidence may be given of their contents. 2 *Term Rep. K. B.* 201. *n.*

A copy of an attorney's bill, the original of which has been delivered to the defendant may be admitted in evidence without proof of notice to produce the original. 2 *Bos. & Pull.* 237. And notice to the defendant's attorney or agent in such case is sufficient. *Ibid.*

Where a prisoner got possession of a forged note and swallowed it, parol evidence was permitted to be given of its contents, without any notice being given to produce it. Cited 14 *East's Rep.* 276.

Since no witnesses are present when goldsmiths' notes or promissory notes are given, such notes are allowed as *evidence* of the receipt of money, or other thing. 1 *Salk.* 283.

A receipt is not conclusive evidence against the party signing it, but he may shew that he did not receive the sum or thing in question. 2 *Term Rep. K. B.* 366.

A church-book, some writers say, is not to be admitted as *evidence*, though others say it may. *Cro. Eliz.* 411. It is said copies of public books of corporations, &c. shall be *evidence.* 1 *Lev.* 25. 1 *Lil.* 551. But as to books of corporations, where things are entered not of record, the originals are to be produced as *evidence.*

The mere production in court of a diploma of doctor of physic under the seal of one of the Universities, is not in itself evidence to shew that the party named therein is entitled to that degree. 8 *Term Rep. K. B.* 303.

A pedigree drawn by a herald at arms will not be admitted for *evidence*, without shewing the records or ancient books from whence taken; for the entries in the herald's office are no records, but only circumstantial *evidence.* See title *Court of Chivalry* as to visitation books. But a copy of an inscription on a grave-stone has been given in *evidence* in such a case. 2 *Rol. Abr.* 686, 687. An almanack, wherein the father had writ the day of the nativity of his son, was allowed in *evidence* to prove the non-age of the son. *Raym.* 84.

Every instrument, to the signing of which there is a witness, should be proved by that witness if living; or by proving the hand writing of the witness, in case he is domiciled in a foreign country, or in case he cannot be found, so that there may be a presumption of his death. 7 *Term Rep. K. B.* 266.

If the subscribing witness to a bond be interested therein, as well at the time of the attestation as at the trial, such witness cannot be examined to prove the execution, nor is proof of his hand writing sufficient for that purpose. *Swire* v. *Bell*, 5 *Term Rep.* 371.

The attesting witness to a bond wrote the attestation without seeing the obligor execute; and that person gave evidence that the obligor signed the bond, but did not seal and deliver it: the court of C. P. held, that the signing the bond which purported to be sealed with the obligor's seal, was evidence to be left to a jury of the sealing and delivery. 7 *W. P. Taunton*, 251. And the court held that the attesting witness to the deed denying, having seen the deed executed, other evidence of the execution was admissible. *Ibid.*

In an action on a promisory note, the subscribing witness being dead, proof of his hand-writing and that the defendant was present when the note was prepared, was held sufficient without proving the hand-writing of the defendant. But *query* if proof of the witness's hand-writing would alone have been sufficient? *Nelson v. Whittall, Term Rep. K. B. Mich.* 58 *Geo.* 3. *pa.* 19.

See further titles *Pleading, General Issue, Copy.*

II. 1. The King cannot be a witness under his sign manual, &c. 2 *Rol. Abr.* 686. Though it has been allowed he may, in relation to a promise made in behalf of another. *Hob.* 213. A peer produced as an evidence ought to be sworn. 3 *Keb.* 631. It is no exception to an evidence that he is a judge, or a juror, to try the person; for a judge may give evidence, going off from the Bench. 2 *Hawk. P. C. c.* 46. And a juror may be an evidence as to his particular knowledge; but then it must be on examination in open court, not before his brother jurors. 1 *Lill.* 552. Members of corporations shall be admitted or refused to give evidence in actions brought by corporations, as their interest is small or great; whereby it may be judged whether they will be partial or not. 2 *Lev.* 231. 241. But they will not generally be admitted; though inhabitants not free of the corporation may be good witnesses for the corporation, as their interest is not concerned; and members may be *disfranchised* on these occasions. *Ibid.* 236.

In actions against church-wardens and overseers of the poor for recovery of money mispent on the parish account the evidence of the parishioners not receiving alms shall be allowed. *Stat*, 3 & 4 *W. & M. cap.* 11. In informations or indictments for not repairing highways and bridges, the evidence of the inhabitants of the town, corporation, &c. where such highways lie, shall be admitted. *Stat.* 1 *Ann. cap.* 18.

By *stat.* 27 *Geo.* 3. *c.* 29. In actions on penal statutes, inhabitants of any place are witnesses to prove an offence, though the penalty be given to the poor, or otherwise for the benefit of the said parish or place, provided the penalty does not exceed 20*l.*

Kinsmen though never so near, tenants, servants, masters, attornies for their clients, and all others that are not infamous and which want not understanding, or are not parties in interest, may give *evidence* in a cause, though the credit of servants is left to the jury. 2 *Rol. Abr.* 685. 1 *Vent.* 243. A counsellor, attorney, or solicitor, is not to be examined as an *evidence* against their clients, because they are obliged to keep their secrets; but they may be examined as to any thing of their own knowledge before retained, not as counsel or attorney, &c. 1 *Vent.* 97.

The bail cannot be an *evidence* for his principal. If the plaintiff makes one a defendant in the suit, on purpose to impeach his testimony, under a pretence of his being a party in interest, he may nevertheless be examined *de bene esse;* and if the plaintiff prove no cause of action against him, his *evidence* shall be allowed in the cause. 2 *Lill. Abr.* 701. But in civil suits, and indictments for trespasses, &c. the plaintiff or prosecutor usually goes through his evidence, and those defendants who are not affected, are sometimes, by direction of the judge, acquitted, and then give evidence for the other defendant or defendants, and sometimes they have been examined without the form of an acquittal. If a man makes himself a party in interest, after a plaintiff or defendant has an interest in his *evidence*, he may not by this deprive them of the benefit of his testimony. *Skin. Rep.* 586.

One that hath a legacy given him by will, is not a good witness to prove the will; but if he release his legacy he may be a good *evidence. Skin.* 704. It is the same of a deed; he that claims any benefit by it may not be an *evidence* to prove that deed, in regard of his interest: and a person any ways concerned in the same title of land in question, will not be admitted as *evidence. Ibid.* 705. But it has been held that an heir apparent may be a witness concerning a title of land; and yet a remainder-man, who hath a present interest, cannot. 1 *Salk.* 385. If a legatee is permitted to be sworn and examined, the counsel cannot afterwards except against his *evidence.* 1 *Ld. Raym.* 730.

To obviate all difficulties and inconveniences, it is enacted by *stat.* 25 *Geo.* 2. *c.* 6. that any devise to a person being

witness to any will or codicil, shall be void: and such person shall be admitted as a witness.—And that any creditor attesting a will or codicil, by which his debt is charged upon land, shall be admitted as a witness to the execution, notwithstanding such charge.—The *credit* of every such witness being left to the consideration of the court and jury.

Witnesses competent at law are competent to prove a nuncupative will, by *stat.* 4 *Ann. c.* 16. § 14. The son of a legatee is nowitness to a will in the spiritual court; nevertheless it is held, he may be a good *evidence* to prove a nuncupative will, within the intent of the statute of frauds. 1 *L. Ray.* 85. See title *Will.*

A grantee who is a bare trustee, it is said, is a good witness to prove the execution of the deed made to himself. 1 *P. Wil.* 290. If an action is brought against many persons for taking of goods, one of them concerned may be admitted as an evidence against the rest. *Comberb.* 367. See 1 *Mod.* 282. In criminal cases, as of robbery on the highway, in action against the hundred; in rapes of women, or where a woman is married by force, &c. a man or a woman may be an *evidence* in their own cause. 1 *Vent.* 243. And in private enormous cheats, a person may give *evidence* in his own cause, where nobody else can be a witness of the circumstances of the fact, but he that suffers. 1 *Salk.* 286. Upon an information on the statute against usury, he that borrows the money, after he hath paid it, may be an *evidence*, but not before. *Raym.* 191.

In an action upon a joint contract against two, one who has suffered judgment by default is not an admissible witness against the other to prove that he joined in the contract. 4 *W. P. Taunton*, 752.

An alien infidel may not be an *evidence;* but a Jew may, and be sworn on the *Old Testament.* 1 *Inst.* 6. A quaker shall not be permitted to give *evidence* in any criminal cause (unless he will take an oath:) Though, on other occasions, his solemn affirmation shall be accepted instead of an oath. *Stat.* 7 & 8 *W.* 3. *cap.* 34. See title *Quaker.*—The oath of a *Gentoo*, sworn according to the circumstances of his religion, has been admitted in a civil matter. 1 *Atk.* 21. And by *Willes*, C. J. an infidel in general is an admissible witness for the term does not imply that he is an atheist; but wherever it appears that a witness has no idea of a God or religion, he shall not be permitted to give his testimony. 1 *Atk.* 40. 45.

Persons *non sanæ memoriæ;* those that are attainted of conspiracy, or in a *præmunire* upon the statute 5 *Eliz. c.* 1. *Popish* recusants convict, on the *stat.* 3. *Jac.* 1. *c.* 5. are disabled to give *evidence;* but see contra, 1 *Hawk. P. C. c.* 12. § 6. So persons convicted of felony, perjury, &c. And if one by judgment hath stood in the pillory, or been whipped; for his infamy he shall not be admitted to give *evidence* whilst the judgment is in force: But the record of conviction must be produced on objecting against his testimony; and the witness shall not be asked any question to accuse himself, though his credit may be impeached by other *evidences*, as to his character in general, so as not to make proof of particular crimes whereof he hath not been convicted. 3 *Inst.* 108. 219. 3 *Lev.* 426. If after a man hath stood in the pillory, &c. he be pardoned, he may be an *evidence:* And notwithstanding judgment of the pillory infers infamy at Common Law, by the civil and canon law it imports no infamy, unless the cause for which the person was convicted was infamous; and therefore such may be a good witness to a will, if not convicted of any infamous act. 3 *Lev.* 426, 427. It has been held, that it is not standing in a pillory disables a person to give *evidence, but standing there upon a judgment for an infamous crime, as forgery*, &c. If for a libel, a man may be a witness. 5 *Mod.* 74. 3 *Nels. Abr.* 557.

Persons excommunicated cannot be witnesses, because being excluded out of the church, they are supposed not to be under the influence of any religion. But persons outlawed may be witnesses, because they are punished in their properties, and not in the loss of their reputation: and the outlawry has no manner of influence on their credibility. *Bull. N. P.* 292, 293.

A man is convicted of felony, and afterwards pardoned, he may be a good *evidence. Raym.* 369. So where burnt in the hand, which is *quasi* a statute pardon; and it is said this burning in the hand restores the offender to his credit. *Ibid.* 330. A person who was condemned to be hanged for burglary, but having a pardon for transportation, hath been allowed to be a good *evidence.* 5 *Mod.* 18. One outlawed for treason and pardoned, may be an evidence. *State Trials, vol.* 3. 515. Persons acquitted, or guilty of the same crime, (while they remain unconvicted,) may be *evidence* against their fellows. *Kel.* 17. Though no *evidence* ought to be given of what an accomplice hath said, who is not in the same indictment. *State Trials vol.* 2. 414. An informer may be a witness, though he is to have part of the forfeiture, where no other witnesses can be had. *Wood's Instit.* 598. Members of either House of Parliament may be witnesses on impeachments. *State Trials, vol.* 2. 632.

Ideots, madmen, and children, (see tit. *Infants,*) are excluded from giving evidence for want of skill and discernment.

2. In addition to what has been already said as to the number of witnesses, we may mention that it is required by *stat.* 29 *Car.* 2. *cap.* 3. "That all devises of *lands* shall be attested and subscribed in the presence of the testator, by *three* or four credible witnesses, or else shall be void." See title *Will.*

If a witness, served with a process in a civil cause, refuse to appear, being tendered reasonable charges, and having no lawful excuse, action on the case lies against him, whereon damages shall be recovered: And a feme covert not appearing, action may be brought against the husband and her. *Stat.* 5 *Eliz. cap.* 9. 1 *Leon.* 112.

If there is a doubt that a witness will not attend, the best way is to serve him with the original *subpœna*, keeping a copy: and if he is at any distance from the place of trial, tender reasonable charges: if he does not appear at the trial, call him three times on his *subpœna*, and then, if occasion requires, the party may bring his action, or move for an attachment.

In a criminal cause, if a witness refuse to appear and give *evidence*, being served with process, the court will put off the trial, and grant attachment against him; and, as refusing to give *evidence* is a great contempt, the party may be committed and fined. 1 *Salk.* 278.

Preventing *evidence* to be given against a criminal is punishable by fine and imprisonment; and a person was fined one thousand marks in such a case. *Hill.* 1663. *B. R.* Persons dissuading a witness from giving *evidence*, &c. and jurors or others disclosing *evidence* given, are likewise offences punished by fine and imprisonment. 2 *Hawk. P. C. c.* 22.

By *stat.* 26 *Geo.* 3. *c.* 71. § 16. (made to prevent *horse-stealing*, and which see under that head,) the justice before whom complaint shall be made for any offence against the act, may summon any person, other than the party complained against, to appear before him to give evidence; and in case such person shall wilfully refuse or neglect to attend, or give evidence, he shall forfeit 10*l.* and in default of payment, or in case of inability, shall stand committed to gaol for not more than two months, nor less than one. And similar punishments are inflicted by other statutes.

Where necessity requires, witnesses may be examined apart in court, till they have given all they have to say in evidence; so that what one has deposed, may not induce another to give his evidence to the same effect. *Fortesc.* 54.

A witness shall not be examined where his evidence tends to clear or accuse himself of a crime. *State Trials, vol.* 1. 557. Nor is he bound to give any answer by which he confesses or accuses himself of any crime. And a witness shall not be cross-examined till he hath gone through the evidence on the side whereon produced. *Ibid. vol.* 2. 772. But a witness cannot by law refuse to answer on the ground only that his answer may establish a debt due from him to the King, or any other. *Stat.* 46 *Geo.* 3. *c.* 37. See *ante.*

The court, in criminal cases, is to examine the witnesses, and not the prisoner or prosecutors. *Ibid. vol.* 1. 143. Though, in case of the court, counsel are frequently admitted to examine the evidence. A witness shall not be permitted to read his evidence, but he may look on his notes to refresh his memory. *Ibid. vol.* 4. 45. A witness may not recite his evidence to the jury, after gone from the bar, and he hath given his evidence in court: if he doth, the verdict may be set aside. *Cro. Eliz.* 159. One that is to be a witness at a trial, ought not to be examined before the trial, but by the consent of both parties, *and a rule of court for that purpose;* and sometimes by a judge's order at chambers witnesses are examined on interrogatories, where such witness is about to leave the kingdom.

No evidence ought to be produced against a man in a trial for his life, but what is given in his presence. *State Trials, vol.* 4. 227. And evidence shall not be given against the prisoner for any other crime than that for which prosecuted. *Ibid. vol.* 3. 947. But upon an indictment for disposing of and putting away a forged bank note, knowing it to be forged, the prosecutor may give evidence of other forged notes having been uttered by the prisoner, in order to prove his knowledge of the forgery. *Rex* v. *Wylie, New Rep.* i. 92. A prisoner may bring evidence to prove that the witnesses gave a different testimony before a justice of peace, or at another trial: though he may not call witnesses to disprove what his own witnesses have sworn. *State Trials, vol.* 2. 623. 792. And no objection can be made to the evidence after verdict given. *Ibid. vol.* 4. 35. It is justifiable to maintain or subsist an evidence, but not to give him any reward; for this, if proved, will avoid his testimony. *Ibid. vol.* 2. 470.

A witness shall not be examined to any thing that does not relate to the matter in issue. *Ibid. vol.* 2. 343. And where an issue is not perfect, no evidence can be applied, nor can the justices proceed to trial. *Brownl.* 42. 47. 435. If evidence doth not warrant and maintain the same thing that is in issue, the evidence is defective, *and may be demurred upon;* but proving the substance is sufficient. *Trials per pais,* 425. Evidence may be given of facts before and after the time they are laid in the indictment. And where a place is laid only for a *venue* in an indictment, or an appeal, (and not made part of the description of the fact,) proof of the same crime may be made at any other place in the same county; and after a crime hath been proved in the county where laid, evidence may be given of other instances of the same crime in another county, to satisfy the jury. 2 *Hawk. P. C.* 46.

But *where a certain place is made part of the description of the fact against the defendant,* the least variation as to such place between the evidence and indictment is fatal. 2 *Hawk. P. C. c.* 46. It hath been also adjudged, that where an indictment sets forth all the special matter, in respect whereof the law implies malice, variance between the indictment and evidence as to the *circumstances of the fact,* doth not hurt; so that the *substance of the matter* be found by the evidence. *Ibid.*

3. It seems to have been agreed, as a general rule, (even before the statute of *frauds and perjuries,*) that no parol evidence could be admitted to controul what appeared on the face of a deed or will, not only from the danger of perjury, but *from a presumption, that whatsoever the parties at that time had in contemplation, was reduced into writing.* 5 *Co.* 68. *a. b.* 3 *Co.* 155. *a. Kelw.* 49.

But this rule has received a relaxation, especially in the courts of equity, where a distinction has been taken between evidence that may be *offered to a jury,* and such as may be used only to *inform the conscience of the court; viz.* that in the *first* case no such evidence should be admitted, because the jury might be inveigled thereby; but that in the *second* it could do no hurt, because the court were judges of the whole matter, and could distinguish what weight and stress ought to be laid on such evidence. 2 *Vern.* 98. 337. 625.

Also to ascertain a fact, parol evidence hath been admitted to explain the intent of the testator: as where the testator had two sons both named John, and he devised lands to his son John; here parol evidence was admitted to shew which of his sons he meant; and it being proved that one of his sons of that name had been absent several years beyond sea, and that the testator apprehended that he was dead, the devise was held good, and that the other should take; for without such evidence the will must be void. 2 *Vern.* 98. 337. 625. So parol evidence may be admitted to explain the intent of a testator in cancelling a will. *Cowp.* 53.

*Parol* evidence to prove that a bond was given, in lieu of dower, refused. 1 *Wils.* 34. *Parol* proof admitted that the testator intended his wife *executrix* should have the residue undisposed of. *Id.* 313. Debt upon bond with condition for payment of money to *Lydia Dovey,* who is a third person, she declares the defendant owes her nothing, and upon proof thereof, a verdict was for the defendant; such declaration was properly given in evidence, for *Lydia Dovey* is to be considered as the real plaintiff. *Id.* 257.

In trover for a bond, parol evidence was admitted to support the general description of the instrument in the declaration, without notice having been given to the defendant to produce it. 14 *East's Rep.* 274.

Parol evidence shall not be admitted to annul or substantially vary a written agreement, where there is no latent ambiguity. 3 *Wils.* 275. *Str.* 794. 3 *Term Rep.* 590. 2 *Bos. & Pull.* 565. But parol evidence may be admitted to explain a written instrument or agreement which, on the face of it, appears to be equivocal. 8 *Term Rep.* 379.

Parol evidence shall not be received to prove an additional rent payable by a tenant, beyond that expressed in the written agreement for a lease. 2 *Bl. Rep.* 1249.

Parol evidence may be admitted to prove *other* considerations than those mentioned in a deed; as where the conditions mentioned in the deed were 10,000*l. and* natural love and affection, and the premises were worth 30,000*l.* an issue was directed to try whether natural love and affection made any part of the consideration; and it being found that they did not, the deed was set aside. 7 *Bro. P. C.* 70. cited 3 *Term Rep.* 473.

In an action on a policy, the property of the ship may be proved by parol evidence of the possession of the assured, unless disproved by the production of the written documents of the ship under the register acts. (See title *Navigation Acts.*) And such parol evidence of ownership, arising from possession at a particular period, was not disproved by shewing a prior register in the name of another, and a subsequent register to the same person. 4 *East's Rep.* 130.

Parol evidence of what passed at the time of effecting a policy of insurance is not admissible to restrain the effect of the policy. 1 *W. P. Taunton,* 115.

What a dead witness has sworn on a former trial between the same parties is evidence in the cause, and may either be read from the judge's notes, or proved upon oath by the notes or recollection of any person who heard it. 3 *W. P. Taunton,* 262.

By the statute of frauds, several things must be evidenced by writing, of which, before that statute, parol evidence had been sufficient. See this Dict. title *Fraud*.

Sometimes violent presumption will be admitted for evidence without witnesses; as where a person is run through the body in a house, and one is seen to come out of the house with a bloody sword, &c. But on this the court ought not to judge hastily. 1 *Inst.* 6. 673. And though presumptive and circumstantial evidence may be sufficient in felony, it is not so in treason. *State Trials*, *vol.* 4. *p.* 307.

Persons once in being shall be intended still living, if the contrary is not proved. 2 *Rol. Rep.* 461. But now, by *stat.* 19 *Car.* 2. *c.* 6. it is enacted, "that if any person or persons, for whose life or lives estates have been, or shall be granted, shall remain beyond the seas, or elsewhere absent themselves in this realm, *by the space of seven years together*, and no sufficient and evident proof made of the life or lives of such person or persons respectively, in any action commenced for the recovery of such tenements by the lessors or reversioners, in every such case the person or persons, upon whose life or lives such estate depended, shall be accounted as naturally dead; and in every action brought for the recovery of the said tenements, by the lessors or reversioners, their heirs or assigns, the judges, before whom such action shall be brought, shall direct the jury to give their verdict, as if the person so remaining beyond the seas, or otherwise absenting himself, *were dead*." See titles *Life Estate*; *Presumption*.

A clerk of the post-office, accustomed to inspect franks for the detection of forgeries, has been admitted to prove that the hand-writing of an instrument is an imitated, and not a natural hand, though he never saw the party write: and also to prove that two writings, suspected to be imitated hands, were written by the same person. 4 *Term Rep. K. B.* 497.

An instrument executed abroad, and witnessed by a foreigner residing there, may be proved by evidence of the *hand-writing* of the witness and of the contracting party, but not by the latter alone. 7 *Term Rep. K. B.* 265.

If a subscribing witness to a deed be abroad out of the jurisdiction of the court, and not amenable to its process, evidence of his hand-writing is admissible, though it do not appear whether he is settled abroad. 2 *East's Rep.* 250. & see *Id.* 183.

So if he has set out to leave the kingdom. 1 *W. P. Taunton*, 461. So also if upon diligent enquiry, an attesting witness is not to be found, having absconded from his creditors. *Id.* 364.

As to *Hearsay Evidence*, it seems that the two principal cases, if indeed not the exclusive cases, in which it is admissible, are *pedigrees* and *prescriptions*. See 3 *Term Rep.* 707. Unless we add cases in which no other evidence can be procured, as with respect to possession of premises, &c. See 2 *Term Rep.* 53. 55.

Neither the hearsay of a pauper, nor his ex-parte examination in writing taken on oath before magistrates touching his settlement, are admissible evidence. 2 *East's Rep.* 27. 54. 64.

Hearsay evidence of the declaration of a deceased father as to the *place* of birth of his bastard child, is not admissible to prove the birth-settlement of such child. 8 *East's Rep.* 539.

Declarations of a party accompanying an act done, and tending to explain such act, are evidence for the latter purpose as part of the *res gesta*.

It seems agreed, that what another has been heard to say, is no evidence, because the party was not on oath; also because the party, who is affected thereby, had not an opportunity of cross-examining; but such speeches or discourses may be made use of by way of inducement or illustration of what is properly evidence. 1 *Mod.* 383. *Skin.* 402.

Also what a witness hath been heard to say at another time may be given in evidence, in order either to *invalidate* or *confirm* the testimony he gives in court. 2 *Hawk. P. C. c.* 46. So what a person accused of a crime hath been heard to say at another time, may be given in evidence at his trial, for or against him. *Id. ib.*

A witness by hearsay of a stranger shall not be allowed, except perhaps to confirm the evidence of a witness that spoke of his knowledge. *Wood's Instit.* 644.

If a person who gave evidence in a former trial be dead; upon proof of his death, any person who heard him give evidence may be admitted to give the same evidence between the same parties; but a copy of the record of the trial when the evidence was given ought to be produced. 3 *Inst.* 2. 2 *Lil. Abr.* 705.

Evidence given at one trial in criminal cases, has been held not to be evidence at another's trial. 2 *State Trials*, 863.

See further, as to Evidence, *Gilbert's Law of Evidence*; *Bull. Ni. Pri.*; *Espinasse's Ni. Pri.* &c. &c.; 2 *Hawk. P. C. c.* 46; *Peake's Law of Evidence*; *Philips's Law of Evidence*; this Dict. tit. *Baron and Feme*, I. 2; *Treason*; *Witness*; and other apposite titles.

EWAGE, from the Fr. *eau*, water.] Toll paid for water-passage; see *Aquage*.

EWBRICE, Sax. *ew*, i. e. *conjugium*, and *bryce*, *fractio*.] Adultery or marriage-breaking: from this Saxon word *ew*, marriage, we derive our present English *woo*, to court.

EWE, *euva*.] A German word signifying law; it is mentioned in *Leg. W.* 1.

EXACTION, is defined to be a wrong done by an officer, or one in pretended authority, by taking a reward or fee for that which the law allows not. The difference between *exaction* and *extortion* is this: *extortion* is where an officer extorts more than his due, when something is due to him; and *exaction* is, when he wrests a fee or reward where none is due; for which the offender is to be fined and imprisoned, and render to the party twice as much as the money he so takes. *Co. Lit.* 368. 10 *Rep.* 100. See title *Extortion*.

EXACTOR REGIS. The King's exactor or collector of Taxes; sometimes taken for the *sheriff*. *Niger Liber Scacc. par.* 1. *cap. ult.*

EXAMINATION, *examinatio*.] A searching by, or cognizance of a magistrate. See this Dict. titles *Commitment*; *Evidence*; *Justice*.

With respect to *examinations* touching church benefices, see title *Benefice*.

EXAMINERS IN THE CHANCERY, *examinatores*.] Two officers of that court, who examine, upon oath, witnesses produced by either side, in London, or near it, on such interrogatories as the parties to any suit exhibit for that purpose; and sometimes the parties themselves are, by particular order, likewise examined by them. In the country, witnesses are examined by *commissioners*, (usually attornies not concerned in the cause,) on the parties joining in commission, &c. See title *Depositions*.

EXANNUAL ROLL. In the old way of exhibiting *sheriff's accounts*, the illeviable fines and desperate debts were transcribed into a *roll* under this name; which was yearly read, to see what might be gotten. *Hale's Sher. Acco.* 67.

EXCAMBION, Exchange. See title *Exchange*.

EXCAMBIATORES. A word used anciently for *exchangers* of land: but Cowel supposes them to be such as we now call *brokers*, that deal upon the Exchange between merchants.

EXCEPTION, *exceptio*.] Is a stop or stay to an action; and divided into *dilatory* and *peremptory*. Bract. lib. 5. tract. 5. In law proceedings, it is a denial of a matter alleged in bar to the action; and in Chancery it is what is alleged against the sufficiency of an answer, &c. The counsel in a cause

are to take all their *exceptions* to the record at one time; and before the court hath delivered any opinion thereon. 1 *Lil. Abr.* 559. And on an indictment for treason, &c. *exception* is to be taken for mis-naming, false Latin, &c. before any evidence is given in court, or the indictment shall be good. *Stat.* 7 *W.* 3. *c.* 3. See titles *Indictment; Treason.*

Where, by a general pardon, any particular crime is excepted: if a person be attainted, &c. of that offence, he shall have no benefit of the pardon. 6 *Rep.* 13. 2 *Nels. Abr.* 765. And when a pardon is with an *exception* as to persons, the party who pleads it ought to shew that he is not any of the parties excepted. 1 *Lev.* 26. A negative expression may be taken to enure to the same intent as an *exception*; for an *exception* in its nature is but a denial of what is taken to be good by the other party, either in point of law or pleading. And *exceptio in non exceptis firmat regulam.* 1 *Lill.* 559.

Exception, in Scotch Law is used synonimously with *Defence.*

Exception to Evidence, &c. See this Dict. titles *Bill of Exceptions; Witness.*

Exception in Deeds and Writings, Keeps the things from passing thereby; being a saving out of the deed, as if the same had not been granted: but it is to be a *particular* thing out of a *general* one, as a room out of an house, ground out of a manor, timber out of land, &c. And it must not be of a thing expressly granted in a deed: also it must be of what is *severable* from, and *not inseparably incident* to, the grant. *Co. Lit.* 47. 1 *Lev.* 287. *Cro. El.* 244.

Where an *exception* goeth to the whole thing granted or demised, the *exception* is void. *Cro. El.* 6. A man makes a lease of a manor, excepting all courts, &c. the *exception* is void as to the courts; for having leased the manor, it cannot be such without courts. *Hob.* 108. *Moor*, 870. A lease was made of all a man's lands in L. excepting his manor of H. and he had no lands in L. but the said manor; it was adjudged that the manor passed, and that the *exception* was void. *Hob.* 170. 2 *Nels. Abr.* 764. A lease of an house and shops, except the shops; though this may extend to other shops, it is void as to the shops belonging to the house demised, because it is repugnant to the lease. *Dyer*, 265.

If an *exception* crosses the grant, or is repugnant to it, the same is void: and if there be a saving or *exception* out of an *exception*, it may make a particular thing as if never excepted; as if a lease be made of a rectory, excepting the parsonage-house, saving to the lessee a chamber; this chamber not being excepted out of the lease, shall pass by the lease of the rectory. *Hob.* 72. 170. *Cro. El.* 372. *Owen*, 20.

By *exception* of trees, the soil is not excepted, but only sufficient nutriment for the trees: for the lessee shall have the pasture growing under them, though the lessor shall have all the benefit of the trees, mast, fruit, &c. and the trees are parcel of the inheritance. 5 *Rep.* 11. 11 *Rep.* 48. 50. But it has been adjudged, that, by an exception of woods, underwood, and coppices, the soil of the coppices is excepted. *Poph.* 146. *Cro. Jac.* 487. If a lessee for years assign over his term, excepting the trees, &c. the exception is not good, because no one can have a special property in the trees, but the owner of the land. 2 *Nels.* 764. Though where lessee for life makes a lease for years, excepting the wood, &c. this may be a good exception, although he hath not any interest in it but as a lessee, in regard he is chargeable in waste, &c. and hath not granted his whole term. *Cro. Jac.* 296. 1 *Lill. Abr.* 560. These exceptions are commonly in leases for life and years; and must be always of a thing in *esse. Co. Lit.* 47. See titles *Grant; Deed; Lease; Condition.*

Exceptio rei Judicatæ, An exception or defence in the Scotch Law, that the *matter has been adjudged* in another court or country, and the judgment carried into effect.

# EXCHANGE.

EXCHANGE, *Excambium* or *cambium;* with the Civilians, *permutatio.*] The *King's Exchange*, is the place appointed by the King for *exchange* of plate or bullion for the King's coin, &c. These places have been divers heretofore; but now there is only one, *viz.* the Mint in the Tower. See *stats.* 25 *Ed.* 3. *st.* 5. *c.* 12. 5 & 6 *Ed.* 6. *c.* 19. and this Dict. titles *Coin; Money.*—There is also a *Royal Exchange of Merchants* in London.

Exchange among merchants is a commerce of money, or a bartering or exchanging of the money of one city or country for that of another: money, in this sense, is either real or imaginary; real, any species current in any country at a certain price, at which it passes by the authority of the State, and of its own intrinsic value; and by imaginary money is understood, all the *denominations* made use of to express any sum of money, which is not the just value of any real species. *Lex Mercatoria.*

The methods of exchange for money used in England ought to be *par pro pari*, according to value for value: and our exchange is grounded on the weight and fineness of our own money, and the weight and fineness of that of other countries, according to their several standards, proportionable in their valuation; which being truly and justly made, reduces the price of the exchange of money of any nation or country to a certainty. But this course of exchange is of late abused, and money is become a merchandise, that rises and falls in its price in regard to the plenty and scarcity of it. At London, all exchanges are made upon the pound sterling of 20*s.* In the *Low Countries*, France and Germany, upon the French crown; Spain and Italy, &c. upon the ducat; and at Florence, Venice, and other places in the *Streights*, by the dollar and florin. See tit. *Bill of Exchange.*

Exchanges of Goods and Merchandise, Were the original and natural way of commerce, precedent to buying; *for there was no buying till money was invented;* though in exchanging both parties are as buyers and sellers, and both equally warrant. 3 *Salk.* 157.

If A. and B. agree to exchange horses, and B. give a sum of money to A. to bind the bargain, A. may maintain an action against B. for not delivering his horse, without alleging any delivery of or offer to deliver his own to B., for the payment of earnest-money vests the property of A.'s horse in B. But in such an action A. must allege a special demand on B. for his horse. 5 *Term Rep. K. B.* 409.

Exchange of Lands. A mutual grant of equal interest in lands or tenements, the one in consideration of the other: and is used peculiarly in our Common Law for that compensation which the *warrantor* must make to the *warrantee*, value for value, if the land warranted be recovered from the warrantee. *Bract. lib.* 2. *cap.* 16. *Accomp. Conv.* 1 *vol.* 170. Also there is a tacit condition of re-entry in this deed, on the lands given in exchange, in case of eviction; and on the warranty to vouch and recover over in value, &c. For if either of the parties is evicted, even of a part, the exchange is defeated. 4 *Rep.* 121. *Cro. Eliz.* 903.

The word *Exchange* is so individually requisite and appropriated by law to this case, that it cannot be supplied by any other word, or expressed by any circumlocution. 1 *Inst.* 50, 51. The estates exchanged must be equal in *quantity of interest*, value is immaterial; as fee-simple for fee-simple, a lease for 20 years for a lease for 20 years, and the like. *Litt.* § 64, 65. And the exchange may be of things that lie either in grant or in livery. But no livery of seisin, even in exchanges of freehold, is necessary to perfect the conveyance; for each party stands in place of the other, and occupies his right, and each of them hath already had corporal possession of his own land. *Litt.* § 62.—Entry however must be made on both sides; for if either party die before entry, the exchange is void for want of sufficient notoriety. 1 *Inst.* 50.

An exchange may be made of lands in fee-simple, fee-tail, for life, &c. The estates granted are to be equal, as fee-simple for fee-simple, &c. though the lands need not be of equal value, or of the like nature; for a rent in fee issuing out of land, may be exchanged for land in fee. *Lit.* 63, 64. *Co. Lit.* 50, 51. If an exchange be made between tenant for life and tenant in tail after possibility of issue extinct, the exchange is good; because their estates are equal: 11 *Rep.* 80. *Moor*, 665.

An exchange made between tenant in tail, and another of unequal interest, may be good during his life; but his issue, when of full age, shall avoid it. And exchanges made by infants; by persons *non sanæ memoriæ*; a husband of the wife's lands, &c. are not void, but voidable only; by the infant at his full age, the heir of the person *non sanæ memoriæ*, and the feme after the death of the husband, who may waive the possession, and disagree to them. *Perk.* § 277. 281.

Two joint-tenants and two tenants in common may exchange their *lands*: and, by this deed, freeholds pass without livery and seisin; but the word *exchange* is to be used; and there must be execution of the exchange, by *entry* on the lands in the life of the parties, or the exchange will be void. 1 *Inst.* 51. 1 *Mod.* 91. See titles *Lease*, *Release*, as to making exchange by those conveyances.

*Littleton* expresses himself concerning an exchange as of a transaction between *two*; and in the case of *Eton College*, 2 *Wils. part* 3. *p.* 483. the court held, that an exchange in the strict legal sense of the word, cannot be between three; the principles of it not being applicable to more than two *distinct* contracting parties, for want of the mutuality and reciprocity on which its operation so entirely depends; and the case abovementioned, of tenants in common exchanging with joint tenants, is not irreconcileable to this rule; because though *four* persons may be named, yet they constitute only *two* distinct *parties*; and consequently there is the same reciprocity as if the transaction were between two persons only. And this applies to any number of persons, if so conjoined, as to make only two distinct relative parties. 1 *Inst.* 50. *b.* 51. *a. in notis.*

Sometimes lands intended to pass by exchange, not having the qualities and incidents of exchanged lands, may pass by way of gift or grant; as if two persons are seised of two acres of land, and one of them by deed gives his acre to the other, and the other his acre to him, and each of them gives livery of seisin upon his acre given in exchange; here the acres will pass from one to the other, but not in a way of exchange, because there was no word of exchange in the deed. *Litt. sect.* 62. *Perk.* 253.

A man grants to another lands in fee-simple, for lands in tail by way of exchange; or land in tail, for lands for life, &c. these deeds will not take effect *as exchanges*. *Fitz. Exchange* 15. 64. *Co. Lit.* 64. If tenant in tail give his land in exchange, for other land of the same estate-tail, the issue in tail may make it good if he will, or avoid the exchange. 1 *Rep.* 96. A feoffment is made to A. and B. and the heirs of A. and they exchange the land for other lands, this will be good, and they shall hold the lands in the same nature that the land given in exchange was held. *Perk.* § 277.

If a lord release to the tenant his services in tail, in exchange of land given to the lord in exchange in tail also, it is ill: but if lessee for life of one acre, give another acre to his lessor in tail, in exchange for a release from him of that acre, *habendum* in tail in like manner, it is a good exchange. *Perk.* § 219. 276. 283. In case two persons make an exchange of land, and limit no estate, each shall have an estate for life by *implication*: but if an express estate be limited to one for life, and none to the other, it will be void. 19 *H.* 6. 27. And to make a good exchange, both the things must be in *esse* at the time of the exchange. *Co. Lit.* 50. 3 *Ed.* 4. 10.

But an exhange may be made to take effect *in futuro*, as well as presently; for if it be that after the feast of Easter, A. B. shall have such lands in D. in exchange for his lands in S. this is good. *Perk.* § 265.

By a special kind of agreement, an exchange may be of unequal estates. *Moor*, *c.* 209. The condition and warranty in exchanges run to the *parties in privity*; not to an *assignee*, &c. And if after two have exchanged lands, one of them releases to the other the warranty in law, it will not destroy the exchange. 4 *Rep.* 122. 1 *Rol. Abr.* 815. The parties themselves, and all privies and strangers, for the most part, may take advantage of exchanges void by any defect or accident: *contra*, if they are voidable, &c. 1 *Rep.* 105. *Dyer*, 285.

Exchange of Church Livings. These exchanges are now seldom used, except that parsons sometimes exchange their *churches*, and resign them into the bishop's hands; and this is not a perfect exchange till the parties are inducted; for if either dies before they both are inducted, the exchange is void. *Wood's Inst.* 284. 2 *Comm.* 323.

By *Stat.* 31 *El. c.* 6. § 8. If any incumbent of any benefice with cure of souls, shall corruptly resign or exchange the same; or corruptly take for or in any respect of the resigning or exchanging the same, directly or indirectly, any pension, sum of money, or other benefit whatsoever; as well the giver as the taker, shall lose double the value of the sum; half to the Crown, and half to him that shall sue for the same. See this Dict. titles *Simony*, *Advowson*.

If two parsons by one instrument agree to exchange their benefices, and in order thereto resign them into the hands of the Ordinary, such exchange being executed on both parts is good, and each may enjoy the other's living: but the patrons must present them again to each living; and if they refuse to do it, or the Ordinary will not admit them respectively, then the exchange is not executed; and in such case either clerk may return to his former living, even though one of them should be admitted, instituted, and inducted to the benefice of the other; which is expressed in the exchange itself, and the *protestation* usually added to it. 2 *Rep.* 74. *Rol. Abr.* 814.

EXCHANGEORS. Those that return money by *bills of exchange*. See *Excambiatores*. 5 *R.* 2. *c.* 2.

## EXCHEQUER.

Scaccarium, from the Fr. *eschequier*, i. e. *abacus*, *tabula lusoria*, or from the Germ. *schaiz*, viz. *thesaurus*.] An *ancient court of record*, wherein all causes touching the revenue and rights of the crown are heard and determined; and where the revenues of the crown are received. *Camden* in his *Britan. p.* 113. saith, This court took its name *à tabulâ ad quam assidebant*, the cloth which covered it being party coloured, or *chequered*: we had it from the Normans, as appears by the *Grand Custumary*, *cap.* 56. where it is described to be an assembly of high justiciers, to whom it appertained to amend that which the inferior justiciers had misdone, and unadvisedly judged, and to do right to all, as from the Prince's mouth; and this seems the origin of the Court of *Exchequer-Chamber*.

The Court of *Exchequer* is inferior in rank not only to the court of King's Bench, but to the Common Pleas also; it is a very ancient court of record, set up by William the Conqueror as a part of the *aula Regia*, though regulated and reduced to its present order by King Edward I. and intended principally to order the revenues of the crown, and to recover the king's debts and duties. 4 *Inst.* 103—116. It is called the Exchequer, *scaccarium*, from the chequed cloth, resembling a chess-board, which covers the table there, and on which, when certain of the king's accounts are made up, the sums are marked and scored with counters. It consists of two divisions: the receipt of the Exchequer, which ma-

nages the royal revenue; and the court or judicial part of it; which latter is again subdivided into a court of Equity, and a court of Common Law.

*The Court of Equity* is held in the Exchequer-Chamber, before the Lord Treasurer, the Chancellor of the Exchequer, the Chief Baron, and three *puisne* Barons. These *Mr. Selden* conjectures (*Titles of Hon.* 2. 5. 16.) to have been anciently made out of such as were Barons of the kingdom, or parliamentary Barons: and thence to have derived their name; which conjecture receives great strength from *Bracton's* explanation of *Magna Charta*, *c.* 14. which directs that the earls and barons be amerced by their peers; that is, says he, by the barons of the Exchequer, *l.* 3. *tr.* 2. *c.* 1. § 3.

In this court of equity, the clergy have long used to exhibit their bills for the non-payment of tithes, in which case the surmise of being the King's debtor is no fiction, they being bound to pay him their first fruits and annual tenths. But the Chancery has of late years obtained a large share in this business. See this Dict. titles *Chancery*, *Equity*, *Tithes*.

An appeal from the equity side of this court lies immediately to the House of Peers; but from the Common Law side, in pursuance of the *stat.* 31 *E.* 3. *c.* 12. a writ of error must be first brought into the court of Exchequer-Chamber. And from the determination there had, there lies in the *dernier resort*, a writ of error to the House of Lords. 3 *Comm.* 44. See this Dict. titles *Decree*, *Equity*, *Error*.

In this Court of Equity the proceedings are by *English bill* and answer, as in Chancery.

In this court the Attorney-General brings bills for any matters concerning the King; and any person grieved in any cause prosecuted against him on behalf of the King, may bring his bill against the Attorney-General to be relieved in equity, in which case the plaintiff must attend the King's Attorney with a copy of the bill, and procure him to answer the same; and Mr. Attorney may call any that are interested in the cause, or any officer or others, to instruct him in the making of his answer so as the King be not prejudiced thereby; and his answer is to be put in without oath. 4 *Inst.* 109. 112. 118.

By *stat.* 57 *Geo.* 3. *c.* 18. the Lord Chief Baron of the court, for the time being, is empowered to hear and determine all causes, matters, and things, at any time depending in the said Court of Exchequer, as a Court of Equity; and if the Chief Baron should, from illness, &c. be prevented from sitting for those purposes, his Majesty may, from time to time, appoint by warrant under the sign manual, revocable at pleasure, any other of the Barons of the degree of the coif, to hear and determine the same. The Lord Chief Baron, &c. may sit in the Court of Equity, whether the other Barons of the Court are sitting or not; and decrees under this act are declared valid, subject only to appeal to the House of Lords, or to rehearing by the Chief Baron, or other Barons so appointed.

The primary and original business of the Court of Exchequer is to call the King's debtors to account, by bill filed by the attorney-general; and to recover any lands, tenements, or hereditaments, any goods, chattels, or other profits or benefits, belonging to the crown. So that by their original constitution the jurisdiction of the courts of Common Pleas, King's Bench and Exchequer, was entirely separate and distinct: the Common Pleas being intended to decide all controversies between subject and subject; the King's Bench to correct all crimes and misdemeanors that amount to a breach of the King's peace; and the Exchequer, to adjust and recover the King's revenue. See this Dict. title *Courts*, *King's Bench*, *Common-Pleas*. But as, by a fiction, almost all sorts of civil actions are now allowed to be brought in the King's Bench, in like manner by another fiction, all kinds of personal suits may be prosecuted in the court of Exchequer. For as all the officers and ministers of this court have, like those of other superior courts, the privilege of suing and being sued only in their own court, so also the King's debtors and farmers, and all accomptants of the Exchequer, are privileged to sue and implead all manner of persons in the same court of equity that they themselves are called into. They have likewise privilege to sue and implead one another, or any stranger, in the same kind of Common Law actions (where the personalty only is concerned) as are prosecuted in the court of Common Pleas.

This gives origin to the *Common Law* part of their jurisdiction, which was merely for the benefit of the King's accomptants; and is exercised by the barons only of the Exchequer, and not the treasurer or chancellor. The writ upon which all proceedings here are grounded is called a *quo minùs*: in which the plaintiff suggests that he is the King's farmer or debtor, and that the defendant hath done him the injury or damage complained of; *quo minùs sufficiens existit*, (*by which* he is *the less* able,) to pay the King his debt or rent. And these suits are expressly directed by what is called the statute of *Rutland*, 10 *E.* 1. *c.* 11. to be confined to such matters only, as specially concern the King or his ministers of the Exchequer. And by the *articuli super cartas*, 28 *Ed.* 1. *c.* 4. it is enacted, that no Common Pleas be thenceforth holden in the Exchequer, contrary to the form of the great charter. But now, by the suggestion of privilege, any person may be admitted to sue in the Exchequer, as well as the King's accomptant. The surmise of being debtor to the King is therefore become matter of form, and mere words of course, and the court is open to all the nation equally. The same holds with regard to the equity side of the court: for there any person may file a bill against another upon a bare suggestion that he is the King's accomptant; but whether he is so or not is never controverted.

Some persons think there was an Exchequer under the Anglo-Saxon Kings; but our best historians are of opinion, that it was erected by King William the First, its model being taken from the transmarine *Exchequer*, established in Normandy long before that time. *Madox's Hist. Exchq.*

In the reign of Henry the First there was an Exchequer, which has continued ever since; and the judges of the court were at that time styled *Barones Scaccarii*, and administered justice to the subjects. In ancient times the Barons of the Exchequer dealt in affairs relating to the state, or public service of the crown and realm: and were greatly concerned in the preservation of the prerogative, as well as the revenue of the crown; for at the Exchequer it was the care of the Treasurer and Barons to see that the rights of the crown were no ways invaded. *Lex Constitutionis*, 198.

On account of the authority and dignity of the court of Exchequer, anciently it was held in the King's palace; and the acts thereof were not to be examined or controlled in any other of the King's ordinary courts of justice: the Exchequer was the great repository of records, wherein the records of the other courts at Westminster, &c. were brought to be laid up in the Treasury there. And writs of the Chancery were sometimes made forth at the Exchequer; writs of summons to assemble parliaments, &c. *Ibid.*

The Exchequer has been commonly held at Westminster, the usual place of the King's residence; but it hath been sometimes holden at other places, as the King pleased; as at Winchester, &c. And in the Exchequer there are reckoned seven courts; *viz.* the court of *Pleas*; the court of *Accounts*; the court of *Receipts*; the court of the *Exchequer-Chamber* (being the assembly of all the judges of England for difficult matters in law); the court of *Exchequer-Chamber*, for *Errors* in the court of *Exchequer*; for *Errors* in the *King's Bench*; and the court of *Equity* in the *Exchequer* Chamber. 4 *Inst.* 119.

But, according to the usual division for the dispatch of all common business, the Exchequer is divided (as has been already noticed) into two parts; one whereof is conversant especially in the judicial hearing and deciding of causes pertaining to the Prince's coffers, anciently called *Scaccarium Computorum*; the other is the *Receipt of the Exchequer*, which is properly employed in the receiving and payment of money. And it has been observed, that about the time of the Conquest there was very little money in specie in the realm; for then the tenants of knight's fees answered their lords by military services: and till the reign of King Henry 1. the rents or farms due to the King were generally rendered in provisions and necessaries for his household; but in that reign the same were changed into money; and afterwards, in succeeding times, the crown revenue was changed or paid into the Exchequer chiefly in gold and silver. *Lex Constitutionis, p.* 208.

By statute, all sheriffs, bailiffs, &c. are to account in the Exchequer before the Treasurer and Barons: and annual rolls are to be made of the profits of counties, &c. Also inquisitors shall be appointed in every county, of debts due to the King. 51 *H.* 3. *st.* 5, 10 *Ed.* 1. *Stat. Rutl.* And all fines of counties for the whole year are to be sent into the Exchequer. *Stat. de Vicecom.* 14 *Ed.* 2. *c.* 1. Persons impeached in the Exchequer may plead in their own discharge; and there shall be writs for discharging persons, &c. 5 *R.* 2, *c.* 10. 14. The officers of the receipt may receive and take for their fees 1*d.* in the pound for sums issued out. &c. 5 & 6 *W.* & *M. cap.* 20.

Officers of the Exchequer are without delay to receive money brought thither: and the money on the receipt is to be kept in chests under three different locks and keys, kept by three several officers, &c. 8 & 9 *W.* 3. *c.* 28.

The Exchequer is now said to be the last of the four courts at Westminster governed by the Chancellor of the Exchequer, the *Lord Chief Baron*, and three other *Barons*, who are the sovereign auditors of England, and the judges of the court. There also sits in this court a *Cursitor Baron*, who administers the oath of all high-sheriffs, under-sheriffs, bailiffs, auditors, receivers, collectors, controllers, surveyors, and searchers of all the customs in England.

The *Chancellor*, and who is *Under Treasurer*, hath the custody of the seal of this court. The King's *Attorney-General* is made privy to all manner of pleas, that are not ordinary and of course, which rise upon the process of the court; and he puts into court in his own name, informations of concealments of customs, seizures, &c. And also for intrusions, wastes, and encroachments upon any of the King's lands; or upon penal statutes, forfeitures, &c.

The *Remembrancers* keep the records of the court betwixt the King and his subjects, and enter the rules and orders there made: one is called the King's Remembrancer, and the other the Lord Treasurer's Remembrancer. The *Remembrancer for the King* hath all manner of informations upon penal statutes used in his office only; and he calls to account, in open court, all the great Accountants of the Crown, Collectors of Customs, &c. he makes out writs of privilege, enters judgments of pleas; and all matters upon *English bill* are remaining in his office.

The *Remembrancer for the Lord Treasurer* makes out all the estreats; he sets down in his book the debts of all sheriffs, and takes their foreign accounts; and issues out writs and process in many cases, &c. And these Remembrancers have several *attornies* to do business under them, who, by statute, are not to issue out of the Remembrancer's office any writs upon supposition, but upon just grounds, &c. 1 *Jac.* 1. *c.* 26. See as to regulation of the office of these Remembrancers, *stat.* 57 *Geo.* 3. *c.* 60. *post.*

There are two *Chamberlains* that keep the keys of the Treasury where the records lie, with the book of Domesday, &c. They may sit in court if they please, but not intermeddle with any thing, unless it be relating to the sheriffs, in the pricking whereof they have a vote. See *post, stat.* 23 *Geo.* 3. at the end of this article. And, besides the Chamberlains, there is a *Clerk of the Pipe*, in whose custody are conveyed out of the King's and Treasurer's Remembrancer, &c. as water through a pipe, all accounts and debts due to the King.

The *Controller of the Pipe*, who is said to be the Chancellor of the Exchequer. The *Clerk of the Estreats*, who receives the estreats from the Remembrancer's office, and writeth them out to be served for the King, &c. The *Foreign Apposer*, who apposes or makes a charge on all sheriffs, &c. of their green wax, *i. e.* fines, issues, amerciaments, recognisance, &c. certified in estreats annexed to the writ, under the seal, in green wax, and delivereth the same to the Clerk of the Estreats to be put in process. The *Auditors*, that take the accounts of the King's Receivers, Collectors, &c. and perfect them. The four *Tellers*, whose business to receive and pay all money is well known. The *Clerk of the Pells*, from his parchment rolls, called *Pellis Receptorum*. The Clerk of the *Nihils*, who makes a roll of such sums as the sheriff upon process returns *Nihil*, &c. The *Clerk of the Pleas*, in whose office all officers and privileged persons are to sue and be sued; and here are divers *Under Clerks* employed in suits commenced or depending in this court. There is a *Clerk of the Summons*; *Secondaries* in the offices of the *Remembrancers*; *Secondaries* of the *Pipe*; *Marshal*, &c.

By *stat.* 23 *Geo.* *c.* 82. the offices of the two Chamberlains, the Tally-cutter, Usher of the Exchequer, and the second Clerks to each Teller, shall, after the death, surrender, forfeiture, or removal of the persons interested in them, *be abolished.* § 1. 4.

Upon the death &c. of the two Chamberlains, instead of the tally now used to denote the receipt of money, there shall be substituted an indented cheque receipt. § 2.—And upon the death, &c. of the Usher, the chief officer in each office shall supply his place. § 3.

After the death, &c. of the present Auditor, Clerk of the Pells, either of the four Tellers, or two Chamberlains, the payment of all salaries, fees, and emoluments *to the said officers* shall cease; and in lieu thereof, certain annual salaries are made payable; *viz.* To the Auditor 4000*l.* his chief Clerk 1000*l.* Clerk of the Pells 3000*l.* his first Clerk 1000*l.* The four Tellers each 2700*l.* Each of their first Clerks 1000*l.* These are to appoint such other clerks and officers as they think fit, to be appoved of by the Treasury. § 5.

All fees as heretofore (see *stat.* 26 *Geo.* 3. *c.* 99.) to be received by the first clerk to the Clerk of the Pells; [200*l.* of whose salary is on that account;] two thirds thereof to be applied to the sinking fund, and one third to pay the above salaries. § 9.

The houses of the Auditor, four Tellers, and Usher shall, after the death, &c. of the present possessors, be vested in his Majesty, and not annexed to the offices. § 10—And no office in the receipt of the Exchequer may be granted either in possession or reversion, in any other manner than subject to this act. § 11.

By *stat.* 57 *Geo.* 3. *c.* 60. for regulating certain offices in the Court of Exchequer in England, after the termination of the existing interest in the following offices, the duties thereof shall be discharged in person and not by deputy; subject to the regulation of the Lords of the Treasury, as to fees, &c. the surplus of which, after payment of such officers as shall be found necessary, is to become part of the Consolidated Fund, for the public benefit. The offices mentioned in this act are the King's Remembrancer, Clerk of the Pleas, Clerk of the Pipe, Comptroller of the Pipe, Marshal, Foreign Ap-

poser, Surveyor and Receiver-General of Green Wax, Lord Treasurer's Remembrancer, Clerk of Foreign Estreats, Clerk of the Nihils, Comptroller of the First Fruits: and in the Alienation Office, three Commissioners, the Receiver General, two entering Clerks, Master in Chancery, and solicitor of the Exchequer.

By *stat.* 57 *Geo.* 3. *c.* 84. the like regulations are made as to the offices of Auditor, the Four Tellers and Clerk of the Pells in the Exchequer in *England*, and of the Auditor, Teller, and Clerk of the Pells, in the Exchequer of *Ireland*. And persons appointed to the offices so regulated are rendered incapable of sitting in Parliament.

Disputes having arisen as to the right of appointment to the office of Clerk of the Pleas in the Court of Exchequer in *Ireland*, the Lord Chief Baron having claimed the right of appointment, but which was finally determined against him on appeal to the House of Lords; the *stat.* 56 *Geo.* 3. *c.* 122. (continued by 59 *Geo.* 3. *c.* 93.) was passed for impounding and securing the profits of the office during the litigation.

The Court of Exchequer in *Scotland* was established in its present form by *stat.* 6 *Ann. c.* 26. The judges by that act are declared to be the High Treasurer of Great Britain, with a Chief Baron and other four Barons, chosen from Serjeants at law, or English Barristers, or Scotch Advocates of five years' standing. This Court has a peculiar jurisdiction in the Customs and Excise, and in all revenue matters, and in all forfeitures and penalties arising to the Crown. The judges of this Court are also commissioned to pass signatures authorising charters and gifts by the Crown.

The Court of Exchequer-Chamber was first erected in England by statute 31 *Ed.* 3. *c.* 12. to determine causes upon writs of error, from the Common Law side of the Court of Exchequer. And to that end it consists of the Lord Chancellor, and Lord Treasurer, taking unto them the justices of the King's Bench and Common Pleas. In imitation of which, a second Court of Exchequer-Chamber was erected by *stat.* 27 *Eliz. c.* 8. consisting of the justices of the Common Pleas, and the Barons of the Exchequer; before whom writs of error may be brought to reverse judgments in certain suits originally begun in the court of King's Bench. See this Dict. title *Error*. 3 *Com.* 56.

Into the court also of Exchequer-Chamber, (which then consists of all the judges of the three superior courts, and sometimes the Lord Chancellor also,) are sometimes adjourned from the other courts such causes as the judges, upon argument, find to be of great weight and difficulty, before any judgment is given upon them in the court below. 4 *Inst.* 119. 2 *Bulst.* 146.

In the abovementioned court of Exchequer-Chamber, established under *stat.* 27 *Eliz. c.* 8. there are no more than two return-days in every term; one is called the general *affirmance day*, being appointed by the judges, to be held a few days after the beginning of every term, for the general affirmance or reversal of judgments: the other is the adjournment day, which is usually held a day or two before the end of every term. On the first of these days judgments are affirmed or reversed, or writs of error non-prossed; the intent of the latter is, to finish such matters as were left undone at the former; on which last day also (as well as on the first) judgments may be affirmed or reversed, or writs of error non-prossed, on paying a fee extraordinary to the clerk of the Errors, and setting down the cause for affirmance two days before the adjournment day. *Impey, K. B.* 678.

The Court of Exchequer-Chamber in *Ireland* was established by the Irish act 40 *Geo.* 3. *c.* 39. but requires further regulations for making its proceedings effective. It consists of the Chief Justices, Chief Baron, and the rest of the Justices and Barons, or any nine of them.

Exchequer Bills. See titles *National Debt*, *Forgery*.



## EXCISE.

From the Belg. *acciise* tributum.] An inland imposition paid sometimes on the consumption of the commodity, or frequently upon the retail sale, which is the last stage before the consumption.

This is doubtless, (says *Blackstone*, 1 *Comm.* 318.) impartially speaking, the most economical way of taxing the subject; the charges of levying, collecting, and managing the excise duties being considerably less in proportion than in other branches of the revenue. It also renders the commodity cheaper to the consumer than charging it with customs to the same amount would do. But at the same time, the rigour and arbitrary proceedings of excise laws, seem hardly compatible with the temper of a free nation. For the frauds that might be committed in this branch of the revenue, unless a strict watch is kept, make it necessary wherever it is established, to give the officers a power of entering and searching the houses of such as deal in exciseable commodities, at any hour of the day; and in many cases of the night likewise. And (for the same reasons) the proceedings in case of transgressions are summary and sudden, to the exclusion of the trial by jury.

Its original establishment was in 1643, when it was introduced by the Parliament then in rebellion against King Charles I. Its progress was gradual, being at first laid upon those persons and commodities where it was supposed the hardship would be least perceivable; *viz.* The makers and venders of beer, *ale*, *cyder*, and *perry*; and was afterwards imposed on such a multitude of commodities, that it might fairly be denominated general.

Upon the restoration of Charles II. it having then been long established, and its produce well known, some part of it was given to the crown by way of purchase for the feodal tenures and other oppressive parts of the hereditary revenue. And notwithstanding the objections eternally raised against it by the interested or the patriotic, it has from time to time been imposed on a vast variety of articles.

By the Consolidating Act, 43 *Geo.* 3. *c.* 69. (and see *stat.* 59 *Geo.* 3. *c.* 53) the following articles and matters are subject to a duty of Excise in Great Britain; viz. *Auctions*, of lands and goods—*Beer*, *Bricks*, and *Tiles*—*Candles*—*Cocoa Nuts* and *Coffee*—*Cyder* and *Perry*—*Glass*—*Hides* and *Skins*—*Hops*—*Licences*; to auctioneers, brewers, wax and tallow-candle makers, grocers, glass-makers, tanners, &c. maltsters, paper-makers, plate, dealers in, calico-printers, &c. soap-makers, distillers, rectifiers, dealers in spirits, starch makers, sweet wine brewers, tobacco manufacturers and dealers, vinegar makers, wine retailers, wire-drawers—*Malt*—*Mead* or *Metheglin*—*Paper*—*Pepper*—*Printed* and *stained* papers, linens, cottons, and silks—*Salt*—*Soap*—*Spirits*—*Starch*—*Sweets*—*Tea*—*Tobacco* and *Snuff*—*Verjuice*—*Vinegar*—*Wines* imported—*Wire*.—The list is *at present* somewhat shorter in Ireland.

It has been very judiciously observed that the grievances of the excise exist more, perhaps, in apprehension than in reality.—Actions and prosecutions against officers, commissioners, and justices, for misconduct in excise cases, are very rarely heard of in courts of law. It is certainly an evil that a fair dealer cannot have the benefit of any secret improvement in the management of his trade or manufactory; yet it seems more than equivalent to the Public at large, that by the survey of the excise, the commodity is preserved from many shameful adulterations; as experience has fully proved since *wine* was made subject to the excise laws.

The Excise, like the Customs, is necessarily regulated by a multiplicity of statutes; the abridgment of which would form no small volume. See title *Customs*.—The following

short extracts from *Burn's Justice*, title *Excise*, where this subject is more fully stated, will convey the information most useful to the student.

One principal head office of Excise is to be kept in London, or within ten miles thereof, to which all other offices in the kingdom shall be subordinate and accountable; which said office shall be managed by such commissioners as the King shall appoint. *Stats.* 12 *Car.* 2. *c.* 24. § 46. 5 *W.* *c.* 20. § 16.

And all the places within the Bills of Mortality shall be under the immediate care and management of the said head-office; and such and so many subordinate commissioners and sub-commissioners, and other officers, shall be appointed by the King in other places, as he shall think fit. *Stat.* 12 *Car.* 2. *c.* 24. § 48.

The excise office in all places where it shall be appointed, shall be kept open from eight in the morning till 2 in the afternoon. *Stat.* 23 *Geo.* 2. *c.* 26. § 12.

The commissioners or sub-commissioners shall appoint under their hands and seals, such persons as they shall think needful in each market-town, to be there, upon every market-day, in some known and public place; for receiving entries and duties, and performing all other things touching the revenue of excise: and if such office be not so kept in each market town, the commissioners or others neglecting or refusing, shall, for every market day, forfeit 10*l.* And such person as shall come to such market town to make his entry or payment, and tender the same accordingly, and be able to prove such tender by oath of one witness, shall not be liable to any penalty for such weekly or monthly entries or payments as should have been made or paid on such market day. *Stat.* 15 *Car.* 2. *c.* 11. § 10.

The kingdom of England and Wales (exclusive of the bills of Mortality) is divided into about 50 *collections;* some called by names of particular counties; others by the names of great towns; where one county is divided into several collections, or where a collection comprehends the contiguous parts of several counties, every collection is subdivided into several *districts*, within which there is a *Supervisor;* and each district is parcelled into *out-rides*, and *foot-walks*, within each of which there is a *Gauger*, or surveying officer. *Gilb. Exch. Append.*

The commissioners or sub-commissioners, in their respective circuits and divisions, shall constitute under their hands and seals such and so many gaugers as they shall find needful. *Stat.* 12 *Car.* 2. *c.* 24. § 33.

In order to which, he who would be made a gauger, must procure a certificate that he is above 21, and under 30 years of age: that he understands the four first rules of arithmetic; that he is of the communion of the church of England; how he has been employed, or what business he hath followed; that he is not incumbered with debts; whether single or married; and if married, how many children he has, for if he has above two he cannot (by the rules of the office) be admitted. *Gilb. Exch. Append.*

He must also nominate two persons to be his sureties; and it must be certified that they are of sufficient ability, and that the said certificate is of his own hand-writing: such certificate, written by him, must be signed by the supervisor of excise where the party applying lives. At the bottom of his certificate must be his affidavit, that neither he, nor any else to his knowledge, hath directly or indirectly, given or promised to give any treat, fee, gratuity, or reward, for his obtaining or endeavouring to obtain an order for his being instructed. When an order for instruction is granted, it is directed to an experienced officer, who receives such person as his pupil: and the like books as officers have, being delivered to such pupil, he goes with and attends the officer who instructs him, and he takes surveys, and in his own book makes the like entries, as if he was an officer, until the instructor certifies that he is fully instructed. After he is thus certified for, and until he is employed, he is called an *expectant*, being to wait till a vacancy happens. *Gilb. Exch. Append.*

No person shall be capable of intermeddling with any office relating to the Excise, until he shall, before two justices in the county where his employment shall be, or before a baron of the Exchequer, take the oaths of allegiance and supremacy, together with an oath of office, which is to be certified to and recorded by the next Quarter Sessions. *Stat.* 12 *Car.* 2. *c.* 24. § 47, 48. and see *stat.* 15 *Car.* 2. *c.* 11. § 57.

The business of the *Supervisor* is to be continually surveying the houses and places of the persons within his district liable to duties: and to observe and see whether the officers duly make their surveys, and make due entries thereof in their books and in their specimen-papers; and every supervisor is in his own book to enter what he himself does each day and part thereof; and also set down the behaviour, good and bad, the diligence or negligence of the several officers of his district; and at the end of every six weeks to draw out a diary of every day's business, and of the remarks made each day of the several officers in his district, and to transmit such diary at the end of every six weeks to the chief office. Each commissioner takes and peruses a proportion of these diaries, and when he meets with any remarkable complaint against any officer, he communicates it to the rest, who thereupon come to an agreement, either to *admonish*, *reprimand*, *reduce*, or *discharge*. For small faults, officers are admonished; for great ones reprimanded; for greater, reduced: but for the greatest discharged. The commissioner who peruses the diary writes in the margin, *admonish*, *reprimand*, or as the case is. *Gilb. Exch. Append.*

These diaries, after having been thus written upon are delivered to the clerk of the diaries, who in a book, called the reprimand-book, places the admonitions, reprimands, and the like, to each officer's account, and writes every offender word thereof. Which reprimand-book is resorted to upon discovering new faults; and if it is there found that the officer has before been admonished and reprimanded so often that there are no hopes of his amending, he is then discharged. The said book is likewise resorted to when application is made for advancing or preferring an officer into a better post. Frequent admonitions or reprimands are a bar to preferment, unless they are of old standing; but if for three years last he stands pretty clear of admonitions and reprimands, those of elder date are not much regarded. The *Collector's* business is, every six weeks, to go his rounds, and in the intervals of rounds, he is to be assisting in prosecuting offenders before the justices; he is also to peruse the supervisor's diaries; and where he finds an officer complained of, is to examine him and the supervisor, and having heard both, is in the margin to write his opinion of each fact: he is also to have an eye how the supervisors and officers of his collection perform their duties, and from the vouchers he transcribes into his book the charge on each particular person in his collection. For faults gaugers are *reduced*, either to be only assistants, or from foot-walks to out-rides; supervisors are reduced to be again only gaugers; and collectors are reduced to be supervisors. In some instances discharged officers, after having for a competent time been thereby kept out of pay, are again restored; but if twice discharged, are never again restored, unless one of the discharges appears to have been occasioned by a misrepresentation of the case. *Gilb. Exch. Append.*

The *stat.* 49 *Geo.* 3. *c.* 66. abolishes all holidays at the Excise offices, except Christmas day, Good Friday, general fast days, the Restoration of Charles the IId. King's birth-day, the Queen's, and that of the Prince of Wales. The Chief office is to be kept open from eight till three o'clock. *s.* 2.

EXCLUSA, EXCLUSAGIUM. A sluice for the carrying off water; and the payment to the lord for the benefit of such a sluice. *Et duo molendina in eodem manerio cum aquis* exclusagiis, &c. Mon. Ang. tom. 1. p. 398. 587.

EXCOMMENGEMENT, *Law French.*] *Excommunition.* Stat. 23 Hen. 8. c. 3.

EXCOMMUNICATION, *Excommunicatio.*] An ecclesiastical censure, divided into the greater and the lesser; by the latter a person is excluded from the communion of the church only; by the former, from that communion, and also from the company of the faithful; and incapacitated from performing any legal act.

The sentence of excommunication was instituted originally for preserving the purity of the church; but ecclesiastics did not scruple to convert it into an engine for promoting their own power, and inflicted it on the most frivolous occasions. *Roberts. Hist. Emp. Charles* V. 2 *vol.* 109. &c.

If the judge of any spiritual court excommunicates a man for a cause of which he hath not the legal cognizance, the party may have an action against him at common law; and he is also liable to be indicted at the suit of the King. 1 *Inst.* 134. 2 *Inst.* 527. 623.

By *stat.* 52 *Geo.* 3. *c.* 127. for the better regulation of ecclesiastical courts in England, it is enacted, that after passing the act, excommunication, together with all proceedings following thereupon, shall in all cases (except those after specified in the act) be discontinued: and that in all causes cognizable in the ecclesiastical courts, when any person duly cited to appear in, or required to comply with the orders or decrees (as well final as interlocutory) of, any ecclesiastical courts, shall refuse to appear or to obey such order or decree, or when any person shall commit a contempt in the face of such court, no sentence of excommunication shall be given or pronounced: but instead thereof the judge shall pronounce such person contumacious and in contempt, and within ten days shall signify the same into Chancery in a form annexed to the act, as hath heretofore been done in signifying excommunications: and thereupon a writ *de Contumace capiendo* (in form annexed to the act) shall issue out of Chancery directed and returnable, and of like force as the former writ *de excommunicato capiendo;* and upon the appearance, or obedience or submission of the party, the ecclesiastical judge shall pronounce him absolved from the contumacy, and shall order him to be discharged.—The jurisdiction of ecclesiastical courts to excommunicate, is reserved in definitive sentences, &c. pronounced as spiritual censures for offences of ecclesiastical cognisance: But it is provided that no person so pronounced excommunicate shall incur any civil penalty or incapacity whatever, except such imprisonment, not exceeding six months, as the ecclesiastical court shall direct, and which sentence shall be signified into Chancery, and thereon the writ *de excom. cap.* shall issue and be forwarded, and the party be kept in custody for the term directed, or until absolved. The like enactments were made as to Ireland, by *stat.* 54 *G.* 3. *c.* 68. The ancient decisions as to excommunication, and the effect of it, and the proceedings therein, are here preserved as matter of curious information and as applying in some particulars by analogy to the provisions of the statutes in cases of sentences of contumacy.

An excommunicated person was disabled to do any act required to be done by one that is *probus* and *legalis homo.* He could not serve upon juries, nor be a witness in any court, nor bring an action, either real or personal, to recover lands or money due to him. *Litt.* § 201.

In some cases persons incur excommunication *ipso facto* by act of parliament; but they are first to be convicted of the offence by law, and the conviction is transmitted to the Ordinary. *Dyer*, 275. 1 *Ventr.* 146.

By *stat.* 5 & 6 *Ed.* 6. *c.* 4. "if any person shall smite, or lay violent hands upon any other, either in any church of church-yard, then *ipso facto* every person so offending shall be deemed excommunicate, and be excluded from the fellowship and company of Christ's congregation."

And it is further enacted by the said statute, "That if any person shall maliciously strike any person with any weapon in any church or church-yard, or shall draw any weapon in any church or church-yard, to the intent to strike another with the same weapon, then every person so offending shall stand *ipso facto* excommunicated as aforesaid." See title *Church.*

By the *stat.* 3 *Jac.* 1. *cap.* 5. §§ 11 & 12. it is enacted, "That every popish recusant convict shall stand to all intents and purposes disabled, as a person lawfully excommunicated." See this Dict. title *Papist.*

By *stat.* 9 *E.* 3. Bishops may excommunicate, not only all perturbers of the peace of the church, but also felons, and other offenders, &c. And by the ecclesiastical laws, excommunicated persons are not permitted to have Christian burial.

The bishop's certificate, if he die before the return of the writ, shall not be received, for his successor shall certify; the *significavit* must mention that the party lived within the diocese where he was excommunicated, and by what bishop; if it be pleaded, the time when is to be shewn; and excommunication must be declared in the ecclesiastical court before they proceed, &c. 8 *Rep.* 68. *Cro. Jac.* 82. *Moor, Ca.* 667. *Latch.* 174. *Hetley*, 86. See this Dict. title *Abatement*, I. 2. 6.

It is not necessary that the party should be resident in the diocese at the time of the excommunication; it is sufficient if he were there at the time of the citation. 7 *Term Rep. K. B.* 153.

It hath been adjudged that the spiritual court hath not power to meddle with the body of any persons whatsoever, or to send process to take them; for if a person is excommunicated for contempt, &c. they ought to certify it into the Chancery, whence it is sent into B. R. and thence issues process. *Cro. Eliz.* 741. See *post*, title *Excommunicato Capiendo.*

If a person be unjustly excommunicated for a matter of which the spiritual court hath not conuzance, and he is taken on a writ of *excommunicato capiendo*, the party grieved shall have a writ out of Chancery to the sheriff, to deliver him out of prison. 2 *Inst.* 623. 12 *Co.* 76. *F. N. B.* 141.

So if the spiritual court proceeds *inverso ordine;* as if they refuse a copy of the libel, &c. a prohibition shall go with a clause to absolve and deliver the party injured. 1 *Sid.* 232.

Also if a man be excommunicated, and offers to obey and perform the sentence, and the bishop refuseth to accept it, and to *assoil* him, he shall have a writ to the bishop, requiring him, upon performance of the sentence, to *assoil* him; and the reason thereof is, for that by the excommunication the party is disabled to sue any action, or to have any remedy for any wrong done unto him, so long as he shall remain excommunicate; and also the party grieved may have his action upon his case against the bishop, in like manner as he may when the bishop doth excommunicate him for a matter which belongeth not to the ecclesiastical conuzance; also the bishop, in those cases, may be indicted at the suit of the King. 2 *Inst.* 623.

But if the excommunication be for a just cause, the party must make present satisfaction before he can be absolved, or he must put in caution, that he will hereafter perform that which the bishop shall reasonably and according to law enjoin him; which caution, in the Civil Law, is of three sorts: 1. *Fidejussoria*, as when a man bindeth himself with sureties to perform somewhat. 2. *Pignoratio*, or *realis cautio*, as

when a man engageth goods or mortgageth lands for the performance. 3. *Juratoria*, when the party who is to perform any thing taketh a corporal oath to do it; which last is now the most frequent method.

This method of taking caution was held to be against law. 1 *Bulst.* 122.———But was afterwards, on great debate, held to be good; and that the bishop having a discretionary power herein, it was as much in his option to take caution by obligation as by either of the two other methods. 2 *Lev.* 36. *Raym.* 225.

If the sentence of the greater instead of the lesser excommunication be pronounced, it is only a ground of appeal: the court of K. B. will not quash the writ *de excom. cap.* for that objection. 7 *Term Rep.* 153.

If after a person is excommunicated, there comes a general act of pardon, which pardons all contempts, &c. it seems that this offence is taken away without any formal absolution. See *Cro. Car.* 199. *Cro. Jac.* 212. 8 *Co.* 68. 1 *Jon.* 227. 2 *Lev.* 36. *Gibs. Cod.* 1110.

EXCOMMUNICATO CAPIENDO. A writ directed to the sheriff for apprehending him who stands obstinately excommunicated. If within *forty days* after sentence of excommunication has been published in the Church, the offender does not submit and abide by the sentence of the Spiritual Court, the bishop may *signify*, *i. e.* certify, such contempt to the King in Chancery. Upon which there issues out this writ to the sheriff of the county, called, from the bishop's certificate, a *significavit*: or, from its effect, a writ *de excommunicato capiendo*. And the sheriff shall thereupon take the offender and imprison him in the county gaol till he is reconciled to the church, and such reconciliation certified by the bishop. *F. N. B.* 62.

This writ (except in cases of definitive sentences pronounced as spiritual censures for offences of ecclesiastical cognisance, is now, by the statutes 52 *Geo.* 3. *c.* 127. 54 *Geo.* 3. *c.* 68.) superseded by the writ *de contumace capiendo*. See the provisions of the statutes under title *Excommunication*.

By the *stat.* 5 *Eliz. c.* 23. writs *de excommunicato capiendo*, shall issue out of the Court of Chancery in term time, and be returnable in B. R. &c. They shall be brought sealed into the King's Bench, and there opened and delivered of record to the sheriff, and there must be twenty days between the *teste* and the return: and if the sheriff return a *non est inventus* on the writ, a *capias* with proclamation is to be granted for the party to yield his body to gaol under the penalty of 10*l.* And if he do not appear on the first *capias* and proclamation, a second is to go forth, and he is to forfeit 20*l.* &c. This statute is extended to writs *de contumace capiendo*, under *stat.* 52 *Geo.* 3. *c.* 127.

But, by the statute, if in the *excommunicato capiendo*, the party excommunicated hath not a sufficient addition, as to his place of dwelling, &c. according to 1 *H.* 5. *c.* 5. he shall not incur the penalties in this act for his contempt, in not rendering himself prisoner upon the *capias*, &c. 2 *Inst.* 661.

A writ *de excom. cap.* stating that the defendant was excommunicated in a cause of defamation and slander merely spiritual, is good. 7 *Term. Rep. K. B.* 153.

EXCOMMUNICATO DELIBERANDO. A writ to the sheriff for delivery of an excommunicate person out of prison, upon certificate from the ordinary of his conformity to the ecclesiastical jurisdiction. *F. N. B.* 63. *Reg. Orig.* 67. And where a man is unduly excommunicated, he may be delivered, in some cases, by an *habeas corpus*; and sometimes by pleading, as well as by an *excommunicato deliberando*: also sometimes by prohibition, &c. And on a general pardon, the party may have a writ to the bishop to absolve him. 12 *Rep.* 76. *Latch.* 205. *Godb.* 272. If a plaintiff in an action be excommunicate, and after he gets letters of *absolution*, on shewing them in court, he may have a re-summons, &c. upon his original. 1 *Inst.* 133.

EXCOMMUNICATO RECIPIENDO, or rather *Recapiendo.*] A writ whereby persons excommunicated being for their obstinacy committed to prison, and unlawfully delivered, before they have given *caution* to obey the authority of the church, are commanded to be sought after, *retaken*, and imprisoned again. *Reg. Orig.* 67.—If a person after his commitment escapes, and the sheriff has not returned his writ, a *capias excommunicatum de novo* shall go, otherwise if the writ be returned. *Mod. Ca.* 78.

EXCULPATION, *Letters of.* The warrant to an offender indicted, for citing witnesses in his own defence. *Scotch Dict.*

EXECUTION, Executio.] Signifies the last performance of an act, as of a judgment, &c. It is the obtaining possession of any thing recovered by judgment of law. 1 *Inst.* 289.

Sir Edw. Coke, in his Reports, makes two sorts of executions; one *final*, another with a *quousque*, tending to an end: an execution *final* is that which makes money of the defendant's goods, or extends his lands, and delivers them to the plaintiff, which he accepts in satisfaction, and is the end of the suit, and all that the king's writ requires to be done; the other writ with a *quousque*, though it tendeth to an end, is not final: as in case of a *capias ad satisfaciendum*, which is not a final execution, but the body of the party is to be taken, to the intent the plaintiff be satisfied his debt, &c. and the imprisonment of the defendant not being absolute, but until he do satisfy the same. 6 *Rep.* 87.

Execution, in the usual legal sense of the word, is a judicial writ grounded on the judgment of the court from whence it issues: and is supposed to be granted by the court at the request of the party at whose suit it is issued, to give him satisfaction on the judgment which he hath obtained; and therefore an execution cannot be sued out in one court, upon a judgment obtained in another. *Impey, K. B.*

This execution, or putting the law in force, is performed in different manners, according to the nature of the action upon which it is founded, and of the judgment which is had or recovered.

If the plaintiff recovers in an action real or mixed, whereby the seisin or possession of land is awarded to him, the writ of execution shall be an *Habere facias seisinam*, or writ of seisin of a freehold; or an *Habere facias possessionem*, or writ of possession of a chattel interest. *Finch L.* 470. See this Dict. those titles. These are writs directed to the sheriff of the county, commanding him to give actual possession to the plaintiff of the land so recovered, in the execution of which the sheriff may take with him the *posse comitatûs*, or power of the county, and may justify breaking open doors, if the possession be not quietly delivered. See *post*, III, 3. But if it be peaceably yielded up, the delivery of a twig, a turf, or the ring of a door, in the name of seisin, is sufficient execution of the writ. 3 *Comm.* 412.

Upon a presentation to a benefice recovered in a *quare impedit*, or assise of *darrein presentment*, the execution is by a writ *de clerico admittendo*; directed not to the sheriff, but to the bishop or archbishop, and requiring him to admit and institute the clerk of the plaintiff. See titles *Admittendo clerico*, *Advowson*.

In other actions, where the judgment is that something special be done or rendered by the defendant, then, in order to compel him so to do, and to see the judgment executed, a special writ of execution issues to the sheriff according to the nature of the case. As upon an assise of nuisance, or *quod permittat prosternere*, where one part of the judgment is that the nuisance be removed, a writ goes to the sheriff to abate it at the charge of the party; which likewise issues in case of an indictment. *Comb.* 10. See title *Nuisance*.

Upon a replevin the writ of execution is the writ *de retorno habendo;* to have a return of the cattle distrained; and if the distress be eloigned, the defendant shall have a *Capias in Withernam;* but on the plaintiff's tendering the damages, and submitting to a fine, the process in *Withernam* shall be stayed. 2 *Leon.* 174. See titles *Replevin; Distress; Withernam.* In detinue, after judgment the plaintiff shall have a *distringas* to compel the defendant to deliver the goods by repeated distresses of his chattels: (1 *Ro. Ab.* 737. *Rast. Ent.* 215:) or else a *scire facias* against any third person in whose hands they may happen to be, to shew cause why they should not be delivered: and if the defendant still continues obstinate, then (if the judgment be by default or on demurrer) the sheriff shall summon an inquest to ascertain the value of the goods, and the plaintiff's damages: which (being either so assessed, or by the verdict in case of an issue, *Bro. Ab.* tit. *Damages*, 29.) shall be levied on the person or goods of the defendant. See title *Detinue.* So that after all, in *Replevin* and *Detinue*, the only actions for recovering the specific possession of personal chattels, if the wrong-doer be very perverse, he cannot be compelled to the restitution of the identical thing taken or detained; but he has still his election to deliver the goods or their value. *Keilw.* 64.

*Executions*, in actions where money only is recovered, as a *debt* or *damages*, are of five sorts. 1. Against the body of the defendant. 2. Against his goods and chattels. 3. Against his goods and the *profits* of his lands. 4. Against his goods and the *possession* of his lands. 5. Against all three, his body, lands, and goods.

1. The first of these species of execution is by writ of *capias ad satisfaciendum*, (shortly called a *Ca. sa.*) to *take* and imprison the body of the debtor till *satisfaction* be made for the debt, costs, and damages. See this Dict. title *Capias.* Sir Edward Coke gives a singular instance where a defendant in 14 *Ed.* 3. was discharged from a *capias* because he was of so advanced an age that he could not undergo the pain of imprisonment. 1 *Inst.* 289. This writ is an execution of the highest nature, inasmuch as it deprives a man of his liberty till he makes the satisfaction awarded; and therefore when a man is once taken in execution upon this writ, no other process can be sued out against his lands or goods. Only by *stat.* 21 *Jac.* 1. *c.* 24. if the defendant dies while charged in execution upon this writ, the plaintiff may, after his death, sue out a new execution against his lands, goods, or chattels.

If a *Ca. sa.* is sued out, and a *non est inventus* is returned thereon, the plaintiff may sue out a process against the bail, if any were given; who stipulate in this triple alternative, that the defendant shall, if condemned in the suit, satisfy the plaintiff his debt and costs, or surrender himself a prisoner; or that they will pay it for him: as therefore the two former branches of the alternative are neither of them complied with, the latter must immediately take place. *Lutw.* 1269, 1273. In order to which a writ of *scire facias* may be sued out against the bail, commanding them to shew cause why the plaintiff should not have execution against them for his debt and damages; and on such writ, if they shew no sufficient cause, or the defendant does not surrender himself on the day of the return, or of shewing cause, the plaintiff may have judgment against the bail; and take out a writ of *Ca. sa.* or other process of execution against them. See titles *Bail; Scire Facias*—Post.

2. The next species of execution is against the goods and chattels of the defendant, and is called a writ of *Fieri Facias*, from the words in it where the sheriff is commanded that he *cause to be made* of the goods and chattels of the defendant, the sum or debt recovered. This lies as well against privileged persons, peers, &c. as other common persons; and against executors or administrators, with regard to the goods of the deceased. The sheriff may not break open any outer doors to execute either this writ or the writ of *Ca. sa.* but must enter peaceably; and may then break open any inner door belonging to the defendant, in order to take the goods. 5 *Rep.* 92. *Palm.* 54. See *post*, III, 3. And the sheriff may sell the goods and chattels of the defendant, even an estate for years, which is a chattel real, (8 *Rep.* 171.) till he has raised enough to satisfy the judgment and costs; first paying the landlord of the premises upon which the goods are found the arrears of rent then due, not exceeding one year's rent in the whole. *Stat.* 8 *An. c.* 14. See titles *Distress; Rent.* If part only of the debt be levied on a *Fieri Facias*, the plaintiff may have a *Ca. sa.* for the residue. 1 *Ro. Ab.* 904. *Cro. Eliz.* 344. See further this Dict. titles *Fieri Facias; Venditioni Exponas.*

3. A third species of execution is by writ of *Levari facias;* which affects a man's goods, and the *profits* of his lands, by commanding the sheriff to levy the plaintiff's debt on the lands and goods of the defendant; whereby the sheriff may seize all his goods, and receive the rents and profits of his lands, till satisfaction be made to the plaintiff. *Finch, L.* 471. Little use is now made of this writ; the remedy by *elegit*, which takes possession of the lands themselves, being much more effectual. But, as a species of this *levari facias* may be considered a writ of execution proper only to ecclesiastics, which is given when the sheriff, upon a common writ of execution sued, returns that the defendant is a beneficed clerk, having no lay fee. In this case a writ goes to the bishop of the diocese, in the nature of a *levari* or *fieri facias*, to levy the debt and damages *de bonis ecclesiasticis*, which are not to be touched by lay hands: and thereupon the bishop sends out a *sequestration* of the profits of the clerk's benefice, directed to the churchwardens to collect the same, and pay them to the plaintiff till the full sum be raised. *Reg. Orig.* 300. *Burn E. L.* 329. 2 *Inst.* 472. *Jenk.* 207. See further title *Levari Facias.*

4. The fourth species of execution is by the writ of *Elegit*, which is a judicial writ given by *stat. W.* 2. 13 *E.* 1. *c.* 18. either upon judgment for a debt or damages, or upon the forfeiture of a recognizance taken in the King's court. By the common law, a man could only have satisfaction of goods, chattels, and the present profits of lands, by the two writs of execution last-mentioned, (2 and 3;) but not the possession of the lands themselves, which was a natural consequence of the feodal principles prohibiting alienation of lands. See this Dict. title *Tenure.*

By this writ of *Elegit*, the defendant's goods and chattels are not sold, but only appraised; and all of them, except oxen and beasts of the plough, are delivered to the plaintiff at such reasonable appraisement and price, in part of satisfaction of his debt. If the goods are not sufficient, then the moiety, or one half of his freehold lands, which he had at the time of the judgment given, whether held in his own name, or any other in trust for him, are also to be delivered to the plaintiff: to hold till out of the rents and profits thereof the debt be levied, or till the defendant's interest be expired; as till the death of the defendant, if he be tenant for life, or in tail. 2 *Inst.* 395. *Stat.* 29 *Car.* 2 *c.* 3.

It is upon feodal principles also, that copyhold lands are not liable to be taken in execution upon a judgment. 1 *Ro. Ab.* 888. But in case of a debt to the King, it appears by *Magna Charta, c.* 8. that it was allowed by the common law for him to take possession of the lands till the debt was paid.

This execution, or seizing of lands by *elegit*, is of so high a nature, that after it the body of the defendant cannot be taken: but if execution can only be had of the goods because there are no lands, and such goods are not sufficient to pay the debt, a *Ca. sa.* may then be had after the *elegit;* for such *elegit* is in this case no more in effect than a *fieri facias. Hob.* 58.

Thus it appears that *body* and *goods* may be taken in execution; or land and *goods;* but not body and land too upon any judgment between subject and subject, in the course of the common law; but

5. Upon some prosecutions given by statute; as in the case of recognizances or debts acknowledged on *Statute Merchant*, or *Statute Staple;* (pursuant to *stat.* 13 *E.* 1. *de Mercatoribus;* 27 *E.* 3. *c.* 9. see this Dict. those titles;) upon forfeiture of these the body, lands, and goods may all be taken at once in execution to compel the payment of the debt. The process hereon is usually called an *Extent* or *extendi facias;* because the sheriff is to cause the lands, &c. to be appraised to their full extended value, before he delivers them to the plaintiff, that it may be certainly known how soon the debt will be satisfied. *F. N. B.* 131. See this Dict. title *Extent.*

By *stat.* 33 *H.* 8. *c.* 39. all obligations made to the King shall have the same force, and of consequence the same remedy to recover them, as a statute-staple: though indeed before this statute, the King was entitled to sue out execution against the body, lands, and goods of his accountant or debtor. 3 *Rep.* 12. And his debt shall, in suing out execution, be preferred to that of every other creditor who hath not obtained judgment before the King commenced his suit. *Stat.* 33 *H.* 8. *c.* 39. § 74.

The King's judgment also affects lands which the King's debtor hath at or after the time of contracting his debt, or which any of his officers mentioned in *stat.* 13 *Eliz. c.* 4. hath at or after the time of his entering on the office: so that if such officer of the Crown aliens for a valuable consideration, the land shall be liable to the King's debt, even in the hands of a *bonâ fide* purchaser: though the debt due to the King was contracted by the vendor many years after the alienation. 10 *Rep.* 55, 6. 8 *Rep.* 171. And see *stat.* 25 *Geo.* 3. *c.* 35. which enables the Court of Exchequer, on application by the Attorney-General by motion, to order the estate of any debtor to the King, and of the heirs and assigns of such debtor, in any lands extended, to be sold as the court shall direct; the conveyance to be made by the remembrancer of the court, by Bargain and Sale, to be inrolled in that court.

Judgments between subject and subject related, even at common law, no farther back than the first day of the Term in which they were recovered, in respect of the lands of the debtor; and did not bind his goods and chattels but from the date of the writ of execution: and now by the statute of frauds, 29 *Car.* 2. *c.* 3. the judgment shall not bind the land in the hands of a *bonâ fide* purchaser, but only from the day of actually signing the same, which is directed by the statute to be punctually entered on the record: nor shall the writ of execution bind the goods in the hands of a stranger or a purchaser, (*Skin.* 257.) but only from the actual delivery of the writ to the sheriff or other officer, who is therefore ordered to indorse on the back of it the day of his receiving the same. See further this Dict. title *Judgment:* and as to the prerogative of the crown, *post*, IV, 2. and on the subject in general, 3 *Comm. c.* 26.

The Reader may now pursue his inquiries under the following divisions:

I. *Of the Nature and several Kinds of Executions, and what Things were liable thereto at Common Law, &c.*

II. *Of the Judgments on which the several Executions may be taken out, and where the Party shall be concluded by the Election of one of them, &c.*

III. 1. *By whom, against whom.* 2. *At what Time, Executions may be sued.* 3. *By whom, and how they shall be executed.* 4. *How they are to be released and discharged.*

IV. 1. *To what time Executions shall relate, so as to avoid Alienation;* 2. *Of the King's Prerogative in respect of Executions.*

V. 1. *Of the Party's Remedy against irregular Executions;* 2. *Of the Offence of obstructing Executions.*

The writs of execution at Common Law were only a *fieri facias* on the goods and chattels, and a *levari facias* to levy the debt or damages upon the land and chattels: The *ca. sa.* was given by construction of the *stat.* 25 *Ed.* 3. *c.* 17. and the *elegit*, by *stat. Westm.* 2. *c.* 18. which makes the body liable, and the future profits of lands, &c. 1 *Inst.* 154. 2 *Inst.* 394.

The reason why by the Common Law, where a subject had execution for debt or damages, he could not have the body of the defendant, or his lands, in execution, (unless it were in special cases,) was, that the defendant's body might be at liberty, not only to follow his own affairs and business, but also to serve his King and country; and taking away the possession of his lands would hinder the following of his husbandry and tillage. 2 *Inst.* 394.

Though neither the body nor lands of the debtor on a judgment could be taken in execution at Common Law, but only his goods; yet in action of debt against an heir, upon the bond of his ancestor, his land which he had by descent was subject to be taken in execution. 3 *Rep.* 11. In action of debt against the heir upon his ancestor's bond, there was judgment by *nihil dicit:* and it was held that the plaintiff should have execution against the heir, of any of his own lands or goods. *Dyer*, 89, 149. Judgment was had against the heir by *nil dicit*, and a *scire facias* being brought against him to have execution, he pleaded *riens per descent;* it was adjudged that this plea was too late after the judgment by *nil dicit*, and the execution shall be on his own lands. *Dyer*, 344.

But there is a difference between a *scire facias* and an *action of debt* brought against an heir upon a bond of his ancestor, in which the heir is named. *Poph.* 193. On a judgment for the debt of an ancestor, where the heir hath made over lands descended to him, execution may be taken against such heir to the value of the land, &c. for the debt of his ancestor, as if it were his own debt. *Stat.* 3 & 4 *W.* & *M. c.* 14. § 5. See title *Fraud.*

If a person have judgment given against him for debt or damages, or be bound in a recognizance, and dieth, and his heir be within age, no execution shall be sued of the lands during the minority; and against an heir within age, no execution shall be sued upon a statute-merchant or staple, &c. 1 *Inst.* 290.

No execution for damages recovered in a real action, shall be had by *capias ad satisfaciendum:* but where a man hath judgment to recover lands and damages, he may have execution of both together. 8 *Rep.* 141.

Whatever may be *assigned* or *granted* may be taken on an execution. Nothing can be taken in execution that cannot be *sold*, as deeds, writings, &c. *Bank-notes*, &c. cannot be taken in execution; as they remain, in some measure, *choses in action. Hardw.* 53.

If there are chattels sufficient, the sheriff ought not to take the lands; nor may things fixed to the freehold, goods bought *bonâ fide*, goods pawned, &c. be taken in execution. 8 *Rep.* 143. And if a defendant hides his goods in secret places, so that the plaintiff cannot take them in execution, it is said no action will lie against him. 5 *Rep.* 92, 93.

The sheriff cannot take the goods of a stranger, for he is to take the goods of the party only at his peril. And if a bailiff on a *fi. fa.* against the goods of A. take those of B. an action of trespass lies against the sheriff. *Doug.* 40. If on execution against one of two partners, the partnership effects

be taken and sold, the court will order the sheriff to pay over to the other, a share of the produce, proportioned to his share in the partnership effects, to be ascertained by the master. *Doug.* 650. *Eddie* v. *Davidson.*

If the plaintiff cannot find sufficient effects to satisfy his judgment, the court will order the sheriff to retain for his use money which he has levied in an action at the suit of the defendant. *Doug.* 231. But *Money*, the surplus of a former execution against the defendant's goods, was refused to be stayed in the hands of a former sheriff, for the purpose of satisfying another execution at the suit of the same plaintiff against the same defendant, who had no other effects on which the sheriff in office could levy. *Fieldhouse* v. *Croft*, 4 *East's Rep.* 510. and see 9 *East's Rep.* 48.

By *stat.* 56 *Geo.* 3. *c.* 50. for regulating the sale of *farming stock* taken in execution, it is enacted that no sheriff, &c. shall sell or carry off from any lands any straw, chaff, turnips, or manure, in any case whatever, nor any hay or other produce, contrary to the covenants to which the tenant is subject, of which the tenant must give notice; but shall dispose of such crops or produce subject to agreement to spend them on the land; and sheriffs are indemnified for acting under the provisions of the act.

II. When a judgment is signed, execution may be taken out immediately upon it, and need not be delayed till it is entered, it being a perfect judgment of the court before entered. *Co. Lit.* 505. And if the judges of the court of B. R. see one against whom there is a judgment of that court walk in Westminster-Hall, they may send an officer to take him up if the plaintiff desire it, without a writ of execution. 7 *Mod.* 52. If execution be not sued *within a year and a day* after judgment, where there is no fault in the defendant, as if writ of error be not brought, &c. there must be a *scire facias* to revive the judgment, which, in that time, may be had without moving the court; but if it be of longer standing, the court is to be moved for it. 1 *Inst.* 290. 2 *Inst.* 771. But if the defendant be *outlawed* after judgment, (as he may where he cannot be taken in execution, or hath no lands or goods to pay the debt, &c. when the suit is commenced by original,) the plaintiff need not renew the judgment by *scire facias* to obtain execution after a year. 1 *Inst.* 290.

It hath been adjudged that, by the Common Law, if a man was outlawed after judgment in debt, the plaintiff was at the end of his suit, and he could have no other process after that personally, but was put to his new original, &c. 2 *Nels. Abr.* 772. If one be arrested upon process in B. R. and puts in bail; and afterwards the plaintiff recovers, and the defendant renders not himself according to law, in safeguard of his bail, the plaintiff may, at his election, take execution against the principal, or his bail, after judgment against them; but if he takes the bail, he shall never afterwards meddle with the principal. *Cro. Jac.* 320.

If one recovers jointly against two in debt, the execution must be joint against them: the court cannot divide an execution which is entire, and grounded on the judgment. *Mich.* 24 *Car. B. R.*

A man and his wife recovered in an action of debt against the defendant 100*l.* and damages; then the wife died, and the husband prayed to have execution upon this judgment: the court at first inclined, that it should not survive to the husband, but that administration ought to be committed of it, as a thing in action; but at last they agreed that the husband might take out execution, for that by the judgment it became his debt due to him in his own right. *Cro. Car.* 608. 1 *Mod. Rep.* 179, 180. See titles *Baron* and *Feme.*

If judgment be against two, on the death of one the plaintiff shall have execution by *scire facias* against the survivor; and though he pleads that the other defendant has an heir alive, &c. it will not prevent it. *Raym.* 26. And where two persons recover in debt, and before execution one of them dies; it has been held that execution may be sued in both their names by the survivor, and it will be no error which may be done without a *scire facias. Noy*, 150. An execution may be executed after the death of the defendant; for his executor being privy, is bound as well as the testator; and where execution is once begun it cannot be delayed, unless there appears irregularity; and *audita querela* is no *supersedeas* to it, nor shall any thing stop the sheriff from selling, &c. *Cro. Eliz.* 73. *Comberb.* 33. 389.

Though a man can have but one execution; yet it must be intended *an execution with satisfaction*, and the body of the defendant is no satisfaction, only a pledge for the debt. 5 *Rep.* 486. When therefore a person dies in execution, it is without satisfaction; so that the plaintiff may have a *fieri facias* against the goods, or *elegit* against the lands. This was not so at Common Law, *Hob.* 57. but it is given by *stat.* 21 *Jac.* 1. *c.* 24. Where a person however was taken on a *capias utlagatum*, and died in prison, the plaintiff having chosen this execution, which is the highest in law, it has been held that the defendant dying, the law will adjudge it a satisfaction. *Cro. Eliz.* 850.

If a sheriff make a seizure under a writ of *fieri facias*, the plaintiff cannot take the defendant in execution under a writ of *ca. sa.* until the writ of *fi. fa.* is returned, though he abandon the seizure of the goods. *Miller* v. *Parnel*, 6 *W. P. Taunton*, 370.

If an execution be executed and filed, the party can have no other execution upon that judgment; because there can be but one execution with satisfaction upon one judgment: but if the execution be not returned and filed, another execution may be had: and if only part of the debt be levied on a *fieri facias*, another writ of execution may be sued out for the residue thereof. 1 *Lill. Abr.* 565. If one take out any writs of execution, and they have no effect, he may have other writs on their failure. *Hob.* 57.

In case any prisoner committed in execution shall escape, any creditor at whose suit he stands charged, may retake him by a new *capias ad satisfaciendum*, or sue forth any other kind of execution, as if the body of such prisoner had never been taken in execution. *Stat.* 8 & 9 *W.* 3. *c.* 27. See title *Escape.* Where two are bound *jointly and severally*, and judgment is had against both of them, if one in execution escapes, the creditor may take out execution against the other; but if he go by licence of the creditor, then the other will be discharged. *Cro. Car.* 53. If one in execution be delivered by privilege of parliament, when the privilege ceases the plaintiff may sue out a new execution against him. *Stat.* 1. *Jac.* 1. *c.* 13.

See *stat.* 41 *Geo.* 3. (U. K.) *c.* 90. by which it is provided, that where in any suit between party and party in England, any order shall be made for payment of money by the Court of Chancery, a copy thereof shall be certified into the Court of Chancery in Ireland and inrolled there, and process issued thereon: and so *vice versa*, on order of the Court of Chancery of Ireland, which shall, in like manner, be enforced and executed in England. § 5, 6.

III. 1. No person is entitled to, or can sue out execution, who is not privy to the judgment, or intitled to the thing recovered, as heir, executor, or administrator to him who has judgment. 1 *Rol. Abr.* 889.

If one have judgment to recover lands, and die before execution, his heir shall have it; and where tenant in tail recovers and dies before the execution without issue, he in remainder may sue out execution: an heir is to have execution for lands, and the executor or administrator for damages. *Co. Litt*, 251. *Dyer*, 26. The executors of executors may

sue out execution of a judgment; but an administrator getting judgment in behalf of the intestate, and then dying, neither his executor or administrator shall take out the execution, but the administrator *de bonis non administratis* of the first intestate. 5 *Rep.* 9. And see *stat.* 17 *Car.* 2. *c.* 8.

But if an administrator, *durante minori ætate* of an executor, recovers in debt, and before execution the executor comes of age, he shall have a *scire facias* on this judgment; for carrying on the suit in right of the executor, made the executor privy thereto. 1 *Rol. Abr.* 888, 889.

After interlocutory judgment against a woman upon a contract, she marries, yet the plaintiff may proceed to judgment and execution against her without joining the husband by *scire facias*. And a *capias ad satisfaciendum* against her following the judgment, is at all events regular, though the plaintiff had notice of the marriage before. 4 *East's Rep.* 521.

If a man has judgment for the arrears of rent, and dies, his executor shall sue out execution, and not the heir; for by the recovery it becomes a chattel vested, to which the executor is entitled. 1 *Rol. Abr.* 880.

If a statute be entered into, to husband and wife, and the husband dies, the wife shall take out execution. 1 *Rol. Abr.* 889. So if husband and wife recover lands and damages, and the husband dies, the wife shall have execution of the damages, and not the executors of the husband. 1 *Rol. Abr.* 342. 889, 890. See titles *Baron* and *Feme*.

If there be judgment in debt against two, and one dies, a *scire facias* lies against the other alone, reciting the death: and he cannot plead that the heir of him that is dead has assets by descent, and demand judgment, if he ought to be charged alone; for at Common Law, the charge upon a judgment being personal, survived, and the statute of *Westm.* 2. that gives the *elegit* does not take away the remedy of the plaintiff at Common Law; and therefore the party may take out his execution which way he pleases; for the words of the statute are, *fit in electione*; but if he should after the allowance of this writ, and revival of the judgment, take out an *elegit* to charge the land, the party may have remedy by suggestion, or else by *audita querela*. *Raym.* 26. 1 *Lev.* 30. 1 *Keb.* 92. 123. S. C.

By the Common Law, if judgment be given against a man for debt or damages, and the defendant dies before execution sued, his heir within age is not liable to execution during his minority; but *the parol must demur* (*i. e.* the plea must stand still) in such case till he comes of age. *Co. Lit.* 290. *a.* 1 *Rol. Abr.* 140.

And this privilege of infancy does not only protect the infant, but all others who are affected by the judgment; as if there be father and two daughters, and judgment be given for debt against the father, who dies, one of the daughters being within age, partition being made, the eldest shall not be charged alone, but shall have the benefit of her sister's minority, which puts a stop to the execution. *Co. Lit.* 290. *a.*

There can be no execution taken out against a member of parliament during privilege of parliament: also no *capias* can issue against a peer; for even in the case of a private person at Common Law, the body was not liable to creditors; and the statute of *Ed.* 3. which subjects the body does not extend to peers, because their persons are sacred: the law also supposes that persons thus distinguished by the King have wherewithal otherwise to satisfy their creditors. 6 *Co.* 52. *Hob.* 61. *Cro. Car.* 205.

A *capias ad satisfaciendum* may be executed upon a prisoner in prison for felony; and if he be acquitted of the felony, the sheriff is to keep him. 1 *Lil. Abr.* 567. But where a person is in prison for criminal matters, he ought not to be charged with a civil action without leave of the court; yet if he be charged, he shall not be discharged. *Raym.* 58. See 7 *Mod.* 153. and this Dict. title *Prisoner*.

A *ca. sa.* will lie against a man who is outlawed for felony, and he may be taken in execution at the suit of a common person. *Owen*, 69. And if he was taken upon a *capias utlagat.* which was at the King's suit, he shall be in execution at the suit of the party if he will. *Moor*, 566. But this is not prayer of the party: and if after a judgment given, the judges of their own heads, or at the request of any person, without prayer of the plaintiff, commit the defendant to prison; by this he shall not be said to be in execution for the plaintiff. *Dyer*, 297. If one arrested be in prison for debt, and judgment is had against him; though it be in arrest on a *latitat* or *capias*, he shall not be in execution upon the judgment, unless the plaintiff prays it of record, or sues a *capias ad satisfaciendum*, and delivers it to the sheriff. *Dyer*, 167. 306. *Jenk. Cent.* 165.

In ejectment against a feme sole who married before trial, and verdict and judgment against her by her original name: held that it was regular to issue an *habere facias possessionem*, and *fi. fa.* against her by the same name, though the latter was inoperative. *Doe, d. Taggart*, v. *Butcher*, *Term Rep. K. B. Hil.* 55 *Geo.* 3. 557.

2. At Common Law in *real* actions, where land was recovered, the demandant, after the year, might take out a *scire facias* to revive his judgment; because the judgment being particular in the real action, *quoad* the lands with a certain description, the law required that the execution of that judgment should be entered *upon the roll, that it might be seen whether execution was delivered of the same thing of which judgment was given:* a *scire facias* issued to show cause why execution should not be. 2 *Inst.* 471. 5 *Co.* 88. *Cro. Eliz.* 416. 6 *Mod.* 288.

But if the plaintiff, after he had obtained judgment in any *personal* action, had lain quiet, and had taken no process of execution within the year, he was put to a new original upon his judgment, and no *scire facias* was issuable at law on the judgment, because there was not a judgment for any *particular thing in the personal action*, with which the execution could be compared; therefore after a reasonable time, which was a year and a day, it was presumed to be executed, and the law allowed him no *scire facias* to shew cause why there should not be execution; but if the party had slipped his time, he was put to his action on the judgment, and the defendant was obliged to shew how that debt of which the judgment was an evidence, was discharged. 2 *Inst.* 469. *Carth.* 30, 31. 1 *Sid.* 351.

To remedy this, and to make the forms of proceeding more uniform in both actions, the stat. of *Westm.* 2. *cap.* 45. gave the *scire facias* to the plaintiff to revive the judgment, where he had omitted to sue execution within the year after judgment obtained.

A *scire facias* lies on a judgment in ejectment; for the words of the act are, *Sive servitia, sive consuetudines, sive alia quæcunque irrotulata*, which comprehend all judgments, and give the like remedy on them by *scire facias*, as the demandant had on a judgment in a real action at Common Law. 1 *Sid.* 351. 2 *Salk.* 600.

But though the general rule be that the plaintiff cannot take out execution after the year and day without a *scire facias*, yet the rule must be understood with some restrictions.

If a *Fi. fa. Ca. sa.* or *Elegit* be taken out within the year, and returned and awarded on the roll, the same may be continued from term to term to the time of the execution thereof, although after the year; and be as effectual as if the judgment had been revived by *scire facias*. *N. on R. E.* 5 *Geo.* 2. But a *Fi. fa.* must be left with the proper officer before he will make the entry on the roll returned by the sheriff. *Imp. K. B.*

If the defendant brings a writ of error, and thereby hinders the plaintiff from taking his execution within the year, and

the plaintiff in error is nonsuit, or the judgment affirmed, the defendant in error may proceed to execution after the year without a *scire facias*, because the writ of error was a *supersedeas* to the execution, and the plaintiff must acquiesce till he hears the judgment above; besides, while the cause is still *sub judice*, it is not known whether the plaintiff shall recover or not, and the year for the execution ought to be accounted from the *final* judgment given. *Cro. Jac.* 364. *Yelv.* 7. 1 *Rol. Abr.* 899. 4 *Leon.* 197. 5 *Co.* 88. *Carth.* 236, 237. 6 *Mod.* 288.

The Court refused to stay execution after verdict and judgment, which was affirmed on error, until the trial of an indictment for perjury against two of the plaintiff's witnesses in the action. *Warwick* v. *Bruce*, *Term Rep. K. B. East.* 55 *G.* 3. 140.

Leave refused to take out an execution, after a writ of error, where it did not appear but that the declaration of the defendant, that he would sue out a writ of error and delay the plaintiff, was made before an action pending. An affidavit for grounding a rule for leave to take out execution, notwithstanding a writ of error may be sworn before judgment signed. *Baskett* v. *Barnard*, *Term Rep. K. B. Trin.* 55 *G.* 3. 330.

If the plaintiff hath a judgment, with stay of execution for a year, he may, after the year, take out his execution without the *scire facias*, because the delay is by consent of parties, and in favour of the defendant; and *the indulgence of the plaintiff shall not turn to his prejudice*, nor ought the defendant to be allowed any advantage of it, when it appears to be done for his advantage, and at his instance. 6 *Mod.* 288. 1 *Rol. Rep.* 104.

But if the defendant had been tied up by an injunction out of Chancery for a year, yet he cannot take out execution without a *scire facias*, because the courts of law do not take notice of Chancery injunctions as they do of writs of error; besides in that case, it had been no breach of the injunction to have taken out the execution within the year, and continued it down by *vic' non misit breve*, which cannot be done in the case of a writ of error, *because that removes the record out of the court where the judgment* was; and therefore there can be no proceedings below till it be affirmed, and returned to the inferior courts. 1 *Salk.* 322. 6 *Mod.* 288. *S. C.*

In debt, if defendant acknowledge the action for part, and as to the remainder pleads to issue, and the plaintiff hath judgment for that he confesseth; here he may not have execution till the issue is tried for that which he is to recover damages: though if he releases the damages, he may have execution presently for the rest. *Rol.* 897.

3. All judgments of *inferior courts* in debt are to be executed in the *peculiar jurisdictions* where given, and cannot be removed to be executed by the *superior courts*. *Cro. Car.* 34.

Now by *stat.* 19 *Geo.* 3. *c.* 70. § 4. where final judgment shall be obtained in any suit in any inferior court of record, any of the courts at Westminster, on affidavit thereof, and that execution has issued against the defendant's person or effects, and that they are not to be found within the jurisdiction of such inferior court, may cause the record of the judgment to be removed into such superior court, to issue execution thereon in the same manner as in judgment obtained in the said superior courts.

If a judgment given in another court be affirmed or reversed for error in B. R. because the proceedings in the court below are entered upon record in the King's Bench, the party shall have execution in that court; and so if a judgment of debt, &c. in the Common Pleas be affirmed in B. R. on a writ of error. 5 *Rep.* 88. Though where the record of a judgment given in C. B. is removed into B. R. the party cannot take out execution upon it, without a *scire facias quare executionem habere non debeat*, 1 *Lill. Abr.* 562. And where a writ of error is brought in the Exchequer Chamber, to reverse a judgment in B. R. if the judgment is affirmed there, yet that court cannot make out execution upon the judgment affirmed; but the record must be transmitted back to the court of King's Bench, where execution must be done. 1 *Lill.* 565. See title *Error*.

As an execution is an entire thing, he who begins must end it; a new sheriff may distrain an old one to sell the goods on a *distringas nuper vicecom'* and to bring the money into court, or sell and deliver the money to the new sheriff; and the authority of the old sheriff continues by virtue of the first writ, so that when he hath seized, he is compellable to return the writ, and liable to answer the value according to the return; likewise by the seizure the property of the goods, &c. is divested out of the defendant, and he is discharged, whereby no further remedy can be had against him. 1 *Salk.* 322. 3 *Salk.* 159.

A sheriff shall have his fees for executions upon a writ of *capias ad satisfaciendum* for the whole debt upon a *fieri fac.* according to the sum levied; and on an *elegit* it is held by some, that he shall have fees according to what is levied, and by others, for the whole debt recovered, because the plaintiff may keep the land till he is satisfied the entire debt. 1 *Salk.* 333. Where the sheriff hath a *fieri facias* or *ca. sa.* against a man, and before execution he pays him the money, execution may not be done afterwards; if it be, trespass or false imprisonment lies. 5 *Rep.* 93. 12 *Car. B. R.* See title *Sheriff*.

It is laid down as a general rule in our books, that the sheriff, in executing any judicial writ, cannot break open the door of a dwelling-house; this privilege, which the law allows to a man's habitation, arises from the great regard the law has to every man's safety and quiet, and therefore protects them from the inconveniences which must necessarily attend an unlimited power in the sheriff and his officers in this respect; hence, every man's house is called his castle. 5 *Co.* 91. &c. 3 *Inst.* 162. *Moor*, 668. *Yelv.* 28. *Cro. Eliz.* 908. *Dalt. Sher.* 350.

Yet in favour of executions, which are the life of the law, and especially in cases of great necessity or where the safety of the King and Commonwealth are concerned, this general case hath the following exceptions:

1st. That whenever the process is at the suit of the king, the sheriff or his officer may, after request to have the door opened, and refusal, break and enter the house to do execution, either on the party's goods, or take his body, as the case shall be. 5 *Co.* 91. *b.*

2dly. So in a writ of seisin or *habere facias possessionem* in ejectment, the sheriff may justify breaking open the door if denied entrance by the tenant; for the end of the writ being to give the party full and actual possession, consequently the sheriff must have all power necessary for this end: besides, in this case, the law does not, after the judgment, look upon the house as belonging to the tenant, but to him who has recovered. 5 *Co.* 91.

3dly. Also this privilege of a man's house relates only to such execution as affects himself; and therefore if a *fieri facias* be directed to the sheriff to levy the goods of A. and it happens that A.'s goods are in the house of B. if after request made by the sheriff to B. to deliver these goods, he refuses, the sheriff may well justify the breaking and entering his house. 5 *Co.* 93. *a.* 1 *Sid.* 186.

4thly. It hath been adjudged that the sheriff, on a *fieri facias*, may break open the door of a barn, standing at a distance from the dwelling-house, without requesting the owner to open the door; in the same manner as he may enter a close, &c. 1 *Sid.* 186. 1 *Keb.* 698. *S. C.*

5thly. So on a *fieri facias*, when a sheriff or his officers are once in the house, they may break open any chamber-door or trunks for the completing execution. 2 *Show.* 87.

6thly. So if the sheriff's bailiffs enter the house, the door being open, and the owner locks them in, the sheriff may justify breaking open the door for the setting at liberty the bailiffs; for if, in this case, he were obliged to stay till he could procure a *homine replegiando*, it might be highly inconvenient; also it seems that, in this case, the locking in the bailiffs is such a disturbance to the execution, that the court will grant an attachment for it. *Palm.* 52. *Cro. Jac. p.* 555. *S. C.* 2 *Roll. Rep.* 132. *S. C.*

7thly. That if the sheriff, in executing a writ, breaks open a door, where he has no authority for so doing by law, yet the execution is good, and the party has no other remedy but an action of trespass against the sheriff. 5 *Co.* 93. *a.*

A sheriff finding the doors open may enter a house to search for the body of a debtor, under a writ of *cap. ad satis.* 4 *W. P. Taunton*, 619.

If the sheriff refuses to execute any judicial writ, this is a contempt to the court, for which an attachment will be granted. 1 *Salk.* 323.

So if he executes the writ, and makes a false return, the party injured may have *an action on the case* against him. 1 *Salk.* 323.

Although a sheriff make a warrant and seizure of goods under a *fi. fa.* last delivered to him, yet the plaintiff in a *fi. fa.* first delivered to the sheriff, is entitled to be first satisfied out of the fruits of that seizure. And if a second *fi. fa.* be delivered to a sheriff after he has the defendant's goods in possession under the prior *fi. fa.* of another, the goods are bound by the second execution, subject to the first execution, from the date of the delivery of the last writ to the sheriff; and that without warrant on the second writ, or further seizure. *Jones* v. *Atherton*, 7 *W. P. Taunton*, 56.

4. By a release of *all suits* execution is gone; for no one can have execution without prayer and suit, but the King only, in whose case the judges ought to award execution *ex officio*, without any suit: and a release of *all executions* bars the King. By release of *all debts or duties*, the defendant is discharged of the *execution*, because the debt or duty on which it is founded is discharged: but if the body of a man be taken in *execution*, and the plaintiff release *all actions*, yet he shall remain in *execution*. *Co. Lit.* 291. If a judgment is given in action of debt, and the defendant taken in *execution*, the plaintiff releaseth the *judgment*, the body shall be discharged of the *execution*. And if the plaintiff after judgment releaseth *all demands*, the *execution* is discharged. *Ibid.* Where one is in *execution* at my suit, and I bid the sheriff let him go; this is a good discharge and release both to the party and sheriff. *Poph.* 207.

A defendant cannot be taken in execution *twice* on the same judgment, though he were discharged the first time by the plaintiff's consent, upon an express undertaking that he should be liable to be taken in execution again if he failed to comply with the terms agreed on, which he did. *Blackburn*, v. *Stupart*, 2 *East's Rep.* 213.—See title *Debtors.*

But if the plaintiff make a release to the defendant *being in execution*, or other act amounting to a discharge; it will not be a discharge *ipso facto*, but by this means he may have the same. 5 *Rep.* 86. *Dyer*, 152.

If one of two defendants taken on a joint *ca. sa.* be discharged under an insolvent act, that will not operate as a discharge of the other. 5 *East's Rep.* 147.

A defendant superseded for not being charged in execution within two terms after judgment, cannot be again arrested and taken in execution upon the same judgment. *Aliter* if superseded for want of proceeding in time *before* judgment. 7 *East's Rep.* 330.

The court will not stay judgment and execution on a summary application, because the plaintiffs after verdict became alien enemies. 9 *East's Rep.* 324.

By *stat.* 32 *Geo.* 2. *c.* 28. usually called the *Lords' Act*, if a defendant charged in execution for any debt not exceeding 100*l.* (extended by *stat.* 26 *Geo.* 3. *c.* 44. for five years to 200*l.*; extended by 33 *Geo.* 3. *c.* 5. to 300*l.* amended by 37 *Geo.* 3. *c.* 85. and made perpetual by 39 *Geo.* 3. *c.* 50.) will surrender all his effects to his creditors (except his apparel, bedding, and tools of his trade, not amounting in the whole to the value of 10*l.*) and will make oath of his punctual compliance with the statute, such prisoner may be discharged, unless the creditor insists on detaining him; in which case he shall allow him 3*s.* 6*d.* per week, to be paid on the first day of every week, and on failure of regular payment the prisoner shall be discharged. Yet the creditor may at any future time have execution against the lands and goods of such defendant, though never more against his person. And the creditors may, as in case of bankruptcy, *compel*, under pain of transportation for seven years, such debtor to make a discovery and surrender of all his effects for their benefit; whereupon he is also entitled to the like discharge of his person.

Persons thus charged in *execution*, in order to take the benefit of these acts, are to exhibit a petition to the court whence the process issued, with an account of their whole estate upon oath, praying to be discharged, &c. And thereupon the court shall order the prisoner to be brought up, and his creditors summoned at a certain day, when the court, in a summary way, is to examine into the same, &c. and order the estate and effects of the prisoner to be assigned to the creditors by indorsement on the back of the petition. § 13.

The prisoners (except in London and Westminster) before they petition any of the courts from whence the process issued, for a rule to be brought up, are to give notice to their creditors in writing, that they design to petition, and also a true copy of the account or schedule of their whole estates which they intend to deliver into the court, &c. And then, upon such petition, the prisoners shall have a rule of court to be brought to the next assizes for the county, at an expence not exceeding 12*d.* a mile, to be paid to the officer out of the effects of the prisoners, &c. And the creditors must be summoned to appear at the said assizes, by order served on them, or left at their houses thirty days before; and at the assizes the judges, on examination, shall determine the matter, and give judgment and relief; a record of which judgment is to be returned and certified to the court whence the process issued, on which the prisoners were taken in execution. No person charged in execution shall be allowed to exhibit a petition to any court at law to be discharged, pursuant to the above acts, unless it be done before the end of the next term after he is charged. § 14, 15.

By *stat.* 49 *Geo.* 3. *c.* 6. persons in custody for contempts of courts of equity, for non-payment of money or costs, are declared entitled to the benefit of *stats.* 32 *Geo.* 3. *c.* 28. &c.

By *stat.* 48 *Geo.* 3. *c.* 123. persons having lain in prison for a year in execution on the judgment of any court whatever, whether of record or not, for any debt or damages not exceeding 20*l.* may be discharged on application to the courts at Westminster in term time; their future estate remaining liable.

A plaintiff who has lain in prison more than a year under an execution for the costs of a nonsuit, not amounting to 20*l.* is entitled to his discharge under the said act 48 *Geo.* 3. *c.* 123. *Roylance* v. *Hauling*, *Term Rep. K. B. Mic.* 55 *Geo.* 3. 282.

If a creditor who detains a defendant in custody pay any part of his weekly allowance in a spurious or foreign coin (*e. g.* French) the defendant is entitled to his discharge. And the turnkey of a prison is not such an agent for a prisoner in execution that by his acceptance of such spurious coin he can bind a prisoner. *Agatter* v. *Wilson*, 7 *W. P. Taunton*, 7.

See further title *Insolvent Debtors.*

IV. 1. Writs of execution bind the property of *goods* only from the time of the *delivery of the writs* to the sheriff; who, upon receipt thereof, indorses the day of the month when received: but *land* is bound from *the day of the judgment*. *Stat.* 29 *Car.* 2. *c.* 3. *Cro. Car.* 149. But the judgment *must be docketed* according to the directions of *stat.* 4 *& 5 W. & M. c.* 20. by which, for the greater security of purchasers, it is enacted, that the clerk of the essoins of the court of C. B. the clerk of the doggets of the court of King's Bench, and the master of the office of pleas in the court of Exchequer, shall make and put into an alphabetical dogget, by the defendant's names, a particular of all judgments, as well by confession, *nòn sum informatus*, *nihil dicit*, &c. as on verdict entered in their several courts, &c. and that no judgment not doggeted, and entered in the books as aforesaid, shall affect any lands or tenements as to purchasers or mortgagees, or have any preference against heirs, executors, or administrators, in their administration of their ancestors, testators, or intestate's estates. See title *Judgment*.

Notwithstanding this statute, if after the writ delivered to the sheriff, and *before execution is executed*, the defendant becomes *bankrupt*, that will hinder execution. 3 *Salk.* 159. See title *Bankrupt*.

The plaintiff takes out execution by *fieri facias* against the defendant; all the goods and chattels that he had at the time of the execution will be liable to it: and where debt or damages are recovered, the plaintiff shall have execution of any land the defendant had *at the time of the judgment*; not of the lands he had the day when the first writ was purchased. *Rol. Abr.* 892. By *stat.* 29 *Car.* 2. *c.* 3. sheriffs may deliver in execution all lands whereof others shall be seised in trust for him against whom execution is had on a judgment, &c.

The sale of goods for a valuable consideration, after judgment, and before execution awarded, is good. And if judgment be given against a lessee for years, and afterwards he selleth the term before execution, the term assigned *bonâ fide* is not liable; also if he assign it by fraud, and the assignee sells it to another for a valuable consideration, it is not liable to execution in the hands of the second assignee. *Godb.* 161. 2 *Nels. Abr.* 783. If a person has a bill of sale of any goods in nature of a security for money, he shall be preferred for his debt to one who hath obtained a judgment against the debtor before those goods are sold; for, till execution lodged in the sheriff's hands, a man is owner of his goods, and may dispose of them as he thinks fit, and they are not bound by the judgment. *Preced. Ch.* 286. But where a man generally keeps possession of goods after sale, it will make the same void against others, by the statute of fraudulent conveyances. And where, on an execution, the owner of the goods, by agreement, was to have the possession of them upon certain terms; afterwards another got judgment against the same person, and took those goods in execution: it was adjudged they were liable, and that the first execution was by fraud, and void against any subsequent creditor; because there was no change of the possession, and so no alteration of property. *Ibid.* 287. See title *Fraud*.

A *fieri facias* being executed fraudulently, a *fieri facias* at the suit of another person afterwards shall stand good, and be preferred; and on trial, it is a matter proper to be left to a jury. 1 *Wils.* 44.

Where two writs of *fieri facias* against the same defendant are delivered to the sheriff on different days, and no sale is actually made of the defendant's goods, the first execution must have the priority, even though the seizure was first made under the subsequent execution. 1 *Term Rep.* 729. But where the sheriff has given a bill of sale to the person claiming under the second execution, this entitles the latter to secure his debt, and the sheriff is liable to the plaintiff who delivered the first writ. *Ib.* 731.

Execution may be made of lands that the defendant hath by purchase after the judgment; although he sell the same before execution. *Roll.* 892.

The *stat.* 8 *Ann. c.* 14. directs that where there is an execution against goods or chattels, of a tenant for life, or years, the plaintiff before removal of the goods by the execution is to pay the landlord the rent of the land, &c. so as there be not above a year due; and if more be due, paying a year's rent, the plaintiff may proceed in his execution, and the sheriff shall levy the rent paid, as well as the execution money.

But a ground-landlord cannot come in for a year's rent in the case of an execution against an under lessee; for the statute only extends to the immediate landlord. *Str.* 787. And the landlord must give the sheriff notice, or he is not bound. 1 *Str.* 97. Vide 2 *Wils.* 140.

2. The King, by his prerogative, may have execution of the body, lands, or goods of his debtor, at his election. *Hob.* 60. 2 *Inst.* 19. 2 *Rol. Abr.* 472.

As to the King's execution of *goods*, the same relates to the time of the awarding thereof, which is the *teste* of the writ, as it was in the case of a common person at law; for though by the 29 *Car.* 2. *cap.* 3. no execution shall bind the property of goods, but from the time of the delivery of the writ to the sheriff; yet as this act does not extend to the King, an *extent* of a *later teste* supersedes an *execution* of the goods by a *former* writ; because by the King's prerogative at Common Law, if there had been an execution at the subject's suit and afterwards an extent, the execution was superseded till the extent was executed, because the public ought to be preferred to private property. 2 *New. Abr.* 365.

If the King's debt be *prior on record*, it binds the lands of the debtor, into whose hands soever they come, because it is in the nature of an original charge upon the land itself, and therefore must subject every body that claims under it; but if the lands were aliened in whole, or in part, as by granting a jointure before the debt contracted, such alienee claims prior to the charge, and in such case the land is not subject. See 2 *Roll. Abr.* 156, 157. *Moor*, 126. 3 *Leon.* 239, 240. 4 *Leon.* 10.

*Execution* for the *King's debt*, or *prerogative execution*, is always preferred before any other executions. 7 *Rep.* 20. And if a defendant is taken by *capias ad satisfaciendum*, and before the return thereof a *prerogative* writ issues from the *Exchequer*, for the debt of the King, tested a day before he was taken, here he shall be held in execution for the King's debt and that of the subject. *Dyer*, 197. Lands *entailed* in the hands of the issue in tail, when subject to the King's extent, and where not, see 7 *Rep.* 21. See also this Dict. titles *King*, *Extent*.

Process sued out by the crown against a defendant to recover penalties, upon which judgment for the crown is afterwards obtained, entitles the King's execution to have priority within 33 *Hen.* 8. *c.* 39. § 74. before the execution of a subject, whose execution had issued and been commenced on a judgment recovered against the same defendant prior to the King's judgment, but subsequent to the commencement of the King's process: the King's writ of execution having been delivered to the sheriff before the actual sale of the defendant's goods under the plaintiff's execution. *Butler*, v. *Butler*, 1 *East.* 338. *Att. Gen.* v. *Aldersey*, *Mich.* 1786. *S. P. ib.*

V. 1. An execution may be set aside as irregular, by *supersedeas*; and the party have restitution, &c. *Carthew.* 460, 461, 468. It hath been resolved, that a writ of error is a *supersedeas* from the time of the allowance: though if a writ of execution be executed before the writ of error is allowed, it may be returned afterwards. 1 *Salk.* 321. No writ of execution shall be stayed by any writ of error or *su-*

*persedeas, after verdict and judgment*, in any action upon the case for payment of money, covenant, detinue, trespass, &c. until recognizance be entered into as directed by 3 *Jac.* 1. *cap.* 8. &c. Judgment was had against a person at Bristol, and his goods attached there; and the court of B. R. being moved to stay the execution until a writ of error brought should be determined, they granted a *habeas corpus*, but nothing to stay the execution. 1 *Bulst.* 268. See title *Error*.

A defendant cannot plead to any writ of execution, (though he may in bar of execution to a *scire facias* brought;) but if he hath any matter after judgment to discharge him of the execution, he is to have *audita querela*. *Co. Lit.* 290. Or, move the court for relief, which is now the usual method.

If husband and wife are taken in *execution* for the debt of the wife, the wife shall be discharged; for the husband being in execution, the wife shall not be so also, and because the wife hath nothing liable to the execution. 1 *Lev.* 51.

The execution of a *liberate* is good without being returned; and where a man is taken upon a *ca. sa.* the execution is good, though the writ is not returned: and so in all cases where no inquest is to be taken, but only lands delivered, or seisin had, &c. which are only matters of fact. 4 *Rep.* 67. 5 *Rep.* 89.

2. There were anciently castles, fortresses, and liberties, where they resisted the sheriff in executing the King's writs, which creating great inconvenience, the statute of *Westm.* 2. *cap.* 39. (13 *Ed.* 1.) hindered the sheriff from returning rescuers to the King's writ of execution, and directed him to take the *posse comitatus*. See the *Stat.* and 2 *New Abr.* 368.

The judges construed the words of the statute to extend only to *executions*, and not to writs on mesne process; that the sheriff was not obliged to carry the *posse comitatus* where the man was bailable, for they did not presume that in such cases the King's writ would be disobeyed. 2 *New Abr.* 368.

The original of commitment for contempts seems to be derived from this statute; for since the sheriff was to commit those who resisted the process, the judges who awarded such process must have the same authority to vindicate it; hence, if any one offers any contempt to his process, either by word or deed, he is subject to imprisonment during pleasure, *viz. from whence they shall not be delivered without the King's special commandment*. 2 *New Abr.* 368. See titles *Debt*, *Error*.

See further, on *Executions* in civil cases in general, *Com. Dig.* that title, &c.

Execution of Criminals, must in all cases, as well capital as otherwise, be performed by the sheriff or his deputy; whose warrant for so doing was anciently by precept under the hand and seal of the judge, as is still practised in the court of the Lord High Steward upon the execution of a peer. 2 *Hale*, 409. Though in the court of the peers in parliament it is done by writ from the King; afterwards it was established, that, in case of life, the judges may command execution to be done without any writ. *Finch*, 478. And now the usage is for the judge to sign the calendar, a list of all the prisoners' names, with the separate judgments in the margin, which is left with the sheriff; the sheriff, on receipt of this warrant, is to do execution within a convenient time, which in the country is left at large: in London, the Recorder, after reporting to the King in person the case of the several prisoners, and receiving his royal pleasure that the law must take its course, issues his warrant to the sheriffs, directing them to do execution at the day and place assigned. See 4 *State Trials*, 332. *Fost.* 43. 4 *Comm.* 403.

It is held by *Coke* (3 *Inst.* 52.) and *Hale* (2 *H. P. C.* 272. 412.) that even the King cannot change the punishment of the law, by altering hanging (or burning when used,) into beheading; though, when beheading is part of the sentence, the King may remit the rest. And notwithstanding some examples to the contrary, *Coke* maintains that *judicandum est legibus non exemplis*. But others have thought, and more justly, that this prerogative being founded in mercy, and immemorially exercised by the crown, is part of the Common Law. *Fost.* 270. *F. N. B.* 244 *b.* 19 *Rym. Fœd.* 284. For hitherto, in every instance, all these exchanges have been for more merciful kinds of death; and how far this may also fall within the King's power of granting conditional pardons, (*viz.* by remitting a severer kind of death, on condition that the criminal submits to a milder,) is a matter that may bear consideration. 4 *Comm.* 404.—There are ancient precedents wherein men condemned to be hanged for felony have been beheaded by force of a special warrant from the King. *Bract.* 104. *Staundf.* 13.

Subsequent justices have no power by the *stat.* 1 *Ed.* 6. *c.* 7. to award execution of persons condemned by former judges; but if judgment has not been passed on the offenders, the other justices may give judgment, and award execution, &c. 2 *Hawk. P. C.* Execution ought to be in the same county where the criminal was tried and convicted; except the record of the attainder be removed into B. R. which may award execution in the county where it sits. 3 *Inst.* 31. 211. 217.

If, upon a record removed, an outlawed person confess himself to be the same person, execution shall be had; but if he deny it, and the King's Attorney confesses he is not, he shall be discharged; though if the Attorney-General take issue upon it, the same shall be tried. 2 *Hale's Hist. P. C.* 402. 463. If a person, when attainted, stands mute to a demand why execution shall not go against him, the ordinary execution shall be awarded. 2 *Hawk. P. C.* In case a man condemned to die, come to life after he is hanged, as the judgment is not executed till he is dead, he must be hung again. *Finch*, 389. 2 *Hal. P. C.* 412. 2 *Hawk. P. C.* 4 *Comm.* 406. And so was the law of old; for if a criminal thus escaped and fled to sanctuary, he was not permitted to abjure the realm. *Fitz. Ab.* title *Coroner*, 335.

The body of a traitor or felon is forfeited to the King by the execution; and he may dispose of it as he pleases. The execution of persons under the age of discretion is usually respited, in order to obtain a pardon. 1 *Hawk. P. C. c.* 1. § 8.

By the *stat.* 25 *Geo.* 2. *c.* 37. persons convicted of murder are to be executed the day next but one after sentence; [unless that happens to be Sunday, for which reason murderers are generally tried on a Friday, to afford them a merciful respite of one day more to prepare for eternity;] and their bodies delivered to surgeons to be anatomised. The judge may stay the sentence, and appoint the body to be hung in chains or anatomised, but not buried.—And, by the said statute, to rescue the body of any such malefactor from the custody of the sheriff after *execution*, is made felony, punishable by transportation for seven years.—And to rescue such criminal going to, or during execution, is felony without benefit of clergy. See this Dict. title *Rescue*. Under this act, the time and place of the execution are part of the judgment, but in no other case whatever. 4 *Comm.* 404. See further title *Murder*; and as to these executions in general, titles *Treason*, *Felony*, and other proper titles.

In order to enable the Crown to extend its clemency to criminals in Scotland, it is provided by *stat.* 11 *Geo.* 1. *c.* 26. § 10. that where the punishment is either capital or consists in dismembring, it shall not be inflicted in places south of the Forth, in less than 30 days, and north of the Forth, in less than 40 days, after judgment.

Execution may be avoided by a *reprieve* or a pardon, whereof the former is only temporary, the latter (as to which, see this Dict. title *Pardon*) is permanent.

A Reprieve, from *reprendre* to take back, or more immediately from the participle *repris*,] is the withdrawing of

a sentence for an interval of time, whereby the execution is suspended. This may be *ex arbitrio judicis*, either before or after judgment; as where the judge is not satisfied with the verdict, or the evidence is suspicious, or the indictment is insufficient, or he is doubtful whether the offence be within clergy; or sometimes if it be a small felony, or any favourable circumstances appear in the criminal's character, in order to give room to apply to the crown for either an absolute or conditional pardon. These arbitrary reprieves may be granted or taken off by the justices of gaol delivery, although their session be finished, and their commissions expired; but this rather by common usage than of strict right. 2 *Hal. P. C* 412.

Reprieves may also be *ex necessitate legis*.

If a woman quick with child be condemned either for treason or felony, she may allege her being with child in order to get the execution respited; and thereupon the sheriff or marshal shall be commanded to take her into a private room, and to impanel a jury of matrons to try and examine whether she be quick with child or not; and if they find her quick with child, the execution shall be respited till her delivery. But it is agreed, that a woman cannot demand such respite of execution by reason of her being quick with child more than once; and that she can neither save herself by this means from pleading upon her arraignment, nor from having judgment pronounced against her upon her conviction. Also it is said, both by *Staundford* and *Coke*, that a woman can have no advantage from being found with child, unless she be also found *quick* with child. 2 *Hawk. P. C. c.* 51. § 9, 10.

Another cause of regular reprieve is if the offender become *non compos* between the judgment and the award of execution. 1 *Hal. P. C.* 370. For regularly, though a man be *compos* when he commits a capital crime, yet if he becomes *non compos* after, he shall not be indicted; if after indictment, he shall not be convicted; if after conviction, he shall not receive judgment; if after judgment, he shall not be ordered for execution: for the law knows not but he might have offered some reason, if in his senses, to have stayed these respective proceedings. It is therefore an invariable rule, when any time intervenes between the attainder and the award of execution, to demand of the prisoner what he hath to allege why execution should not be awarded against him; and if he appears to be insane, the Judge, in his discretion, may and ought to reprieve him.

The party may also plead in bar of execution; which plea may be either pregnancy, (of which above,) the King's pardon, an act of grace; (see title *Pardon*;) or lastly, diversity of person, *viz.* that he is not the same that was attainted, and the like. In this last case a jury shall be impannelled to try this collateral issue, namely, the identity of his person, and not whether guilty or innocent, for that has been decided before; and in these collateral issues the trial shall be *instanter*, and no time allowed the prisoner to make his defence, or produce his witnesses, unless he will make oath that he is not the person attainted. 1 *Sid.* 72, *Fost.* 42. Neither shall any peremptory challenges of the jury be allowed the prisoner; though formerly such challenges were held to be allowable whenever a man's life was in question. 1 *Lev.* 61. *Fost.* 42. 46.—*Staundf. P. C.* 163. *Co. Lit.* 157. *Hal. Sum.* 259.

Every Judge who hath power to order execution, hath power to grant a reprieve; and execution is often stayed on condition of transportation. See *Stat.* 8 *Geo.* 3. *c.* 15. for a power given to judges of assise to reprieve for the purpose of obtaining a conditional pardon. See also this Dict. titles *Transportation*, *Felony*, *Clergy*. 2 *Hawk. P. C. c.* 51. But no prisoner convicted of any felony for which he cannot have his clergy, at the sessions at the Old Bailey for London and Middlesex, &c. ought to be reprieved but in open Sessions; and reprieves are not to be granted otherwise, but by the King's express warrant. *Kel.* 42.

EXECUTIONE FACIENDA IN WITHERNAMIUM. See title *Replevin*.

EXECUTIONE JUDICII, is a writ directed to the judge of an inferior court to do *execution upon a judgment* therein, or to return some reasonable cause wherefore he delays the execution. *F. N. B.* 20. If execution be not done on the first writ, an *alias* shall issue, and a *pluries* with this clause, *vel causam nobis significes quare*, &c. And if upon this writ execution is not done, or some reasonable cause returned why it is delayed, the party shall have an attachment against him who ought to have done the execution, returnable in B. R. or C. B. *New Nat. Br.* 43. If the judgment be in a court of record, this writ shall be directed to the *justices* of the court where the judgment was given, and not unto the *officer* of the court; for if the officer will not execute the writs directed unto him, nor return them as he ought, the judges of the court may amerce him. *New Nat. B. R.* 43. See *Execution*, III. 3. and the *Stat.* 19 *Geo.* 3 *c.* 70. there mentioned.

One may have a writ *de executione judicii* out of the Chancery to execute a judgment in an inferior court, although a writ of error be brought to remove the record, and reverse the judgment; if he that brings the writ of error do not take care to have the record transcribed, and the writ of error returned up in due time. 1 *Lil. Abr.* 562.

EXECUTIVE POWER. The supreme executive power of these kingdoms is vested, by our laws, in a single person, the King or Queen, for the time being. 1 *Comm.* 190. &c. See title *King*.

EXECUTOR, *Lat.*] One appointed by a man's last will and testament to perform or *execute* the contents thereof after the testator's decease; and to have the disposing of all the testator's substance, according to the tenor of the will: he answers to the *hæres designatus*, or *testamentarius* in the *Civil Law*, as to debts, goods, and chattels of his testator. *Termes de Ley*.

The rights, powers, and duties of EXECUTORS and ADMINISTRATORS, being in many respects similar, and the several determinations in the books being generally applicable to both, it seems most methodical and useful to consider them together; for which purpose reference is made from title *Administrator* to this place. The present summary is founded on *the Commentaries*, having various points and heads from other sources interwoven on that excellent groundwork. See 2 *Comm. c.* 32.


I. 1. *Of the Appointment of Administrators in Cases of Intestacy.*
2. *How Administrations may be revoked.*
II. *Of the Appointment of Executors, and particular Administrators;* and see IV.
III. *Of Administrations to* Next of Kin, *or on Failure of them:* and see V. 8.
IV. *Of the Distinction in Interest between Executors and Administrators.*
V. *Of the Duty of Executors and Administrators.*
1. *Of Executor* de son tort.
2. *Of burying the Deceased.*
3. *Proving the Will.*
4. *Making Inventory.*
5. *Collecting the Goods.*
6. *Paying the Debts in due Order of Priority.*
7. ——— *Legacies;* and see title *Legacy.*
8. *Distribution of the Residue, to the Executor himself or next of Kin; and herein,*
9. ——— *of the Customs of London and York, as to Intestates.*
VI. 1. *Of Actions by and against Administrators.*
2. ——— *Executors.—And herein of* Devastavit.

I. 1. In case a person makes no disposition of his effects by will, he is said to die *intestate;* and in such cases it is said, that by the old law the king was entitled to seize upon his goods, as the general trustee of the kingdom. 9 *Rep.* 38.—This prerogative the king continued to exercise for some time, by his own ministers of justice; and probably in the county-court, where matters of all kinds were determined; and it was granted as a franchise to many lords of manors and others, who have to this day a prescriptive right to grant administration to their intestate tenants and suitors, in their own Courts baron, and other courts, or to have their wills there proved, in case they make any. 9 *Rep.* 37. Afterwards the crown, in favour of the church invested the prelates with this branch of the prerogative; and then the Ordinary might seize the goods, and keep them without wasting; and also might give, alien, or sell them at his will, and dispose of the money *in pios usus;* being thus, probably, merely the king's almoner in his diocese. *Finch Law*, 173, 174. *Plowd.* 77.

As the Ordinary had thus the disposition of intestates' effects, the probate of wills of course followed; for it was thought just and natural that the will of the deceased should be proved to the satisfaction of the prelate, whose right of distributing his goods was superseded thereby.

By degrees, through an abuse of this power of the Ordinary, often complained of before it was redressed, the Popish clergy secured the intestate's estate to themselves, without paying even his lawful debts; for which reason it was enacted by *stat. Westm.* 2. (13 *E.* 1. *A. D.* 1285.) *c.* 19. that the Ordinary shall be bound to pay the debts of the intestate, so far as his goods will extend, in the same manner as executors were bound in case of a will.—But still the residue remained in the hands of the Ordinary; and the continued abuse of this power at length produced the *stat.* 31 *E.* 4. *c.* 11. (*A. D.* 1357,) which provides, that in case of intestacy, the Ordinary shall depute the *nearest* and most lawful friends of the deceased to administer his goods, which *administrators* are put upon the same footing, with regard to suits, and to accounting, as executors.—The next and most lawful friend is interpreted to be the *next of blood*, who is under no legal disabilities. 9 *Rep.* 39.—The *stat.* 21 *H.* 8. *c.* 5. enlarges the power of the ecclesiastical judge a little more; permitting him to grant administration *either* to the widow *or* the next of kin, or to *both* of them, at his discretion; and where two or more persons are in the same degree of kindred, gives the Ordinary his election to accept which he pleases. 1 *Sid.* 179. *Raym.* 93. 1 *Show.* 351. 1 *Salk.* 36.

On this footing now stands the general law relative to the appointment of administrators—Who are the *next of blood*, or as it is usually called *Next of kin*, is stated *post*, III. and V. 8.

2. The Ordinary ought not to repeal letters of *administration* which he hath duly granted; but if they are granted to such persons who ought not by law to have them, he may revoke them. 1 *Lill.* 38. For just cause they may be revoked, as where a person is a lunatic, &c. And if granted where not grantable, they may be repealed by the delegates. 1 *Lev.* 157. 186. If *administration* is granted, and afterwards a will is produced and proved, the *administration* shall be revoked; and all acts done by the *administrator* are void. 2 *Rol. Abr.* 907. If a citation is granted against a stranger *administrator*, and his *administration* is revoked by sentence, yet all acts done by him *bonâ fide* as *administrator* are good till the revocation; the *administration* being only voidable. 6 *Rep.* 18. 8 *Rep.* 135. But if there is any fraud, a creditor may have relief upon the *stat.* 13 *Eliz. cap.* 5. And when the first *administration* is merely void, as granted by a wrong person, &c. it is otherwise: so when there is an appeal from the grant of the *administration*, to suspend the former decree. 5 *Rep.* 30. *Administration* was granted to J. S. and he released all actions, and afterwards the *administration* was revoked, and declared void, this release was held good. 1 *Brownl.* 51. *Qu.* If it had been without consideration? If an *administrator* gives goods away, and then *administration* is revoked or repealed, 'tis said the gift is good; except it be by *covin*, when it shall be void only against a creditor by statute: and where the administrator, after many goods administered, had his administration revoked, and it was committed to B. who sued the first administrator for goods unduly administered, it was held that there was no remedy but in Chancery. 6 *Rep.* 19. *Clayt.* 44. 4 *Shep. Ab.* 89. See *Hob.* 266.—But in such a case as this it seems that the second administrator might maintain an action at law against the first, for money had and received, &c. or trover for any goods remaining in his possession, or by him converted, and not duly administered.

In 2 *Leon.* 155, it is said, where the first administration is *void*, the administrator who, under that administration, takes the goods, is a trespasser. Letters of administration obtained by fraud are void. 3 *Rep.* 78. 6 *Rep.* 18, 19. 8 *Rep.* 143.

See the several cases on this part of the subject collected in 1 *Com. Dig.* title *Administrator* (B. 8.); the result of which (as given in 4 *Burn's Ecclesiastical Law*, 236.) is, that ad administration may be repealed, although not arbitrarily, yet where there shall be a just cause for so doing; of which the temporal courts are to judge.

II. All persons are capable of being Executors, that are capable of making wills, and many others besides; as femes coverts and infants: nay even infants unborn, or *in ventre ses meres*, may be made Executors. *West. Symb. p.* 1. § 635.

A popish recusant convict cannot be an executor. 9 *Rep.* 37. A mayor and commonalty may be made executors. 1 *Rol. Abr.* 915. And if the King is made executor, he appoints others to take the execution of the will upon them, and to take account. 5 *Rep.* 29.

It seems agreed, that, by our law, an alien, or one born out of the allegiance of our King, may be an executor or administrator; also it hath been adjudged, that such a one shall have administration of leases as well as personal things, because he hath them *in auter droit*, and not to his own use. *Off. of Ex.* 17.

But it has been long doubted whether an alien enemy should maintain an action as executor; for, on the one hand, it is said, that by the policy of the law, alien enemies shall not be admitted to actions to recover effects, which may be carried out of the kingdom to weaken ourselves and enrich the enemy, therefore public utility must be preferred to private convenience; but on the other hand it is said, that those effects of the testator are not forfeited to the King by way of reprisal, because they are not the alien enemy's, for he is to recover them for others; and if he allows such alien enemies to possess the effects as well as an alien friend, he must allow them power to recover, since in that there is no difference, and by consequence he must not be disabled to sue for them; if it were otherwise, it would be a prejudice to the King's subjects, who could not recover their debts from the alien executor, by his not being able to get in the assets of the testator. *Cro. Eliz.* 685. *Moor*, 431. *Carter*, 49. 191. *Skin.* 370.

But an excommunicated person cannot be an executor or administrator; for by the excommunication he is excluded from the body of the church, and is incapable to lay out the goods of the deceased to pious uses. *Co. Lit.* 134. *Swinb.* 319. *Godolph.* 85.

No infant can act as Executor till the age of 17 years; till which time administration must be granted to some other *durante minore ætate*. *Went. Off. of Ex. c.* 18. 6 *Rep.* 67. 4 *Inst.* 335.

And if the right of administration devolves on an infant, administration *durante minore ætate* is to be granted till he arrives at twenty-one. *Godolph.* 102. 5 *Co.* 29. *Hob.* 250. *Yelv.* 128.

And as such an administrator is but in nature of a curator for the infant, and has no interest or benefit in the testator or intestate's estate, but in right of the infant, it has been always held discretionary in the Ordinary to whom to grant it, and therefore it hath been frequently adjudged, that he is not obliged within the *stat.* 21 *H.* 8. *c.* 5. to grant it to the next of kin either of the deceased, or the infant. *Hob.* 250. 1 *Vent.* 219. 1 *Keb.* 549. 3 *Mod.* 24. 1 *New Abr.* 381.

If an infant, and one of full age, are made executors, he who is of full age may take out administration *durante minori ætate* of the infant, and may declare as executor or administrator *durante minori ætate;* and there is no absurdity in this case, that there should be an executor and administrator to the same party. 1 *New Abr.* 381.

In like manner, as it may be granted *durante absentiâ pendente lite;* when the executor is out of the realm; or 1 *Lutw.* 342. or when a suit is commenced in the Ecclesiastical court, touching the validity of the will. 2 *P. Wms.* 589, 590.

The appointment of an executor is essential to the making of a will; (*Went. c.* 1. *Plowd.* 281.) and it may be performed either by express words, or such as strongly imply the same: but if the testator makes an incomplete will, without naming any executors; or if he names incapable persons; or if the executors named refuse to act, (see 9 *Rep.* 37. *Went. Off. Ex.* 38.) in any of these cases administration must be granted *cum testamento annexo* to some other persons; (1 *Rol. Ab.* 907. *Comb.* 20.) and then the duty of the administrator, as also when he is constituted only *durante minore ætate, &c.* is very little different from that of an Executor. See *Glanvil. l.* 7. *c.* 6.

A man may appoint two or more persons to be *joint Executors*, and they are accounted in law but as one person. See post, V. 3. 5.—Such joint executors shall not be charged by the acts of their companions, any further than for effects *actually* come to their hands. *Moor*, 620. *Cro. Eliz.* 318. 2 *Leon.* 209—But if two or more executors *join in a receipt* [in writing] and one of them only actually receives the money, each is liable for the whole, *as to creditors at law*, but not as to legatees, or next of kin. 1 *Salk.* 318.—If joint executors, by agreement among themselves, agree that each shall intermeddle with a certain part of the testator's estate, yet each shall be chargeable for the whole (to creditors) by agreeing to the other's receipts. *Hard.* 314.

III. If the deceased died wholly intestate, without making either will or executors, then general letters of administration must be granted to such administrator as the *stats.* 31 *E.* 3. *c.* 11. and 29 *H.* 8. *c.* 4. (see *ante* 1.) direct; in consequence of which it is to be observed, 1st. That the Ordinary is compellable to grant administration of the goods of the wife to the *husband*, or his representatives; (*Cro. Car.* 106. *Stat.* 20 *C.* 2. *c.* 3. 1 *P. Wms.* 381.) and of the husband's effects to the widow, *or* next of kin. *Salk.* 36. *Stra.* 532.—2dly, That among the kindred, those are to be preferred that are the nearest in degree to the intestate.—3dly, That this nearness of degree shall be reckoned according to the computation of the civilians; (*Prec. Ch.* 593.) and not of the canonists, which the law of England adopts in the descent of real estates; (see title *Descent.*)—And therefore, in the first place, the *children*, or on failure of children, the *parents* of the deceased are entitled to administration; both which are indeed in the first degree, but the children are allowed the preference. *Godolph. p.* 2. *c.* 34. § 1. 2 *Vern.* 125.—Then follow *brothers, grandfathers;* (*Prec. Ch.* 527. 1 *P. Wms.* 41.) *uncles*, or *nephews;* (*Atk.* 455.) and the females of each class respectively; and, lastly, *Cousins.*—4thly, The half blood is admitted to the administration as well as the whole; for they are of the kindred of the intestate, and only excluded from inheritances of land, upon feodal reasons. Therefore the brother of the half blood shall exclude the uncle of the whole blood; (1 *Vent.* 425.) and the Ordinary may grant administration to the sister of the half, or the brother of the whole blood, at his own discretion. *Aleyn.* 36. *Sty.* 74. See post, V. 8.—5. If none of the kindred will take out administration, a *creditor* may, by custom, do it. *Salk.* 38.—6thly, If the Executor refuses, or dies intestate, the administration may be granted to the *residuary legatee*, in exclusion of the next of kin. 1 *Sid.* 281. 1 *Vent.* 219. And, lastly, the Ordinary may, in defect of all these, commit administration, (as he might have done before the *stat.* 31 *E.* 3. *c.* 11. *Plowd.* 278.) to such discreet person as he approves of: or (in these cases, as well as in that of an Executor's refusal, *Cro. El.* 92.) may grant him letters *ad colligendum bona defuncti*, which neither makes him executor nor administrator; his only business being to keep the goods in his safe custody; (*Went. Ch.* 14.) and to do other acts for the benefit of such as are entitled to the property of the deceased. 2 *Inst.* 398. If a bastard who has no kindred, being *nullius filius*, or any one else that has no kindred, dies intestate, and without wife or child, it hath formerly been held, (*Salk.* 37.) that the Ordinary might seize his goods, and dispose of them *in pios usus.* But the usual course now is, for some one to procure letters patent, or other authority from the King; and then the Ordinary, of course, grants administration to such appointee of the crown. 3 *P. Wms.* 33.

IV. The interest vested in the executor by the will of the deceased, may be continued and kept alive by the will of the same executor; so that the executor of A's. executor is to all intents and purposes the executor and representative of A. himself; see 25 *Ed.* 3. *st.* 5. *c.* 5. 1 *Leon.* 275. but the executor of A.'s administrator, or the administrator of A.'s executor, is not the representative of A. *Bro. Abr.* title *Administrator* 7. For the power of an executor is founded upon the special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power to another, in whom he hath equal confidence: but the administrator of A. is merely the officer of the Ordinary, prescribed to him by act of parliament, in whom the deceased has reposed no trust at all; and therefore, on the death of that officer, it results back to the Ordinary to appoint another. And, with regard to the administrator of A.'s executor, he has clearly no privity or relation to A. being only commissioned to administer the effects of the intestate executor, and not of the original testator. Wherefore in both these cases, and whenever the course of representation from executor to executor is interrupted by any one administration, it is necessary for the Ordinary to commit administration afresh, *of the goods* of the deceased, *not* administered by the former executor or administrator. And this administrator, *de bonis non*, is the only legal representative of the deceased in matters of personal property. *Sty.* 225. But he may, as well as an original administrator, have only a *limited* or *special* administration committed to his care, *viz.* of certain specific effects, such as a term of years and the like; the rest being committed to others. 1 *Roll. Abr.* 908. *Godolph. p.* 2. *c.* 30. *Salk.* 36. 1 *New. Abr.* 385. See also the *stats.* 43 *Eliz. c.* 8. 30 *Car.* 2. *c.* 7.

If an executor dies *before probate*, such an executor's executor cannot prove the will, because he is not named therein, and no one can prove a will but he who is named executor in it; but if the first executor had proved the will, then his executor might have been executor to the first testator, there requiring no new probate. 1 *Salk.* 299.

Though an executor of an executor may thus be executor to the first testator, yet he may take upon him the executorship of his own testator, and refuse to intermeddle with the estate of the other: and if the first executor refuses, (as if he dies before probate,) his executor shall not administer to the first testator. *Dyer*, 372.

V. 1. The duty and office of Executors and Administrators in general are very much the same; excepting, first, that the executor is bound to perform a will, which an administrator is not, unless where a testament is annexed to his administration, and then he differs still less from an executor: and secondly, that an executor may do many acts before he proves the will: *Wentw. ch.* 3. but an administrator may do nothing till letters of administration are issued; for the former derives his power from the will, and not from the probate; the latter owes his entirely to the appointment of the Ordinary. *Com.* 51.

If a stranger takes upon him to act as executor, without any just authority; (as by intermeddling with the goods of the deceased, 5 *Rep.* 33, 34. and many other transactions, *Wentw. ch.* 14. *Stat.* 43 *Eliz. c.* 8.) he is called in law an *Executor of his own wrong*, [*de son tort*,] and is liable to all the trouble of an executorship, without any of the profits or advantages; but merely doing acts of necessity or humanity, as locking up the goods, or burying the corpse, of the deceased, will not amount to such an intermeddling, as will charge a man as executor of his own wrong. *Dyer*, 166. Such a one cannot bring any action himself in right of the deceased, (*Bro. Abr.* title *Administrator* 8.) but actions may be brought against him. And in all actions by creditors against such an officious intruder, he shall be named an executor generally; (5 *Rep.* 31.) for the most obvious conclusion which strangers can form from his conduct is, that he hath a will of the deceased, wherein he is named executor, but hath not yet taken probate thereof. 12 *Mod.* 471. He is chargeable with the debts of the deceased, so far as *assets* comes to his hands. *Dyer*, 166. And as against creditors in general, shall be allowed all payments made to any other creditor in the same or superior degree. 1 *Chan. Cas.* 33. himself only excepted; in which he differs from a rightful executor. 5 *Rep.* 30. *Moor*, 527. And though, as against the rightful executor or administrator, he cannot plead such payment, yet it shall be allowed him in mitigation of damages; (12 *Mod.* 441. 471.) unless, perhaps, upon a deficiency of assets, whereby the rightful executor may be prevented from satisfying his own debt. *Wentw. ch.* 14.

When there is a rightful executor, and a stranger possesses himself of the testator's goods, without doing any further act as executor, he is not an executor *do son tort*, but a trespasser, *Dyer*, 105. *Rol. Abr.* 918. See 5 *Rep.* 82. An executor of his own wrong may be sued as executor; and he shall be sued for legacies as well as a rightful executor. *Noy*, 13. Though an executor *de son tort* cannot maintain any suit or action, because he cannot produce any will to justify it, yet he will be severely punished for a false plea; for in such case the execution shall be awarded for the whole debt, though he meddled with a thing of very small value. *Noy*, 69.

What acts make a person liable as Executor *de son tort*, is a question of Law; the jury are to say whether the acts be sufficiently proved. The slightest circumstance of intermeddling with the testator's goods will constitute a person an executor *de son tort*. 2 *Term Rep. K. B.* 97. 597.

Debt was brought against an executor of his own wrong, who pleaded that he *never was executor*, nor administered as such; it was held, not to be material whether he had assets or no, but to prove that *he had administered any thing* was enough; for this would make him chargeable with the debt: but if he had not pleaded falsely, he would have been liable for no more than the value of the goods of the deceased. *Style*, 120.

If an executor of his own wrong possesses himself of goods, and afterwards administration is granted him, he may, by virtue thereof, retain goods for his own debt. 5 *Rep.* 30. And where a man took possession of an intestate's goods wrongfully, and sold them to another, and then took out administration, it was adjudged that the sale was good by relation. *Moor*, 126. An executor *de son tort* shall be allowed in equity all such payments which a rightful executor ought to have paid. 2 *Chanc. Rep.* 33. See further *post*, VI. 2. and this Dict. title *Devastavit*.

A creditor of an intestate, who received goods of the intestate after his death from his widow, in payment of the debt, cannot protect his possession against an action of trover by the lawful administrator, upon the ground of such delivery having been made by one who had, by such intermeddling, made herself executrix *de son tort*; no fact appearing to give colour to having acted in the character of executrix, except the single act of wrong complained of, in which the defendant participated. *Qu.* How far any payment by an executor *de son tort* to a creditor can be set up as a bar to an action of trover by lawful executor, &c.; though if it be such as the latter would have been bound to make, it shall be recouped in damages. *Mountford* v. *Gibson*, 4 *East.* 441.

An executor *de son tort* cannot discharge himself from an action brought by a creditor, by delivering over the effects to the rightful executor *after* the action is brought. 3 *Term Rep. K. B.* 587. 2 *H. Blackst.* 18.

Nor can he retain for his own debt, of a higher nature, by consent of the rightful executor, given after the bringing of the action by the creditor. 3 *Term Rep.* 587.

Although a person cannot be charged as an executor *de son tort* while he acts under a power of attorney made to him by one of several executors who have proved the will, yet if he continue to act after the death of such executor, he may be charged as executor *de son tort*, though he act under the advice of another of the executors who has not proved. *Cottle* v. *Aldrich, Term Rep. K. B. Tr.* 55 *Geo.* 3. 175.

2. The executor or administrator must *bury* the deceased in a manner suitable to the estate which he leaves behind him. Necessary funeral expences are allowed, previous to all other debts and charges; but if the executor or administrator be extravagant, it is a species of *devastation* or waste of the substance of the deceased; and shall only be prejudicial to himself, and not to the creditors or legatees of the deceased. *Salk.* 196. *Godolph. p.* 2. *c.* 26. § 2. See *post*, VI. 2. and this Dict. title *Devastavit*, *Funeral*.

3. The executor or administrator *durante minore ætate*, or *durante absentiâ*, or *cum testamento annexo*, must prove *the will* of the deceased: which is done either in common form, which is only upon his own oath before the Ordinary, or his surrogate; or *per testes*, in more solemn form of law, in case the validity of the will be disputed. *Godolph. p.* 1. *c.* 20. § 4. When the will is so proved, the original must be deposited in the registry of the Ordinary; and a copy thereof, in parchment, is made out under the seal of the Ordinary, and delivered to the executor or administrator, together with a certificate of its having been proved before him; all which together is usually styled the probate. By *stat.* 37 *Geo.* 3. *c.* 90. the executor must take probate within six months on penalty of 50*l.* See title *Probate*.

If there are many executors of a will, and one of them only proves the will, and takes upon him the executorship, it is sufficient for all of them; but the rest after may join with him, and intermeddle with the testator's estate; but if they all of them *refuse* the executorship, none of them will ever afterwards be admitted to prove the will; the Ordinary, in this case, grants administration with the will annexed. 9 *Rep.* 37. 1 *Rep.* 113. *Perk.* 485.

An executor may refuse an executorship; but the refusal ought to be before the Ordinary: If an executor be summoned to accept or refuse the executorship, and he doth not appear on the summons, and prove the will, the Court may grant administration, &c. which shall be good in Law till such executor hath proved the will; but no man can be compelled to take on him the executorship, unless he hath intermeddled with the estate. 1 *Leon.* 154. *Cro. Eliz* 858. Where there are several executors, and they all refuse, none of them shall administer afterwards; but if there is a refusal by one, and the other proves the will, the refusing executor may administer when he will during the life of his co-executor. 1 *Rep.* 28. If there is but one executor, and he administer, he cannot refuse afterwards; and if once he refuse he cannot administer afterwards: Thus, where a testator being possessed of lands, &c. for a term of years, devised the same to the Chief Justice Catline, and made him executor, and died; afterwards the executor wrote a letter to the Judge of the Prerogative Court, intimating that he could not attend the executorship, and desiring him to grant administration to the next of kin to the deceased, which was done accordingly; and after this the executor entered on the lands, and granted the term to another; it was adjudged void, because the letter which he wrote was a sufficient refusal; and he may not after refusal take upon him the executorship. *Moor*, 272.

An executor, after a *caveat* entered against the will, took the usual oath of an executor, and afterwards refused to prove the will; and it was held, that having taken the oath of executor, the Court could not admit him to refuse afterwards, but ought to grant probate to him, notwithstanding the *caveat*, on another's contesting for the administration, &c. 1 *Vent.* 335. See title *Executor*.

As the testator has thought the executor appointed a proper person to be intrusted with his affairs, the Ordinary cannot adjudge him disabled or *incapax*; but a *mandamus* shall issue from B. R. for the Ordinary to grant probate of the will, and admit the executor, if he refuse him: neither can the Ordinary insist upon security from the executor, as the testator hath thought him able and qualified. 1 *Salk.* 299.

And although an executor becomes bankrupt, yet it is said the Ordinary cannot grant administration to another: but if an executor become *non compos*, the Spiritual Court may commit administration for this natural disability. 1 *Salk.* 307. If an executor takes goods of the testator's, and convert them to his own use; or if he either receive or pay debts of the testator, or give bond for payment; make acquittances for them, or demand, the testator's debts as executor; or give away, the goods of the testator, &c. these are an administration, so that he cannot afterwards refuse the executorship; and it has been held, that if the wife of the testator take more apparel than is necessary, it is an administration. *Offic. Exec.* 39.

It is usual when there is a contest about a will, or when the right of administration comes in question, to enter a caveat in the Spiritual Court, which, by their law, is said to stand in force for three months. *Godolph.* 258. *Goldsb.* 119. 2 *Rol. Rep.* 6. *Cro. Jac.* 463, 464.

But it is said that our law takes no notice of a caveat, and that it is but a mere cautionary act done by a stranger, to prevent the Ordinary from doing wrong; and that therefore, if administration be granted pending a caveat, this is valid in our law, though, by the law in the Spiritual Court, it may be such an irregularity as will be sufficient to repeal it. 1 *Rol. Rep.* 191. *Cro. Jac.* 463. 2 *Rol. Rep.* 6.

In defect of any will, the person entitled to be administrator, must also, at this period, take out letters of administration under the seal of the Ordinary; whereby an executorial power to collect and administer, that is, dispose of the goods of the deceased, is vested in him: and he must, by *stat.* 22 & 23 *Car.* 2. *c.* 10. enter into a bond with sureties, faithfully to execute his trust. If all the goods of the deceased lie within the same jurisdiction, a probate before the Ordinary, or an administration granted by him, are the only proper ones: but if the deceased had *bona notabilia*, or chattels to the value of a *hundred shillings*, in two distinct dioceses or jurisdictions, then the will must be proved, or administration taken out, before the metropolitan of the province, by way of special prerogative. 4 *Inst.* 335. Hence the courts, where the validity of such wills are tried, and the offices where they are registered, are called the prerogative courts, and the prerogative offices, of the provinces of Canterbury and York. Lynedewode, who flourished in the beginning of the 15th century, and was official to archbishop Chichele, interprets these hundred shillings to signify *solidos legales*; of which he tells us seventy-two amounted to a pound of gold, which in his time was valued at fifty nobles, or 16*l.* 13*s.* 4*d.* He therefore computes (*Provinc. l.* 3. *t.* 13.) that the hundred shillings, which constituted *bona notabilia*, were then equal in current money to 23*l.* 3*s.* 0½*d.* This will account for what is said in our antient books, that *bona notabilia* in the diocese of London, 4 *Inst.* 335. *Godolph. p.* 2. *c.* 22.) and indeed every where else, (*Plowd.* 281.) were of the value of ten pounds *by composition*: for, if we pursue the calculations of Lynedewode to their full extent, and consider that a pound of gold is now almost equal to an hundred and fifty nobles, we shall extend the present amount of *bona notabilia* to nearly 70*l.* But the makers of the canons of 1603, understood this ancient rule to be meant of the shillings current in the reign of James I. and have therefore directed, (*Can.* 92.) that five pounds shall for the future be the standard of *bona notabilia*; so as to make the probate fall within the archiepiscopal prerogative. Which prerogative (properly understood) is grounded upon this reasonable foundation: that as the bishops themselves were originally the administrators to all intestates in their own diocese, and as the present administrators are in effect no other than their officers or substitutes, it was impossible for the bishops, or those who acted under them, to collect any goods of the deceased, other than such as lay within their own dioceses, beyond which their episcopal authority extends not. But it would be extremely troublesome, if as many administrations were to be granted, as there are dioceses within which the deceased had *bona notabilia*; besides the uncertainty which creditors and legatees would be at in case different administrators were appointed to ascertain the fund out of which their demands were to be paid. A prerogative is therefore very prudently vested in the metropolitan of each province, to make in such cases one administration serve for all.

Probate in the court of the Archdeacon of Sudbury, to whom the Bishop granted full power to prove the wills of all persons deceased within the archdeaconry, was held good, the testator having died within the archdeaconry, although he was possessed of a term of years lying within another archdeaconry in the same diocese. *R.* v. *Yonge*, *Term Rep. K. B. E.* 56 *Geo.* 3. 119.

4. The executor or administrator is to make an *inventory* of all the goods and chattels, whether in possession or action of the deceased, which he is to deliver in to the Ordinary upon oath, if thereunto lawfully required. *Stat.* 21 *H.* 8. *c.* 5. By *stat.* 1 *Jac.* 2. *c.* 17. § 6. No administrator shall be

cited into court to render *an account* of the personal estate of his intestate, otherwise than by an inventory thereof, unless at the instance of some person in behalf of a minor, or having a demand out of such estate, as a creditor, or next of kin; nor shall be compellable to account before any Ordinary or judge empowered by the act of 22 & 23 *Car.* 2. *cap.* 10. otherwise than as aforesaid. See 9 *Rep.* 30. 2 *Inst.* 600. *Raym.* 407.

5. He is to *collect* all the goods and chattels so inventoried; and to that end he has very large powers and interests conferred on him by law, being the representative of the deceased; *Co. Lit.* 209. and having the same property in his goods as the principal had when living, and the same remedies to recover them. And if there be two or more executors, a sale or release by one of them shall be good against all the rest. *Dyer*, 23. *Cro. Eliz.* 347. *Sid.* 33. *Brownl.* 183. unless such release be obtained by fraud. *Moor*, 620. *Cro. Eliz.* 318. 2 *Leon.* 209. but in case of administrators, it is otherwise. 1 *Atk.* 460. Whatever is so recovered, that is of a saleable nature, and may be converted into ready money, is called *assets* in the hands of the executor or administrator, that is, *sufficient* or enough (from the French *assez*) to make him chargeable to a creditor or legatee, so far as such goods and chattels extend. Whatever *assets* so come to his hands, he may convert into ready money, to answer the demands that may be made upon him. See 6 *Rep.* 47. *Co. Lit.* 374. In actions against executors, the jury must find assets to what value, for the plaintiff shall recover only according to the value of assets found. 1 *Ro. Rep.* 58. As to *real assets by descent*, see this Dict. title *Assets*.

The chattels, real and personal, of the testator coming to the executor, are leases for years, rent due, corn growing and cut, grass cut and severed, &c. cattle, money, plate, household goods, &c. *Co. Lit.* 118. *Dyer*, 130, 537. An executor having a lease for years of land in right of the deceased, if he purchase the fee, whereby the lease is extinct, yet this lease shall continue to be assets, as to the creditors and legatees. 1 *Rep.* 87. *Bro. Lease*, 63. Though a plantation be an estate of inheritance, yet, being in a foreign country, it is a chattel in the hands of executors to pay debts. 1 *Vent.* 358. The executor is not only entitled to all personal goods and chattels of the testator, of what nature soever they are, but they are also accounted to be in his possession, though they are not actually so: for he may maintain an action against any one who detains them from him: he is likewise entitled to *things in action*; as right of execution on a judgment, bond, statute, &c. Also to money awarded on arbitration, where the party dies before the day, &c. *Co. Lit.* 209. 2 *Vent.* 249. 1 *Danv. Abr.* 549.

If goods of the testator are kept from the executor, he may sue for them in the Spiritual Court, or at Common Law; and if one seised of a messuage in fee, &c. hath goods in the house, and makes a will and executors, and dies, the executors may enter into the house, and carry away the goods. *Lit.* 60. An executor may, in convenient time after the testator's death, enter into a house descended to the heir, for removing and carrying away the goods, so as the door be open, or the key be in the door. *Offic. Exec.* 8. He may take the goods and chattels to himself, or give power to another to seize them for him, 9 *Rep.* 38. If an executor with his own goods redeem the goods of the testator; or pays the testator's debts, &c. the goods of the testator shall, for so much, be changed into the proper goods of the executor. *Jenk. Cent.* 188.

Where a man by will devises that his lands shall be sold for payment of *debts*, his executors shall sell the land, to whom it belongs to pay the debts, 2 *Leon. c.* 276. And if lands are devised to executors to be sold for payment of the testator's debts, those executors that act in the executorship, or that will sell, may do it without the others. *Co. Lit.* 113 By *stat.* 21 *H.* 8. *c.* 4. Bargains and sales of lands, &c. devised to be sold by executors, shall be as good, if made by such of the executors only as take upon them the execution of the will, as if all the executors had joined in the sale. If lands are thus devised to pay debts, a surviving executor may sell them; but if the devise be, *that the executor shall sell* the land, and not *of the land to them* to be sold, here being only an *authority* not an *interest*; if one dies, the other cannot sell.

6. The Executor or Administrator must pay the *debts* of the deceased. In payment of debts he must observe the rules of priority; otherwise, on deficiency of assets, if he pay those of a lower degree first, he must answer those of a higher out of his own estate. And, first, he must pay all funeral charges, and the expences of proving the will, and the like. Secondly, debts due to the King on record or specialty. 1 *And.* 129. Thirdly, such debts as are by particular statutes to be preferred to all others; money due upon poor rates, (*Stat.* 17 *Geo.* 2. *c.* 38.) for letters to the post-office, (*Stat.* 9 *Ann. c.* 10.) and some others. Fourthly, debts of record; as judgments, (docquetted according to the *stat.* 4 & 5 *W. & M. c.* 20.) statutes, and recognizances. (4 *Rep.* 60. *Cro. Car.* 363.) Fifthly, debts due on special contracts; as for rent; (for which the lessor has often a better remedy in his own hands, by distraining;) or upon bonds, covenants, and the like under seal. (*Wentw. ch.* 12.)

Lastly, debts on simple contracts, *viz.* upon notes unsealed and verbal promises. Among these simple contracts, servants' wages are by some, (1 *Rol. Abr.* 927.) with reason preferred to any other: and so stood the ancient law according to *Bracton*, (*lib.* 2. *c.* 26.) and *Fleta*, (*b.* 2. *c.* 56. § 10.) Among debts of equal degree, the executor or administrator is allowed to pay himself first; by retaining in his hands so much as his debt amounts to. 10 *Mod.* 496. If a creditor constitutes his debtor his executor, this is a release or discharge of the debt, whether the executor acts or not. (*Plowd.* 184. *Salk.* 299.) provided there be assets sufficient to pay the testator's debts: for, though this discharge of the debt shall take place of all legacies, yet it were unfair to defraud the testator's creditors of their just debts by a release which is absolutely voluntary. *Salk.* 303. 1 *Rol. Abr.* 921. 5 *Rep.* 30. 8 *Rep.* 136. But if a person dies intestate, and the Ordinary commits administration to a debtor, the debt is not thereby extinguished, for he comes in only by the act of law, not by the act of the party. 5 *Rep.* 136. 1 *Salk.* 306.—See also 1 *Cha. Rep.* 292. *Moor*, 855. *Hutt.* 128.

A debt on a judgment against a testator or intestate (not docketed) is put by the Statute on a level with simple contract debts. 6 *Term Rep.* 384.

A debt on judgment, not docketed according to the directions of *stat.* 4 & 5 *W. & M. c.* 20, is by that act put on a level with simple contract debts; and therefore such judgment cannot be pleaded by an executor, to an action on a simple contract; and on a plea of *plene administravit* to debt on such a judgment, the executor may give in evidence payment of specialty debts, which exhausted all the effects. 6 *Term Rep. K. B.* 384. 1 *Bos. & Pull.* 307.

A. being indebted in his individual capacity to a house in trade, of which he himself was a partner, in a sum of money, the amount of which could not be exactly ascertained, covenanted to pay the firm all his then debts, and such other debts as should subsequently accrue. A. died without having satisfied the original debt, and having contracted a further debt after the execution of the deed. His executors, two of whom were partners in the house of trade, were not allowed to plead either of these debts as an outstanding specialty debt, or by way of retainer, *De Tastet* v. *Shaw*, *Term Rep. K. B. Tr.* 58 *Geo.* 3, 664.

If no suit is commenced against him, the executor may pay any one creditor *in equal degree* his whole debt; though he has nothing left for the rest, for, without a suit commenced, the executor has no legal notice of the debt. *Dyer*, 32. 2 *Leon.* 60.

Pending a bill in equity against an executor, he may pay any other debt of a higher nature, or of as high a nature, where he has legal assets: but where there is a final decree against an executor, if he pays a bond, it is a mis-payment; for a decree is in nature of a judgment. 2 *Salk* 507.

If there be several debts due on several bonds from the testator, his executor may pay which bond debt he pleases, except an action of debt is actually commenced against him upon one of those bonds: and in such case, if, pending an action, another bond creditor brings another action against him, before judgment obtained by either of them, he may prefer which he will, by *confessing a judgment* to one, and paying him; which judgment he may plead in bar to the other action. *Vaugh.* 89. See *Sid.* 21. But this judgment confessed must be before plea. The usual way is, if there is time, and an executor or administrator is desirous of preferring another creditor of equal degree with him who sues, instantly, before plea, to confess a judgment, and then plead it with a *plenè administravit ultra*.

If judgment for 100*l.* is suffered, and the plaintiff compounds for 60*l.* the judgment for the whole sum shall not be allowed to keep off other creditors. 8 *Rep.* 133. Judgments are not to be kept on foot by fraud. *Sid.* 230. 1 *Vent.* 76.

On a *Sci. Fac.* against an executor, he cannot plead fully administered, but must plead specially that no goods of the testator came to his hands, whereby he might discharge the debt; for he may have fully administered, and yet be liable to the debt, where goods of the testator's afterwards come to his hands. 1 *Lill.* 568. *Cro. Eliz.* 575. In *Scire Facias* against executors, upon a judgment against their testator, they pleaded *Plenè Administravit*, by paying debts upon bonds *ante notitiam:* It was adjudged no plea, for at their peril they ought to take notice of debts upon record, and first pay them; and though the recovery be in another county than that where the testator lived: but where an action is brought against executors in another county than where they live, and they not knowing thereof, pay debts upon specialty, it is good. *Cro. Eliz.* 793.

Where day of payment is past, the penalty of a bond is the sum due at law; but where the day of payment is not come, the sum in the condition is the debt, and the executor cannot cover the assets any further. The *Bank* of *England* v. *Morrice*, *Widow*. *Annaly*, 224.

A bill may be exhibited in the Chancery against an executor, to discover the testator's personal estate; and thereupon he shall be decreed to pay debts and legacies. *Abr. Ca. Eq.* 238. If a person being executor, and his testator greatly indebted, be desirous to pay the assets as far as they will go, and that his payments may not be afterwards questioned, he may bring a bill in equity against all the testator's creditors, in order that they may, if they will, contest each other's debts, and dispute who ought to be preferred in payment. 2 *Vern.* 37.

Where there are only *equitable assets*, they must be equally paid amongst all the creditors; for a debt by judgment and simple contract is in conscience equal. 2 *Peere Williams*, 416. As to what are legal, and what equitable assets, see *Vin. Abr.* title *Payment*. And it is held, that bonds and other debts shall be paid equally by executors, where a person has devised lands to them to be sold for the payment of his debts. 1 *P. Wms.* 430.

A debt devised by the testator is not to be paid by the debtor to the legatee, but to the executor, who can give a sufficient discharge for it, and is answerable to the legatee if there be sufficient assets. If an executor pays out the assets in legacies, and afterwards debts appear, of which he had no notice, which he is obliged to pay, the executor, by bill in Chancery, may force the legatees to refund. *Chan. Rep.* 136. 149. One legatee paid shall refund against another, and against a creditor of the testator, that can charge the executor only in equity; but if an executor pays a debt upon simple contract, there shall be no refunding to a creditor of a higher nature. 2 *Vent.* 360.

The following extract from Mr. Cox's admirable notes to his edition of Peere Williams's Reports; (1 *P. Wms.* 294. 679.) will serve as a general summary or abridgment of the determinations relative to the application of the different funds of a testator's estate, in payment of his different debts.

The personal estate of a testator shall, in all cases, be primarily applied in discharge of his *personal debt* (or general legacy), unless he, by express words, or *manifest* intention exempt it. 2 *Atk.* 625. 3 *Atk.* 202. *Haslewood* v. *Pope*, 3 *P. Wms.* 324. *French* v. *Chichester*, 1 *Bro. P. C.* 192. *Fereyes* v. *Robertson*, *Bunh.* 302. *Walker* v. *Jackson*, 2 *Atk.* 624. *Bridgeman* v. *Dove*, 3 *Atk.* 202. *Inchiquin* (E.) v. *French*, *Amb.* 33. 1 *Wils.* 82. *S. C. Samuel* v. *Wake*, 1 *Bro. C. R.* 144. *Ancaster* (D.) v. *Mayor*. *Bro. C. R.* 454.—Yet it may be so exempted; as in *Bampfield* v. *Wyndham*, *Pre. Ch.* 101. *Wainewright* v. *Bendlowes*, 2 *Vern.* 718. *Amb.* 581. *Stapleton* v. *Colville*, *Talb.* 202. *Walker* v. *Jackson*, 2 *Atk.* 624. *Anderton* v. *Cooke*, 1 *Bro. C. R.* 456, 457. and the case of *Kynaston & Kynaston*, cited there.—*Holiday* v. *Bowman*, cited 1 *Bro. C. R.* 145. *Webb* v. *Jones*, 2 *Bro. B. R.* 60.

Every loan creates a debt from the *borrower*, whether there be a bond or covenant for payment or not. *Cope* v. *Cope*, 2 *Salk.* 449. *Howel* v. *Price*, 1 *P. Wms.* 291. *Balsh* v. *Hyam*, 2 *P. Wms.* 455. *King* v. *King*, 3 *P. Wms.* 458.

So the personal estate shall be liable, although such *personal* debt be also secured by mortgage. *Howel* v. *Price*, 1 *P. Wms.* 291. *Cope* v. *Cope*, 3 *Salk.* 449. *Pockley* v. *Pockley*, 1 *Vern.* 36. *King* v. *King*, 3 *P. Wms.* 360. *Galton* v. *Hancock*, 2 *Atk.* 436. *Robinson* v. *Gee*, 1 *Vez.* 251. *Belvedere* (E.) v. *Rochfort*, 6 *Bro. P. C.* 520.—*Philips* v. *Philips*, 2 *Pro. C. R.* 273.

So lands subject to, or devised for, payment of debts, shall be liable to discharge such mortgaged lands, either descended or devised. *Bartholomew* v. *May*, 1 *Atk.* 487. *Tweedale* (MSS.) v. *Coventry* (E.) 1 *Bro. C. R.* 240. Even though the mortgaged lands be devised expressly *subject to the incumbrance*. 2 *P. Wms.* 366. *Serle* v. *St. Eloy*.—So lands *descended* shall exonerate mortgaged lands devised. *Galton* v. *Hancock*, 2 *Atk.* 424.—So *unincumbered* lands and *mortgaged* lands, both being specifically devised, (but expressly "after payment *of all* debts,") shall contribute in discharge of such mortgage. *Carter* v. *Barnardiston*, 1 *P. Wms.* 505. 2 *Bro. P. C.* 1.

But in all these cases, the debt being considered as the *personal* debt of the *testator himself*, the charge on the real estate is merely collateral. The rule therefore is otherwise where the charge is on the *real* estate *principally*, although there be a collateral personal security. *Coventry* (Countess) v. *Coventry* (E.) 2 *P. Wms.* 222. *Freeman* v. *Edwards*, 2 *P. Wms.* 437. *Wilson* (E.) v. *Darlington*, 2 *P. Wms.* 664. *in n. Ward* v. *Ld. Dudley*, 2 *Bro. C. R.* 316.—Or where the debt, although personal in its creation, was contracted originally by another. *Cope* v. *Cope*, 2 *Salk.* 449. *Bagot* v. *Oughton*, 1 *P. Wms.* 347. *Leman* v. *Newnham*, 1 *Vez.* 51. *Robinson* v. *Gee*, 1 *Vez.* 251. *Parsons* v. *Freeman*, *Amb.* 115. *Lacam* v. *Mertins*, 1 *Vez.* 312. *Lawson* v. *Hudson*, 1 *Bro. C. R.* 58. *Perkyns* v. *Baynton*, 2 *P. Wms.* 664. *in n. Shafto* v. *Shafto*, *ib.* *Basset* v. *Percival*, *ib.* *Tankerville* v. *Fawcet*, 2 *Bro. C. R.* 57. *Tweddell* v. *Tweddell*, 2 *Bro. C. R.* 101. 152. *Billinghurst* v. *Walker*, 2 *Bro. C. R.* 604.

With respect to the priority of application of *real* assets, when the personal estate is either exempt or exhausted, it seems that, First, the real estate expressly devised for payment of debts shall be applied: Secondly, to the extent of specialty debts, the real estate descended: Thirdly, the real estate specifically devised, subject to a general charge of debts. *Galton* v. *Hancock*, 2 *Atk.* 242. *Powis* v. *Corbet*, 3 *Atk.* 566. *Wride* v. *Clarke*, 2 *Bro. C. R.* 261. *n. Davies* v. *Top*, *Id.* 259 *n. Donne* v. *Lewis*, *Id.* 257.

It being the object of a Court of Equity that *every* claimant upon the assets of a deceased person shall be satisfied, as far as such assets *can*, by any arrangement consistent with the nature of the respective claims, be applied in satisfaction thereof; it has been long settled, that where one claimant has more than one fund to resort to, and another claimant only one, the first claimant shall resort to that fund on which the second has no lien. *Lanoy* v. *Athol* (D.) 2 *Atk.* 446. *Lacam* v. *Mertins*, 1 *Ves.* 312. *Mogg* v. *Hodges*, 2 *Ves.* 53.

If therefore a specialty creditor, whose debt is a lien on the real assets, receive satisfaction out of the personal assets, a simple contract creditor shall stand in the place of the specialty creditor against the real assets, *so far* as the latter shall have exhausted the personal assets in payment of his debt. 2 *C. C.* 4. *Sagitary* v. *Hyde*, 1 *Vern.* 455. *Neave* v. *Alderton*, 1 *Eq. Ab.* 144. *Wilson* v. *Fielding*, 2 *Vern.* 763. *Galton* v. *Hancock*, 2 *Atk.* 436.—And legatees shall have the same equity as against assets descended. *Culpepper* v. *Aston*, 2 *C. C.* 117. *Bowman* v. *Reeve*, *Pre. Ch.* 578. *Tipping* v. *Tipping*, 1 *P. Wms.* 730. *Lucy* v. *Gardner*, *Bunb.* 137. *Lutkins* v. *Leigh*, *Talb.* 54.—So where lands are subjected to payment of *all* debts, a legatee shall stand in the place of a simple contract creditor, who has been satisfied out of personal assets. *Haslewood* v. *Pope*, 3. *P. Wms.* 323. So where legacies by will are charged on the real estate, but not the legacies by codicil, the former shall resort to the real assets upon a deficiency of the personal assets to pay the whole. *Masters* v. *Masters*, 1 *P. Wms.* 422. *Bligh* v. *Darnley* (E.) 2 *P. Wms.* 620. *Hyde* v. *Hyde*, 3 *C R.* 83.

But from the principles of these rules it is clear, that they cannot be applied in aid of one claimant, so as to defeat the claim of another, and therefore a pecuniary legatee shall not stand in the place of a *specialty creditor*, as against land *devised*, though he shall as against land descended. *Scott* v. *Scott*, *Amb.* 383. *Clifton* v. *Burt*, 1 *P. Wms.* 678. and *Haslewood* v. *Pope*, 3 *P. Wms.* 324. But such legatee *shall* stand in the place of a mortgagee who has exhausted the personal assets to be satisfied out of the mortgaged premises, though specifically devised. *Lutkins* v. *Leigh*, *Talb.* 53. *Forrester* v. *Ld. Leigh*, *Amb.* 171. For the application of the personal assets, in case of the real estate mortgaged, does not take place to the defeating of every legacy. *Oneal* v. *Mead*, 1 *P. Wms.* 693. *Tipping* v. *Tipping*, *Id.* 730. *Davies* v. *Gardner*, 2 *P. Wms.* 190. *Ryder* v. *Wager*, *Id.* 335.

It is now settled that the Court of Chancery will not marshall assets in favour of a charitable bequest, so as to give it effect out of the personal chattels, it being void so far as it touches any interest in land. *Mogg* v. *Hodges*, 2 *Ves.* 52. *Attorney-General* v. *Tyndal*, *Amb.* 614. *Foster* v. *Blagden*, *Amb.* 704. *Hillyard* v. *Taylor*, *Id.* 713. II. and it is to be observed, that none of the rules abovementioned *subject* any fund to a claim to which it was not before subject, but only take care that the *election* of one claimant shall not prejudice the claims of the others. 2 *Atk.* 438. 1 *Ves.* 312.

Some of the questions heretofore much agitated respecting the application of *real* assets, are set at rest by the act 47 *Geo.* 3. *st.* 2. *c.* 74. 'for more effectually securing the payment of the debts of *Traders*.' By this act it is provided, that when any person being, at the time of his death, a trader within the meaning of the bankrupt laws, shall die seised of, or entitled to, any real estate, which he shall not by his last will have charged or devised for payment of his debts, and which would have been assets for payment of debts due on any specialty, in which heirs were bound, such real estate shall be assets to be administered in courts of equity for payment of *all* debts, as well debts due on simple contract as on specialty; and that the heir at law and devisees shall be liable to suits in equity accordingly: Provided that creditors by specialty, in which heirs are bound, shall be fully paid in preference to creditors by simple contract, or by specialty, in which heirs are not bound.

7. When the debts are all discharged, the *legacies* claim the next regard; which are to be paid by the executor so far as his assets will extend: but he may not give himself the preference herein, as in the case of debts. 2 *Vern.* 434. 2 *P. Wms.* 25. See title *Legacy*.—The assent of an executor to legacies is held necessary to entitle the legatee; but as this assent may be compelled, see *March*, 97. it does not seem necessary to state the effect of a dissent where there are assets sufficient to answer both debts and legacies. Where there are not assets, the assent of the executor to a legacy would subject him to a devastavit.—See *Co. Lit.* 111. *Keilw.* 128. *Perk.* 570. *Plowd.* 525, 543. 4 *Rep.* 28. *Cro. Eliz.* 719. and this Dict. title *Legacy*.

8. When all the debts and particular legacies are discharged, the surplus or residuum must be paid to the Residuary Legatee, if any be appointed by the will; and if there be none, it was long a settled notion that it devolved to the executor's own use, by virtue of his executorship. *Perkins*, 525.—But whatever ground there might have been formerly for it, this opinion seems now to be understood, with the following restriction; that although where the executor has no legacy at all, the *residuum* shall in general be his own; yet wherever there is sufficient on the face of a will, (by means of a competent legacy or otherwise,) to imply that the testator intended his executor should not have the residue, the undivided surplus of the estate shall go to the next of kin, the executor then standing upon exactly the same footing as an administrator. *Prec. Chanc.* 323. 1 *P. Wms.* 7. 514. 2 *P. Wms.* 338. 3 *P. Wms.* 43. 194. *Stra.* 559. *Lawson* v. *Lawson*, *Dom. Proc.* 28 *April*, 1777.

The result of the many cases on this subject, (as ingeniously stated in a note of Mr. Cox's, to his edition of *P. Wms. vol.* 1 *p.* 550.) appears to be this.

By law the appointment of an Executor vests in him beneficially, all the personal estate of the testator not otherwise disposed of; but wherever courts of Equity have seen, *on the face of the will*, sufficient to convince them that the testator did not intend the executor to take the surplus, they have turned the executors into trustees for those on whom the law would cast the surplus, in case of a complete intestacy, *i. e.* the next of kin; as where the executors are expressly called executors *in trust*, or where any other expressions occur, shewing the office only to be intended them, and not the beneficial interest. *Pring* v. *Pring*, 2 *Vern.* 99. *Rachfield* v. *Careless*, 2 *P. Wms.* 158. *Graydon* v. *Hicks*, 2 *Atk.* 18. *Dean* v. *Dalton*, 2 *Bro. C. R.* 634. *Bennet* v. *Bachelor*, 3 *Bro. C. R.* 28. So where there is a residuary clause, but the name of the residuary legatee is not inserted. *Wheeler* v. *Sheers*, *Mosel.* 288. *Cloyne* (Bishop) v. *Young*, 2 *Ves.* 91. *North* (Lord) v. *Purdon*, 2 *Ves.* 495. Or where the residuary legatee dies in the life-time of the testator, *Nicholls* v. *Crisp*, *Amb.* 769. *Bennett* v. *Bachelor*, 3 *Bro. C. R.* 28.

So a *pecuniary* legacy to a sole executor affords a sufficient argument to exclude him from the residue; as it is absurd to suppose a testator to give expressly *a part* of the fund to the person he intended to take the whole. *Cook* v. *Walker*, cited 2 *Vern.* 676. *Joslin* v. *Brewett*, *Bunb.* 112. *Davers* v. *Dewes*, 3 *P. Wms.* 10. And it is settled (notwithstanding

the case of *Ball* v. *Smith*, 2 *Vern.* 675,) that the wife being the executrix shall make no difference, as appears as well by the cases mentioned in *Farrington* v. *Knightly*, (1 *P. Wms.* 544 and *seq.*) as by 2 *Eq. Ab.* 444. *p.* 58. *Martin* v. *Rebow*, 1 *Bro. C. R.* 154. So *equal pecuniary* legacies to two or more executors shall exclude them from the surplus. *Petit* v. *Smith*, 1 *P. Wms.* 7. and the several cases there mentioned, and 3 *Bro. C. R.* 110. Neither will legacies to the next of kin vary the rule. *Andrew* v. *Clarke*, 2 *Vez.* 162.

But wherever the legacy is *consistent* with the intent that the executor should take the whole, a court of equity will not disturb his legal right: and therefore where the gift to the executor is only an *exception* out of another legacy, it shall not exclude him from the residue, because it is necessary to make such exception expressly. *Griffith* v. *Rogers*, *Pre. Ch.* 231. *Hoskins* v. *Hoskins*, *Pre. Ch.* 263. *Granville* (Ld.) v. *Beaufort* (Dss.) 1 *P. Wms.* 114. *Jones* v. *Westcombe*, *Pre. Ch.* 316. *Newstead* v. *Johnston*, 2 *Atk.* 45. 2 *Eq. Ab.* 444. *p.* 58. So the same principle seems to have prevailed in *Lawson* v. *Lawson*, 7 *Bro. P. C.* 511. So a legacy to one only of two or more executors shall exclude neither from the surplus; because the testator might intend to such a one a preference *pro tanto*, *Colesworth* v. *Branguin Pre. Ch.* 323. *Mason* v. *Hawkins*, 4 *Bro. P. C.* 1. *Johnston* v. *Twist*, cited 2 *Vez.* 167. *Cloyne* (Bp.) v. *Young*, 2 *Vez.* 91. *Wilson* v. *Ivatt*, 2 *Vez.* 166. The same rule and reason hold, where several executors have *unequal* pecuniary legacies. *Brasbridge* v. *Woodroffe*, 2 *Atk.* 69. *Bowker* v. *Hunter*, 1 *Bro. C. R.* 328. although, in the last case, the following were objected as authorities against the determination, viz. 2 *Vern.* 677. *Pre. Ch.* 392. 2 *Vern.* 361. and *Vachell* v. *Jefferies*, *Pre. Ch.* 169. and 1 *Bro. P. C.* 167.

Then, as to *specific* legacies, it is determined, that a specific legacy will exclude a sole executor. *Randal* v. *Bookey*, 2 *Vern.* 425. *Southat* v. *Watson*, 3 *Atk.* 226. *Martin* v. *Rebow*, 1 *Bro. C. R.* 154. but that distinct specific legacies of *unequal* value to several executors, shall not exclude them. *Blinkhorne* v. *Feast*, 2 *Vez.* 27. and the language of Lord Hardwicke in *Southat* v. *Wilson*, treats specific and pecuniary legacies as standing precisely upon the same ground in questions of this nature. See title *Legacy*.

However, no case occurs in the books in which *distinct specific* legacies of equal value to several executors have excluded them from the surplus. And the argument which supports this rule as to *pecuniary*, certainly does not apply with equal force to *specific*, legatees; since it is very probable that a testator may wish to distribute specific quantities of stock, or particular debts, &c. &c. amongst his executors in some particular manner; although equally, in point of value, and consistently with an intention that they should take the surplus. The case of *Shrimpton* v. *Stanhope*, cited 3 *Atk.* 230. is not a case of *distinct specific* legacies: for it appears from *Reg. Lib. B.* 1736, *fo.* 104. that the testator there gave some specific legacies to a man and his wife jointly, whom he also made his executors. And so in *Willis* v. *Brady*, *Barn*, 64. and these cases therefore seem like legacies to a sole executor.

With regard to the admission of parol evidence in cases of this kind, see *Rachfield* v. *Careless*, 2 *P. Wms.* 158. and *Rutland* (D.) v. *Rutland* (Dss.) 2 *P. Wms.* 210. and Mr. Cox's notes on the former of those cases.

Concerning the *Administrator* indeed there was formerly much debate, whether or no he could be compelled to make any distribution of the intestate's estate. *Godol. p.* 2. *c.* 32. For though (after the administration was taken in effect from the Ordinary, and transferred to the relations of the deceased), the spiritual court endeavoured to compel a distribution, and took bonds of the administrator for that purpose, they were prohibited by the temporal courts, and the bonds declared void at law. 1 *Lev.* 233. *Cart.* 125. 2 *P. Wms.* 447. And the right of the husband not only to administer, but also to enjoy exclusively, the effects of his deceased wife, depends still on this doctrine of the Common Law: the statute of frauds declaring only, that the statute of distribution does not extend to this case. But now these controversies are quite at an end; for by the statute commonly called the Statute of Distribution, 22 & 23 *Car.* 2. *c.* 10. (explained by 29 *Car.* 2. *c.* 30.) it is enacted that the surplusage of intestates, (except of *femes coverts*, which are left as at common law. *Stat.* 29 *Car.* 2. *c.* 3. § 25.) shall, after the expiration of one full year from the death of the intestate, be distributed in the following manner: *One third* shall go to the widow of the intestate, and the residue, in equal proportions, to his children, or if dead, to their representatives, that is, their *lineal* descendants: if there are no children or legal representatives subsisting, then a moiety shall go to the widow, and a moiety to the next of kindred in equal degree, and their representatives: if no widow, the whole shall go to the children; if neither widow nor children, the whole shall be distributed among the next of kin in equal degree, and their representatives: but no representatives are admitted among collaterals farther than the children of the intestate's brothers and sisters. *Raym.* 496. *Lord Raym.* 571.

The next of kindred here referred to are to be investigated by the rules of consanguinity, as those who are entitled to letters of administration, of whom sufficient has already been said (*ante* III.) And therefore, by this statute, the mother, as well as the father, succeeded to all the personal effects of their children, who died intestate, and without wife or issue; in exclusion of any brothers and sisters of the deceased. And so the law still remains with respect to the father; (see 1 *P. Wms.* 48.) And the father need not administer, (*Pr. Ch.* 260.) But by *stat.* 1 *Jac.* 2. *c.* 17. if the father be dead, and any of the children die intestate, without wife or issue, in the life-time of the mother, she and each of the remaining children or their representatives, shall divide his effects in equal portions.—And in case a man die, leaving a wife and a mother, and brothers and sisters, the wife shall have only a *moiety*, the remainder going to his mother, brothers, and sisters equally. 2 *P. Wms.* 344.

The statute of distribution bears, in its principle, a near resemblance to our ancient English law previous to the statute of wills, by which (see *Glanvil*, *l.* 2. *c.* 5. *Bracton*, *l.* 2. *c.* 26. *Fleta*, *l.* 2. *c.* 57.) a man's goods were to be divided into three equal parts; of which one went to his heirs or lineal descendants, another to his wife, and the third was at his own disposal; or if he died without a wife, he might then dispose of one moiety, and the other went to his children. And so if he had no children, the wife was entitled to one moiety, and he might bequeath the other; but if he died without either wife or issue, the whole was at his own disposal. The shares of the wife and children were called their *reasonable* parts; and the writ *de rationabili parte bonorum* was given to recover them. *F. N. B.* 122.

By the same Statute of Distributions it is directed, that no child of the intestate (except his heir at law,) on whom he settled in his life-time any estate in lands, or pecuniary portion, equal to the distributive shares of the other children, shall have any part of the surplusage with their brothers and sisters; but if the estates so given them, by way of advancement, are not quite equivalent to the other shares, the children, so advanced, shall have so much only as will make them equal. And this with respect to goods and chattels is part of the ancient custom of London, of the province of York, and of Scotland: and with regard to lands descending in coparcenary, that it hath always been and still is, the common law of England, under the name of *Hotchpot*.

It may be observed that the doctrines and limits of repre-

sentation, laid down in the statute of Distribution, seem to have been in some measure also borrowed from the civil law: whereby it will sometimes happen, that personal estates are divided *per capita*, and sometimes *per stirpes*; whereas the Common Law knows no other rule of succession but that *per stirpes* only. They are divided *per capita*, to every man an equal share, when all the claimants claim in their own rights, as in equal degree of kindred, and not *jure representationis*, in the right of another person. As if the next of kin be the intestate's three brothers, A. B. and C. here his effects are divided into three equal portions, and distributed *per capita*, one to each: but if one of these brothers A. had been dead, leaving three children, and another, B. leaving two, then the distribution must have been *per stirpes*; *viz.* one third to A.'s three children, another third to B.'s two children, and a remaining to C. the surviving brother. Yet if C. had also been dead, without issue, then A.'s and B.'s five children, being all in equal degree to the intestate, would take in their own rights *per capita*; *viz.* each of them one-fifth part. *Prec. Chanc.* 54.

A question hath been made, if a father die intestate, leaving only one son, which son also dies intestate, whether administration should be granted to the next of kin, of the *father* or of the son? The latter determination hath been, that, by this statute of distribution of intestate's estates, a right is vested in one child, where there is one and no more, (*viz.*) a right to sue for the estate: and by consequence, if he die before the estate is recovered, and actually in his possession, it must go to his administrator, and not to the administrator of the father. *Palmer* v. *Alcock*, 3 *Mod.* 58. Vide *Shower*, 26. and 2 *Vern.* 274.

So where a person died intestate, leaving two, who were next a-kin, in equal degree to him; one of them died intestate within the year, and before distribution; adjudged, that *an interest was vested in him*, and his next of kin shall have the administration, like the case of a *residuary legatee* dying before probate of the will, (*viz.*) his next of kin shall have the administration, and the next of the testator. *Show.* 25.

9. The Statute of Distributions expressly excepts and reserves the customs of the city of London, of the province of York, and of all other places having peculiar customs of distributing intestates' effects. So that, though in those places the restraint of devising is removed, their ancient customs remain in full force with respect to the estates of intestates.

In the city of London (*Ld. Raym.* 1329.) and province of York, (2 *Burn. Eccl. Law*, 746.) as well as in the kingdom of Scotland, (*Ibid.* 782.) and probably also in Wales, (concerning which there is little to be gathered, but from the *stat.* 7 & 8 *W.* 3. *c.* 38.) the effects of the intestate, after payment of his debts, are in general divided according to the ancient universal doctrine of the *pars rationabilis*. If the deceased leaves a widow and children, his substance (deducting for the widow's her apparel, and the furniture of her bed-chamber, which in London is called the *widow's chamber*,) is divided into three parts one of which belongs to the widow, another to the children, and the third to the administrator; if only a widow, or only children, they shall respectively, in either case, take one moiety, and the administrator the other. 1 *P. Wms.* 341. *Salk.* 246.—If neither widow nor child, the administrator shall have the whole. 2 *Show.* 175.—And this portion or *dead man's* part, the administrator was wont to apply to his own use. (2 *Freem.* 85. 1 *Vern.* 133.) Till the *stat.* 1 *Jac.* 2. *c.* 17. declared that the same should be subject to the statute of Distribution. So that if a man dies worth 1800*l.* personal estate, leaving a widow and two children, this estate shall be divided into eighteen parts; whereof the widow shall have eight, six by the custom, and two by the statute; and each of the children five, three by the custom, and two by the statute; if he leaves a widow and one child, she shall have still eight parts, as before, and the child shall have ten, six by the custom, and four by the statute; if he leaves a widow and no child, the widow shall have three-fourths of the whole, two by the custom, and one by the statute; and the remaining fourth shall go, by the statute, to the next of kin. It is also to be observed, that if the wife be provided for by a jointure before marriage, in bar of her customary part, it puts her in a state of non-entity, with regard to the custom only; (2 *Vern.* 665. 3 *P. Wms.* 16) but she shall be entitled to her share of the dead man's part under the statute of Distribution, unless barred by special agreement. 1 *Vern.* 15. 2 *Chan. Rep.* 252. And if any of the children are advanced by the father in his life-time with any sum of money, (not amounting to their full proportionable part) they shall bring that portion into hotchpot with the rest of the brothers and sisters, but not by the widow, before they are entitled to any benefit under the custom; (2 *Freem.* 279. 1 *Equ. Cas. Abr.* 155. 2 *P. Wms.* 526.) but if they are fully advanced, the custom entitles them to no farther dividend. 2 *P. Wms* 527.

Thus far, in the main, the customs of London and of York agree: but besides certain other less material variations, there are two principal points in which they considerably differ. One is, that in London the share of the children (or orphanage part) is not fully vested in them till the age of twenty-one, before which they cannot dispose of it by testament, (2 *Vern.* 558.) and if they die under that age, whether sole or married, their share shall survive to the other children; but after the age of twenty-one it is free from any orphanage custom; and in case of intestacy, shall fall under the statute of Distributions. *Prec. Chanc.* 537. The other, that in the province of York, the heir at Common Law, who inherits any land, either in fee or in tail, is excluded from any filial portion or reasonable part. 2 *Burr.* 754.

VI. 1. Against an *administrator* and for him, action will lie, as for and against an executor, and he shall be charged to the value of the goods, and no further; unless it be by his own false plea, or by wasting the goods of the intestate. An executor or *administrator* shall never be charged *de bonis propriis*, but where he doth some wrong; as by selling the testator's goods, and converting the money to his own use, concealing or wasting them, or by pleading what is false. *Dyer*, 210. 2 *Rol. Rep.* 295. But this plea must be of a fact within his own knowledge. If an *administrator* plead *plenè administravit*, and it is found against him, the judgment shall be *de bonis propriis*, because it is a false plea, and that upon his own knowledge. 2 *Cro.* 191. *Contrà* where he pleads such a plea, and that he hath no more than to satisfy such a judgment, &c. the recovery shall be *de bonis testatoris*, &c. 2 *Rol. Rep.* 400. This must mean where such plea is true in fact. Upon *plenè administravit* pleaded by an *administrator*, the plaintiff must prove his debt, or he shall recover but a penny damages, though there be assets; because the plea only admits the debt, but not the *quantum*. 1 *Salk.* 296.

Special bail is not required of *administrators* or executors in any action brought against them for the debt of the intestate; except where they have wasted the goods of the deceased: nor shall costs be had against them. Vide title *Costs*. See *Cro. Eliz.* 503. *Yelv.* 168. *Hut.* 69. 2 *Rol. Rep.* 87. 1 *Salk.* 207. 3 *Salk.* 106. Not even on a writ of error where judgment is affirmed. Where an *administrator* is plaintiff, he must shew by whom *administration* was granted; for that only entitles him to the action: but if an *administrator* is defendant, the plaintiff need not set forth by whom *administration* was granted, for it may not be within his knowledge. *Sid.* 228. 1 *Lutw.* 301. Generally an *administrator* shall be charged by others for any debt or duty due from the deceased, as he himself might have been charged in his life-time; so far as he hath any of the intestate's estate to discharge the same. *Co. Lit.* 219. *Dyer*, 14.

If a man have judgment for land in a real or mixed action and for damages, and then dies, his executor or *administrator*, not the heir, shall have execution for the damages, but not for the land. *Fitz. Admin.* 53. *March* 9.

2. For the goods of the testator, taken from them, or for trespass upon the land, &c. *Executors* may, *before the will proved*, bring action of trespass, detinue, &c. And if they sell cattle, or other goods of the testator, before the will is proved, they may have actions for the money payable, before the same is proved. *Offic. Exec.* 35. It has been ruled, that an executor may commence an action before probate; but he cannot declare upon it without producing in court the letters testamentary: he is not like an administrator, who hath no right till administration committed; for his right is the same before as after probate of the will, and the not proving it is only an impediment to the action. 1 *Salk.* 303.

Executors may maintain action of trover for goods converted in the life of the testator. *Cro. Eliz.* 377. And by the *stat. Westm.* 2. (13 *E.*) *c.* 23. executors shall have a writ of account, and the like action and process, as the testator might have had.—By *stat.* 4 *E.* 3. *c.* 7. the executors may bring actions for trespass done to their testator, as for goods and chattels carried away in his life, and shall recover their damages in the same manner as he should have done.—By *stat.* 25 *E.* 3. *st.* 5. *c.* 5. *executors of executors* shall have actions of debt, account, and of goods taken away of the *first testator's*; and have execution of statutes, &c. and shall answer to others, so far as they recover goods of the *first testator*, as the *first executor's*.—As to process against Executors, see *st.* 9 *E.* 3. *c.* 3.

Formerly if an executor wasted goods, and left an executor, and died leaving assets, his executor should not be chargeable, because it was a personal tort. 2 *Lev.* 120. but now it is otherwise by the *stat.* 4 & 5 *W. & M. c.* 24.

The law subjects the executors to every person's claim and action, which he had against the testator, except as to trespass *vi et armis*, &c. commited by the testator; for which reason the executor is said to be the testator's assignee, and to represent the person of the testator: but for personal wrongs done by the testator to the person, or goods, &c. of another, the *executor* doth not represent him: because personal actions die with the person. *Co. Lit.* 209. 9 *Rep.* 89. See title *Action*.

Nothing can be debt in the *executor*, which was not debt in the testator. *Cro. Eliz.* 232. A promise to pay to an *executor*, when the *testator* is not named, is not good. *Cro. Jac.* 570. But a testator may bind his *executors* as to his goods, though he himself is not bound. *Ibid.* And an *executor* may recover a duty due to the testator, though he be not named. *Dyer*, 14. Action lies against an *executor* upon a collateral promise made and broken by the testator. *Cro. Jac.* 663. The testator's *Assumpsit* to do any collateral thing, as to build an house, &c. which is not a debt, binds *executors*. *Jenk. Cent.* 290. 336. *Assumpsit* lies upon a contract of the testator; and the reason is the same upon a promise, where the testator had a valuable consideration. *Palm.* 329. Though a debt upon a simple contract of the testator, cannot be recovered of the *executor* by action of debt; yet it may by *assumpsit*. 1 *Lev.* 200 9 *Rep.* 87.

A promise made upon good consideration by a testator, that his executor shall pay, is a sufficient consideration for an action in *assumpsit* against the executor; and in such action it is neither necessary to aver assets, nor a promise by the executor; and on a count averring an account stated by the defendant of monies due from him as executor the judgment shall be *de bonis testatoris*, and such count may therefore be joined with counts on promises of the testator. *Powell* v. *Graham*, 7 *W. P. Taunton*, 580.

Counts on promises to a testator, may be joined with counts on promises to an executor, if the damages recovered under the last would be assets in the hands of the executor. *Powley* v. *Newton*, 6 *W. P. Taunton*, 456.

If two persons are *jointly bound*, and one of them dies, the survivor only shall be charged, and not the other's *executor*. *Pasch.* 16 *Car.* 2. When there are two *executors*, if one of them dies, action is to be brought against the surviving *executor*, and not the *executor* of the deceased: but in equity the testator's goods are liable in whosesoever's hands they are. 1 *Leon.* 304. *Chan. Rep.* 57.

If there be no assets, the obligee *executor* may sue the heir of the obligor testator in action of debt upon his bond. 1 *Salk.* 304. 1 *Lil. Abr.* 575.

If an executor releases all actions, suits and demands, it extends only to demands in his own right, not such as he hath as executor. *Sh. w.* 153. An executor shall be charged with rent in the *detinet*, if he hath assets; and if he continues the possession, he shall be charged in the *debet* and *detinet*, in respect of the perception of the profits, whether he hath assets or not. 1 *Lev.* 127. But an execution is not suable in the *debet* and *detinet* for part, and in the *detinet* for the other part, because they require several judgments; *viz. De bonis propriis* for the *debet* and *detinet* and *de bonis testatoris* for the *detinet*. 3 *Lev.* 74. See title *Debet* and *Detinet*.

If an executor has a term, and the rent reserved is *more* than the value of the premises, in action brought against him for it in the *debet* and *detinet*, he may plead the special matter, *viz.* That *he hath no assets*, and that *the land is of less value than the rent*, and demand judgment if he ought not to be charged in the *detinet tantum*: and he cannot waive the lease without renouncing the whole executorship. 1 *Salk.* 297.

One executor cannot regularly sue another at law; but he may have relief in equity: in the eye of the law all are but as one executor; and most acts done by, or to any of them, are esteemed acts done by or to all of them. 1 *Rol. Abr.* 918. If where one executor is sued, he plead that there is another executor *he ought to shew that he hath administered*. 1 *Lev.* 161. And *he only that administers is to be* sued *in actions against executors*; but actions *brought by executors are to be in the name of all of them*, though some do not take upon them the executorship. 1 *Rol.* 924. *Jenk. Cent.* 106, 107. If any executor refuses to join in an action with his co-executors he must be *summoned and severed*.

An executor is not disabled by outlawry to sue for the debts of the testator.

By the *stat. of Frauds*, 29 *Car.* 2. *c.* 3. no action shall charge an executor to answer damages out of his own estate, upon any promise to another, unless there be *some writing* thereof *signed by the party* to be charged therewith. See *Rann* v. *Hughes*, 4 *Bro. P. C.*

By *stat.* 17 *Car.* 2. *c.* 8. § 1. on any judgment after verdict, had by or in the name of an executor or administrator; an administrator *de bonis non* may sue forth a *scire facias*, and take execution upon such judgment. If an executor makes himself a stranger to the will of the testator, or pleads *Ne unques* executor, or any *false plea*, and it is found against him, judgment shall be *de bonis propriis*: in other cases *de bonis testatoris*. *Cro. Jac.* 447.

If on a *scire facias* against an executor, the sheriff return a *devastavit*, the plaintiff shall have judgment and execution *de bonis propriis* of the defendant; and if *nulla bona* be returned, he may have a *capias ad satisfaciend.* or an *elegit*. 2 *Nels.* 791. *Dyer*, 185. But one executor shall not be charged with a *devastavit* made by his companion; for the act of one shall charge the other no further than the goods of the testator in his hands amount to. *Cro. Eliz.* 318.

If an executor does any waste, or mis-employs the estate of the deceased, or doth any thing by negligence or fraud, &c. it is a *devastavit*, and he shall be charged for so much

out of his own goods. 8 *Rep.* 133. And a *new* executor may have an action against a former executor, who wasted the goods of the deceased; or the old one may remain chargeable to creditors, &c. *Hob.* 266.

If an executor takes an obligation in his own name, for a debt due by simple contract to the testator, this shall charge him as much as if he had received the money; for the new security hath extinguished the old right, and is *quasi* a payment to him. *Off. of Ex.* 158. *Yelv.* 10. 1 *Lev.* 189.

So if the executor sues a person in trover and conversion, in which he has a right to recover; and afterwards he and the defendant come to an agreement, that he shall pay the executor such a sum at a future day, and the party fails, this is a *devastavit;* and he shall answer *ad valorem.* 2 *Lev.* 189. 2 *Jon.* 88. *S. C.* 1 *Vern.* 474. *S. C.*

It is a *devastavit* to permit interest to run in arrear, and then suffer judgment for it; and want of assets to pay before the incurring of it by the administrator shall not be intended unless it be expressly pleaded. 2 *Lev.* 40. *Hil.* 23 & 24. *Car.* 2. *B. R. Seaman* v. *Dee.*

An executor in case of a *devastavit* is in nature of a trustee of an estate. *Chan. Cases* 304.

EXECUTORY ESTATE. Is where an estate in fee created by deed or fine is *to be afterwards executed* by *entry, livery*, writ, &c. Leases for years, rents, annuities, conditions, &c. are called inheritances *executory.* *Wood's Inst.* 293. *Estates executed* are when they pass presently to the person to whom conveyed, without any after act. 2 *Inst.* 513. See title *Estate.*

EXECUTORY DEVISE. The Devise of a *future interest.* A Devise that *vests not at the death of the testator*, but depends on some *contingency* which must happen before it can vest. 1 *Eq. Cas. Abr.* 486.

An executory devise differs from a remainder in three very material points. 1. That it needs not any particular estate to support it. 2. That by it a fee-simple or other less estate may be limited after a fee-simple. 3. That by this means a remainder may be limited of a chattel interest, after a particular estate for life created in the same. See title *Remainder*, and 2 *Comm.* 172—5.

1. The first case happens when a man devises a future estate to arise upon a contingency: and until that contingency happens does not dispose of the fee-simple, but leaves it to descend to his heir at law. As if one devises land to a feme-sole and her heirs, upon her day of marriage: here is in effect a contingent remainder without any particular estate to support it; a freehold commencing *in futuro.* This limitation, though it would be void in a deed, yet is good in a will, by way of executory devise. 1 *Sid.* 153. For, since by a devise a freehold may pass without corporal tradition or livery of seisin, (as it must do if it passes at all,) therefore it may commence *in futuro;* because the principal reason why it cannot commence *in futuro* in other cases, is the necessity of actual seisin, which always operates *in præsenti.* And since it may thus commence *in futuro*, there is no need of a particular estate to support it, the only use of which is to make the remainder, by its unity with the particular estate, a present interest. And hence also it follows, that such an executory devise not being a present interest, cannot be barred by a recovery, suffered before it commences. *Cro. Jac.* 593. See this Dict. title *Fine and Recovery.*

2. By executory devise a fee, or other less estate, may be limited after a fee. And this happens where a devisor devises his whole estate in fee, but limits a remainder thereon to commence on a future contingency. As if a man devises lands to A. and his heirs; but, if he dies before the age of twenty-one, then to B. and his heirs: this remainder also, though void in deed, is good by way of executory devise. 2 *Mod.* 289.

In both these species of executory devises, the contingencies ought to be such as may happen within a reasonable time, as within one or more life or lives in being, or within a moderate term of years; for courts of justice will not indulge even wills, so as to create a perpetuity, which the law abhors. 12 *Mod.* 287. 1 *Vern.* 164. 1 *Salk.* 229. The utmost length that has been hitherto allowed for the contingency of an executory devise of either kind to happen in, is that of a life or lives in being, and one and twenty years afterwards. As when lands are devised to such unborn son of a feme-covert as shall first attain the age of twenty-one, and his heirs; the utmost length of time that can happen before the estate can vest, is the life of the mother and the subsequent infancy of her son, and this hath been decreed to be a good executory devise. *Forr.* 232. This limit was taken from the time in which an estate may be rendered unalienable by a strict settlement. An executory devise to an unborn son of a *man*, may be suspended a few months beyond the life of the father, and twenty-one years afterwards, by a posthumous birth. See *post* I. *ad finem.*

3. By executory devise a term of years may be given to one man for his life, and afterwards limited over in remainder to another, which could not be done by deed: for, by law, the first grant of it to a man for life, was a total disposition of the whole term; a life estate being esteemed of a higher and larger nature than any term for years. 8 *Rep.* 95.

And, at first, the courts were tender even in the case of a will of restraining the devisee for life from aliening the term, but only held, that in case he died without exerting that act of ownership, the remainder over should then take place; for the restraint of the power of alienation, especially in very long terms, was introducing a species of perpetuity. *Bro.* tit. *Chattels*, 23. *Dyer*, 74. But, soon afterwards it was held, that the devisee for life hath no power of alienating the term, so as to bar the remainder-man. *Dyer*, 358. 8 *Rep.* 96. Yet, in order to prevent the danger of perpetuities, it was settled, that though such remainders may be limited to as many persons successively as the devisor thinks proper, yet they must all be *in esse* during the life of the first devisee; for then, as it is expressed, all the candles are lighted, and are consuming together, and the ultimate remainder is in reality only to that remainder-man who happens to survive the rest. It was also settled that such remainder may not be limited to take effect, unless upon such contingency as must happen (if at all) during the life of the first devisee. 1 *Sid.* 551. *Skinn.* 341. 3 *P. Wms.* 358. See *post* II.

Having said thus much on Executory Devises in general, subsequent information may be thus divided.

I. *Of Executory Devises of Lands of Inheritance.*
II. *Of Executory Devises of Terms for Years; and of personal Goods and Chattels.*

I. It is a settled rule of law that where the court can construe a devise to be a contingent remainder, they will never construe it to be an executory devise. 2 *Bos. & Pull.* 298. See title *Remainder*, II.

If a *particular estate* is limited, and the *inheritance passes out of the donor*, this is a *contingent remainder;* but where the *fee* by a *devise* is *vested in any person* and *to be vested in another by contingency*, this is an *executory devise:* and in all cases of *executory devises*, the estates descend until the contingencies happen. *Raym.* 28. 1 *Lutw.* 798. Where a *contingent estate* limited, *depends upon a freehold*, which is capable of supporting a remainder, it *shall never be construed an executory devise, but a remainder.* And so it is if the estate be limited by words *in præsenti*, as when a person devises his

lands to the heirs of A. B. who is living, &c. Though if the same were to the heir of A. after his death it would be as good as an executory devise. 2 *Saund.* 380. 4 *Mod.* 255.

One by will devises land to his mother for life, and after her death, to his brother in fee; provided, that if his wife, being then *enseint*, be delivered of a son, then the land to remain to him in fee, and dies, and the son is born; in this case it was held, that the fee of the brother shall cease and vest in the son, by way of *executory devise*, on the happening of the *contingency;* and here such fee estate enures as a new original devise to take effect when the first fails. *Dyer*, 33. 127. *Cro. Jac.* 592. A *remainder of a fee* may not be limited by the rules of law, *after a fee-simple;* for when a man hath parted with his *whole* estate, there cannot remain any thing for him to dispose of: but of late times a distinction hath been made between an *absolute fee simple*, and a *fee simple* which *depends upon a contingency*, or is *conditionally limited;* especially where such a contingency may happen in the course of a *few years*, or of *one or two lives;* and where such a *remainder* is *limited by will*, it is called an *executory devise.* 2 *Nels. Abr.* 797.

An estate devised to a son and his heirs, upon condition that if he did not pay the legacies given by the will within such a time, that then the land should remain to the legatees, &c. and their heirs; this limitation of *a fee in remainder*, after a *fee limited to the son*, being upon the *contingency* of the son's failing in payment of the legacies, was adjudged good by way of *executory devise. Cro. Eliz.* 833. And where the father devised his lands to his youngest son and his heirs, and if he die without issue, the eldest son being alive, then to him and his heirs; this was held a good remainder in fee to the eldest brother, after the conditional contingent estate in fee to the youngest, as depending upon the possibility that he might be alive when his youngest brother died without issue; and his dying without issue was a collateral determination of his estate, whilst the other was living. *Godb.* 282. 2 *Nels. Abr.* 798.

There can be no *executory devise* after an *estate-tail generally limited*, because that would tend to *a perpetuity;* and a contingency is too remote where a man must expect a fee upon another's dying *without issue, generally:* But *dying without issue, living another*, may happen in a little time, because it depends upon *one life;* and therefore a devise of a fee-simple to one, but to remain to another upon such a contingency, is now held good by *executory devise. Cro. Jac.* 695.

If a devise be "to A. for ever, that is, if he shall have a son or sons who shall attain 21, but if A. shall die without son or sons to inherit, that the son of B. shall inherit:" this is a fee in A. with an executory devise to the son of B. who shall take if A. die without issue, or if the issue die before 21. 1 *Bro. C. R.* 147.

If a devise be to the second son, then unborn, of A. B. and after his decease, or accession to his paternal estate, then to *his* second son and his heirs male, with remainders over: such second son of A. B. when born, will take an estate in tail male by way of executory devise, determinable on the accession of the family estate, and in the mean time the lands descend to the heir of the testator. 2 *Black. Rep.* 1159.

One devised to his daughter then under age, an estate in fee, and if she died under the age of 21 years, unmarried, and without leaving lawful issue, then to his wife in fee. The daughter married, and died under 21 without issue, but left her husband surviving her. The court of K. B. held that the devise over did not take effect, as by the words of the will it was made to depend on the happening of the *three* events, dying under 21, dying under that age unmarried, and dying under that age without issue. *Doe d. Baldwin & Ux.* v. *Rawding & Ux. Term Rep. K. B. E.* 59 *G.* 3. 441. and see *Doe* v. *Cook*, 7 *East's Rep.* 269. and *Doe* v. *Jessop*, 12 *East's Rep.* 269. But see *Maberly* v. *Strode*, 3 *Ves. jun.* 450. and *Bell* v. *Phynn*, 2 *Ves.* 247.

By 39 & 40 *Geo.* 3. *c.* 98. reciting 'that it is expedient that all dispositions of real or personal estates, whereby the produce and profits thereof are directed to be accumulated, and the beneficial enjoyment thereof is postponed, should be made subject to certain restrictions;' it is enacted, that no person shall by deed or will settle or dispose of any real or personal property, in such manner that the rents or profits shall be accumulated, for a longer term than the life of the settler, or twenty-one years after his decease, or during the minority of any party living (or in *ventre sa mere*,) at the time of such decease, or the minorities of parties beneficially entitled: all directions to the contrary are declared void, and the rents, &c. are to go to the parties who would be entitled if such accumulation were not directed.—This act does not extend to provisions for payment of debts, or for raising portions for children, or respecting the produce of timber; nor to the disposition of heritable property in Scotland.

II. It has now been long fully settled, that a term for years, or any chattel interest, may be given by an executory devise to an unborn child of a person in existence, when it attains the age of 21; and that the limits of executory devises of real and personal property are precisely the same. *Fearne.* See *ante* I.

It is very common to bequeath chattel interests to A. and his issue, and if he dies without issue to B. It seems now to be determined, that where the words are such as would have given A. an estate tail in real property; in cases of personal property the subsequent limitations are void, and A. has the absolute interest: but if it appear from any clause or circumstance in the will, that the testator intended to give it over only in case A. had no issue living at the time of his death, upon that event the subsequent limitation will be good as an executory devise. See *Fearne*, and the cases referred to in *Cox's P. W.* iii. 262.

Formerly where a term of years (which is but a chattel) was devised to one; and that if he died, living another person, it should remain to the other person during the residue of the term, such a remainder was adjudged void: for a devise of a chattel to one for an hour, was a devise of it for ever. *Dyer*, 74. But it was afterwards held, that *a remainder of a term to one, after it was limited to another for life*, was good: in a case where a testator having a term, devised that his wife should have the lands for so many years of the term as she should live, and that after her death the residue thereof should go to his son and his assigns; and this was the first case wherein an executory remainder of a term for years was adjudged good. *Dyer*, 253. 358.

A person possessed of a term, devised to his wife for eighteen years, and after to his eldest son for life, after to the son's eldest issue male during life; though he have no such issue at the time of the devise and death of the devisor, if he has before his own death, he shall have it as an *executory devise.* 1 *Rol.* 612. But if one devise a term to his wife for life, the remainder to his first son for life, and if he dies without issue, to his second son, &c. the remainder to the second son is void, and no executory devise; yet where the dying without issue living at a person's death, may be confined to one life, it hinders not a remainder over. 1 *Eq. Abr.* 194.

Where there is an *executory devise*, there needs not any *particular estate* to support it; and because the person who is to take upon contingency, hath not a *present* but *future interest*, his estate *cannot be barred by a common recovery.* 2 *Nels. Abr.* 797, 798. It is held, *executory devises*, and *limitations* of the *trust of a term*, are governed alike. 1 *Vern.* 234.

The husband being possessed of a term for years, devised *the lease itself* to his wife for *her life*, and after her death to

*her children unpreferred;* it was insisted for the wife that she had the whole term, the devise being of *the lease itself*, and the lands are not mentioned throughout the will; but adjudged that the wife had only *an estate for so many years of the lease as she should live*, and that so much as remained unexpired at her death, was to vest in the children upon the contingency of their living at that time. 1 *And.* 61. 2 *Leon.* 92. 3 *Leon.* 89. *Gold.* 26.

By the rules of the ancient Common Law there could be no future property, to take place in expectancy, created in personal goods and chattels: because, being things transitory, it would occasion many suits and quarrels, and put a stop to the freedom of trade, if such limitations were *generally* allowed. But yet in last wills and testaments such dispositions were permitted; though, originally, that indulgence was only shewn when merely the use of the goods, and not the goods themselves, were given to the first legatee, the property being supposed to continue in the executor: but now that distinction is disregarded: and therefore if a man, either by deed or will, limits furniture, &c. to A. for life, with remainder over to B. this is good. But where an estate-tail in things personal is given to the first or any subsequent possessor, it vests in him the total property, and no remainder over shall be permitted on such a limitation. For this, if allowed, would tend to a perpetuity, as the devisee or grantee in tail of a chattel has no method of barring the entail; and therefore the law vests in him at once the entire dominion of the property, being analogous to the fee-simple, which a tenant in tail may acquire in a real estate. See 2 *Comm. c.* 25. II. 3.

EXECUTRY. The personal estate of the deceased; and falling under the distribution of the executor. *Scotch Dict.*

EXEMPLIFICATION OF LETTERS PATENT, &c. See title *Evidence*.

EXEMPLIFICATIONE. A writ granted for the exemplification of an original record. *Reg. Orig.* 290.

EXEMPTION, *Exemptio.*] A privilege to be free from service or appearance; as knights, clergymen, &c. are exempted from appearing at the county-court by statute, and peers from being put upon inquests. 6 *Rep.* 23. Persons seventy years of age, apothecaries, &c. are also exempted by law from serving on juries: and justices of peace, attornies, &c. from parish offices. 2 *Inst.* 247. There is an exemption from tolls, &c. by the King's *Letters Patent:* and a writ of exemption, or of ease, to be quit of serving on juries, and all public service. *Shep. Epitom.* 1049. Where an act directs that the *tolls* of a navigation should be exempt from any taxes, rates, &c. other than such as the land, which should be used for the purpose of the navigation, would have been subject to if the act had not been made; that goes to exempt the *tolls* qua *tolls* altogether from being rated in respect of the line so exempted, leaving the *land* rateable as before. *Rex v. The Leeds and Liverpool Canal Company.* 5 *East.* 325. See further the proper titles in this Dict.

EXENNIUM OR EXHENIUM. A gift at present; and more properly a new year's gift.

EXERCITUALE. A heriot; paid only in arms, horses, or military accoutrements. *Leg. Edw. Conf.* 1.

EXFREDIARE, from *ex* and the Sax. *Frede, Frith, Peace.*] To break the peace, or commit open violence. *Leg. H.* 1. *c.* 13.

EX GRAVI QUERELA. A writ that lies for him to whom any lands or tenements in fee are devised by will, (within any city, town, or borough, wherein lands are deviseable by custom,) and the heir of the devisor enters and detains them from him. *Reg. Orig.* 244. *Old Nat. Br.* 87. And if a man devises such lands or tenements unto another in tail, with remainder over in fee, if the tenant in tail enter, and is seised by force of the entail, and afterwards dieth without issue, he in remainder shall have the writ *ex gravi querela* to execute that devise. *New Nat. Br.* 441. Also where tenant in tail dies without issue of his body, the heir of the donor, or he who hath the reversion of the land, shall have this writ in the nature of a *formedon in the reverter. Ibid.* If a devisor's heir be ousted by the devisee, by entry on the lands, he may not after have this writ, but is to have his remedy by the ordinary course of the Common Law. *Co. Lit.* 111.—If the claimant's title accrues within twenty years, the most eligible method of proceeding is now by Ejectment.

EXHIBIT, *Exhibitum.*] Where a deed or other writing is in a suit in Chancery exhibited to be proved by witnesses, and the examiner or commissioners appointed certify on the back of it, that the deed or writing was shewn to the witness, to prove it at the time of his examination, and by him sworn to; this is then called an exhibit in law proceedings. The same under a commission of bankrupt.

EXHIBITION. An allowance for meat and drink, such as was customary among the religious appropriators of churches, who usually made it to the depending vicar: the benefaction settled for the maintaining of scholars in the Universities, not depending on the foundation, are called *exhibitions. Paroch. Antiq.* 301.

EXHIBITION; in the Scotch law, is the term applied to an action for compelling the production of writings.

EXIGENDARIES. See *Exigenter.*

EXIGENT, or *Exigi facias.*] A writ that lies where the defendant in an action personal cannot be found, nor any thing of his within the county, whereby to be attached or distrained; and is directed to the sheriff, to proclaim and call him *five county-court days*, one after another, charging him to appear upon pain of outlawry: It is called *exigent*, because it *exacteth* the party, *i. e.* requires his appearance or forthcoming to answer the law; and if he come not at the last day's proclamation, he is said to be *quinquies exactus*, (*five times exacted,*) and is outlawed. *Cromp. Juris.* 188.

The statutes requiring proclamations on exigents awarded in civil actions, are 6 *Hen.* 8. *c.* 4. 31 *Eliz. cap.* 3. Exigents are to be awarded against receivers of the King's money, who detain the same; and against conspirators, rioters, &c. *Stat.* 18 *Ed.* 3. *c.* 1. And a writ of proclamation shall be issued to the sheriff to make three proclamations in the county where the defendant dwells, for him to yield himself, &c. *Stat.* 31 *Eliz. c.* 3.

The writ of exigent also lies in an indictment of felony, where the party indicted cannot be found: And upon suing out an exigent for a criminal matter before conviction, there shall be a writ of proclamation, &c. 3 *Inst.* 31. 4 *& 5 W. & M. c.* 22. If a person indicted of felony absent himself so long that the writ of exigent is awarded, his withdrawing will be deemed a *flight in law*, whereby he will be liable to forfeit his goods; and though he renders himself upon the exigent, after such withdrawing, and is found Not guilty, it is said the forfeiture shall stand. 5 *Rep.* 110. 3 *Inst.* 232. After a *capias* directed to the sheriff, to take and imprison a person, &c. if he cannot be taken, an exigent is awarded; And after a judgment in a civil action, the exigent is to go forth after the first *capias*; but before judgment there must be a *capias, alias*, and *pluries*. 4 *Inst.* 177. If the defendant be in prison, or beyond sea, &c. he or his executors may reverse the award of the exigent. See further this Dict. title *Outlawry.*

EXIGENTER, *Exigendarius.*] An officer of the court of Common Pleas; of which officers there are four in number: They make all exigents and proclamations, in actions where process of outlawry doth lie; and also writs of *supersedeas*, as well as the *prothonotaries*, upon such exigents made out in their offices. But the issuing writs of *supersedeas* is taken from them by an officer in the same court, constituted by letters patent by King James the First.

EXIGI FACIAS. See *Exigent.*

EXILE. A banishment, or driving one away from his country. And this exile is either by restraint, when the government forbids a man, and makes it penal to return; or it is voluntary, where he leaves his country upon disgust, but may come back at pleasure. 2 *Lev.* 191.

One natural and regular consequence of personal liberty under the laws of England is, that every Englishman may claim a right to abide in his own country so long as he pleases, and not to be driven from it unless by sentence of the law. Exile and Transportation are both punishments unknown to the Common Law; and wherever the latter is inflicted, it is either by the choice of the criminal himself to escape a capital punishment, or by the express direction of some statute. See *Magna Charta, c.* 29. which expressly declares that no freeman shall be banished unless by the judgment of his peers, or by the laws of the land. And for the provisions of the *Habeas Corpus Act, st.* 31 *Car.* 2. *c.* 2. (termed by *Blackstone* a second *Magna Charta*, and stable bulwark of our liberties,) with respect to sending Englishmen prisoners to Scotland, Ireland, or beyond the seas. See titles *False Imprisonment, Habeas Corpus.*

Soldiers and sailors form necessary exceptions to these rules; but it is said the King cannot even constitute a man Deputy, or Lord Lieutenant of Ireland, nor make one a foreign Ambassador against his will: since these in reality might be no more than honourable exiles. 2 *Inst.* 46.

See further on this subject, this Dict. titles *Abjuration, Clergy, Felony, Transportation.*

EXILIUM. Signifies in legal construction, a spoiling: And by the statute of *Marlbridge* it seems to extend to the injury done to tenants, by altering their tenure, ejecting them, &c. and this is the sense that *Fleta* determines, who distinguishes between *vastum, destructio*, and *exilium*; for he tells us that *vastum* and *destructio* are almost the same, and are properly applied to houses, gardens, or woods; but *exilium* is when servants are enfranchised, and afterwards unlawfully turned out of their tenements. *Fleta, lib.* 1. *cap.* 11. See *stat. Marlb. c.* 25.

EXITUS. Issue or offspring; and applied to the issues or yearly rents and profits of lands. *Stat. West.* 2. *c.* 45. See titles *Issues.*

EXLEGALITUS. He who is prosecuted as an outlaw. *Leg. Edw. Confes. c.* 38.

EX MERO MOTU. Words used in the King's charters and letters patent, to signify that he grants them of *his own will and mere motion*, without petition or suggestion of any other: And the intent and effect of these words is to bar all exceptions that might be taken to the charters or letters patent, by alleging that the King in granting them was abused by false suggestions. *Kitch.* 352. When the words *ex mero motu* are made use of in any charter, they shall be taken most strongly against the King. 1 *Co. Rep.* 451.

EX OFFICIO. The power a person has *by virtue of an office*, to do certain acts, without being applied to: as a justice of peace may not only grant surety of the peace, at the complaint or request of any person, but he may demand and take it *ex officio* at discretion, &c. *Dalt.* 270.

Ex Officio Informations. Informations at the suit of the King, filed by the Attorney-General, as by *virtue of his office*; without applying to the court wherein filed, for leave, or giving the defendant any opportunity of shewing cause why it should not be filed. See title *Information.*

EXONERATIONE SECTÆ. A writ lay for the King's ward, to be *free from all suit* to the county-court, hundred-court, leet, &c. during wardship. *F. N. B.* 158.

Exoneratione Sectæ ad Curiam Baron'. A writ of he same nature, sued by the guardian of the King's ward, and directed to the sheriff or stewards of the court that they do not distrain him, &c for not doing suit of court. *New Nat. Br.* 352. And if the sheriff distrain tenants in ancient demesne to come to the sheriff's torn or leet, they may have a writ commanding the sheriff to surcease, &c. *Ibid.* 359. Likewise if a man have lands in divers places in the county, and he is constrained to come to the leet where he is not dwelling, when he resides within the precincts of any other leet, &c. then he shall have this writ to the sheriff to discharge him from coming to any other court-leet than in the hundred where he dwelleth. *Ibid.* 357.

By the common law parsons shall not be distrained to come to court-leets, for the lands belonging to their churches; and if they be, they may have the writ *exoneratione sectæ*, &c. *F. N. B.* 394. So shall a woman holding land in dower, if she is distrained to do suit of court for such land; when the heir has lands sufficient in the same county. *Ibid.*

EX PARTE. Of the one part; as a commission in Chancery *ex parte*, is that which is taken out and executed by one side or party only, on the other party's neglecting or refusing to join. When both plaintiff and defendant proceed, it is a joint commission.

Ex parte talis. Is a writ that lies for a *bailiff* or *receiver*, who having auditors assigned to take his account, cannot obtain of them reasonable allowance, but is cast into prison. And the course in this case is to sue this writ out of the Chancery, directed to the sheriff to take four mainpernors to bring his body before the barons of the Exchequer at a certain day, and to warn the lord to appear at the same time. *F. N. B.* 129.

EXPECTANT. Having relation to or depending upon; and this word is likewise used in the law with *fee*, as *fee-expectant.*

Expectancy. *Estates in*; are of two sorts; one created by act of the *parties* called a *remainder*; the other by act of *law*, called a *reversion.* See titles *Estate, Remainder, Reversion, Executory Devise.*

EXPEDITATE, *Expeditare.*] In the laws of the *forest*, signifies to cut out the ball of the dog's fore-feet, for the preservation of the King's game: but the ball of the foot of a mastiff is not to be taken out, but the three claws of the fore-foot on the right side are to be cut off by the skin. *Cromp. Jurisd.* 152. *Manwood, cap.* 16. This relates to every man's dog who lives near the forest; and was formerly done once in every three years: and if any person keeps a great dog not expeditated, he forfeits to the king 3*s.* 4*d.* 4 *Inst.* 308. See title *Forest.*

EXPEDITATÆ ARBORES. Trees rooted up or cut down to the roots. *Fleta, lib.* 2. *c.* 41.

EXPENDITORS. Persons appointed by commissioners of *sewers* to pay, disburse, or expend the money collected by the tax for the repairs of sewers, &c. when paid into their hands by the collectors, on the reparations, amendments, and reformations ordered by the commissioners, for which they are to render accounts when thereunto required. *Laws of Sewers*, 87, 88. See title *Sewers.* The steward who supervises the repair of the banks and water courses in Romney Marsh, is called the *Expenditor.*

EXPENSÆ LITIS. Costs of suit, allowed a plaintiff or defendant, recovering in his action. See title *Costs.*

EXPENSIS MILITUM NON LEVANDIS, &c. An ancient writ to prohibit the sheriff from levying any allowance for knights of the shire, upon those that hold lands in ancient demesne. *Reg. Orig.* 261. For there was also a writ *de expensis militum levandis*, for levying expences for knights of the parliament, &c. *Reg. Orig.* 191. See title *Parliament.*

EXPLEES. The rents or profits of an estate, &c. See *Esplees.*

EXPLORATOR. A scout; also a huntsman, or chaser,

EXPORTATION. The shipping or carrying out the native commodities of England for other countries; mentioned in the statutes relating to the *Customs*. See this Dict. title *Navigation Acts*.

EXPOSITION OF DEEDS, shall be favourable, according to the apparent intent: and be reasonable and equal, &c. *Co. Lit.* 313. See title *Deed*.

EX POST FACTO. Is a term used in the law, signifying something done after, or as arising from, or to affect, another thing that was committed before. An act done, or estate granted, may be made good by matter *ex post facto*, that was not so at first by election, &c. As sometimes a thing well done at first, may afterwards become ill. 5 *Rep.* 22. 8 *Rep.* 146. An *ex post facto* law is one which operates upon a subject not liable to it at the time the law was made. Such is an act imposing duties of customs on goods imported before the passing of the act. See title *Statute*.

TO EXTEND, *Extendere*.] To value the lands or tenements of one bound by a statute, who hath forfeited his bond, at such an indifferent rate, as by the yearly rent the creditor may in time be paid his debt. *F. N. B.* See the next article.

EXTENDI FACIAS, OR EXTENT, *Extenta*.] A writ of execution, or commission to the sheriff for the valuing of lands or tenements: and sometimes the act of the sheriff or other commissioner upon this writ. *Bro.* 313. See this Dict. title *Execution*. This term is also used for the estimate or valuation of lands, which, when made to the utmost value, is said to be the full extent; whence come our extended rents, or rack rents.

If one bound to the King by specialty, or to others by statute, recognizance, &c. hath forfeited it: so that by the yearly rent of the debtor's lands, the creditor is to be paid his debt; upon this the creditor may sue a writ to the sheriff out of the chancery to deliver him the lands and goods to the value of the debt, which is termed a *libertare*. *F. N. B.* 131. This is after the extent directed to the sheriff to seize and value the lands, &c. of the debtor, to the utmost extent. 4 *Rep.* 67.

Lands and goods are to be appraised and extended by the inquest of twelve men, and then delivered to the creditor, in order to the satisfaction of his debt: every extent ought to be by inquisition and verdict, by the *stat. Westm.* 2. And the sheriff cannot execute the writ without an inquisition. *Cro. Jac.* 569.

The body of the cognisor, and all lands and tenements that were his at the time of the statute, &c. entered into, or afterwards, into whose hands soever they come, are liable to the extent. 2 *Inst.* 396. But *copyhold* lands are chargeable only during the life of the cognisor: and may not be extended by *elegit*, so as to admit a stranger to have interest in the lands held by copy, without the admittance of the lord. Lands in ancient demesne, annuities, rents, &c. are extendible. 1 *Rol. Abr.* 88. Two parts of an entire rent may be delivered upon an extent by the sheriff. *Cro. Eliz.* 742. But if the cognisor of a statute have a rent-charge, and before the extent he purchase parcel of the land; the rent is gone and shall not be held in execution: It is otherwise if he purchases after extent of the rent. *Dyer*, 206. A reversion of lands, &c. may not be extended; but a plaintiff had judgment for his debt and damages *de reversione cum acciderit*, and a special *elegit* to extend the moiety, &c. 2 *Sid* 86. *Dyer*. 373.

An advowson in gross is not extendible on elegit, &c. *Stat. Westm.* 2. *cap.* 18. An office of trust cannot be extended, because it is not assignable; and nothing shall be extended, but what may be assigned over. *Dyer*, 7. Though an office is extendible in equity. *Chanc. Rep.* 39. Goods and chattels, as leases for years, cattle, &c. in the cognisor's own hands, and not sold for valuable consideration, are subject to the extent. As the lands are to be delivered to the party at a reasonable yearly value, so the goods shall be delivered in extent at a price that is reasonable; and on a *scire facias ad computand'* the cognisee is to account according to the *extended* value; not the *real* value of the land. *Hardr.* 136. If the extenders appraise and value the lands too high, the cognisee at the return of the writ may pray that they may take and retain the lands at the rate appraised; and then it is said he may have execution against their lands for the debt; but this may not be on *elegit*. *Cro. Jac.* 12. It has been adjudged, that at the return of the writ the cognisee may refuse the lands, &c. extended, if overvalued. *Cro. Car.* 148.

Where lands are extended at under-value, and delivered in execution, the cognisee hath an interest in the land, which cannot be divested by finding of surplusage. *Cro. Eliz.* 266. *Cro. Jac.* 85. The cognisor cannot enter upon the cognisee, when satisfaction is received for the debt, but is put to his *scire facias* on an *extent*; though on an *elegit* the defendant may enter because the land is only awarded, till the debt, which is certain, is satisfied; whereas on extent, the land is to be held until the debt, damages and costs, &c. are satisfied; and the cognisee being in by matter of record, shall not be put out but by matter of record, *viz.* a *scire facias* brought against him, 4 *Rep.* 67. *March's Rep.* 207, 208. *Sed. qu.* Where is the difference? Is not the tenant by *elegit* in by matter of record?

After an extent returned, a *liberate* shall go to the sheriff, reciting the *extendi facias* and return, and commanding that he deliver the goods and lands to the conusee (under a statute-staple, &c.) *si per extentum, et pretium illa habere voluit*. *F. N. B.* 131. *Lutw.* 432.

The cognisee hath no absolute property in land, by the extent, till the delivery upon the *liberate*: but notwithstanding by the very extent they are *in custodiâ legis* for his benefit. *Cro. Car.* 106. 148. No actual seisin can be on an extent, and a cognisee of a statute staple, &c. cannot bring ejectment before the *liberate*; nor can the sheriff upon the *liberate* turn the tertenant out of possession, as he may upon a *hab. fac. possessionem*, 1 *Vent.* 41. Where there is an extent upon a statute, and a *liberate* thereupon, but not returned, yet it is good; though regularly, when inquisitions are taken, the writ ought to be returned. 4 *Rep.* 67. 1 *Lill. Abr.* 592. The sheriff may be charged to make a return of his writ, if he put the cognisee in possession of part only; and so the cognisee may have possession of the whole. 2 *Nels. Abr.* 774. But it is said if a person suing out an extent, die before the return of a writ, the sheriff may proceed in his inquisition, &c. afterwards; for there must be a prosecution *de novo*.

After a full and perfect execution had by extent, returned, and of record, there shall never be any re-extent upon an eviction: but by *stat.* 32 *Hen.* 8. *cap.* 5. if lands delivered in execution on a judgment, statute, or recognizance, shall be evicted, without fraud, or default of the tenant, who holds them in execution, before the debt and damages are wholly levied, the recoveror or conusee may have a *scire facias* against the person on whom the execution was first sued, his heirs, executors or assigns, of lands then liable, returnable in the same Court, 40 days after the teste; and if the defendant makes default, or shews not cause, the Chancellor or Justices of the court where the *scire facias* is returned shall make a new writ of the like nature of the former execution for levying the residue of the debt. *Co. Lit.* 290.

If lands be extended upon a mistake, &c. a re-extent may be had; see *Dyer*, 299. If part of the lands is evicted, the cognisee is to hold over the residue of the land till the debt is satisfied. 4 *Rep.* 66. When lands are delivered in extent, it is as if the cognisee had taken a lease thereof for years, until the debt is satisfied; and he shall never afterwards take out a new execution; the cognisee having accepted the land upon the *liberate*, the law presumes the debt to be satisfied.

1 *Lutw.* 429. An extent was filed, and though it was discovered that lands were omitted, the court would not grant a re-extent. *Sid.* 356. By *stat.* 16 & 17 *C.* 2. *c.* 5. (made perpetual by *stat.* 22 & 23 *C.* 2. *c.* 2.) when any judgment, statute or recognizance shall be extended (within twenty years after such judgment, &c. had,) the same shall not be avoided or delayed by occasion that any part of the lands extendible are omitted out of such extent: saving to the parties whose lands shall be extended, their remedy for contribution against those whose lands are omitted; except heirs within age.

Where a *fieri facias* issues, and is delivered to the sheriff to be executed, the property of the goods is vested by the *delivery*, and an extent afterwards for the King comes too late. *Comb.* 123. See also 2 *Black. Rep.* 1294. *Doug.* 415. 399. 4 *Term Rep. K. B.* 402. See this Dict. title *Execution*, *Receiver*.

EXTINGUISHMENT; from *Lat. Extinguo.*] The Extinction or annihilation of a right, estate, &c. by means of its being merged in, or consolidated with, another, generally a greater or more extensive, right or estate. Wherever a right, title, or interest is destroyed, or taken away by the act of God, operation of law, or act of the party, this in many books is called an Extinguishment. *Co. Lit.* 147, *b.* 1 *Ro. Abr.* 933.

This Extinguishment is of various natures, as applied to various rights; *viz. Estates*, *Commons*, *Copyholds*, *Debts*, *Liberties*, *Services*, and *Ways*. See more at large under those titles: what follows will give some general information on the subject.

EXTINGUISHMENT OF ESTATES. If a man hath a yearly rent out of lands, and afterwards purchases the lands whereout it ariseth, so that he hath as good an estate in the land as in the rent: now both the property and rent are consolidated or united in one possessor; and therefore the rent is said to be extinguished. Also where a person has a lease for years, and afterwards buys the property; this is a consolidation of the property and fruits, and an extinguishment of the lease: but if a man have an estate in the land but for life or years, and hath a higher estate as a fee-simple, in the rent; the rent is not extinguished, but in suspence for a time; for after the term, the rent shall revive. *Termes de Ley.*

Extinguishment of a rent is a destroying of the rent by purchase of the land; for no one can have a rent going out of his own land: though a person must have *as high an estate in the land, as in the rent, or the rent will not be extinct. Co. Lit.* 147. If a person hath a rent-charge to him and his heirs issuing out of lands, and he purchaseth any part of the land to him and his heirs; as the rent is entire and issuing out of every part of the land, the whole rent-charge is extinguished; though it is not so where one hath a *rent-service*, and purchaseth part of the land out of which it issues; *rent-service* being *apportionable* according to the value of the land, so that it shall only extinguish the rent for the land purchased. *Lit.* 222. *Co. Lit.* 148. And if the grantee of a rent-charge purchases parcel of the lands, and the grantor by his deed granteth that he may distrain for the rent in the residue of the land, this amounts to a new grant. *Co. Lit.* 147. See titles *Grant*, *Estate*.

If a man be seised of a rent-charge in fee, and grants it to another and his heirs, and the tenant attorns; the grantor is without remedy for the rent in arrear before his grant; and such arrears become as it were extinct. *Vaug.* 40. 1 *Lill. Abr.* 594. A. B. made a lease for years of land to another, and afterwards granted a rent-charge to C. D. who devised the said rent to the said A. B. till 100*l.* should be levied; then to B. G. and died: adjudged that by the devise to A. B. the rent was suspended, and that a personal thing once suspended by the act of the party is extinguished for ever. *Dyer*, 140.

If tenant for life makes a lease for years, rendering rent, and afterwards the reversion desends to the tenant for life; this is not an extinguishment of the term; but it is otherwise if he have the reversion by purchase. 1 *Co. Rep.* 96. A joint-tenant for life purchases the land in reversion, it will extinguish the estate for life for a moiety, and sever the joint-tenure. 2 *Rep.* 60. Lands are given to two men, and the heirs of their bodies; though they have an estate for life jointly, and several inheritances, yet the estate for life is not extinct: *Contrà*, if it be by *several conveyances*; as where a lease is made to two for their lives, and after the lessor grants the reversion to them and their heirs, &c. here the life estate will be extinguished. *Co. Lit.* 182.

If one after his title begun to be tenant by the curtesy, make a feoffment in fee upon condition, and enter for the condition broken; the estate is extinct, so that if his wife die, he shall not be tenant by the curtesy. 1 *Rep.* 18. Where a man hath an estate for his own life, and for another's life at once; the estate *pour auter vie* will be extinguished in the estate for his own life, which is greater in law than the other. 11 *Rep.* 87. *Dyer*, 11. See *Bro.* 409. *Moor*, 94. 2 *Nels. Abr.* 821.

When the freehold cometh to the term, the estate for years is extinct. 2 *Nels. Abr.* 820. Where the remainder of a term is granted over to another, if the party in possession purchase the fee-simple, though by this means his interest is extinguished; yet that shall not defeat the reversionary interest. 10 *Rep.* 52. 2 *Nels.* 820.

A fine, &c. of lands, will extinguish a term; and by purchase of an estate in fee-simple, an estate-tail in land is extinct. 9 *Rep.* 139. But if a fee-simple and fee-tail meet together by *descent*, the estate-tail will not be extinguished. 3 *Rep.* 61. Descent of lands to the same person who has a term, will extinguish the term. *Moor*, 286.

When a lessor enters tortiously upon the lessee against his consent, the rent is extinguished. 2 *Lev*, 143. But it has been adjudged, that rent is not extinct by the entry of the lessor, but only suspended; and revives by the lessee's re-entry. *Dyer*, 361. An infant has a rent, and purchases the land out of which it is issuing; by this the rent will be suspended, but not extinct. *Bro. Extinguish.* A man lessee for years takes a wife, or woman lessee a husband, that hath the reversion after the lease; here the term is *not* extinguished. 12 *Rep.* 81. See title *Baron and Feme.*

Although a surrender of a life-estate to the owner of the fee is, as between the parties, an extinguishment of the estate surrendered; yet such estate may have continuance to uphold a prior interest derived under it. Therefore, on an ejectment, where J. B. C. having a lease for three lives of a manor (where by the custom the copyholds were demisable by copy) made a lease for years, by indenture of a copyhold tenement to the father of the defendant, and afterwards the estate of J. B. C. was surrendered to the lord of the fee, who made a lease of the manor to the lessor of the plaintiff; the court of K. B. held that, inasmuch as the lease to the defendant's father, though not warranted by the custom, and though it suspended the copyhold tenure, was nevertheless good to pass an interest to him, the lessor of the plaintiff should not avoid it, during the continuance of one of the three lives in the lease to J. B. C. notwithstanding the surrender of that estate. *Doe. d. Beadon*, v. *Pyke*, *Term Rep. K. B. E.* 56 *Geo.* 3. 146. See 1 *Inst*, 338 *b.* 8 *Rep.* 144 *b.*

EXTINGUISHMENT OF COMMON. By purchasing lands wherein a person hath common appendant, the common is extinguished. *Cro. Eliz.* 594. A commoner releases his common in one acre, it is an extinguishment of the whole common. *Show. Rep.* 350. And where a person hath common of *vicinage*, if he incloses any part of the land, all the common is extinct. 1 *Brownl.* 174.

But if one hath common appendant in a great waste, belonging to his tenant, and the lord improve part of the waste leaving sufficient; if he after make a feoffment to the commoner of the land improved, this will be no extinguishment. *Dyer*, 339. *Hob.* 172. A commoner aliens part of his land, to which the common doth belong; the common is not extinct, but shall be divided. 2 *Shep. Abr.* 152. See title *Common*.

Extinguishment of Copyhold. It is laid down as a general rule, that any act of the copyholder's which denotes his intention to hold no longer of his lord, and amounts to a determination of his will, is an extinguishment of his copyhold. *Hutt.* 81. *Cro. Eliz.* 21. 1 *Jon.* 41.

As if a copyholder in fee accepts a lease for years of the same land from the lord, this determines his copyhold estate; or if the lord leases the copyhold to another, and the copyholder accepts an assignment from the lessee, his copyhold is extinct. *Moor*, 184. 2 *Co.* 16, *b. Godb.* 11. 101.

So if a copyholder bargains and sells his copyhold to the lessee for years of the manor, his copyhold is thereby extinguished; or if he joins with his lord in a feoffment of the manor, his copyhold is thereby extinct, for these are acts which denote his intention to hold no longer by copy. *Hutt.* 65. 1 *Jon.* 41. *S. C. Godb.* 11.

So if a copyholder accepts to hold of his lord, by bill under the lord's hand, this determines his copyhold; so if he accepts an estate for life by parol, if with livery this is an extinguishment; otherwise not; for without livery, nothing but an estate at will passes, which cannot merge or extinguish an estate at will. 1 *And.* 199. *Latch.* 213.

If one seised of a *manor* in right of his wife lets lands by indenture for years, this doth not destroy the custom as to the wife: for after the death of her husband she may demise it again by copy. *Cro. Eliz.* 459.

So if a copyhold is in the hands of a subject, who after becomes King, the copyhold is extinct, for it is below the Majesty of a King to perform such servile services; yet after his decease the next that hath right shall be admitted, and the tenure revived. 2 *Sid.* 82. 4 *Co.* 24. *Cro. Eliz.* 232. See 2 *Leon.* 208. 4 *Co.* 26, *b. Cro. Eliz.* 103. And a copyhold estate is extinct whenever it becomes not demiseable by copy. *Coke's Copyholder*, 62. See further title *Copyhold*.

Extinguishment of Debt. If feme sole debtee take the debtor to husband; or there be two *joint* obligors in a bond, and the obligee marries one of them; or in case a person is bound to a feme sole and another, and she takes the obligor to husband; in these cases, the debt will be extinguished. 8 *Rep.* 136. And if a debtor makes the debtee his executor, or him and another executors, and they take the executorship upon them; or if the debtee makes his debtor executor, &c. it is an extinguishment of the debt, and it shall never revive. *Plowd.* 184. 1 *Salk.* 304. But where a debtee or debtor executor legally refuseth; or he and others being made executors they all refuse, then the debt is revived again. *Plowd.* 185. See titles *Baron* and *Feme*, *Executor*.

It is agreed as a general rule, that a creditor's accepting a higher security than he had before, is an extinguishment of the first debt; as if a creditor by simple contract accepts an obligation, this extinguishes the simple contract debt. 1 *Rol. Abr.* 470, 471. 604. 6 *Co.* 44.

So if a man accepts a bond for a legacy, he cannot after sue for his legacy in the spiritual court; for by the deed the legacy is extinct, and it is become a mere debt at Common-law. *Yelv.* 38.

So if a bond-creditor obtains judgment on the bond, or has judgment acknowledged to him, he cannot afterwards bring an action on the bond; for the debt is drowned in the judgment, which is a security of a higher nature than the bond. 6 *Co.* 44 *b.*

But these cases must be understood where the debtor himself enters into these securities; and therefore if a stranger give bond for a simple contract due by another, this does not extinguish the simple contract debt; but if *upon making the contract*, a stranger gives bond for it, or being present promises to give bond for it and after does so, the debt by simple contract is extinguished, the obligation being made *upon*, or *pursuant to the contract*. 2 *Leon.* 110.

But the accepting a security of an inferior nature is by no means an extinguishment of the first debt; as if a bond be given in satisfaction of a judgment. *Cro. Jac.* 579. 2 *Brownl.* 29. *Cro. Jac.* 649, 650.

Also the accepting a security of equal degree is no extinguishment of the first debt; as where an obligee has a second bond given to him; for one deed cannot determine the duty upon another. *Cro. Eliz.* 304. 716. 727. 1 *Brownl.* 74. *Lit. Rep.* 58. *Cro. Car.* 86.

Though a bond is taken for a simple contract debt, yet *if it is after an act of bankruptcy*, the simple contract is *not* extinguished. *Stran.* 1042.

By a release of part of a debt due on bond, the whole is gone, and the obligation *extinguished*. *Bro. Contract.* 80. 1 *And.* 235.—See further titles *Acceptance*, *Bond*.

Extinguishment of Liberties. Liberties and franchises granted by the King, may sometimes be extinguished, and sometimes not. *Moor*, 474. When the King grants any privileges, liberties or franchises, which were in his own hands, as parcel of the flowers of the crown, such as *bona felonum*, *fugitivorum et utlagatorum*, waifs, strays, deodand, wreck on the sea, &c. if they come to the crown again, they are drowned and extinct in the crown, and the King is seised of them *jure coronæ*: but if liberties of fairs, markets, or other franchises, and jurisdictions, be erected and created by the King, they will not be extinguished, nor their appendances severed from the possessions. 9 *Rep.* 25. A man has liberties by prescription, if he takes letters patent of them, the prescription will be gone and extinct; for things of a higher determine those of a lower nature. 2 *H.* 7. 5. See title *King*.

Extinguishment of Services. The lord purchases or accepts parcel of the tenantcy, out of which an intire service is to be paid or done; by this the whole service will be extinct: but if the service be *pro bono publico*, then no part of it shall be extinguished; and homage and fealty are not subject to extinguishment, by the lord's purchasing part of the land. 6 *Rep.* 1. 105. *Co. Lit.* 149. If the lord and another person do purchase the lands, whereout he is to have services, they are extinct: also by severance of the services, a manor may be extinguished. *Co. Lit.* 147. 1 *And.* 257. See title *Tenure*.

Extinguishment of Ways. If a man hath a highway as appendant, and after purchases the land wherein this way is, the way is extinct. *Termes de Ley*. Though a way of necessity to market or church, or to arable land, &c. is not extinguished by purchase of ground, or unity of possession. 11 *H.* 7. 25. *Co. Lit.* 155. See title *Way*.

EXTIRPATIONE. A judicial writ, either before or after judgment, that lies against a person who, when a verdict is found against him for land, &c. doth maliciously overthrow any house, or extirpate any trees upon it. *Reg. Jud.* 13. 56.

EXTOCARE. To grub up lands, and reduce them to arable or meadow. *Mon. Angl. tom.* 2. *p.* 71.

EXTORTION, *extorsio*, from *extorqueo*, to wrest away]. In a large sense, any oppression under colour of right: It is usually applied to that abuse of public justice which consists in the unlawful taking by any officer, &c. *by colour of his office*, of any money, or valuable thing, from a person where none at all is due, or not so much is due, or before it is due. *Co. Lit.* 368. 10 *Rep.* 102. See title *Bribery*, *Fees*.

The distinction between *bribery* and *extortion* seems to be this. The former offence consists in the *offering* a present or receiving one if offered; the latter, in *demanding* a fee or present, by colour of office.

At the Common law, which was affirmed by the statute of *Westm.* 1. *c.* 26. it was extortion for any minister of the King, whose office did any way concern the administration and execution of justice, or the common good of the subject, to take any reward for doing his office, except what he received from the King: though reasonable fees for the labour and attendance of officers of the courts of justice are not restrained by statute, which are stated and settled by the respective courts; and it has been thought expedient to allow these officers to take certain immediate fees in many cases. 2 *Inst.* 209. 3 *Inst.* 149. 1 *Hawk. P. C. c.* 68.

The taking of money by *virtue* of an office, implies the act to be lawful; but to take any money by *colour* of an office, implies an ill action; and the taking being for expedition of business, is judged by colour of the office, and unlawful. 2 *Inst.* 206. *Co. Lit.* 368.

Yet according to some it seems that an officer, who takes a reward which is voluntarily given to him, and which has been usual in certain cases, for the more diligent or expeditious performance of his duty, cannot be said to be guilty of extortion; for without such a *premium* it would be impossible in many cases to have the laws executed with vigour and success. 9 *Inst.* 210. 3 *Inst.* 149. *Co. Lit.* 368.

But it has been always held, that a promise to pay an officer money for the doing of a thing, which the law will not suffer him to take any thing for, is merely void, however freely and voluntarily it may appear to have been made. 1 *Rol. Ab.* 16. 1 *Rol. Rep.* 313. *Noy*, 76. 1 *Jon.* 65. *Cro. Eliz.* 654. *Moor*, 468. *Cro. Jac.* 103.

It is an extortion to oblige an executor to prove a will in the bishop's court, and to take fees thereon, knowing the same to have been proved in the Prerogative Court. *Str.* 73.—Or in a sheriff's officer to admit a prisoner to bail, upon an agreement to receive a certain sum when the prisoner should pay to a third person another sum of money. 2 *Burr.* 924.—To arrest a man in order to obtain a release from him. 8 *Mod.* 189.—In a gaoler to obtain money from his prisoner by any colourable means. 8 *Mod.* 226. *Stra.* 575.—Or in a church warden *colore officii.* 1 *Sid.* 307.—In a miller, if he takes more toll than is due by custom. *Ld. Raym.* 159. Or a commissary for absolution. 3 *Leon.* 268.—Or a ferryman more for his ferry. 4 *Mod.* 101.—Or to seize upon the place where a fair is held, and by building stalls to force an exorbitant price for them. *Ld. Raym.* 150.—Or in an undersheriff to refuse to execute process till his fees are paid. *Salk.* 330.—Or to take a bond for his fee before execution is sued out. *Hut.* 53. Or for a coroner to refuse his view until his fees be paid. 3 *Inst.* 149.

Extortion, by the Common-law is severely punished, on indictment, by fine and imprisonment, and removal of officers from the offices wherein committed. 1 *Hawk. P. C. c.* 68. By the *Stat.* 3 *Ed.* 1. inferior officers of justice, &c. guilty of extortion, are to render, by *c.* 26, double, and by *c.* 30. treble value; and there are divers other statutes for punishing extortions of sheriffs, bailiffs, gaolers, clerks of the assise, and of the peace, attornies and solicitors, &c. See *stats.* 23 *H.* 6. *cc.* 7. 9. 33 *Hen.* 8. *c.* 24. 29 *Eliz. c.* 4. 1 *Jac.* 1. *c.* 10. 9 & 10 *W.* 3. *c.* 41. 10 & 11 *W.* 3. *c.* 23. 3 *Geo.* 1. *c.* 15. 32 *Geo.* 2. *c.* 28. § 11. 17 *Geo.* 3. *c.* 26. § 6. &c. See titles *Sheriff, Gaolers, Debtor, Fees.*

In cases of extortion, there must be a positive charge, and that the person charged with it took so much *extorsive* or *colore officii;* which words are as essential as *proditoriè* or *felonice* for treason or felony. 2 *Salk.* 680.

Officers may be jointly indicted of extortion, as they may be jointly guilty of the offence. 1 *Salk.* 382.

The place where the extortion was committed should be set down in the declaration. See *Pl. C. c.* 200. The sum certain extorted must be particularly set forth, and he cannot say that the defendant did extort divers sums from divers men generally. *Godb.* 438. *pl.* 583. *Mich.* 4 *Car.*

The indictment (which may be brought at the Sessions, *Str.* 73), or information must state the fact particularly. 3 *Leon.* 268. 25 *E.* 3. *st.* 3. *c.* 9. 11 *Mod.* 80. It must also specify the time when the offence was committed. 4 *Mod.* 101. 3. But although it be omitted to be stated for what the thing extorted was taken, it is good after verdict. *Sid.* 91. And in general the Court of K. B. will oblige the party to demur to a defective indictment for extortion. 5 *Mod.* 13. And whatever may be the sum, if there is proof only of a shilling taken, the defendant is guilty; for the taking is the offence, and not the contract. *Ld. Raym.* 149. And he also who assists is equally guilty, for there are no accessaries in extortion. *Str.* 73.

Against attornies for extortion, action may be brought, and the party grieved shall have treble damages and costs; but information will not lie on the *stat.* 3 *Jac.* 1. *cap.* 7. *Sid.* 434. 2 *Nels.* 822.

If by abuse of the process of one of the courts at Westminster a sheriff's officer extort a promissory note from a suitor, and declare upon it in another of the courts at Westminster, the latter court cannot interfere *summarily* to punish the officer. 2 *Bos. & Pull.* 88.

EXTRACTA CURIÆ. The issues or profits of holding a court arising from the customary fees, &c. *Paroch. Antiq.* 572.

Extracts of writings or records, being notes thereof. See title *Estreats.*

In the Scotch law the *Extract* is the certified copy by a clerk of the court, of the proceedings in an action carried on before that court, and of the judgment pronounced; and it contains an order for execution or proceedings thereupon.

EXTRAJUDICIAL. Is when judgment is had in a cause not depending in that court where given, or wherein the judge has not jurisdiction. The term is used in contradistinction to a regular act done in judgment, or in the regular proceedings of a court.

EXTRAPAROCHIAL. Out of any parish; any thing privileged and exempt from the duties of a parish.—See this Dict. title *Poor.*

EXTRAVAGANTS. Certain constitutions of the Popes so called, because *extra corpus canonicum Gratiani, sive* extra *decretorum libros* vagantur. *Du Cange.*

EXTUMÆ. Reliques in churches and tombs.—*Cartular. Abbat. Glaston. MS.*

EXUPERARE. To overcome; sometimes it signifies to apprehend or take, as, *exuperare vivum vel mortuum. Leg. Edm. c.* 2.

EY, *Insula*, an island.] Where the names of places end in *ey*, it denotes them an island. As Ramsey, is the island of Rams; Sheppy, the island of Sheep; Hersey, the island of Harts, &c.

EYERY of hawks. See title *Aerie.*

EYRE. Vide *Eire*, and *Justices in Eyre.*

# F.

## F A B

F. Is a letter wherewith *felons*, &c. are branded and marked with an hot iron, on their being admitted to the benefit of clergy. See this Dict. title *Clergy*.

FABRICK LANDS. Are lands given towards the rebuilding or repairing of cathedral and other churches; for in ancient times almost every person gave by his will more or less, to the *fabrick* of the cathedral or parish-church where he lived; and lands thus given were called *fabrick lands*, being *ad* fabricam *reparandum*: these lands are mentioned in the *stat.* 12 *Car.* 2. *c.* 8.

FACILITY of disposition, whereby one is easily imposed upon and induced to do deeds to his own prejudice, when combined with any fraud or circumvention on the part of another, is a ground for the interference of Equity.

FACTA ARMORUM. Feats of arms, justs, tournaments, &c. *His. Job. Brompton*, in *R.* 1. *p.* 1261.

FACTO. In fact; as where any thing is actually done, &c. See *De facto*.

FACTOR. The agent of a merchant abroad, residing in this country: or *è contra*.—A Factor is authorised by a letter of attorney, with a salary or allowance for his care. He must pursue his commission strictly; and the same person may be factor for many different merchants. *Mal.* 81.

A Factor is a species of Mandatory, whose powers depend on the nature and terms of the mandate, commission, or authority under which he acts.

The character of Broker is materially different from that of Factor; and therefore where a broker sells goods without disclosing the name of his principal, he acts beyond the scope of his authority, and the buyer cannot set off a debt due from the broker to him against the demand of the goods made by the principal. *Baring* v. *Corrie*, *Term Rep. K. B. Mic.* 59 *Geo.* 3. 157. See further title *Merchant*.

If the principal give the *factor* a general commission to act for the best, he may do for him as he thinks fit; but otherwise he may not. Though in commissions at this time, it is common to give the *factor* power in express words to dispose of the merchandize, and deal therein as if it were his own; by which the *factor's* actions will be excused, though they occasion loss to his principal. *Lex Mercat. Mal*, 81. *Str.* 1178.

Goods remitted to a *factor* ought to be carefully preserved; and he is accountable for all lawful goods which shall come to his hands; yet if the *factor* buy goods for his principal, and they receive damage after in his possession, though no negligence of his, the principal shall bear the loss; and if a *factor* be robbed, he shall be discharged in account brought against him by his principal. 4 *Rep.* 83. See title *Bailment*.

If the *factor* has orders from his principal not to sell any goods but in such a manner, and breaks those orders, he is liable to the loss or damage that shall be received thereby: and where any goods are brought or exchanged without orders, it is at the merchant's curtesy whether he will accept of them, or turn them on his *factor's* hands. When a *factor* has bought or sold goods pursuant to orders, he is immediately to give advice of it to his principal, lest the former orders should be contradicted before the time of his giving notice, whereby his reputation might possibly suffer: and where a factor has made a considerable profit for his principal, he must take due care in the disposition of the same; for without commission or particular orders he is answerable.

## FACTOR.

A factor shall suffer for not observing orders; and no factor acting for another man's account in merchandize, can justify receding from the orders of his principal, though there may be a probability of advantage by it: if he make any composition with creditors without orders, he shall answer it to his principal. *Lex Mercatoria*.

Factors ought to observe the contents of all letters from their principals, or written to them by their order. A merchant is answerable in action upon the case for the deceits of his factor, in selling goods abroad: and as somebody must be a loser by such deceit, it is more reasonable that he who employs, and puts confidence in the deceiver, should lose, than a stranger. 1 *Salk.* 289.

Factors are liable to the statutes concerning bankrupts. *Stat.* 5 *Geo.* 2. *c.* 30. § 39. See title *Bankrupt*. Factor not to buy cattle on his own account. *Stat.* 31 *Geo.* 2. *c.* 40. § 11. See title *Cattle*.

A bare commission to a *factor* to sell and dispose of merchandize, is not sufficient power for the factor to entrust any person, or to give a further day of payment than the day of the sale of the goods; for in this case, on the delivery of the one he ought to receive the other: and by the general power of doing as if it were his own, he may not trust an unreasonable time, *viz.* beyond one or three months, &c. the usual time allowed for the commodities disposed of; if he doth, he shall be answerable to his principal out of his own estate. 1 *Bulst.* 102. But in 2 *C. C.* 57. it is said that by his general commission a factor has authority to sell upon credit.

If a *Factor* buys goods on account of his principal, where he is used so to do, the contract of the *factor* shall oblige the principal to a performance of the bargain; and the principal is the proper person to be prosecuted on non-performance: but if the *factor* enters into a charter-party of affreightment with a master of a ship, the contract obliges him only; unless he lades aboard generally his principal's goods; then both the principal and lading become liable for the freight, and not the *factor*. *Goldsh.* 137.

It is a general rule that where a factor, who is authorised to sells goods in his own name, makes the buyer debtor to himself, though he is not answerable to his principal for the *debt*, if the money be not paid: yet he has a right to receive it if it be paid, and his receipt is a discharge to the buyer. The factor may compel such payment by action, and the buyer cannot defend himself by saying that the principal was indebted to him more than the amount. *Comp.* 255, 256. Where goods are sold by a factor at his own risk, for which he has an additional allowance, the vendee is not answerable to the owner. *Stra.* 1182. See *Del Credere*.

Though a factor has power to sell, and thereby bind his principal, yet he cannot bind or affect the property of the goods by pledging them as a security for his own debt, though there is the formality of a bill of parcels and a receipt. *Stran.* 1178.

If a factor sells goods as his own, by indorsement of the bill of lading, though no delivery is made, the goods being at sea, the vendee shall keep possession unless fraud appears between him and the factor. 4 *Burr.* 2046. 1 *Black. Rep.* 629. See *post*, the last paragraph of this article.

It hath been held in Equity, that if one employs a factor, and entrusts him with the disposal of merchandize, and the factor receives the money, and dies indebted in debts of a

higher nature, and it appears by evidence that this money was vested in other goods, and remains unpaid, those goods shall be taken as part of the merchant's estate, and not the factor's; but if the factor have the money, it shall be looked upon as the factor's estate, and must first answer the debts of superior creditors, &c. for as money has no ear-mark, Equity cannot follow that in behalf of him who employed the factor. 1 *Salk.* 160.

If a person doth employ a factor to sell goods, who sells them on credit, and before the money is paid dies indebted more than his assets will pay; this money shall be paid to the principal merchant, and not to the factor's administrator, but thereout must be deducted what was due for commission; for a factor is in nature only of a trustee for his principal. 2 *Vern.* 638.

Bills remitted to a factor or banker, while unpaid, are in the nature of goods unsold; and if the factor become bankrupt, must be returned to the principal, subject to such lien as the factor may have thereon. 2 *Blac. Rep.* 1154.

A factor has a *Lien* on goods consigned to him, not only for incident charges, but as an *item* of mutual account, for the general balance due to him, so long as he retains the possession; if he parts with the possession, he parts with his *lien*. See 1 *Burr.* 489. 1 *Blac. Rep.* 104. If he be surety in a bond for his principal, he has a lien on the price of the goods sold by him for his principal, to the amount of the sum he is bound for. *Cowp.* 251. A dyer, merely as a manufacturer, has not a general lien; but a packer being in the nature of a factor has. 4 *Burr.* 2214.

A factor has no lien on goods for a *general* balance, unless they come into his *actual* possession; and if, in consideration of goods being consigned to him, he accept bills drawn by the consignor, and pay part of the freight, and become insolvent before the bills are due, and before the goods get into his actual possession, the consignor may stop them *in transitu*. 1 *Term Rep.* 119. If a factor accept bills drawn by his principal upon the faith of consignments agreed to be made by the principal to the factor, and both of them become bankrupts before a cargo consigned come into possession of the factor, the factor's assignees have no property in such cargo, and cannot recover the produce of it against the assignees of the principal, if the latter have sold it, and received the purchase money. 1 *Term Rep.* 783. See 4 *Bro. P. C.* 47. (8vo. ed.)

The consignor may stop goods *in transitu* before they get into the hands of the consignee, in case of the insolvency of the consignee; but if the consignee assign the bills of lading to a third person for a valuable consideration, the right of the consignor as against such assignee is devested. There is no distinction between a bill of lading indorsed in blank, and an indorsement to a particular person. 4 *Bro. P. C.* (8vo. ed.) 57. See 2 *Term Rep.* 63. 1 *H. Blac. Rep.* 357. And further as to stopping goods *in transitu*, 2 *Term Rep.* 674. 3 *Term Rep.* 465.

A *Factor* cannot *pledge* the goods of his principal by indorsement and delivery of the *bill of lading*, any more than by the delivery of the *goods* themselves; though the indorsee knew not that he was factor. And where goods were consigned on the *joint account* of the consignors and consignee, and a bill of lading was sent to deliver the goods to the consignee or his assigns, who afterwards indorsed and delivered it to the defendants, upon condition of their making an advance to him on it, which they failed to do, but claimed to retain it as a security for prior advances, held that such indorsement and delivery of the bill of lading, did not devest the consignor's right to stop the goods *in transitu* upon the insolvency of the consignee, who had not paid for them. *Newsom & al.* v. *Thornton & al.* 6 *East's Rep.* 17. 1 *Maul. & Selw. Rep.* 140. See further title *Merchant*.

Where an estate is sequestrated by the Court of Session in Scotland, or where the property of it is in dispute, that court appoints a *Factor* to take charge of the rents and preserve the property.

FACTORAGE. Is the wages or allowance paid and made to a factor by the merchant. The gain of factorage is certain, however the success proves to the merchant; but the commissioners and allowances vary according to the customs and distance of the country, in the several places where factors are resident. *Lex. Mercat.* See title *Factor*.

FACTUM. A man's own act and deed; fact or feat; particularly used in the civil law, for any thing stated and made certain. See *Fait*.

FACULTY, *Facultas.*] As restrained from the original and active sense, to a particular understanding in law, is used for a privilege, or special dispensation, granted to a man by favour and indulgence, to do that which by law he ought not to do. And for the granting of these, there is an especial court under the Archbishop of Canterbury, called the *Court of the Faculties*; and the chief officer thereof the *Master of the Faculties*; who has power by the *stat.* 25 *H.* 8. *cap.* 21. to grant dispensations; as to marry persons without the banns first asked, (and every diocesan may make the like grants) to ordain a deacon under age, for a son to succeed the father in his benefice, one to have two or more benefices incompatible, and for other purposes. And in this court are registered the certificates of bishops and noblemen granted to their chaplains, to qualify them for pluralities and non-residence. 4 *Inst.* 337. See title *Chaplain*. In the Scotch law, Faculty is synonimous with Power: thus a Faculty to burden, is the power or right of charging an estate with a sum of money. See title *Pews*.

FASTING MEN. In *Mon. Angl. tom.* 1. *pag.* 100. are rendered to signify vassals: but Cowel thinks they rather mean pledges or bondsmen; which, by the custom of the Saxons, were *fast* bound to answer for one another's peaceable behaviour. See *Festing-men*.

FAG. A knot or excrescency in cloth; and in this sense it is used in the statute 4 *Ed.* 4. *cap.* 1. The *fag-end*, signifies that end of a piece of cloth or linen, where the weaver ends his piece, and works up the worst part of his materials.

FAGGOT. A badge wore in the times of *popery*, by persons who had recanted and abjured what was then adjudged to be heresy: those were condemned not only to the penance of carrying a *faggot*, as an emblem of what they had merited, to such an appointed place of solemnity; but for a more durable mark of infamy, they were to have the sign of a *faggot* embroidered on the sleeve of their upper garment: and if this badge or *faggot* was at any time left off, it was often alledged as the sign of *apostacy*.

FAIDA. Malice or deadly fued. *Leg. H.* 1. *c.* 88.

FAILURE OF RECORD. Is when an action is brought against a man, who alledges in his plea matter of record in bar of the action, and avers to prove it by the record; but the plaintiff saith, *Nul tiel record*, *viz.* denies there is any such record: upon which, the defendant hath day given him by the court to bring it in; and if he fails to it, then he is said to *fail of his record*, and the plaintiff shall have judgment to recover. *Terms de Ley*. See further titles *Amendment*, *Jeofails*, *Record*.

FAINT ACTION, Fr. *feinte.*] A *feigned* action; such that although the words of the writ are true, yet for certain causes the plaintiff hath no title to recover thereby; but a *false action* is properly where the words of the writ are *false*. *Co. Lit.* 361.

FAINT PLEADER. A fraudulent, false or collusory manner of pleading to the deceit of a third person; against which, among other things, was made the *stat.* 3. *Ed.* 1. *cap.* 19.

FAIR-PLEADER. See title *Beau-pleader*.

# FAIR.

FAIR. Fr. *feire*, Lat. *feriæ*, *nundinæ*.] A solemn or greater sort of market, granted to any town by privilege, for the more speedy and commodious providing of such things as the subject needeth: and the utterance of what commodities we abound in above our own uses and occasions; and both our English and the French word seems to come from *feriæ* [festivals]; because it is incident to a *fair* that persons shall be privileged from being molested or arrested in it, for any other debt, or contract than what was contracted in the same, or at least was promised to be paid there. See *stat.* 17 *Ed.* 4. *c.* 2. made perpetual by 1 *R.* 3. *c.* 6. and this Dict. title *Courts of Pie powders*. See also *stats.* 2 *E.* 3. *c.* 15. 5 *E.* 3. *c.* 5. 27 *H.* 6. *c.* 5. 1 & 2 *P.* & *M.* *c.* 7. 18 *Eliz.* *c.* 21.

I. *The Right to a Fair, and the Manner of holding it.*
II. *The Duty, Power, and Interest of the Owners of Fairs.*
—*How far a Sale in a Fair changes the Property of a Thing therein sold*, See this Dict. title *Market*.

I. The first institution of fairs and markets seems plainly to have been for the better regulation of trade and commerce, and that merchants and traders might be furnished with such commodities as they wanted, at a particular mart without that trouble and loss of time, which must necessarily attend travelling about from place to place; and therefore as this is a matter of universal concern to the commonwealth: so it hath always been held, that no person can claim a fair or market, unless it be by grant from the King, or by prescription, which supposes such a grant. 2 *Inst.* 220. 3 *Mod.* 123.

And therefore, if any person sets up any such fair or market, without the King's authority, a *quo warranto* lies against him; and the persons who frequent such fair, &c. may be punished by fine to the King. 3 *Mod.* 127.

Also it seems, that if the King grants a patent for holding a fair or market, without a writ of *ad quod damnum* executed and returned, that the same may be repealed by *scire facias*; for though such fairs and markets are a benefit to the commonwealth; yet too great a number of them may become nuisances to the public, as well as a detriment to those who have more ancient grants. 3 *Lev.* 222.

*Fairs* are generally kept once or twice in the year; and it has been observed, that *fairs* were first occasioned by the resort of people to the feast of Dedication, and therefore in most places the *fairs*, by old custom, are on the same day with the wake or festival of that Saint to whom the church was dedicated: and for the same reason they were kept in the church-yard, till restrained by *stat.* 13 *E.* 1. *st.* 2. *c.* 6. 2 *Inst.* 221. *Blount*. The *Court of Pie-powder* is incident to every *fair*, &c. By *stat* 2 *Ed.* 3. *c.* 15. *fairs* are not to be kept longer than they ought by the lords thereof, on pain of their being seized into the King's hands, until such lords have paid a fine for the offence; and proclamation is to be made how long *fairs* are to continue.—By *stat.* 5 *E.* 3. *c.* 5. no merchant shall sell any goods or merchandise at a *fair* after the time of the *fair* is ended, under the penalty of forfeiting double the value of the goods sold, one fourth part thereof to the prosecutor, and the rest to the King. Any citizen of London may carry his goods or merchandise to any *fair* or market in England at his pleasure. See *stat.* 3 *Hen.* 7. *c.* 9. and this Dict. title *London*.

It seems clearly agreed, that if a person hath a right to a fair or market, and another erects a fair or market so near his, that it becomes a nuisance to his fair, &c. that for this detriment and injury done to him, an action on the case lies; for it is implied in the King's grant, that it should be no prejudice to another. 2 *Rol. Abr.* 140.

Also, although the new market be held on a different day, yet an action on the case lies; for this, by forestalling the ancient market, may be a greater injury to the owner, than if held on the same day with his. 2 *Saund.* 172. 1 *Mod.* 69. See title *Market*.

If a man hath a fair or market, and a stranger disturbs those who are coming to buy or sell there, by which he loses his toll, or receives some prejudice in the profits arising from his fair, &c. an action on the case lies. 1 *Rol. Abr.* 106. 2 *Vent.* 26, 28. So if upon a sale in a fair a stranger disturbs the lord in taking the toll, an action upon the case lies for this. 1 *Rol. Abr.* 106.

The King is the sole judge where fairs and markets ought to be kept; and therefore it is said, that if he grants a market to be kept in such a place, which happens not to be convenient for the country, yet the subjects can go to no other; and if they do, the owner of the soil where they meet is liable to an action at the suit of the grantee of the market, 3 *Mod.* 123. But if no place be limited for keeping a fair by the King's grant, the grantees may keep it where they please, or rather where they can most conveniently: and if it be so limited, they may keep it in what part of such place they will. 3 *Mod.* 108.

At what time *fairs* are to be held, see *stat.* 27 *H.* 6. *c.* 5. & 1 *Car.* 1. *c.* 1. 29 *Car.* 2. *c.* 7. and this Dict. title *Holidays*.

II. Owners and governors of fairs are to take care that every thing be sold according to just weight and measure; for that and other purposes they may appoint a clerk of the *fair* or market, who is to mark and allow all such weights, and for his duty herein can only take his reasonable and just fees. See 4 *Inst.* 274. *Moor.* 523. 1 *Salk.* 327.

*Fairs* and markets are such franchises as may be forfeited; as if the owners of them hold them contrary to their charter, as by continuing them a longer time than the charter admits, by disuser, and by extorting fees and duties where none are due, or more than are justly due. 2 *Inst.* 220. *Finch.* 164. 3 *Mod.* 108.

As to their *interest* it arises chiefly from tolls. *Toll* payable at a fair or market is a reasonable sum of money due to the owner of the fair or market, upon sale of things tollable within the fair or market, or for stallage, pickage or the like. 2 *Inst.* 222. 2 *Jon.* 207.

But this is not incident to a *fair* or market without special grant; for where it is not granted, such a fair or market is accounted a *free fair* or market. 2 *Inst.* 220. *Cro. Eliz.* 559.

Toll is a matter of private benefit to the owner of the *fair* or market, and not incident to them; therefore if the King grants a *fair* or market, and grants no toll, the patentee can have none, and such *fair* or market is accounted free. *Cro. Eliz.* 558. 2 *Inst.* 220. *S. P.* 2 *Lutw.* 1326. *S. P.* resolved.

Also if the King, at the time he grants a *fair* or market, grants a toll, and the same is outrageous and excessive, the grant of the toll is void, and the same becomes free. 2 *Inst.* 220. 2 *Lutw.* 1336. But the King, after he grants a *fair* or market, may grant that the patentee may have a reasonable toll; but this must be in consideration of some benefit accruing from it to those who trade and merchandise in such fair or market. 2 *Inst.* 221.

No toll shall be paid for any thing brought to the fair or market, before the same is sold, unless it be by custom time out of mind, and upon such sale the toll is to be paid by the buyer; and therefore my *Lord Coke* says, that a *fair* or market by prescription is better than one by grant. 2 *Inst.* 221.

And by *stat. Westm.* 1. *cap.* 31. "touching them that take outrageous toll, contrary to the common custom of the realm in market towns, it is provided, that if any do so in the King's town, which is let in fee-farm, the King shall seize into his own hand the franchise of the market; and if it be another's town, and the same be done by the lord of the town, the King shall do in like manner; and if it be done by a bailiff, or any mean officer, without the commandment of his lord, he shall restore to the plaintiff as much more, for the outrageous taking, as he had of him, if he carried away his toll, and shall have forty days' imprisonment."

But where by custom a toll is due upon the sale of any goods in a fair or market, and he who ought to pay it refuses, an action on the case lies against him. 1 *Rol. Abr.* 103, 104. 106.

Some persons, however, are *exempt* from payment of toll, and if the King or any of his progenitors have granted to any to be discharged of toll, either generally or specially; this grant is good to discharge him of all tolls to the King's own *fairs* or markets, and of the tolls, which, together with any *fair* or market, have been granted after such grant of discharge; but cannot discharge tolls formerly due to subjects either by grant or prescription. 2 *Inst.* 221.

Also the King himself shall not pay toll for any of his goods; and if any be taken, it is punishable within the statute *Westm.* 1. *cap.* 31. 2 *Inst.* 221. So tenants in ancient demesne are free and quit from all manner of tolls in fairs and markets, whether such tenants hold in fee, or for life, years, or at will. 2 *Inst.* 221. 4 *Inst.* 269. 1 *Rol. Abr.* 321.

But this privilege does not extend to him who is a merchant, and gets his living by buying and selling, but is annexed to the person in respect of the land, and to those things which grow and are the produce of the land. *F. N. B.* 228. 2 *Leon.* 191. *Cro. Eliz.* 227. 2 *Inst.* 221. 1 *Rol. Abr.* 321, 2.

Owners of *fairs* and markets are to appoint toll-takers or book-keepers, on pain of 40*s.* and they shall enter and give account of horses sold, &c. *Stat.* 1 & 2 *P. & M. c.* 7. 3 *Eliz. c.* 12. See further titles *Toll, Horses, Market.*

FAIT, *factum.*] A deed or writing, lawfully executed to bind the parties thereto. See title *Deed.*

FAIT ENROLLE, *Fr.*] A deed of bargain and sale, &c. and forging the inrollment of it is a great misdemeanor, but not forgery within the *stat.* 5 *Eliz.* 1 *Keb.* 568.

FAITOURS, *Fr.*] In the statute 7 *R.* 2. *cap.* 5. is used for evil-doers; and may be interpreted idle livers, from *faitardise*, which signifies a kind of sleepy disease, proceeding from too much sluggishness; and in the same statute it seems to be synonymous with vagabonds. *Termes de Ley.* See titles *Poor, Vagrants.*

FALANG. A jacket or close coat. *Blount.*

FALCATURA. One day's mowing of grass; a customary service to the lord by his inferior tenants: *falcata* was the grass fresh mowed, and laid in *swathes;* and *falcator* the servile tenant performing the labour. *Kennet's Gloss.*

FALCO. A faulcon. *Falconarius*, a falconer; *falco gentilis*, a jer-falcon; *Falco Spuarius*, a Sparrow Hawk. *Cowel.*

FALDA. A sheep-fold. *Rot. Chart.* 6 *Hen.* 3.

FALDAGE, *faldagium.*] A privilege which several lords anciently reserved to themselves, of setting up *folds* for sheep in any field within their manors, for the better manurance of the same; and this was usually done not only with their own but their tenants' sheep, which they call *secta faldæ.* This *faldage* is termed in some places a *fold course;* and in old charters *faldsoca*, i. e. *libertas* faldæ, *or* faldagii.

FALDÆ CURSUS. A sheep walk or feed for sheep. 2 *Vent.* 139.

FALDFEY, FALD-FEE. A fee or rent paid by some customary tenants for liberty to fold their sheep upon their own land.

FALDISTOR, *Sax.*] The highest seat of a bishop inclosed round with a lettice. *Cowel.*

FALDWORTH. A person of age, that he may be reckoned of some decennary. *Du Fresne.*

FALERÆ, Lat. *phaleræ.*] The tackle and furniture of a cart or wain. *Mon. Angl. tom.* 2. 256.

FALESIA. A great rock, bank or hill by the sea side. *Domesd.*

FALK-LAND, or FOLK-LAND. See title *Copy-hold.*

FALLOW-LAND. See *Warrectum & Terra Warrecta.*

FALLUM. An unexplained term for some particular sort of land.—*De duobus acris et viginti* fallis *in, &c. Mon. tom.* 2. 425.

FALMOTUM, or *falkmote;* the same with *folkemote.* See title *Parliament.*

FALSE ACTION. If brought against one, whereby he is cast into prison, and dies pending the suit, the law giveth no remedy in this case, because the truth or *falsehood* of the matter cannot appear before it is tried: and if the plaintiff be barred or nonsuited, at common law, regularly all the punishment is amercement. *Jenk. Cent.* 161. See *Faint Action.* But if one commence a bailable action against another and hold him to bail thereon, either without a reasonable cause, or for something considerable, more than what is *bonâ fide* due, an *action upon the case* will lie for the vexation and injury. See title *Action*, II.

FALSE CLAIM. By the forest laws, is where a man *claims* more than is his due, and is amerced and punished for the same. A person had a grant, by charter, of the tenth of all the venison in the forest of Lancaster, viz. *In carne tantum sed non in corio;* and because he made a *false claim*, by alledging that he ought to have the tenth of all the venison within the forest, as well *in carne*, as *in corio*, therefore he was *in misericordia de decima venationis suæ in corio non percipiendo. Manwood, c.* 25.

FALSE FORM. In proceedings at law, is aided by a verdict; though not where there is want of certainty, &c. 1 *Keb.* 734. 876. See titles *Amendment, Error.*

## FALSE IMPRISONMENT.

Falsum Imprisonamentum.] A trespass committed against a person, by arresting and imprisoning him without just cause, contrary to law; or where a man is unlawfully detained without legal process; it is also used for a writ which is brought for this trespass.

To constitute the injury of false imprisonment two points are necessary; the detention of the person and the unlawfulness of such detention. Every confinement of the person is an imprisonment whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public streets. 2 *Inst.* 589. Unlawful or false imprisonment consists in such confinement or detention without sufficient authority: which authority may arise either from some process from the courts of justice, or from some warrant from a legal officer having power to commit, under his hand and seal, and expressing the cause of such commitment. 2 *Inst.* 46. See this Dict. titles *Arrest, Commitment, Constable.* Such authority may also arise from some other special cause; warranted, for the necessity of the thing, either by Common or Statute law: as the arresting of a felon by a private person without warrant; the impressing of mariners for the public service; or the apprehending waggoners (under *stat.* 13 *Geo.* 3. *c.* 78.) for misbehaviour in the public highways. False imprisonment may also arise by executing a lawful warrant or process at an unlawful time, as on a Sunday. See titles *Arrest, Sunday.*

The means of removing the actual injury of false imprisonment are four-fold; by writs of *mainprize; odio et atia; homine replegiando;* and *habeas corpus.* See this Dict under those titles. The remedy for a satisfaction for the injury is by action either of case or trespass: and therein the party shall recover damages for the injury he has received.

The distinction between the action of case and action of trespass for this injury is thus stated. Where the immediate act of imprisonment proceeds from the defendant, the action can only be trespass; but when the act of imprisonment by one person, is in consequence of information from another, there an action on the case is a proper remedy. *Morgan* v. *Hughes*, 2 *Term Rep. K. B.* 232.

The most atrocious degree of this offence, that of sending any subject of this realm a prisoner into parts beyond the seas, whereby he is deprived of the friendly assistance of the laws to redeem him from such his captivity, is criminally punished with the pains of *præmunire*, and incapacity to hold any office, without a possibility of pardon. *Stat.* 31 *C.* 2. *c.* 2. See this Dict. titles *Exile*, *Habeas Corpus*.—And by the *stat.* 43 *Eliz. c.* 13. to carry any one by force out of the four Northern counties, or imprison him within the same, in order to ransom him, or make spoil of his person or goods, is felony without benefit of clergy in the principals and all accessaries before the fact. Inferior degrees of this offence of false imprisonment are also punishable by indictment, and the delinquent may be fined and imprisoned. 4 *Comm.* 218.

By the statute of Limitations, 21 *Jac.* 1. *c.* 16. this action must be brought within four years; which has been construed to be from the end of any continued imprisoment. *Salk.* 420. —By *stat.* 24 *Geo.* 2. *c.* 44. actions against justices of peace, or constables acting under their warrants, must be brought within six months; and one month's notice of bringing the action must be given them; and by *stat.* 21 *Jac.* 1. *c.* 12. those officers may plead the general issue, and give the special matter in evidence. See this Dict. titles *Justice*, *Constable*, *Action*.

No action of false imprisonment lies against a judge of a *court of record* for any act done by him in the execution of his office, nor for any mistake of judgment. *Salk.* 396.

Action on the case for false imprisonment has been held to lie against a superior officer where the imprisonment at first was legal, but was afterwards aggravated with many circumstances of cruelty and was continued beyond necessary bounds.—So also where a captain of a man of war imprisoned the defendant three days for a supposed breach of duty, without hearing him, and then released him without bringing him to a Court Martial. 1 *Term Rep. K. B.* 536, 537.

If erroneous process issues out of a court that hath jurisdiction of the matter, and the bailiff or officer executes it, whereby the party is imprisoned, the officer shall be excused in action of *false imprisonment*: but if the court out of which the process issues hath no cognizance of the cause, it is otherwise; for in such case the whole proceedings are *coram non judice*, and the officer will not be excused. 10 *Rep.* 75. See titles *Arrest*, *Constable*.

An officer hath a warrant upon a *capias ad satisfaciend'* against an earl, or countess, &c. who are privileged in their persons and he arrests them: it is said action of *false imprisonment* will not lie against the officer, because he is not to examine the judicial act of the court, but to obey. 6 *Rep.* 56. 10 *Rep.* 75.

If an arrest is made by one who is no legal officer, it is *false imprisonment*, for which action lies. *Co. Lit.* 69. An action of *false imprisonment* lies against a bailiff for arresting a person without warrant, though he afterwards receives a warrant: and so it is if he arrests one after the return of the writ is past; for it is then without writ. 2 *Inst.* 53. If a sheriff, or any of his bailiffs, arrests a man out of his county, &c. or after the sheriff is discharged of his office; or a person arrests one on a justice's warrant after his commission is determined, &c. it will be *false imprisonment*. *Dyer*, 41. And if the sheriff, after he hath arrested a man lawfully, when a legal discharge comes to him, as a *supersedeas*, or the like, do not then discharge the party, he may be sued in this action. 2 *R.* 1. 12. *Fitzh.* 253.

In case the plaintiff in a suit brings an unlawful warrant to a sheriff, and shews him the defendant, requiring him to make the arrest; or if he bring a good warrant and direct the sheriff to a wrong man, &c. for this the action of *false imprisonment* will lie against both. *Bro. Tresp.* 99. 307. *Faux. Impr.* 19. 1 *Brownl.* 211. If a warrant be granted to arrest, or apprehend a person, where there are several of the name, and the bailiff or other officer arrests a wrong person, he is liable to action of *false imprisonment*; and he is to take notice of the right party at his peril. *Dyer*, 244. *Moor*, 457.

A man arrested on a Sunday may bring his action of *false imprisonment*; but one has been refused to be released in such a case. 5 *Mod.* 95. See titles *Arrest*, *Sunday*. If a bailiff demands more than his just fees, when offered him, and keep a person in custody thereupon, it is *false imprisonment* and punishable: and if a sheriff, or gaoler, keeps a prisoner in gaol, after his acquittal, for any thing except his fees, it is unlawful imprisonment. 2 *Inst.* 482. *Wood*, 16. If a man falsely imprisons A. B. and the gaoler detains him till he pays so much money, he shall have action of *false imprisonment*, and taking so much money from him against such person. *Mod. Cas.* 179,

Unlawful or *false imprisonment* is sometimes called *duress of imprisonment*, where one is wrongfully imprisoned till he seals a bond, &c. 2 *Inst.* 482. See title *Duress*.

An imprisonment will be unlawful, and give this action, although the cause be good, when he that makes it doth the same without any colour of authority; or if he has a colour, yet if he hath no good authority, from the court, &c. or where a court or officer hath power, but do not well make it out; or when the authority is well made forth, and not rightly pursued and executed. 4 *Rep.* 64. 8 *Rep.* 67. *Dyer*, 242. If A. having been robbed, suspect B. to be guilty, and take and deliver him into the charge of a constable present; B. if innocent may maintain action of trespass and false imprisonment against A. 6 *Term Rep. K. B.* 315.

A conviction of a justice of peace having competent jurisdiction, upon which the plaintiff was arrested and imprisoned, is, till reversed or quashed, conclusive evidence in favour of the justice against whom an action of trespass and false imprisonment was brought. 7 *Term Rep. K. B.* 633. *n.*

Further as to relief in cases of false imprisonment or wrongful detainer of the person, see this Dict. titles *Habeas Corpus*, *Imprisonment*.

FALSE JUDGMENT, *Falsum Judicium.*] A writ that lieth where *false judgment* is given in the county-court, court-baron, or other courts, *not of record*. *F. N. B.* 17, 18. See title *Error*.

A judgment may be falsified, reversed or avoided without a writ of error for matters foreign to, or *dehors*, the record; that is, not apparent upon the face of it, so that they cannot be assigned for error in the superior court, which can only judge from what appears in the record itself; and therefore if the whole record be not certified, or not timely certified by the inferior court, the party injured thereby, in both civil and criminal cases, may alledge a *Diminution* of the record, and cause it to be rectified. See this Dict. title *Diminution*. Thus if any judgment whatever be given by persons who had no good commission to proceed against the person condemned, it is void; and may be falsified by shewing the special matter without writ of error. As where a commission issues to A. and B. and twelve others or any two of them, of which A. or B. shall be one, to take and try indictments, and any of the other twelve proceed without the interposition or presence of either A. or B. in this case all proceedings, trials, convictions and judgments are void for want of a proper authority in the commissioners, and may be falsified upon bare inspection without the trouble of a writ of error. 2 *Hawk. P. C. c.* 50. § 2. It being a high misdemeanor in the judges so proceeding, and little, if any thing, short of murder in them all, in case the person *so attainted* be executed and suffer death. 4 *Comm.* 390.

So likewise if a man purchases land of another, and afterwards the vendor is, either by outlawry or his own confession, convicted and attainted of treason or felony previous to the sale or alienation; whereby such land becomes liable to for-

feiture or escheat: now upon any trial the purchaser is at liberty without bringing any writ of error, to falsify, not only the time of the felony or treason supposed, but the very point of the treason or felony itself; and is not concluded by the confession or outlawry of the vendor; though the vendor himself is concluded, and not suffered then to deny the fact which he had by confession or flight acknowledged. But if such attainder of the vendor was by verdict, on the oath of his peers, the alience cannot be received to falsify or contradict the *fact* of the crime committed; though he is at liberty to prove a mistake in *time:* or that the offence was committed after the alienation and not before. 3 *Inst.* 231. 1 *Hal. P. C.* 361.

This writ may be brought on a judgment in a plea, real or personal: and for errors in the proceedings of inferior courts, or where they proceed without having jurisdiction, writ of *false judgment* lieth: though the plaintiff assign errors in a writ of *false judgment*, he shall not say, *In hoc erratum est, &c.* but *unde queritur diversimodo sibi* falsum judicium *factum fuisse judicium in hoc, &c. Moor*, 73. 2 *Nels. Abr.* 829. If a writ of *false judgment* abate for any fault in the writ, the plaintiff shall not have *Scire facias ad audiend' errores*, upon the record certified, because it comes without an original: but if the plaintiff dies, and *false judgment* is given in the inferior court, his heir shall have a *Sci. fac. ad audiend' error* against him who recovered upon that record which is removed into C. B.; and where the plaintiff in a writ of *false judgment* is nonsuit, it was formerly a question, whether the other party shall sue execution upon this record so removed against the plaintiff, without suing out a *Scire facias*; but it has been adjudged, that he *may* do it, *Hil.* 23 *Hen.* 6. *New Nat. Br.* 39.

When a record is removed into C. P. by writ of *false judgment*, if the party alledges variance between the record removed, and that on which judgment was given, the trial shall be by those who were present in court when the record was made up. 2 *Lutw.* 957. *Stat.* 1 *Ed.* 3. *c.* 4. A man shall not have a writ of *false judgment* but in a court where there are suitors; for if there be no suitors, there the record cannot be certified by them. *New. Nat. Br.* 40. Where *false judgment* is given on a writ of *justices*, directed to the sheriff, the party grieved shall have a writ of false judgment; although the judgment be for debt, or trespass above the sum of 40*s. Ibid.*

Where a record of a judgment in the county-court was vicious, and the judgment reversed in C. B. the suitors were ordered to be amerced a mark, and the county clerk fined 5*l.* And if a plaintiff in an inferior court declare for more than 40*s.* judgment shall be reversed by writ of *false judgment:* but where damages are laid under that sum, costs may make it amount to more. 1 *Mod.* 249. 2 *Mod.* 102. 206.

Upon *false judgment* before bailiffs, or others who hold plea by prescription, in every sum in debt by bill before them a party shall not have a writ of *false judgment;* but a writ of error thereupon. *M.* 4. *E.* 4. For defaults of tenants for life, in writs of right, &c. writ of false judgment by him in reversion: and this writ may be brought against a stranger to the judgment, if he be tenant of the land. A judgment shall be intended good till reversed by writ of *false judgment*, &c. See titles *Accedas ad Curiam, Attaint.*

FALSE LATIN. Before the statute directing law proceedings to be in English, if a Latin word was significant, though not good Latin, yet an indictment, declaration, or fine, should not be made void by it: but if the word was not Latin, nor allowed by the law, and it were in a material point, it made the whole vicious. 5 *Rep.* 121. 2 *Nels.* 830.

FALSE NEWS. Spreading false news, to make discord between the King and nobility, or concerning any great man of the realm, is punished by common-law, with fine and imprisonment, which is confirmed by statutes *Westm.* 1. 3 *Ed.* 1. *c.* 34. 2 *Rich.* 2. *stat.* 1. *c.* 5. 12 *Rich.* 2. *c.* 11. See 2 *Inst.* 226. 3 *Inst.* 198.

FALSE OATH. See title *Perjury.*

FALSE PLEA. See title *Pleading.*

FALSE PRETENCES. The statutes 30 *Geo.* 2. *c.* 24. and 52 *Geo.* 3. *c.* 64. make the offence of obtaining goods, monies or bonds, or other securities by false pretences punishable by transportation or imprisonment, &c. See title *Cheats.*

An indictment on the *stat.* 30 *Geo.* 2. must negative the truth of the pretences by a special averment; merely to state that the defendant *falsely pretended*, &c. (setting out the pretences) by means of which said *false pretences*, he obtained, &c. is insufficient. 2 *Maul. & Sel. Rep.* 379.

FALSE PROPHECY. See title *Prophecy.*

FALSE RETURN. On a false return by a mayor, &c. to a *mandamus*, or by a sheriff, &c. to a writ, a special action on the case will lie. See title *Action.*

FALSE TOKENS. Where persons get money or goods into their hands, by forged letters, or other counterfeit means they are punishable by imprisonment, &c. See title *Cheats.*

FALSE VERDICT. A writ of *attaint* lieth, to inquire whether a jury of twelve men have given a false verdict; that so the judgment following thereupon may be reversed. It is allowed in almost every action except in a writ of right. See titles *Attaint, Jury, Trial.*

FALSE WEIGHTS. See *Weights, Cheats.*

TO FALSIFY. To prove a thing to be *false. Perk.* 383.

FALSIFYING A RECORD. A person that purchases land of another, who is afterwards outlawed of felony, &c. may *falsify the record*, not only as to the time wherein the felony is supposed to have been committed, but also as to the point of the offence: but where a man is found guilty by verdict, a purchasor cannot *falsify* as to the offence; though he may for the time, where the party is found guilty generally in the indictment, &c. because the time is not material upon evidence. And any *judgment* given by persons who had no good commission to proceed against the person condemned, may be *falsified* by shewing the special matter, without writ of error. Also where a man is *attainted* of treason or felony, if he be afterwards pardoned by parliament, the attainder may be *falsified* by him or his heir, without plea. 2 *Hawk. P. C.* See title *Record.*

FALSIFYING RECOVERY. See titles *Fine, Recovery.*

FALSIFYING A VERDICT. Where in any real action, there is a verdict against tenant in tail, the issue can never *falsify* such verdict in the point directly tried; but only in a special manner, as by saying that some evidence was omitted, &c. 2 *Ld. Raym.* 1050. See titles *Trial, New Trial, Jury, Verdict.*

FALSING OF DOOMS. In Scotch law, the old term for an appeal: Doom is the sentence of a court, and the falsing of Dooms is proving the injustice of that sentence.

FALSONARIUS. A forger.—*Hoveden*, 424.

FALSO RETURNO BREVIUM. A writ that lieth against the sheriff who hath execution of process, for *false returning* of writs. *Reg. Jud.* 43.

FAMILIA. Signifies all the servants belonging to a particular master; but in another sense it is taken for a portion of land, sufficient to maintain one *family:* It is sometimes mentioned by our writers to be a *Hide* of land, which is also called a *Manse;* and sometimes *Carucata* or a plough land. *Blount.*

FANATICKS. Persons supposing themselves inspired. A general name for Quakers, Anabaptists, and other sectaries and dissenters from the church of England. See *stat.* 13 *Car.* 2. *c.* 6.

FANATICO, *Mensis Fanationis.*] The *fawning* season or *fence-months* in *forests. Kennet's Gloss.* See title *Fence-Month.*

FARANDMAN, *Sax.*] A traveller or merchant stranger, to whom by the laws of Scotland justice ought to be done with all expedition, that his business or journey be not hindered. *Shene, c.* 104.

FARDEL OF LAND, *Fardella Terræ.*] Is generally accounted the fourth part of a *Yard Land*, but according to *Noy*, (in his *Compleat Lawyer, p.* 57.) it is an eighth part only; for there he says that two *fardels* of land make a *nook*, and four *nooks* a *yard land*.

FARDING-DEAL, OR FARUNDEL OF LAND; *Quadrantata terræ.*] Is the fourth part of an acre: and besides *quadrantata terræ*, we read of *obolata*, *demariata*, *solidata*, and *librata terræ*, which probably arise in proportion of quantity from the *farding-deal*, as an half-penny, penny, shilling or pound in money, rise in value, and then must *obolata* be half an acre, *denariatia* an acre, *solidata* twelve acres, and *librata terræ* twelve score acres of land: but some hold *obolata* to be but half a perch, and *denariata* a perch; and there is mentioned *viginti libratas terræ vel redditus*, in *Reg. Orig.* 94. 248. whereby it seems that *librata terræ* is so much as yields 20*s. per annum*. *F. N. B.* 87. *Spelm. Gloss.*

FARE, *Sax.*] A voyage or passage by water; but more commonly the money paid for such passage, in which sense it is now used. See *stat.* 3 *P. & M. cap.* 16. So for what we pay an hackney or stage coachman for our carriage.

FARINAGIUM. Toll of meal or flour.—*Ordin. Insul. de Jersey*, 17 *Edw.* 2.

FARLEU. Is money paid by tenants in the West of England in *lieu* of a *heriot:* and in some manors in Devonshire, *farleu* is distinguished to be the best goods; as *heriot* is the best beast, payable at the death of a tenant. *Cowel.*

FARLINGARII. Whoremongers and adulterers. *Sax.*

FARUNDEL OF LAND. See *Farding-deal.*

FARM, OR FERM. Lat. *firma*, from the Sax. *feorme*, i. e. Food; and *feorman* to feed or yield victuals.] A large messuage of land, taken by lease under a certain yearly rent, payable by the tenant; and in former days, about the time of William the First, called the Conqueror, these rents were reserved to the lords in victuals and other necessaries arising from the land: but afterwards in the reign of King Hen. I. were altered and converted into money. *Termes de Ley.* A *farm* is most properly called the chief messuage in a village; and it is a collective word, consisting of divers things gathered in one, as a messuage, land, meadow, pasture, wood, common, &c. *Locare ad firmam* is to let or set to *farm;* and the reason of it may be in respect to the firm or sure hold the tenants thereof have above tenants at will. A *farm* in Lancashire is called *Ferm-holt;* in the North a *Tack;* and in Essex a *Wike:* And *ferm* is taken in various ways. *Plowd.* 195.

FARMER. He that holds a *farm*, or is tenant or lessee thereof. *Termes de Ley.* And it is said generally every lessee for life or years, although it be but of a small house and land, is called *Farmer*, as he is that occupieth the *farm:* as this word implies no mystery, except it be that of husbandry, husbandman is the proper addition of a *farmer*. 2 *Hawk. P. C. c.* 23. § 115. No person whatsoever shall take above two *farms* together, and they to be in the same parish, under the penalty of 3*s.* 4*d.* a week. *Stats.* 25 *H.* 8. *c.* 13. § 14.

FARTHING. Was the fourth part of a Saxon penny, as it is now of the English penny.

FARTHING OF GOLD, *quasi* fourth thing.] A coin used in ancient times, containing in value the *fourth* part of a *Noble*. It is mentioned in the *stat.* 9 *E.* 5. *cap.* 7. where it is ordained, that there shall be good and just weight of the *noble*, *half noble*, and *farthing of gold*, &c.

FARTHING OF LAND. Seems to differ from *Farding-deal;* for it is a large quantity of land: in a survey-book of the manor of West Slapton in Com. Devon is entered thus: A. B. holds six *farthings* of land at 12*l. per annum.*

FASIUS, Fr. *Faisseau.*] A faggot of wood. *Mong. Angl. tom.* 2. *p.* 238.

FAST-DAYS. *Days* of *fasting* and humiliation, appointed to be kept by public authority. There are fixed *days* of *fasting* injoined by our Church, at certain times in the year, mentioned in ancient statutes, particularly the 2 & 3 *Ed.* 6. *c.* 19. and 5 *El. c.* 5. And by *stat.* 12 *Car.* 2. *c.* 14. the 30th of January is ordained to be a *day* of *fasting* and repentance, for the murder of King Charles I. Other days of *fasting*, which are not fixed, are occasionally appointed by the *King's Proclamation.* See *Embring Days, Holydays.*

FASTERMANS, *Sax.*] Pledges. *Leg. Ed. Confess. cap.* 38. Vide *Fæstingmen.*

FAT, VAT, OR WATE. Is a large wooden vessel used by maltsters and brewers, for measuring of malt with expedition, containing eight bushels or a quarter. *Stats.* 1 *H.* 5. *c.* 10. 11 *H.* 6. *c.* 8. It is also a vessel made use of by brewers to run their wort into, and by others for the making of salt at Droitwich in the county of Worcester.

FATHER. See *Descent, Executor, Guardian, Marriage.*

FATUA MULIER. A whore. *Du Fresne.*

FATUOUS PERSONS. Ideots. See title *Lunatics.*

FAUSETUM. A faucet, musical pipe or flute.

FAUTORS. Favourers or supporters of others; abettors of crimes, &c.

FEAL. The tenants by knight service did swear to their lords to be *feal* and *leal*, i. e. to be *faithful* and *loyal. Spelm. de Parliament*, 59. See *Fealty.*

FEAL AND DIVOT. A right in Scotland similar to the right of *Turbary* in England for *fuel*, &c. See title *Common of Turbary.*

FEALTY, *Fidelitas*, Fr. *Feauté*, i. e. *Fides, fidei, obsequii et servitii ligamen, quo particulariter vassalus domino astringitur. Spelm.*] The oath taken at the admittance of every tenant, to be true to the lord of whom he holds his land: and he that holds land by the oath of *fealty*, has it in the freest manner; because all persons that have *fee*, hold *per fidem et fiduciam*, that is, by *fealty* at least. *Smith de Repub. Ang. lib.* 3. *c.* 8. And fealty is incident to all manner of tenures except *frankalmoigne* and tenancy at will. See title *Tenures*, I. 6. *et passim.* This *fealty*, which is used in other nations, as well as England, at the first creation of it bound the tenant to *fidelity;* the breach whereof was the loss of his fee.

It is usually mentioned with *homage*, but differs from it; being an obligation permanent, which binds for ever: and these differ in the manner of the solemnity, for the oath of *homage* is taken by the tenant kneeling; but that of *fealty* is taken standing, and includes the six following things, *viz.*

1. *Incolume*, that he do no bodily injury to the lord. 2. *Tutum*, that he do no secret damage to him in his house, or any thing which is for his defence. 3 *Honestum*, that he do him no injury in his reputation. 4. *Utile*, that he do no damage to him in his possessions. 5. *Facile*, and 6. *Possible*, that he render it easy for the lord to do any good, and not make that impossible to be done, which was before in his power to do: all which is comprised in *Leg. Hen.* 1. *c.* 5.

*Fealty* has likewise been divided into *general* and *special; general* to be performed by every subject to his prince; and *special*, required only of such as in respect of their fee, are tied by oaths to their lords. *Grand. Custum. Normand.*

By *stat.* 17 *Ed.* 2. *st.* 2. the form of this oath is appointed, and as now observed, it runs as follows, *viz. I A. B. will be to you my lord C. true and faithful, and bear to you* fealty *and* faith *for the lands and tenements which I hold of you: and I will truly do and perform the customs and services that I ought to do to you. So help me God.* The oath is administered by the lord or his steward; the tenant holding his right hand

upon the book, and repeating after the lord, &c. the words of the oath; and then kissing the book. *Termes de Ley.*

The law with respect to *fealty* continues the same as when Lord Coke wrote; (See 1 *Inst.* 686. *in note:*) for it does not appear to be varied by *stat.* 12 *C.* 2. *c.* 24. or any other statute made since; but it is no longer the practice to exact the performance of fealty. In the case of copyholders it is become a thing of course on admitting them to enter a respite of fealty; but with respect to such as hold by other tenures it is never thought of. In *Wood's Inst.* 183. it is said that lessees for life or years ought to do fealty to their lords for the lands they hold.—However it may not be amiss to remember that the title to fealty still remains; that it is due from *all* tenants except tenants in *frankalmoigne*, and such as hold at will or by sufferance, and if required must be iterated at every change of the lord; it differing in this respect from homage, which except in special cases is only due *once;* that the receiving of it is at least attended with the advantage of preserving the memory of the tenures; which though perhaps sufficiently done in the case of copyholds by the admittances and by the payment of fines and quit-rents and continual render of other services, may be very necessary in cases where fealty is the only service due; and lastly, that the law for compelling the performance of fealty has provided the remedy by distress, which is an inseparable incident to all services due by tenure, and in the case of fealty cannot, as it is said, be excessive. See 1 *Inst.* 68 *a.* 103 *b.* 104 *a b.* 152 *b.* 2 *Inst.* 107. 4 *Co.* 8 *b.*

FEAR. See *Duress.*

FEASTS. Anniversary times of *feasting* and thanksgiving, as *Christmas, Easter, Whitsuntide*, &c. The *four feasts* which our laws especially take notice of, are the *feasts* of the *annunciation of the blessed Virgin Mary*, of the *nativity of St. John the Baptist*, of *St. Michael the Archangel*, and of *St. Thomas the Apostle;* (or in lieu of the last, *the birth of our Lord Christ*,) on which quarterly days, rent on leases is usuallly reserved to be paid. See *stats.* 5 & 6 *Ed.* 6. *c.* 3. 12 *Car.* 2. *c.* 30.

FEE, AND FEE-SIMPLE.—*Tenant in fee simple*, is he which has lands or tenements to hold to him and his heirs for ever. *Litt. c.* 1. § 1.

The word *fee* is sometimes used for the compass or circuit of a lordship or manor, as we say *the lord of the fee*, &c. as well as the particular estate of the tenant; and also for a perpetual *right incorporeal;* as to have the keeping of prisons, &c. in *fee. Bract. Lib.* 2. *c.* 5. *Old Nat. Br.* 41. And when a rent or annuity is granted to one and his heirs, it is a *fee personal. Co. Lit.* 1, 2.

As to the general nature and origin of estates in fee-simple, and the other estates arising therefrom, see this Dict. titles *Estate, Tenure*, III. 5. It is therefore in this place sufficient to inquire,

I. *In what things one may have a Fee-simple.*
II. *By what Means such an Estate may be acquired.*
III. *By what words it may be created.*

I. A man may have an estate, in fee-simple of all lands or tenements or other things real. *Co. Lit.* 1 *b.* Of lordships, advowsons, commons, estovers, and all hereditaments. *Co. Lit.* 4 *a.* So he may have a fee-simple in things mixed; as in franchises, liberties, &c. *Co. L.* 2. *a.*

So if a man grants to another and his heirs all woods, underwoods, timber-trees or others in such a part of a forest, saving the soil: the grantee has a fee to take *in alieno solo. R.* 8 *Co.* 137. *b.*

So, in things personal; as in annuity. *Co. Lit.* 2. *a.* In a dignity granted to him and his heirs. *Co. Lit.* 2. *a.* In a swan-mark. 7 *Co.* 17. In a part or share of the New River water. *Co. Parl.* 207.

So, in the patronage of an hospital, or other thing created *de novo*, in which there was not a precedent estate, a man may have a fee to him and his heirs, qualified in a particular manner: as if a Queen consort institutes an hospital, and reserves the patronage *sibi & reginis Angliæ succedentibus. Ca. Ch.* 214.

But in estates in *esse* before such desultory inheritance it cannot be: as the dutchy of Cornwall limited to the prince *& filiis regis Angliæ primogenitis*, shall not be good, except when limited by act of parliament. 8 *Co.* 16.

II. A man may take a fee by descent or by purchase.

In what manner a man may take by descent, see under title *Descent.*

With respect to *purchasers*, it is to be noted, that some are incapable of parchasing.

Any alien cannot purchase any lands in England. *Vaugh.* 227. 291. 7 *Co.* 16, 17, 18. *Dyer.* 2. *pl.* 8. See *Alien.*

All persons attainted of treason or felony are incapable of purchasing. 2 *New. Abridg.* 249. *Co. Lit.* 8. *a.* See *Dig. Feud. lib.* 2. *tit.* 23, 24. *Vigellius*, 242. 350. *Spel. Gloss.* 214. 215.

If a man be *attainted of felony*, and after purchase land, and dies, the King shall have it by his prerogative, and not the lord of the fee; because his person being forfeited to the King, he cannot purchase but for the King. *Co. Lit.* 2. *b.*

A monster not having human shape cannot purchase or inherit, but an hermaphrodite shall inherit or purchase *secundum prævalentiam sexûs incalescentis;* one born deaf and dumb may *inherit;* so may one born deaf, dumb, and blind, because it is for their advantage; but they cannot *contract*, because they cannot understand the signs of contracting; an infant, an ideot, and a person of *non-sane memory* may inherit, because the law, in compassion to their natural infirmities, presumes them capable of property; so also an infant or a person of *non-sane memory* may purchase, because it is intended for his benefit, and the freehold is in him till he disagree thereto, because an agreement is presumed, it being for their benefit, and because the freehold cannot be in the grantor, contrary to his own act, nor can be in abeyance, for then a stranger would not know against whom to demand his right; if at full age, or after recovery of his memory they agree thereto, they cannot avoid it: but if they die during minority or lunacy, the heirs may avoid it; for they shall not be subject to the contracts of persons who wanted capacity to contract; so, if after his memory recovered, the lunatick or person *non compos* die without agreement to the purchase, their heirs may avoid it. *Co. Lit.* 2. 8. 2 *Vent.* 303. See title *Estate.*

A feme covert is capable of purchasing: for such an act does not make the property of the husband liable to any disadvantage, nor does it suppose a separate will or power of contracting in the wife; but here the will of the wife is supposed the mind of the husband, (he not objecting,) since no man is supposed not to assent to that which is for his benefit; but in this case the husband may disagree, and it shall avoid the purchase. *Co. Lit.* 3. *a.* See titles *Baron* and *Feme.*

By the *stat.* 11 & 12 *W.* 3. *c.* 4. *Papists* were disabled from purchasing lands, &c. But see title *Papist.*

Persons capable of purchasing may gain a fee-simple by *feoffment;* or by fine, or *common recovery;* which are of the nature of a feoffment upon record; or by *grant*, or by *exchange, release*, or *confirmation*, which are in the nature of grant; or by *bargain* and *sale;* or by *covenant* to stand seised; or by *devise.* See title *Estate.*

So a man may gain a fee by wrong; as by *disseisin, abatement*, or *intrusion.* See those titles.

III. It is the word *heirs* makes the inheritance: and a man cannot have a greater estate. *Lit.* 1. To have *fee-simple* implies, that it is without limitation to what heirs but to heirs generally; though it may be limited by act of parliament. 4 *Inst.* 206. If one give or grant land to J. S. and his heirs; and if he die without heirs, that J. D. shall have it to him and his heirs: by this J. S. hath a *fee-simple*, and J. D. will have no estate. *Dyer*, 4. 33. This means by parol, with livery and seisin, or by deed, &c. but not by will.

Where land is given or granted by fine, deed or will, in possession, reversion, or remainder, to another and his heirs; it will be a *fee-simple*. *Plowd.* 143. And if land be granted to a man and his heirs, *habendum* to him for life only, and livery of seisin is made; it is a *fee-simple* estate, because a fee is expressed in the *grant*. 2 *Rep.* 23.

A lease is granted to one for a term of years, and after that the lessee shall have the land to him and his heirs by the rent of 10*l.* a year; if the grantor make *livery* upon it, 'tis a *fee-simple*: otherwise but for years. *Co. Lit.* 217. Where lands are granted to A. for life, remainder to B. for life, the remainder to the right heirs of A. here A. hath a *fee-simple*. 20 *Hen.* 6. 35. *Bro. Est.* 34, 35. A gift or grant to a man's wife during life, after to him in tail, and after to his right heirs; he will have a *fee-simple* estate. 2 *Rep.* 91.

If lands are granted to a man and his successors, this creates no *fee-simple*: but if such a grant be made to a corporation, it is a *fee-simple*; and in case of a sole corporation, as a bishop, parson, &c. a *fee-simple* is to them and their successors. *Co. Lit.* 1. *b.* *Wood*, 119. An estate *granted* to a person, to hold to *him* for ever, or to *him* and *his assigns* for ever, is only an estate for life; the word *heirs* being wanted to make it *fee-simple*: but in *wills*, which are more favoured than grants, the *fee-simple* and inheritance may pass without the word *heirs*. *Co. Lit.* 19. 9.

And by deed of feoffment a *fee-simple* may be created, which would be an estate-tail by will; as where lands are given to another, and his heirs male, &c. without the word *body*. *Hob.* 32. A gift to a man and his children, and their heirs, is a *fee-simple* to all that are living. *Co. Lit.* 8. *Lit. Rep.* 6.

A feoffment to B. *& heredibus*, without saying *suis*, gives him a fee-simple. *Co. Lit.* 8. *b.* So to a son *and the heirs of his father*. Semb. *Co. Lit.* 220. *b.* So to B. *& liberis suis* and their heirs; if he has issue, it gives them a joint estate in fee. *Co. Lit.* 9. *a.* So to B. *heredibus & successoribus suis*, gives a fee. *Co. Lit.* 9. *a.*

So a grant to the King *in perpetuum* gives him a fee, without the words, *his heirs or successors*, for he never dies. *Co. Lit.* 9. *b.* So a feoffment to a corporation aggregate *in perpetuum* gives a fee; for it never dies. *Co. Lit.* 9. *b.* 1 *Rol.* 832. *l.* 55.

Or, to a corporation sole, to be held in *frankalmoigne*. *Co. Lit.* 9. *b.* 1 *Roll.* 833. *l.* 5. So if A. re-enfeoffs B. *adeo plené* as B. *enfeoffed* him, he has a fee without the word *heirs*. *Co. Lit.* 9. *b.*—This must mean where A. had an estate in fee of the feoffment of B. 1 *Rol.* 833. *l.* 12. So a grant to the church of B. gives a fee, without the word *heirs or successors*. 1 *Rol.* 833. *l.* 3.

And a limitation to *the right heirs* of B. gives a fee, without the words, *and their heirs*. 1 *Rol.* 133. *l.* 16. So a fee may be given without the words, *his heirs*, by fine *sur conuzance de droit come ceo, &c. Co. Lit.* 9. *b.* or by a *common recovery*. *Co. Lit.* 9. *b.*

So a fee passes without the words, *his heirs*, where a man gives land with his daughter, &c. in *frankmarriage*. *Co. Lit.* 9. *b.* If a parcener, or joint-tenant releases to his companion. *Co. Lit.* 9. *b.* If the lord, &c. releases to the tertenant; which enures by way of extinguishment. *Co. Lit.* 9. *b.* If a man releases a mere right; as where a disseissee releases to the disseissor all his right. *Co. Lit.* 9. *b.*

So, if a rent be granted upon partition, for owelty (or equality) of partition, *Co. Lit.* 9, 10. So if a peer be summoned to parliament by writ, he has a fee in his dignity, without the word *heirs*. *Co. Lit.* 9. *b.* So, by the forest law, if the King at a justice seat, grants to another an *assart in perpetuum*, without more, he has a fee. *Co. Lit.* 10. *a.* So, by custom, a grant of a copyhold, *sibi & suis*, or *sibi & assignatis*, may give the inheritance. 4 *Co.* 29. *b.*

A *fee-simple* determinable upon a contingency, is a *fee* to all intents; though not so durable as absolute *fee*. *Vaugh.* 273. But see title *Executory Devise*.

In pleading estates in fee-simple, they may be alledged generally; but the commencement of estates tail, and other particular estates, must regularly be shown. *Co. Lit.* 303. The fee-simple estate, being the chief and most excellent; he who hath it in lands or tenements may give, grant, or charge the same by deed or will at his pleasure; or he may make waste or spoil upon it: And if he bind himself and his heirs to warranty, or for money by obligation, or otherwise, and leave such land to the heir, it shall be charged with warranty and debts: Also the wife of a man that is seised of such an estate, shall be endowed; and the husband of a woman having this estate, shall be tenant by the curtesy. *Co. Lit.* 273. *Dyer*, 330. *Perk.* § 286.

Though fee-simple is the most ample estate of inheritance, it is subject to many incumbrances; as judgments, statutes, mortgages, fines, jointures, dower, &c. And there is a fee-simple *conditional*, where the estate is defeasible by not performing the condition; and a *qualified* fee-simple, which may be defeated by a limitation, &c. This is called a *base fee*, upon which no reversion or remainder can be expectant. *Co. Lit.* 18. 10 *Rep.* 97.

See further on this subject titles *Descent*, *Estate*, *Executory Devise*, *Tenure*, *Wills*, *&c.*

FEE-EXPECTANT. [*Feudum Expectativum.*] Where lands are given to a man and his wife, in frank-marriage to have and to hold to them and their heirs, in this case they have fee-simple; but if they are given to them and the heirs of their body, they have tail and fee-expectant. *Kitch.* 153. See title *Tail*.

FEE-FARM, *Feodi Firma.*] Or *fee-farm rent*; is when the lord, upon creation of the tenancy, reserves to himself and his heirs, either the rent for which it was before let to farm, or was reasonably worth, or at least a fourth part of the value; *without homage, fealty, or other services*, beyond what are especially comprised in the feoffment. 2 *Inst.* 44. By *Fitzherbert*, a third part of the yearly value of the land may be appointed for the rent, where lands are granted in *fee-farm*, &c. *F. N. B.* 110. And *Lord Coke* says, *fee-farm* rents may be one half, a third, or fourth part of the value. *Co. Lit.* 143. See 2 *Comm.* 43. *Doug.* 627. *in note*, and the notes to 1 *Inst.* 143.

These *fee-farm* rents seem to be more or less, according to the conditions or consideration of the purchase of the lands out of which they are issuing. It is the nature of *fee-farm*, that if the rent be behind and unpaid for the space of two years, then the feoffor or his heirs may bring an action to recover the lands, &c. *Brit. c.* 66. *num.* 4. See title *Cessavit*.

*Feodi firma* appellatur, cum quis, ex dono vel concessione alterius, prædia tenuerit sibi et hæredibus suis, reddendo vel dimidiam, vel tertiam, vel ad minus quartam partem veri valoris. Tenens hujusmodi ad nulla servitia obligatur, nisi quæ in ipsâ Chartâ continentur: exceptâ *fidelitate*, quæ omnibus tenuris incumbit. *Spelm. Gloss.* 221.

FEE-FARM RENTS OF THE CROWN. The *fee-farm* rents remaining to the Kings of England from their *ancient demesnes*, were many of them alienated from the crown in the reign of King Charles II. By *stats* 22 *Car.* 2. *c.* 6. 22 & 23 *C.* 2. *c.* 24. (explained by *stat.* 10 *An. c.* 18.) the King was

enabled by letters-patent to grant *fee-farm* rents due in right of his crown, or in right of his dutchies of Lancaster and Cornwall, except quit-rents, &c. to trustees to make sale thereof, and the trustees were to convey the same by bargain and sale to purchasers, &c. who may recover the same as the King might. But it has been observed, that men were so very doubtful of the title to alienations of this nature, that while these rents were exposed to sale for ready money, scarce any would deal for them, and they remained unsold: but what made men earnest to buy them, was the stop upon some of his Majesty's other payments, which occasioned persons to resort to this as the most eligible in that conjuncture: No tenant in tail of any of the said rents, is enable to bar the remainder. See further title *Counties Palatine.*

FEE-SIMPLE. See *Fee.*

FEE-TAIL. See title *Tail.*

FEES. Certain perquisites allowed to officers in the administration of justice, as a recompence for their labour and trouble; ascertained either by acts of parliament, or by ancient usage, which gives them an equal sanction with an act of parliament. 2 *New. Abr.* 463.

I. *In what Cases Fees are due.*
II. *At what Time they may be demanded.*

I. At common law no officer, whose office related to the *administration of justice*, could take any reward for doing his duty, but what he was to receive from the King. *Co. Lit.* 368. 2 *Inst.* 176. 208, 9.

And this fundamental maxim of the common law is confirmed by *Westm.* 1. *cap.* 26. which enacts, "That no sheriff, or other King's officer, shall take any reward to do his office, but shall be paid of that which they take of the King; and that he who so doth shall yield twice as much, and shall be punished at the King's pleasure."

This statute comprehends escheators, coroners, bailiffs, gaolers, the King's clerk of the market, aulnager, and other inferior ministers and officers of the King, whose offices do any way concern the *administration* or *execution of justice.* 2 *Inst.* 209.

And so much hath this law been thought to conduce to the honour of the King and welfare of the subject, that *all prescriptions* whatsoever, which have been *contrary to it*, have been holden *void;* as where by prescription the clerk of the market claimed certain fees for the view and examination of all weights and measures, and it was held merely void. 4 *Inst.* 274. *Moor*, 523. 2 *Inst.* 209. 2 *Rol. Abr.* 226.

But it hath been holden, that the fee of 20*d.* commonly called the bar fee, which hath been taken time out of mind, by the sheriff, of every prisoner who is acquitted; and also the fee of one penny, which was claimed by the coroner of every *visne*, when he came before the justices in *eyre*, are not within the meaning of the statute, because they are not demanded by the sheriff or coroner for doing any thing relating to their offices, but claimed as perquisites of right belonging to any of them. 2 *Inst.* 210. *Staun. P. C.* 49.

Also it is holden by Lord Coke, that within the words of the statute 34 *Ed.* 1. which are, "No tallage or aid shall be taken or levied by us or our heirs in our realm, *without the good will and assent of* archbishops, bishops, earls, barons, knights, burgesses, and other freemen of the land;" no new offices can be erected with new fees, or old offices with new fees; for that is a tallage upon the subject, which cannot be done without common assent by act of parliament, 2 *Inst.* 533.

Yet it is holden, that an office erected for the public good, though no fee is annexed to it, is a good office; and that the party, for the labour and pains which he takes in executing it, may maintain a *quantum meruit*, if not as a fee, yet as a *competent recompence* for his trouble. *Moor*, 808.

*All fees* allowed *by acts of parliament* become established fees; and the several officers intitled to them may maintain *action of debt* for them. 2 *Inst.* 210. All such fees as have been allowed by the courts of justice to their officers, as a recompence for their labour and attendance, are established fees: and the parties cannot be deprived of them without an act of parliament. *Co. Lit.* 368. *Prec. Chan.* 551.

Where a fee is due by custom, such custom, like all others, must be reasonable; and therefore where a person libelled in the spiritual court for a burying fee due to him for every one who died in the parish, though buried in another; the court held this unreasonable, and a prohibition was granted. *Hob.* 175. The plaintiff brought an action on the case for fees due to him as Usher of the Black Rod, and obtained a verdict. *Stran.* 747. Justices in Sessions have no authority to fix the bailiff's fees for arrests in civil cases; nor would the Court of K. B. allow more than the usual fee of one guinea, though a larger sum had in fact been paid for years under an order of such justices. 3 *Term Rep. K. B.* 417.

By *stat.* 23 *H.* 6. *c.* 9. (see title *Sheriff*, V.) the sheriff is entitled to charge only 4*d.* on each warrant issued by him: and where a sheriff claimed a larger fee, and the attorney paid it in ignorance of the law, it was held that he might maintain an action for money had and received for the excess, or might set off the amount in an action by the sheriff against him for fees and postage. *Dew* v. *Parsons*, *Term Rep. K. B. E.* 59 *Geo.* 3. 562.

As to the fees of sheriffs for executions, by *st.* 29 *Eliz. cap.* 4. it is enacted, "That it shall not be lawful for any sheriff, &c. nor for any of their officers, &c. by colour of their office, to take of any person, directly or indirectly, for the serving and executing of any extent or execution upon the body, lands, goods or chattels of any person, more recompence than in this present act appointed, *i. e.* twelve-pence of and for every twenty shillings where it exceedeth not one hundred pounds; and six-pence of and for every twenty shillings, over and above the said sum of 100*l.* that he or they shall so levy or extend, and deliver in execution, or take the body in execution for; upon pain, that the person offending shall forfeit, to the party grieved, his treble damages; and shall forfeit the sum of 40*l.* for every time that he, they, or any of them shall do the contrary.

In an action on this *stat.* 29 *Eliz.* 3. *c.* 4. the plaintiff is entitled to *treble costs* as well as treble damages. *Deacon* v. *Morris*, *Term Rep. K. B. Hil.* 59 *Geo.* 3. 393.

Nothing but the poundage can be taken by the sheriff under this stat. 29 *Eliz. c.* 4.—In actions on simple contract, and judgment, for a debt certain, as the expences of levying must be paid by the plaintiff, he is the *party grieved* by any overcharge of the sheriff: but if the judgment be for a penalty the defendant must pay the expences, and in such case he is the party grieved by such overcharge. 2 *Term Rep. K. B.* 148. 157.

See *stat.* 43 *Geo.* 3. *c.* 46. § 5. as to poundage to sheriffs on executions.—Where the sheriff levied under *fi. fa.* and received the money, and afterwards the judgment and execution being set aside for irregularity, and the money ordered to be returned, paid it back, with the assent of the plaintiff; it was held that the *stat.* 43 *Geo.* 3. *c.* 46. did not take away the sheriff's remedy by action of debt against the plaintiff for his poundage. *Rawstone* v. *Wilkinson*, *Term Rep. K. B. Tr.* 55 *Geo.* 3. 256.

No fee shall be taken for a report upon a reference from any court, *stat.* 1 *Jac.* 1. *c.* 10.—Certain fees of sheriffs settled. *st.* 3 *Geo.* 1. *c.* 15. See title *Sheriff.*—Fees on *nisi prius* records out of the Exchequer to be the same as on other records, *st.* 23 *Geo.* 2. *c.* 26. § 10.—Fees of Justices' clerks to be regulated, *st.* 26 *Geo.* 2. *c.* 14. 27 *Geo.* 2. *c.* 16.

By 46 *Geo.* 3. *c.* 82. and 47 *Geo.* 3. *st.* 1. *c.* 51. for Great Britain, and 48 *Geo.* 3. *c.* 56. for Ireland; the fees to the

officers of the customs in the several ports of the United Kingdom are abolished, and their hours of attendance regulated.

II. It is extortion for any officer to take his fee before it is due; and therefore where an under-sheriff refused to execute a *capias ad satisfaciendum* till he had his fees, the court held, that the plaintiff might bring an action against him for not doing his duty, or might pay him his fees, and then indict him for extortion. *Co. Lit.* 368. 10 *Co.* 102. *a.* 1 *Salk.* 330.

Officer must obey a writ, though fees unpaid. *Stran.* 814. Process must be obeyed though fees are not tendered. *Stran.* 1262. If an *habeas corpus ad subjiciendum* be directed to a gaoler, he must bring up the prisoner although his fees were not paid him; and he cannot excuse himself of the contempt to the court, by alledging that the prisoner did not tender him his fees. 1 *Keb.* 272. *pl.* 57. So as to an *habeas corpus ad faciendum & recipiendum. March* 89. 2 *Keb.* 280. 2 *Inst.* 178. 1 *Keb.* 566. *cont.*

But if the gaoler brings up the prisoner by virtue of such *habeas corpus*, the court will not turn him over till the gaoler be paid all his fees; nor, according to some opinions, till he be paid all that is due to him for the prisoner's diet: for that a gaoler is compellable to find his prisoner sustenance. See 1 *Rol. Rep.* 338. *Co. Lit.* 295. 9 *Co.* 87. *Plowd.* 68. *a.* 2 *Rol. Abr.* 32. 2 *Jon.* 178. See titles *Gaol* and *Gaoler.*

If a person pleads his pardon, the judges may insist on the usual fee of gloves to themselves and officers, before they allow it. *Fitz. Coron.* 294. *Pulton de Pace*, 88. *Keling.* 25. 2 *Jon.* 56. 1 *Sid.* 452.

If an erroneous writ be delivered to the sheriff, and he executes it, he shall have his fees, though the writ be erroneous. 1 *Salk.* 332. It seems to be laid down in the old books as a distinction, that upon an extent of land upon a statute, the sheriff is to have his fees, so much *per* pound according to the statute immediately; but that upon an *elegit* he is not to have them till the *liberate. Poph.* 156. *Winch.* 51. *S. P.*

Fees are now recoverable by an action for money had and received, which has been introduced in lieu of an assise. Money given to A. and claimed by B. as perquisites of office, cannot be recovered by B. in such action, unless such perquisites be known and accustomed fees, such as the legal officer could have recovered from A. 6 *Term Rep. K. B.* 681, 3.

Fees of Attornies and Officers. Are considerations allowed them as a recompence for their labour: and in respect to officers, they are granted over and above their salaries, to excite them to diligence in executing their offices. They differ from *wages* which are paid to servants for certain work and labour done in a certain space; whereas *fees* are disbursed to officers, &c. for the transacting of business which occasionally occurs. If a client, when his business in court is dispatched, refuseth to pay the officer his court fees; the court on motion will grant an attachment against him, on which he shall be committed until the *fees* are paid. 1 *Lil. Abr.* 598. Ecclesiastical courts have not power to establish *fees*: But if a person bring a *quantum meruit in B. R. &c.* for *fees*, and the jury find for him, then they become established *fees.* 1 *Salk.* 333.

A solicitor in Chancery may exhibit his bill for his fees for business done in that court; and so he may where the business is done in another court, if it relates to another demand the plaintiff makes in Chancery. 1 *Vern.* 203. 2 *Chan. Ca.* 135.

Action on the case lies for an attorney for his *fees*, against him that retained him in his cause: And attornies are not to be dismissed by their clients, till their *fees* are paid. 1 *Lil.* 142. But attornies are not to demand more than their just *fees*; nor to be allowed *fees* to counsel without tickets, or the signature of counsel, &c. *Stat.* 3 *Jac.* 1. *c.* 7. An attorney may have action of debt for his *fees*, and also of counsel, and costs of suit: as a counsellor is not bound to give counsel till he has his *fee*, it is said he can have no action for it: Though it has been held otherwise, *F. N. B.* 121. *Brownl.* 73. 31 *H.* 6. *c.* 9.

See further as connected with the subject of fees, this Dict. titles *Bribery*, *Extortion*, and also titles *Barrister*, *Sheriff*, *Attorney*, *Coroner*, *Gaoler*, *&c.*

FEIGNED ACTION. See title *Faint Action.*

FEIGNED ISSUE. If, in a suit in equity, any matter of *fact* is strongly contested, the court usually directs the matter to be tried by a jury; especially such important facts as the validity of a will, or whether A. is the heir at law to B. or the existence of a *modus decimand*, or real and immemorial compositions for tithes. But as a jury cannot be summoned to attend a court of equity, the fact is usually directed to be tried in the court of King's Bench, or at the assises, upon a *feigned issue.* For this purpose, a feigned action is brought, wherein the pretended plaintiff declares that he laid a wager of 5*l.* with the defendant, that A. was heir at law to B; then he avers he is so; and brings his action for the 5*l.* the defendant allows the wager, but avers that A. is not the heir to B. and thereupon that issue is joined, which is directed out of Chancery to be tried: and thus the verdict of the jurors at law determines the fact in the court of equity. 3 *Comm.* 452. If it is a matter of great difficulty and consequence, the direction may be for a trial at bar, with leave of the court. See titles *Chancery*, *Equity.*

Trying a feigned issue without the consent of the court, is a contempt of court: and after such a trial, they will stay the proceedings. 4 *Term Rep. K. B.* 402.

The costs in a feigned issue, under an inclosure act which contains no special directions as to costs, abide the event, by the statute of Gloster, as in other actions of assumpsit. *Fitzwilliam, E.* v. *Maxwell.* 7 *W. P. Taunton*, 31. See title *Costs.*

FELAGUS, *Quasi fide cum eo ligatus.*] A companion, but particularly a friend, who was bound in the *decennary* for the good behaviour of another. In the laws of King Ina, it is said, if a murderer could not be found, &c, the parents of the person slain should have six marks, and the King forty; if he had no parents, then the lord should have it. *Et si dominus non haberet*, felagus *ejus.* LL. *Inæ. cap.* 15.

FELD. Is a Saxon word, signifying *field*: and in its compound it signifies wild; as *feld* honey, is wild honey, &c. *Blount.*

FELE or FEAL HOMAGERS. Faithful subjects; from the Sax. *fai.* i. e. *fides.* See *Fealty.*

FELO DE SE. One that commits felony by laying violent hands upon himself, or commits any unlawful malicious act, the consequence of which is, his own untimely death. See title *Homicide*, III. 1.

FELONS' GOODS. The statuto *de prærogativa regis.* 17 *Ed.* 2. *c.* 1. grants to the King, among other things, the goods of felons and fugitives. If the King grant to a man and his heirs *felons' goods* the grantee cannot devise them, &c. on the statute 32 *H.* 8. *c.* 1. because they are not of a yearly value; but where a person is seised of a manor, to which they are appendant, it is otherwise, for they will pass as appurtenant. 3 *Rep.* 32. See titles *Flight*, *Forfeiture.*

## FELONY.

Felonia.] A term of law including, generally, all capital crimes, below treason. 4 *Comm.* 98. This word is of feudal original; but as to the derivation of which authors differ. Some deduce it, fancifully enough as it seems, from φηλος *Gr.* an impostor; from *fallo*, *Lat.* to deceive; and *Coke* (1 *Inst.* 391,) says it is *crimen* felleo *animo perpetratum.*—All, however, agree that it is such a crime as occasions a forfeiture of the offender's lands or goods; this therefore gives great

probability to Spelman's derivation from the *Teutonick* or *German fee*, a feud or fief, and *lon*, price or value. *Spelm. in verb. Felon.*—Felony according to this derivation, is then the same as *pretium feudi;* the consideration for which a man gives up his fief or estate; as in common speech it is said, such an act is as much as one's life or estate is worth. In this sense, it will clearly signify the feodal forfeiture, or rather the *act* by which an estate is forfeited or escheats to the lord. See 4 *Comm.* 95.

Felony, in the general acceptance of law, comprises every species of crime which occasioned, at Common-law, the forfeiture of lands or goods. This most frequently happens in those crimes for which a capital punishment, either was or is liable to be inflicted; for those felonies which are called clergyable, or to which the benefit of clergy extends, were anciently punished with death in lay or unlearned offenders, though now by the statute law that punishment is for the first offence universally remitted. See this Dict. title *Clergy, Benefit of.* Treason itself (says *Coke* 3 *Inst.* 15.) was anciently comprised under the name of Felony. And not only all offences now capital are in some degree or other, felony; but this is likewise the case with some other offences, which are not punished with death; as suicide, where the party is already dead; homicide by chance medley, or in self defence; and petty larceny or pilfering: all which are, strictly speaking Felonies, as they subject the committers of them to forfeitures. So that upon the whole the only adequate *definition of Felony* seems to be this, *viz.* "An offence which occasions a total forfeiture, of either lands or goods or both, at the Common law; and to which, capital *or other* punishment may be superadded, according to the degree of guilt." 4 *Comm.* 94, 95.

As felony may be without inflicting capital punishment, so it is possible that capital punishment may be inflicted for an offence which is no felony; as in case of *Heresy* by the Common-law, which though capital, never worked any forfeiture of lands or goods, an *inseparable* incident to felony. 3 *Inst.* 43. Of the same nature was the punishment of standing mute, which at Common law was capital, but without any forfeiture, and was therefore no felony. In short the true criterion of Felony is forfeiture, for in all felonies which are punishable by death, the offender loses all his lands in fee-simple, and also his goods and chattels; in such as are not so punishable, his goods and chattels only. 1 *Inst.* 391.

The idea of felony is so generally connected with that of capital punishment, that it seems hard to separate them: and to this usage the interpretations of law now conform. For if a statute makes any new offence *felony*, the law implies that it shall be punished with death (*viz.* by hanging,) as well as by forfeiture, unless the offender prays the benefit of clergy. *Hawk. P. C.* i. *c.* 41. § 4. ii. *c.* 48. So where a statute decrees an offence to undergo judgment of life and member, the offence becomes a Felony, though that precise word be omitted; but the words of the statute must not in such case be the least doubtful or ambiguous. 1 *Hawk. P. C. c.* 41. § 1. 2.

Where a statute declares that the offender shall, under the particular circumstances, be deemed to have *feloniously* committed any act, it makes the offence a *felony*, and imposes all the common and ordinary consequences attending a felony. 3 *Maul. & Selw. Rep.* 556. And though a statute make the doing of an act *felonious*, yet if a subsequent act make it *penal* only, the latter is considered as a virtual repeal of the former. 1 *Hawk. P. C. c.* 40. § 5.

Under the word *felony* in commissions, &c. is included petit treason, murder, homicide, burning of houses, burglary, robbery, rape, &c. chance medley, *se defendendo* and petit larceny. All felonies punishable according to the course of the Common-law, are either by the Common-law, or by statute. Piracy, robbery, and murder *on the sea* are punishable by the civil statute law. 1 *Inst.* 391.

*Felony*, by the *Common Law*, is against the life of a man; as murder, manslaughter, *felo de se, se defendendo*, &c. Against a man's goods, such as larceny, and robbery, against his habitation, as burglary, arson or house-burning: and against public justice, as breach of prison. 3 *Inst.* 31.

It is not very easy to recapitulate the vast variety of offences which are made Felony, by the almost innumerable statutes which have been from time to time found necessary, to restrain mankind within those bounds which the security of Society requires.

A general list is here subjoined of *Felonies, by statute; within clergy*, and *without*. But which probably is not complete: For the particulars relative to each offence, this *Dictionary* may be consulted under the proper titles; see particularly titles *Larceny, Robbery, Accessary*.

Felonies within clergy. *Armour*, the King's, embezzling.—*Assaults*, with intent to spoil persons' dress; or with intent to rob.—*Bail*, personating; before commissioners.—*Bank paper*, forging or preparing.—*Bigamy*—*Bills of Exchange*, foreign forging.—*Bleaching grounds*, robbing.—*Bridges*, destroying, several specified in different statutes.—*Burning* ricks of corn, hay, &c.—*Cattle*, sheep, &c. killing in the night maliciously, or slaughtering horses without notice.—*Child stealing*.—*Cloth*, stealing from tenters, 3d Offence.—*Collieries*, destroying engines to drain.—*Commons*, destroying inclosures of.—*Copper*, removing from a house to steal it, assisting therein, or buying it when stolen.—*Corn*, destroying granaries; 2d Offence.—*Customs;* harbouring smugglers and assisting to run goods.—*Deer stealing*.—*Dikes*, cutting in marsh land.—*Fishing* in enclosed pond, &c. with intent to steal; or buying stolen fish.—*Foreign State*, going out of the realm to serve without taking the oath of allegiance.—*Forests*, destroying inclosures in; 3d Offence.—*Forgery* of bank bills foreign bills, customs' debentures, stamps for marking plate, &c.—*Frame-work-knitting machines*, destroying.—*Gaoler*, forcing a prisoner to become an approver; (impeacher.)—*Hawk*, stealing.—*Hunting*, in the night or in disguise.—*Jewels* and *plate* stolen, receiving of.—*Iron bars* fixed to buildings, stealing.—*King* or his council, conspiring to destroy.—*Labourers;* confederacy of masons against the statute of Labourers.—*Lead;* entering blacklead mines with intent to steal; stealing lead affixed to buildings; or buying or receiving it when stolen.—*Locks*, floodgates, sluices or banks, destroying.—*Maiming* another.—*Marriage*, clandestine, solemnizing.—*Miscarriage*, attempting to procure though the woman be not quick with child.—*Money;* exporting silver, importing false money, blanching copper, putting off counterfeit money, or counterfeiting copper money, or tokens issued by the bank.—*Mutiny* and desertion in seamen or soldiers.—*Oysters* and their brood, taking from beds.—*Palaces* of the King, entering with intent to steal.—*Pewter* stolen, buying or receiving.—*Plague*, persons infected with, going out of doors.—*Poligamy*, or bigamy.—*Post-Office*, frauds in, as to postage of letters.—*Privily stealing* from the person.—*Process*, opposing execution of, in pretended privileged places.—*Public Works*, injuring or damaging.—*Records*, withdrawing or secreting.—*Rescuing prisoners* for treason or felony; or offenders against statutes concerning spirituous liquors; or offenders condemned to hard labour; or bodies of murderers.—*Robbery* of furniture from lodgings; assaulting with intent to rob.—*Rogues* incorrigible escaping from the house of correction or offending a second time.—*Servants*, taking their master's goods at his death; assaulting master woolcomber or weaver; embezzling goods to the value of 40*s.*—*Sheep*, exporting alive; 2d Offence.—*Ships*, destroying; forcibly preventing the lading, sailing, &c. of ships by seamen, keelmen and others.—*Smugglers*, assisting, &c.—*Stamp duties*, frauds respecting,

*Stolen goods*, buyers or receivers of, or person taking reward to discover.—*Stores*, government embezzling.—*Trees*, shrubs, &c. destroying in nurseries or gardens to the value of 5*s*.—*Turnpikes*, gates, toll-houses, &c. destroying.—*Warrens*, entering in the night and killing conies.—*Watermen*, carrying too many passengers, if any drowned.—*Woods*, setting fire to.

FELONIES WITHOUT CLERGY. *Abortion*, procuring.—*Accessaries*, in certain cases.—*Aliens* returning from transportation.—*Arson*.—*Bail*, personating.—*Bank of England*, clerks embezzling notes; altering dividend warrants, &c. paper-makers unauthorised using moulds for notes; (See post, *Forgery*.)—*Banks* of the sea destroying.—*Bankrupt*, not surrendering; concealing his estate, &c.—*Bastard*, murdering, &c.—*Black act*, offenders under.—*Bridges*, wilfully damaging, those of London, Westminster and Fulham.—*Burglary*.—*Burning houses*, or barns with corn.—*Cattle* stealing or maiming.—*Challenging jurors* above twenty, in felonies ousted of clergy—*Cloth*, stealing from the tenters.—*Coal mines*, setting fire to.—*Coining*.—*Cottons*, selling with forged stamps.—*Customs*; smugglers shooting at or wounding officers of the navy or custom house; harbouring transported offenders; not surrendering on proclamation.—*Cutting* maliciously.—*Deeds* inrolled acknowledging in the name of another robbing.—*Fences of Commons*, destroying.—*Fish ponds*, *Fens*, destroying works for draining of.—*Fines*, acknowledging in another's name.—*Forgeries* of deeds, transfers of stock, stamps, bills, notes, wills, registers, &c. &c.—*Highway robbery*.—*Hops*, cutting the binds.—*Horse-stealing*.—*Judgments*, acknowledging in another's name.—*Letters* threatening, sending; or rescuing offenders so doing.—*Linen*, stealing from bleaching grounds; or cutting or destroying.—*Mail*, robbing, or stealing letters from post-office.—*Maiming*; maliciously lying in wait for that purpose.—*Malicious injuries*, viz. shooting at, stabbing, &c. giving medicine to procure miscarriages: setting fire to houses, out-houses, &c.—*Marshes*; setting fire to engines for draining.—*Mariners* wandering without testimonials, and see *stat.* 39 *Eliz. c.* 17. § 4. (post. *Seaman*.)—*Marriage*, forcible.—*Mines*, damaging.—*Miscarriage*, procuring, when the woman is quick with child.—*Money*, uttering false money; 3d Offence.—*Murder*.—*Mute*, standing on trial for treason or felony.—*Northern borders*, thieves and spoilers in Cumberland, Northumberland, Westmorland and Durham.—*Outlawry*, for felonies without clergy.—*Perjury*, convicts for escaping, breaking prison or returning from transportation.—*Personating* bail, seamen, pensioners, nominees of annuities, &c.—*Piracy*; under which is included, sailors hindering the captain of a ship from fighting, by forcible restraint.—*Poisoning* of malice prepensed, and administering with intent to murder, &c.—*Popish recusants*, priests and jesuits in certain cases.—*Post-Office*; robbing mail, secreting letters, &c.—*Prisoners* for swearing themselves under insolvent acts, refusing to deliver up, or concealing their effects; escaping from confinement to hard labour; 2d Offence.—*Privy Councillors*, attempting to kill.—*Quarantine*, neglecting the regulations for performing.—*Rape*.—*Rescuing convicts* from transportation, or murderers.—*Rebels* returning from transportation, their aiders and correspondents.—*Recognizance* or *recovery*, acknowledging in another's name.—*Riots*, and destroying buildings.—*Robbery*, churches, on the highway, in booths in fairs, dwelling-houses, shops, ware-houses, coach-houses or stables; on board vessels; in wharfs; in lodgings, if above 12*d*. value; stealing exchequer orders, bank notes, navy bills, promissory notes, &c.—*Sea*; Treasons, Robberies, Murders, &c. upon.—*Seamen* personating to receive their pay.—*Ships* of war and others, wilfully destroying.—*Shooting at* another.—*Silk*; destroying any silk or velvet in the loom, or the tools for manufacturing thereof.—*Smuggling*, and assembling armed for that purpose.—*Sodomy*.—*Soldiers*; deserting, wandering without testimonials, personating them.—*Stabbing* maliciously.—*South Sea Company*; servants embezzling their effects.—*Stamps*, counterfeiting.—*Stolen goods*, helping to a reward in certain cases.—*Stores*, government; imbezzling or burning or destroying in dock yards.—*Transportation*, returning from, or being at large in the kingdom after sentence.—*Turnpikes*, gates, weighing engines, locks, sluices, &c. destroying.—*Wool*; destroying woollen goods, racks, or tools, or forcibly entering a house for that purpose.—*Women*, stealing, and marrying.—*Wreck* of ships, causing by stealing pumps, &c. stealing shipwrecked goods, or killing shipwrecked persons.

By *stat.* 52 *Geo.* 3. *c.* 143. for amending and reducing into one act the provisions contained in any laws in force, imposing the penalty of death for any act done in breach of, or in resistance to, any part of the laws for collecting the *Revenue* in Great Britain; all such offences punishable under former acts as felonies without clergy, are reduced to felonies within clergy, except where by that act they are expressly re-enacted as felonies without clergy.

Before the reign of K. Hen. I. *felonies* were punished with pecuniary fines; for he was the first who ordered *felons* to be hanged, *about* the year 1108. The judgment against a man for *felony* hath been the same since the reign of that King, *i. e.* That he be hanged by the neck till dead; which is entered *suspendatur per collum*, &c. 4 *Inst.* 124. *Felony* was anciently every capital crime perpetrated with an evil intention: All capital offences by the Common-law, came generally under the title of *felony*; and could not be expressed by any word but *felonicè*; which must of necessity be laid in an indictment of *felony*. *Co. Lit.* 391. It is always accompanied with an evil intention; and therefore felony cannot be imputed to any other motive. But the bare intention to commit a *felony* is so very criminal, that at the Common-law it was punishable as *felony*, where it missed of its effect through some accident; and now the party may be severely fined for such an intention. 1 *Hawk. P. C. c.* 23.

*Felony* is punished with loss of life, and of lands *not entailed*, goods and chattels: Heretofore *felony* worked corruption of blood; unless a statute making an offence *felony*, ordained it otherwise, as many statutes did; and at last by *stat.* 54 *Geo.* 3. *c.* 145. no corruption of blood takes place for any felony (not treason) except *murder or petty treason*. See title *Attainder*, *Clergy*, *benefit of*: *Corruption of Blood*.

The punishment of a person for *felony*, by our ancient books, is, 1st. To lose his life, 2dly, To lose his blood, as to his ancestry, and so as to have neither heir nor posterity. 3dly, To loose his goods. 4thly, To lose his lands; and the King shall have *annum diem & vastum*, to the intent that his wife and children be cast out of the house, his house pulled down, and all that he had for his comfort or delight destroyed. 4 *Rep.* 124. A felony by statute implies, that the offender shall be subject to the like attainder and forfeiture, &c. as is incident to a *felon* at Common-law. 3 *Inst.* 47. 59. 90.

By *stat.* 53 *Geo.* 3. *c.* 162. any court may pass on persons convicted of felony with benefit of clergy (or of grand or petty larceny) sentence of imprisonment to hard labour, either singly and alone, or in addition to any other sentence. A former provision as to passing this sentence on felons by 52 *Geo.* 3. *c.* 44. is repealed by this act. 53 *Geo.* 3.

By *stat.* 59 *Geo.* 3. *c.* 27. provision is made for the trial of felonies committed on board vessels employed on canals; and by *c.* 96. for felonies committed in stage waggons and stage coaches: by which acts the offence may be tried in any county through which the canal, &c. passes.

All *felonies* are several, and cannot be joint; so that a pardon of one felon cannot discharge another: but the *felony* of one man may be dependant upon that of another, and the pardon of the one by a necessary consequence enure to the benefit of the other, as in cases of principal and accessary, &c. 2 *Hawk. P. C.*

Private persons may arrest felons by their own authority, or by warrant from a justice of peace: And every private person is bound to assist an officer to take felons, &c. 2 *Hawk. P. C.* see title *Constable.*

But one ought not to be arrested upon suspicion of *felony*, except there be *probabilis causa* shewed for the ground of the suspicion. 1 *Lil. Abr.* 603. If a *felony* is not done by a man, but some person else, if another hath probable cause to suspect he is the felon, and accordingly doth arrest him, this is lawful and may be justified. But to make good such justification, there must be in fact a *felony* committed by some person, without which there can be no ground of suspicion. 2 *Hale's Hist. P. C.* 78. And as to the person, there ought to be a *reasonable* cause to suspect him, otherwise the arrest will be illegal. See titles *Arrest, Constable.*

A private man arresting one for *felony*, cannot justify breaking doors, to take the party suspected; but he doth it at his peril, *viz.* if in truth he be a felon, it is justifiable; but if innocent, then it is not. To prevent a murder or manslaughter, private persons may break doors open. 2 *Hale* 82. Officers may break open a house to take a felon, or any person justly suspected of *felony;* and if an officer hath a warrant to take a felon, who is killed in resisting, it is not *felony* in the officer; but if the officer is killed, it is otherwise. *Dalt.* 289.

A plea justifying an arrest by a private person on suspicion of felony, must shew the circumstances from which the court may judge whether the suspicion was reasonable. 4 *W. P. Taunton*, 34.

Watchmen and beadles have authority at Common-law to arrest and detain in prison for examination by a magistrate, persons walking in the streets at night, whom there is reasonable ground to suspect of felony, although there is no proof of a felony having been committed. 3 *W. P. Taunton*, 14.

Persons indicted of *felony*, &c. where there are strong presumptions and circumstances of guilt, are not replevisable; but for larceny, &c. when persons are committed who are of good reputation, they may be bailed. 2 *Hawk. P. C.* The former part of the position must be, with an exception to the power of the court of King's Bench. See title *Bail.*

If one be committed to prison for one *felony*, the justices of gaol delivery may try him for another *felony*, for which he was not committed, by virtue of their commission, 1 *Lil.* 602.

In the highest crime, and in the lowest species of felony, *viz.* in petit larceny, and in all the misdemeanors, standing mute hath always been an equivalent to conviction. But upon appeals or indictments for other felonies, or petit treason, the prisoner was not by the ancient law looked upon as convicted, so as to receive judgment for the felony, but should, for his obstinacy, have received a terrible sentence of *penance*, or *peine sort & dure.* See this Dict. titles *Mute, Trial.*

Where a married woman commits *felony*, in company with her husband, it shall be presumed to be done by his command, and she shall be excused. 3 *Inst.* 310. See title *Baron and Feme* VII.

If a man's horse be going into the ground of another, and he takes it *felleo animo*, not as damage-feasant, it is no finding, but *felony:* But if A's sheep stray into the flock of B. and he drives the same along with his flock, or by mistake shears them, this is not a *felony;* though if he knew them to be another person's, and marks them with his mark, it is an evidence of *felony.* 1 *Hale's Hist. P. C.* 506.

Where one steals another's goods, and a third person feloniously takes them from him; he is a *felon* as to both the others. And when there is a pretence of title to things unlawfully taken, it may be only a trick to colour *felony;* and the ordinary discovery of a felonious intent is, if the party doth it secretly, or being charged with the goods denies it. 1 *H. P. C.* 507, 509. If a person to whom goods are delivered on a pretended buying them, runs away with them, it is *felony:* and a guest stealing plate set before him at an inn, &c. is *felony;* also persons who have the charge of things, as a servant of a chamber, &c. may be guilty of felony; and the least removing of a thing in attempts of *felony*, is *felony*, though it be not carried off. 3 *Inst.* 303. *Raym.* 275.

But goods must not be of a base nature; such as dogs, &c. nor *feræ naturæ*, as deer, hares, &c. except they be made tame, when it will be *felony* to steal them. If any turkeys, geese, poultry, fish in a trunk, &c. are taken away, it is *felony.* 3 *Inst.* 309, 310. Stealing of tame peacocks, is *felony;* so of herons and young hawks in their nests; it is otherwise of pheasants, partridges, conies, &c. although they be so kept that they cannot escape; if they be not reclaimed, and known. *Jenk. Cent.* 204. As to cats, dogs, monkeys, and the like; though it be not *felony* to take them, trespass lies for them. *Jenk. Ibid.*

The owner of goods stolen prosecuting the felon to conviction, cannot recover the value of them in trover from the person who purchased them in market overt, and sold them again before conviction, notwithstanding the owner gave him notice of the robbery, while they were in his possession; but he has a right to restitution of the goods in specie. 2 *Term Rep. K. B.* 750. See as to expences of prosecutions for Felony, title *Rewards.*

FEME COVERT. A married woman; said to be *covert baron.* See title *Baron* and *Feme.*

FEME SOLE, *Fr.*] A woman alone, that is unmarried. *Feme Sole Merchant;* A married woman who by the custom of London trades on her own account, independant. See titles *Baron and Feme, London.*

FENCE. A hedge, ditch, or other inclosure of land for the better manurance and improvement of the same. And where a hedge, and ditch join together, in whose ground or side the hedge is, to the owner of that land belongs the keeping of the same hedge or fence, and the ditch adjoining to it on the other side, in repair and scoured. *Par. Offic.* 188. An action on the case or trespass lies, for not repairing of fences, whereby cattle come into the ground of another, and do damage. 1 *Salk.* 335. Also it is presentable in the Court-baron, &c. By *stat.* 9 *G.* 3. *c.* 29. destroying fences set up inclosing commons is made felony, but within benefit of clergy.

No man making a ditch can cut into his neighbours soil, but usually he cuts it to the very extremity of his own land, he is of course bound to throw the soil which he digs out upon his own land, and often if he likes it he plants a hedge on the top of it; therefore if he afterwards cut beyond the edge of the ditch which is the extremity of his land, he cuts into his neighbour's land, and is a trespasser. *Vowles v. Miller*, 3 *W. P. Taunton*, 137. See further this Dict. titles *Common, Inclosure.*

FENCE MONTH, *mensis fanationis* (or *feonacionis*) *mensis prohibitionis*, or *mensis vetitus.*] Is a month wherin female *deer* in forests, &c. do *fawn*, and therefore it is unlawful to hunt in *forests* during that time; which begins fifteen days before *Old Midsummer*, and ends fifteen days after it, being in all thirty days. *Manw. part* 2. *cap.* 13. *Stat.* 20 *Car.* 2. *cap.* 3. Some ancient foresters call this month the *defence month*, because then the deer are to be defended from being disturbed, and the interruptions of fear and danger. Serjeant *Fleetwood* saith, that the *fence month* hath been always kept with watch and ward, in every bailiwick throughout the whole forest, since the time of Canutus. *Fleetwood's Forest Laws, p.* 5. See title *Fish.*

FENGELD, *Sax.*] A tax or imposition, exacted for the repelling of enemies. *MS. Antiq.*

FENS, *paludes.*] Low marshy grounds, or lakes for water; for the draining whereof in this kingdom several statutes have been from time to time enacted, which are chiefly local, and by the provision of which the destroying of works for the drainage or fences for the securing them, are punishable as felonies within clergy, and by other penalties. See title *Rivers, Sea Banks, Poudike.*

FEOD OR FEUD. The right which the vassal had in land, or some immoveable thing of his lord's, to use the same and take the profits thereof, rendering unto his lord such feodal duties and services as belonged to military tenure; the mere property of the soil always remaining in the lord. *See Spelman of Feuds and Tenures, cap.* 1. and this Dict. title *Tenures*, I. 1.

FEODAL, *feodalis, vel feudalis.*] Of or belonging to the feud or *fee. Stat.* 12 *Car.* 2. *cap.* 24.

FEODALITY. Fealty. See title *Fealty, Tenures*, I. 6.

FEODARY, OR FEUDARY, *feudatarius.*] An officer of the *court of wards*, appointed by the master of that court by virtue of the statute 32 *Hen.* 8. *c.* 26. whose business it was to be present with the *escheator* in every county at the finding of offices of lands, and to give in evidence for the King as well concerning the value as the tenure; and his office was also to survey the lands of the ward, after the office found, and to rate it. He did likewise assign the King's widows their dowers; and receive all the rents of wards, lands within his circuit, which he answered to the receiver of the court. This office was wholly taken away by the operation of statute 12 *Car.* 2. *cap.* 24. abolishing tenures.

FEODATARY, OR FEUDATARY. The tenant who held his estate by *feodal* service; and grantees, to whom lands in *feud* or *fee* were granted by a superior lord, were sometimes called *homagers;* and in some writings are termed *vassals, feuds*, and *feodataries.* See title *Tenures*, I.

FEODUM. See FEOD.

FEODUM MILITIS. A knight's *fee: feodum laicum*, a *lay-fee*, or land held in fee of a lay-lord. *Kennet's Gloss.* See title *Tenures.*

FEOFFMENT, *Feoffamentum*, from the verb, *feoffare; donatio feudi.*] A gift or grant of any manors, messuages, lands or tenements, to another in fee, to him and his heirs for ever, by the delivery of seisin and possession of the thing given or granted.—In every feoffment, the giver or grantor is called the *feoffor*, and he that receives by virtue thereof, is the *feoffee. Littleton* says, the proper difference between a *feoffor* and a *donor*, is that the one gives in *fee-simple*, the other in *fee-tail. Litt. lib.* 1. *cap.* 6.

*Blackstone* (2 *Com.* 399.) defines feoffment to be the gift of any corporeal hereditament to another. The deed of feoffment is our most antient conveyance of lands; and in records we often find fees given to knights under the phrases of *de veteri feoffamento*, and *de novo feoffamento;* the first whereof were such lands as were given or granted by King Henry I. And the others, such as were granted after the death of the said King, since the beginning of the reign of Henry II. At common-law the usual conveyance was by feoffment, to which delivery (shortly called livery) and seisin were necessary, the possession being thereby given to the *feoffee;* but if livery and seisin could not be made, by reason there was a tenant in possession, the reversion was granted, and the particular tenant attorned. *Co. Lit.* 9. 49. A feoffment is said, in some respects, to excel the conveyance by fine and recovery; it clearing all disseisins, abatements, intrusions, and other wrongful estates, which no other conveyance doth: and for that it is so solemnly and publicly made, it has been of all other conveyances the most observed. *West. Symb.* 235. *Plowd.* 554. See this Dict. titles *Conveyance, Deed;* and 2 *Comm. c.* 20. *Shep. Touchst. c.* 9. and the notes to the 8vo. edition, 1791.

This conveyance is now but very little used; except where no consideration passes, as is the case of trustees of lands for a corporation, &c. See this Dict. title *Lease and Release.* as to conveyance by bodies corporate. It is still however a formal, valid, and effectual mode of conveyance: but has been of late years almost entirely superseded by the conveyance by *Lease and Release.* See this Dict. under that title; as also titles *Bargain and Sale, Conveyance, Deed.*

It will be found useful to consider the learning relating to feoffments according to the following division:

I. *Of what things a Feoffment may be made.*
II. *Who may make a Feoffment, and how it is to be made.*
III. *Of the different Kinds of Livery; with their effects and operations.*

I. A Feoffment may be of a messuage, land, meadow, pasture, or other corporeal hereditament, and of a moiety, or fourth part of it; that lies in livery. The deed must contain the words, have *granted, bargained*, and *enfeoffed.*

A Feoffment may be made of lands, in which a man has no fixed estate; as, if he has twelve acres to be annually assigned in such a meadow; and livery in any acre, which he has at the time of the feoffment, is sufficient. *Co. Lit.* 4, *a.* 48, *b.* 2 *Rol.* 10. *l.* 40—50.

So, if a feoffment be of fifty acres towards the North in such a moor, which contains 100 acres, livery in any of them is sufficient. 2 *Rol.* 11. *l.* 5. *Dy.* 372, *b.*

So, if two manors be divided *alternis vicibus* between parceners, either may make a feoffment of her manor; and the deed ought to comprehend both; and she shall make livery in one *secundum formam chartæ* this year, and in the other the next year. *Co. L.* 48. *b.*

But a feoffment cannot be made of a thing of which livery cannot be given; as, of *incorporeal* inheritances, *rent, advowson, common, &c.* 2 *Rol.* 1. *b.* 20. Though it be an advowson, &c. in gross. *Cont.* 11 *H.* 6. 4. *Acc.* 2 *Rol.* 1 *l.* 21.

So a feoffment of lands, which are uncertain till a future act, is void; for livery does not operate *in futuro:* as, if A. agrees by indenture to convey 20*l. per annum* in land to such an use, and 20*s. per annum* to such an use, and makes a feoffment of all his lands to the uses in the indenture; it will be void for all but that where livery was made, it not being ascertained which shall be to one use, and which to the other. *R.* 1 *Rol.* 187.

In a deed of feoffment, there must be a good feoffor, that is, one able to grant the thing conveyed by the deed; a feoffee capable to take it; and a thing grantable, and granted in the manner the law requireth. *Co. Lit.* 42. 49. 190.

See further of what things a feoffment may be made, *Com. Dig.* Feoffment (A. 2.) *Vin. Ab.* Feoffment (C.)

II. If a person *non compos* makes a feoffment, and gives livery himself, that is allowed on all hands to be good to bind himself, so that he can by no process or plea avoid the feoffment, and restore himself to the possession; the same law of an ideot; and the reason is, because the investiture being made before the *pares curiæ*, their solemn attestation could not be defeated by the person himself, because it is presumed they are competent judges of the ability of the feoffor to make such feoffment. 2 *Rol. Abr.* 2. *Co. Lit.* 247. 4 *Co.* 125, *a. Show. Parl. Cases*, 153. and see title *Ideots and Lunaticks;* and *post.* II.

But if an infant makes a feoffment, and makes livery himself, this shall not bind him, but he himself may avoid it by writ of *dum fuit infra ætatem;* yet the feoffment of the infant is not void in itself, as well because he is allowed to contract for his benefit, as that there ought to be some act of notoriety to restore the possession to him equal to that which transferred it from him. 4 *Co.* 125. 2 *Rol. Abr.* 2. 8 *Co.* 42, 43. *Whittingham's* case.

Yet if an infant makes a feoffment, and a letter of attorney to make livery, that is void; so if a person *non compos* makes a surrender or release, this is void in law; so if he makes a letter of attorney to give livery: but the heir at law after the death of the person of *non-sane* memory, or ideot, may avoid his feoffment; and so may the king upon an office found of his lunacy during his life. 8 *Co.* 45. *Co. Lit.* 247, *a.* 4 *Co.* 125, *a.* 2 *Rol. Abr.* 2. *Show. Par. Cases*, 153.

There must be livery of seisin in all feoffments, and gifts, &c. where a corporeal inheritance or freehold doth pass; and without livery, the deed is no feoffment, gift or demise. *Lit.* 59. 8 *Rep.* 82. But a freehold may pass without livery, by the statute 27 *H.* 8. *c.* 10. By force of which statute, a feoffment to the use of the feoffor, feoffee, &c. supplies the place of livery and seisin. *Wood's Inst.* 239.

But a feoffment may not be of such things whereof livery and seisin may not be made; for no deed of feoffment is good to pass an estate without livery of seisin; and if either of the parties die before livery, the feoffment is void. *Plowd.* 214. 219. Though where a feme feoffor made a feoffment of lands with livery in view, and then married the feoffee before the livery was executed by actual entry; it was adjudged the livery might be executed after marriage, the feoffee having not only an authority to enter, but an interest passed by the livery in view, and the woman did all on her part to be done. 1 *Vent.* 186.

A man may either give or receive *livery in deed* by letter of attorney; for since a contract is no more than the consent of a man's mind to a thing, where that consent or concurrence appears, it were unreasonable to oblige each person to be present at the execution of the contract, since it may as well be performed by any other person delegated for that purpose by the parties to the contract. *Co. Lit.* 52. 2 *Rol. Abr.* 8.

But such delegation, or authority to give or receive livery, must be by deed, that it may appear to the court, that the attorney had a commission, to represent the parties that are to give or take the livery, and whether the authority was pursued. *Co. Lit.* 48, *b.* 52, *a.*

If a man be disseised, and makes a deed of feoffment, and a letter of attorney to enter and take possession of the land, and afterwards to make livery, according to the form of the charter, it will be a good feoffment, though he was out of possession at the time of the deed made: for the feoffment takes effect by the livery, and not by the deed, *Co. Lit.* 48. 52.

A feoffment being a Common-law conveyance, and executed by livery, makes a transmutation of estate; but a conveyance on the statute of uses, as a covenant to stand seized, &c. makes only a transmutation of possession, and not of estate. 2 *Lev.* 77. *Vent.* 378. A feoffment to the use of A. for life, the remainder to B. if A. refuses to take the estate, B. shall take presently, because the whole estate is out of the feoffor by livery; but if it had been by covenant to stand sesied, he should not have taken till after the death of A. but it would rest in the covenantor who shall have the use in the mean time. 2 *Lev.* 77. 2 *Leon. Ca.* 279. Before the *Stat. Westm.* 1. if a man had made a feoffment in fee, without declaring any use, it should have been to the use of the feoffee; though now by that statute, where no consideration or declaration of use is expressed, it shall go to the feoffor himself. 2 *Leon.* 15, 16. If I convey lands by feoffment, which I have on the part of the mother, to J. S. and his heirs, without consideration; the use will be void, and the land shall return again to me and my heirs on the part of the mother; yet if I declare the use to me and my heirs, or upon such feoffment reserve a rent in like manner, it shall go to my heirs at the Common-law, it being a new thing divided from the land. *Hob.* 31. *Co. Lit.* 13. 231. 1 *Rep.* 100. *Dyer*, 134. Where a man makes a feoffment, without any consideration; by that the estate and possession passes, but not the use, which shall descend to his heir. 1 *Leon.* 182.

A feoffment in fee is made to the use of such persons, and for such estates, as the feoffer shall appoint by his will, or to the issue of his last will; by operation of law the use vests in the feoffor, and he is seised of a qualified fee, *viz.* until he makes his will, and declares the uses; and after the will is made, it is only directory, for nothing passes by it but all by the feoffment. 6 *Rep.* 18. *Moor*, 567. A feoffment in fee, upon condition, &c. was inrolled, but no livery made; and it was adjudged no good feoffment, but the inrollment shall conclude the person to say that it was not his deed. *Poph.* 6. 2 *Nels. Abr.* 844. If a bargain and sale of lands be not inrolled, and the bargainer deliver livery and seisin of the lands *secundum formam chartæ*, &c. it has been held a good feoffment. 1 *And.* 68.

A feoffment in fee made upon condition not to alien, the condition is void; because it is repugnant to the estate; but if livery is had, the feoffment will be good against the feoffor: and a bond with condition that the feoffee shall not alien, is said to be good. *Co. Lit.* 206. *Cro. Jac.* 596. If a man makes a feoffment of lands on condition that the feoffee shall give the lands to the feoffor, and his wife in special tail, remainder to the heirs of the feoffor, and he dies before such gift is made, the feoffee ought to make it as near the intent of the condition as may be, *viz.* to the wife without impeachment of waste, remainder to the heirs of the body of her husband, on her body begotten, and remainder to the husband's right heirs. In case the feoffor and his wife both die, the feoffee then should make the estate to the issue, and heirs of the body of his father and mother begotten, remainder to the right heirs of the husband or father. *Co. Lit.* 219, 220.

Tenant in tail makes a feoffment in fee; the inheritance of the tail is not given to the feoffee by the feoffment, nor is he thereby tenant in tail; for none shall be tenant in tail but he only who is comprehended in the gift made by the donor. But it gives away all the immediate estate the feoffor had. *Plowd.* 562. *Hob.* 335. If lessee for life, and the reversioner in fee, make a feoffment in fee by deed, each gives his estate; the lessee his by livery, and the fee from him in remainder. 6 *Rep.* 15. *Lil. Abr.* 609. A feoffment was made *habendum* to the feoffee and his heirs, after the death of the feoffor, and livery was made: yet it was held to be a void feoffment, for an estate of freehold in lands cannot begin at a day to come: but where a lessor made a lease for lives, and granted the reversion to another for life, whose estate for life was to begin after the death of the survivor of the other lessees for life, this was adjudged a good estate in reversion for life. *Hob.* 171. 1 *Nels. Abr.* 846.

If the husband alone make a feoffment of his wife's land, or of both their lands, his wife being on the land and disagreeing to it; this will be good against all persons but the wife: also so it is, if one jointenant make a deed of feoffment of the whole land his companion being then upon it; or if a man disseise me of my lands, and then enfeoff another thereof, whilst I am upon the land, &c. *Perk.* § 219, 220.

Every gift or feoffment of lands made by fraud or maintenance, shall be void; and the disseisee, notwithstanding such alienation, shall recover against the first disseisor his land and double damages; provided he commence his suit in a year after the disseissin, and that the feoffor be pernor of the profits. *Stat.* 1 *R.* 2. *c.* 9. See *stat.* 11 *H.* 6. *c.* 3.

See more fully who may make a feoffment, and to whom, 4 *Co.* 125. 8 *Co.* 42, *b. Back. Abr. Feoffment* (D.) *Vin. Abr. Feoffment* (E).

III. Livery may be by *deed*; or in *law*; which latter is also called *livery within view.*

The livery in *deed*, is the *actual tradition* of the land, and is made either by the delivery of a branch of a tree or a turf of the land, or some other thing, in the name of all the lands and tenements contained in the deed; and it may be made by words only without the delivery of any thing; as if the feoffor being upon the land, or at the door of the house, says to the feoffee, *I am content that you should enjoy this land according to the deed*; or *enter into this house* or *land, and enjoy it according to the deed*; this is a good livery to pass the freehold, because in all these cases, the charter of feoffment makes the limitation of the estate, and then the words spoken by the feoffor on the land, are a sufficient *indicium* to the people present, to determine in whom the freehold resides during the extent of the limitation; besides, the words, being relative to the charter of feoffment, plainly denote an intention to enfeoff. *Co. Lit.* 48, *a.* 9 *Co.* 137, *b. Thorowgood's* case. 6 *Co.* 26. *Sharp's* case. 2 *Rol. Abr.* 7. *Cro. Jac.* 80. *contrà.*

But if a man without any charter, being in his house, says, *I here demise you this house, as long as I live, paying* 20*l. per. annum*, this passes no freehold, but only an estate at will; because the word *demise* denotes only the extent of the limitation of the estate intended to be conveyed: but bare words of limitation, without some acts or words to discover the intention of the feoffor to deliver over the possession, are not sufficient to convey the freehold; for if a charter of feoffment be made to a man and his heirs, this, without some other act, or word to give the possession, only passes an estate at will, because the act of delivery is requisite to the perfection of the charter; but besides the charter of feoffment, there must be some act or words to deliver over the possession, before the feoffee can enjoy it pursuant to the charter. 6 *Co.* 26, 2 *Rol. Abr.* 7. *Co. Lit.* 48. *Cro. Eliz.* 482. 9 *Co.* 138. *Moor, pl.* 632.

*Livery in deed* is thus performed.—The feoffor, lessor, or his attorney, (for this may be as effectually done by deputy or attorney as by the principals themselves in person,) come to the land, or to the house; and there in the presence of witnesses declare the contents of the feoffment or lease on which livery is to be made: and then the feoffor, if it be of land, doth deliver to the feoffee, all other persons being out of the ground, a clod or turf or a twig or bough there growing with words to this effect, "I deliver these to you in the "name of seisin of all the lands and tenements contained in "this deed." But if it be of a house, the feoffor must take the ring or latch of the door, the house being quite empty, and deliver it to the feoffee in the same form; and then the feoffee must enter alone and shut the door, and then open it and let in the others. 1 *Inst.* 48. *West. Symb.* 251.

If the conveyance or feoffment be of divers lands, lying scattered in one and the same county, then in the feoffor's possession, livery of seisin of any parcel, in the name of the rest, sufficeth for all; but if they be in several counties there must be as many liveries as there are counties. *Lit.* § 414. Also if the lands be out on lease, though all be in the same county, there must be as many liveries as there are tenants; because no livery can be made in this case but by the consent of the particular tenant; and the consent of one will not bind the rest. *Dy.* 18.

In all these cases it is prudent and usual to indorse the livery of seisin on the back of the deed; specifying the manner, place, and time, of making it, together with the names of the witnesses. *Co. Lit.* 48.

The livery *within view*, or the livery in *law*, is, when the feoffor is not actually on the land, or in the house, but being in sight of it says to the feoffee, *I give you yonder house*, or *land, go and enter into the same, and take possession of it accordingly*; this sort of livery seems to have been made at first only at the courts baron, which were antiently held *sub dio*, (in the open air) in some open part of the manor, from whence a general survey or view might have been taken of the whole manor, and the *pares curiæ* easily distinguished that part which was then to be transferred. *Pollex.* 47. This livery in law cannot be given or received by attorney, but only by the parties themselves. 1 *Inst.* 48.

This latter sort of livery also is not perfect to carry the freehold, till an *actual entry* made by the feoffee, because the possession is not actually delivered to him but only a licence or power given him by the feoffor to take possession of it; and therefore, if either the feffor or feoffee die before livery, and entry made by the feoffee, the livery within the view becomes ineffectual and void; for if the feoffor dies before entry, the feoffee cannot afterwards enter, because then the land immediately descends upon his heir, and consequently no person can take possession of his land without an authority delegated from him who is the proprietor; nor can the heir of the feoffee enter, because he is not the person to whom the feoffor intended to convey his land, nor had he an authority from the feoffor to take possession; besides if the heir of the feoffee were admitted to take possession after his father's death, he would come in as purchaser, whereas he was mentioned in the feoffment to take as the representative of his ancestor which he cannot do, since the estate never vested in his ancestor. *Co. Lit.* 48, *b.* 2 *Rol. Abr*, 3. 7. 1 *Vent.* 186. *Moor*, 85. *Pollex.* 48.

The livery *within view* may be made of lands in another county than where the lands lie, because the translation of the feud was often made at the court-baron, in the presence of *pares curiæ*; and these courts being held *sub dio*, the *pares* could have a distinct view of every part of the manor; and therefore were proper to attest this sort of investiture, though the lands were in a different county, for notwithstanding that they might have been part of the same manor, for which the court was held. *Co. Lit.* 48, *b.*

This ceremony was first instituted, that the *pares* of the county might, upon any dispute relating to the freehold, determine in whom it was lodged; and from thence be the better enabled to determine in whom the right was. Hence therefore it is, that if a man makes a feoffment, or lease for life, to commence *in futuro*, and makes livery immediately, the livery is void, and only an estate at will passes to the feoffee; for the design of the institution would fail, if such livery were effectual to pass the freehold; for it would be no evidence, or notoriety of the change of the freehold, if after the livery made, the freehold still remained in the feoffor; the use of the investiture would rather create than prevent the uncertainty of the freehold, and in many cases would put men to fruitless trouble and expence in pursuit of their right; for by that means, after a man had brought his *præcipe* against a person, whom he supposed to be tenant to the freehold, and had proceeded in it a considerable time, the writ might abate by the freehold's vesting in another, by virtue of a livery made before the purchase of the writ. Another reason why such future interests cannot be allowed to pass by any act of livery was because no man would be safe in his purchase, if the operation of livery might create an estate, to commence many years after the livery was made; and though they have allowed a future interest, to commence by way of lease, yet that had no such ill effect in making purchases uncertain, because anciently they were under the power of the freeholder, who by recovery might destroy them; and now unless such leases are made upon good considerations, they are fraudulent against a purchaser; and it is not to be presumed that leases at great distances should be purchased for value. *Cro. Eliz.* 451. 2 *Vent.* 204. *Co. Lit.* 217. 5 *Co.* 94, *b.*

Hence, by the way, we may account why a freehold in reversion or remainder cannot be granted *in futuro*, though there no livery is necessary to pass it; as where A. is tenant for life, remainder to B. in fee; A. makes a lease for years to C. and afterwards grants the land to D. *habend'* from Michael-

mas next ensuing, for life; this grant to D. was adjudged void, though C. attorned to it after Michaelmas, because such future grants create an uncertainty of the freehold; and the tenant of the freehold being the person who is to answer the stranger's *præcipe*, and who was answerable to the lord for the services, it were unreasonable to permit him by any act of his own to prevent or delay the prosecution of their right. *Cro. Eliz.* 451. 2 *Vent.* 204. *Co. Lit.* 217. 5 *Co.* 94, *b.* 2 *Co.* 55. *Buckler's* case. 2 *And.* 29. *Moor*, 423. *Cro. Eliz.* 450. 585. *Hob.* 170, 171. 5 *Co.* 94. 1 *Rol. Rep.* 261.

In what cases livery may be made within the view, See *Vin. Abr. Feoffment* (M).—And further as to the different kinds of livery, *Bac. Abr. Feoffment* (A). *Com. Dig. Feoffment* (B). *Vin. Abr. Feoffment* (E. F.) And this Dict. title *Livery of Seisin.*

FEOFFOR AND FEOFFEE. *Feoffor* is he that infeoffs or makes a feoffment to another of lands or tenements in fee-simple. Feoffee is he who is infeoffed or to whom the feoffment is so made. See title *Feoffment.*

FERÆ NETURÆ. Beasts and birds that are wild, in opposition to the tame; such as hares, foxes, wild geese, and the like wherein no man may claim a property. Unless under particular circumstances, as where they are confined, or made tame, &c. See titles *Game*, *Property.*

FERDELLA *Terræ.* Ten acres, a fardel-land. Query a yard land: but see *Virgata terra.*

FERDFARE, from the Sax. *fyrd.* and *fare* iter.] *Significat quietantiam eundi in exercitum. Fleta. lib.* 1. *c.* 47.

FERDWIT, Sax. *ferd* exercitus, and *wite* pœna.] Was used for being quit of manslaughter, committed in the army. *Fleta, lib.* 1.—It is rather a fine imposed on persons for not going forth in a military expedition; to which duty all persons, who held land, were in necessity obliged: and a neglect or omission of this common service to the public, was punished with a pecuniary mulct called the *ferdwite. Cowel.*

FERIAL DAYS, *dies feriales, feriæ.*] According to the Latin dictionary are holy days; but in the *stat.* 27 *H.* 6. *c.* 5. *Ferial* days are taken for working days; all the days of the week, except *Sunday.*

FERLINGATA (FERLINGUS AND FERDLINGUS) TERRÆ. A quarter or fourth-part of a yard-land.—See titles *Fardel of Land*, and *Fardingdeal.*

FERM, *firma.*] A house and land let by lease, &c. See title *Farm.*

FERMARY, from the Sax. *feorme*, victus.] Is an hospital; and we read of friers of the *firmary.*

FERMISONA. The winter season of killing deer; as *tempus pinguedinis* is the summer season.

FERNIGO. A piece of waste ground where *fern* grows. *Cartular. Abbat. Glaston. MS.*

FERRAMENTUM, *ferramenta.*] The iron tools or instruments of a mill.—*Et reparare* ferramenta *ad tres carucas, i. e.* the iron work of three ploughs. *Lib. Nig. Heref.*

FERRANDUS. An iron colour particularly applied to horses, which we at this time call an *iron grey.*

FERRY. A liberty, by prescription, or the King's grant, to have a boat for passage upon a river, for carriage of horses and men for reasonable toll: it is usually to cross a large river. *Termes de Ley.* A *ferry* is no more than a common highway; and no action will lie for one's being disturbed in his passage, unless he alledge some particular damage, &c. 3 *Mod. Rep.* 294.

A Ferry is in respect of the landing-place, and not of the water, the water may be to one, and the ferry to another; as it is of *ferries* on the Thames, where the *ferry* in some places belongs to the archbishop of Canterbury, while the mayor of London has the interest of the water; and in every *ferry*, the land on both sides of the water ought to belong to the owner of the *ferry*, or otherwise he cannot land on the other part. *Savil*, 11. And every *ferry* ought to have expert and able ferry-men, and to have present passage and reasonable payment for the passage. And it is requisite to have one, who has property in the ferry, and not to allow every fisherman to carry and to re-carry at their pleasure, for divers inconveniences; and especially when a place is between the divisions of two counties, any felon may be conveyed from one county to another, secretly, without any notice. *Sav.* 14.

A ferryman if it be on salt water, ought to be privileged from being pressed as a soldier, or otherwise. *Savil.* 11. 14.

Owner of a ferry cannot suppress that, and put up a bridge in its place without licence, and writ of *ad quod dammum; per Holt*, Ch. J. *Show.* 243. 257. *Cart.* 193. 1 *Salk.* 12.

If a ferry be granted at this day, he that accepts such grant is bound to keep a boat for the public good; *per Holt* Ch. J. *Show.* 257.

Custom for the inhabitants to be discharged of toll, may have a reasonable beginning by agreement, as that the inhabitants of the town might be at the charge of procuring the grant, and in consideration thereof, one man to find the boat, and take toll; and the inhabitants to pay none. *Show.* 257.

A common ferry was for all passengers paying toll, but the inhabitants of A. were toll free. An inhabitant of A. may bring an action for taking toll, but not for neglecting to keep up the ferry; because the former is a private right, but the latter a public. But he cannot maintain an action for not passing; for so, any other subject might bring an action, which would be endless; but the taking toll was a special damage, and without special damage he can only indict, or bring information. 1 *Salk.* 12.

An exclusive right to a ferry from A. to B. does not prevent persons going by any other boat from A. directly to C. though it lie near to B. provided this be not done fraudulently, and as a pretence for avoiding the regular ferry. 4 *Term Rep. K. B.* 666.

The not keeping up a *ferry*, has been held to be indictable. See title *Bridge.*

FERSPEKEN. To speak suddenly.—*Leg. H.* 1. *c.* 61.

FESTA IN CAPPIS. Were some grand holy days, on which the whole *choirs* and *cathedrals* wore *caps. Vita. Abbat. St. Alban. p.* 80. 83.

FESTINGMEN. The Sax. *Festinman* signifies a surety or pledge; and to be free of *festingmen*, was probably to be free of *frank-pledge*, and not bound for any man's fortheoming, who should transgress the law. *Mon. Ang. tom.* 1. *p.* 123.

FESTING-PENNY. Earnest given to servants when hired or retained in service, so called in some Northern parts of England, from the Sax. *Festnian*, to *fasten*, or confirm.

FESTUM. A feast. *Festum S. Michaelis*, the feast of *St. Michael*, &c.

FESTUM STULTORUM. The feast of fools. See *Caput anni.*

FEU, OR FEW. A free and gratuitous right to lands, made to one for service to be performed by him, according to the proper nature thereof. *Scotch Dict.*

FEU, OR FEW-HOLDING. Is whereby the vassal is obliged to pay to the superior a sum of money yearly. *Scotch Dict.*

Though the Latin word *Feudum* was used to denote the feudal holding where the service was purely military, the term *Feu* is used in Scotland in contradistinction to *ward-holding*, the military tenure of that country, and means that holding where the vassal, in place of military services, makes a return in grain or in money. *Bell's Scotch Law Dict.*

FEU, OR FEW ANNUALS. The rent which is due by the *reddendo* of the property of the ground, before the house was built within burgh. *Scotch Dict.*

FEUD, (*Deadly.*) See *Deadly Feud.*

FEUDAL AND FEUDARY. See titles *Feodal* and *Feodary*.

FEUDBOTE. A recompence for engaging in a *feud*, and the damages consequent; it having been the custom in antient times, for all the kindred to engage in their kinsman's quarrel. *Sax. Dict.*

FEUDS. See title *Tenures*, I.

FIAR. In Scotch law, in opposition to life renter; the person in whom the property of an estate is vested, subject to the life renter's estate. *Bell's Scotch Law Dict.*

FIARS-PRICES. The prices of grain in the different counties of Scotland, fixed yearly by the respective sheriffs in the month of February, with the assistance of juries: and these regulate the prices of all grain stipulated to be sold at the fiar prices: and also all cases where no price has been stipulated. *Bell's Scotch Law Dict.*

FIAT. A short order or warrant of some judge for making out and allowing certain processes, &c. If a *certiorari* be taken out in vacation, and tested of the precedent term, the *fiat* for it must be signed by a judge of the court, sometime before the essoign-day of the subsequent term, otherwise it will be irregular; but it is said there is no need for a judge to sign the writ of *certiorari* itself: but only where it is required by statute. 1 *Salk.* 150. See title *Certiorari*.

FIAT JUSTITIA. On a petition to the King, for his warrant to bring a writ of *error in parliament*, he writes on the top of the petition *fiat justitia*, and then the writ of error is made out, &c. And when the King is petitioned to redress a wrong, he indorses upon the petition, "*Let right be done the party.*" *Dyer*, 385. *Stamf. Prærog. Reg.* 22.

FICTION OF LAW, *Fictio juris.*] A Supposition of Law, that a thing is true, without enquiring whether it be so or not, that it may have the effect of truth so far as is consistent with Equity. It is allowed of in several cases: but it must be framed, according to the rules of law; not what is imaginable in the conception of man; and there ought to be equity and possibility in every legal *fiction*. There are many of these *fictions* in the *civil* law; and by some civilians, it is said to be an assumption of law upon an untruth, for a truth in something possible to be done, but not done. *Godolphin and Bartol.* The seisin of the conusee in a fine is but a *fiction in our law*; it being an invented form of conveyance only. 1 *Lil. Abr.* 610. And a common recovery is *fictio juris*, a formal act or device by consent, where a man is desirous to cut off an estate-tail, remainders, &c. 10 *Rep.* 42.

By *Fiction of law*, a bond made beyond sea, may be pleaded to be made in the place where not made, *to wit*, in *Islington* in the county of Middlesex, &c. in order to try the same here; without which such trial cannot be had. *Co. Lit.* 261. And so it is in some other cases; but the law ought not to be satisfied with *fictions*, where it may be otherwise really satisfied; and *fictions in law* shall not be carried farther than the reasons which introduce them necessarily require. 1 *Lil. Abr.* 610. 2 *Hawk.* 320.

FIDEM MENTIRI. Is when a tenant doth not keep that *fealty* which he hath sworn to the lord. *Leg. H.* 1. *c.* 53.

FIEF, which we call *fee*, is in other countries the contrary to chattels: in Germany, certain districts or territories are called *fiefs*; where there are *fiefs of the Empire*. See this Dict. title *Fee, Tenure*.

FIERI FACIAS. A judicial writ of execution, that lies where judgment is had for debt or damages recovered in the King's courts; by which writ the sheriff is commanded to levy the debt and damages of the goods and chattels of the defendant, &c. *Old. Nat. Br.* 152. See this Dict. title *Execution*.

This writ, though mentioned in the statute *W.* 2. 13 *E.* 1. *c.* 18. is a writ of execution at common-law, and is called a *fieri facias*, because the words of the writ, directed to the sheriff, are *quod fieri facias de bonis et catallis*, &c. and from these words the writ takes its denomination. *Co. Lit.* 290. *b.*

This writ is to be sued out within a year and a day after judgment; or the judgment must be revived by *scire facias*: but if a *fieri facias* sued in time be not executed, a second *fieri facias*, or *elegit* may be sued out; and it is said some years after, without a *scire facias*, provided continuances are entered from the first *fi. fa.* which it is also held may be entered after the second *fi. fa.* taken out, unless a rule is made that proceedings shall stay, &c. *Sid.* 59. 2 *Nels. Abr.* 776.

If a man recover a debt against A. B. and levy part of it by *fieri facias*, and this writ is returned; yet he may take the body in execution by *capias* for the rest of the debt. *Rol. Abr.* 904. The sheriff on a *fieri facias* is to do his best endeavours to levy the money upon the goods and chattels of the defendant; and for that purpose to inquire after his goods, &c. And the plaintiff may inquire and search if he can find any, and give notice thereof to the sheriff, who *ex officio* is to take and sell them if he can, or if not, by a writ of *venditioni exponas*. 2 *Shep. Abr.* 111.

There may be a *testatum fieri facias* into another county, if the defendant hath not goods enough in the county where the action is laid to satisfy the execution; and the *fieri facias* for the ground of the *testatum*, may be returned of course by the attornies, as originals are. 2 *Salk.* 589. If all the money is not levied on a *fieri facias*, the writ must be returned before a second execution can be issued; because it is to be grounded on the first writ, by reciting that all the money was not levied. 1 *Salk.* 318.

If an execution is sued on a *fi. fa.* and the defendant dies before it is executed, it may be served on the defendant's goods in the hands of his executor or administrator. *Cro. Eliz.* 181. See further this Dict. titles *Sheriff, Extent, Execution*.

FIFTEENTHS. A tribute or imposition of money, antiently laid generally upon cities, boroughs, &c. through the whole realm; so called, because it amounted to a *fifteenth part* of that which each city or town was valued at, or a *fifteenth* of every man's personal estate according to a reasonable valuation. And every town knew what was a *fifteenth part*, which was always the same; whereas a subsidy raised on every particular man's lands or goods, was adjudged uncertain; and in that regard the *fifteenth* seems to have been a rate formerly laid upon every town; according to the land, or circuit belonging to it. *Camd. Brit.* 171.

There are certain rates mentioned in *Domesday*, for levying this tribute yearly; but since, though the rate be certain, it is not to be levied but by parliament. See *Cowell*; 1 *Com.* 309. and this Dict. title *Taxes*.

FIGHTING AND QUARRELLING. Is prohibited by statute, in a church or church yard, &c. on pain of excommunication, and other corporal punishment. *Stat.* 5 & 6 *Ed.* 6. *c.* 4. See title *Church*.

FIGHTWITE, *Sax.*] A match for fighting, or making a quarrel to the disturbance of the peace.

FIGURES. The *stat.* 6 *Geo.* 2. *c.* 14. Allows the expressing numbers *by figures* in all writs, &c: pleadings, rules, orders and indictments, &c. in courts of justice, as have been commonly used in the said courts, notwithstanding any thing in the *stat.* 4 *Geo.* 2. *c.* 26. See titles *Amendment, Error, Pleading*.

FILACER, FILAZER OR FILIZER, *Filizarius*, from Lat. *Filum*, Fr. *file, filace*, a thread.] An officer of the court of Common Pleas, so called, as he files those writs whereon he makes out process. There are fourteen of those *filazers* in their several divisions and counties, and they make forth all writs and processes upon original writs, issuing out of Chancery, as well real, as personal and mixed, returnable in

that court; and in actions merely personal, where the defendants are returned summoned, they make out *pones* or attachments; which being returned and executed, if the defendant appears not, they make forth a *distringas*, and so *ad infinitum*, or until he doth appear; if he be returned *nihil*, then process of *capias* infinite, &c. They enter all appearances and special bails, upon any process made by them: and make the first *scire facias* on special bails, writs of *habeas corpus*, *distringas nuper vicecomitem vel ballivum*, and all *supersedeas's* upon special bail: in real actions, writs of view, of grand and petit *cape*, of *withernam*, &c. also writs of *adjournment* of a term, in case of public disturbance, &c.

And until an order of court, 14 *Jac.* 1. they entered declarations, imparlances and pleas, and made out writs of execution, and divers other judicial writs, after appearance: but that order limited their proceedings to all matters before appearance, and the *prothonotaries* to all after. The *filazers* of the Common Pleas have been officers of that court before the *stat.* 10 *H.* 6. *c.* 4. wherein they are mentioned: and in the King's Bench, of later times, there have been *filazers* who make out process upon *original writs* returnable in that court, on actions in general.

FILE, *Filacium.*] A thread, string or wire, upon which writs, and other exhibits in courts and offices are fastened or *filed*, for the more safe keeping and ready turning to the same. A *file* is a record of the court; and the *filing* of process of a court makes it a record of it. 1 *Lil.* 112. An original writ may be *filed* after judgment given in the cause, if sued forth before; declarations, &c. are to be *filed*; and affidavits must be *filed*, some before read in court; and some presently when read in court. *Ibid.* 113. Before *filing* a record removed by *certiorari*, the justices of B. R. may refuse to receive it, if it appears to be for delay, &c. and remand it back for the expedition of justice; but if the *certiorari* be once *filed*, the proceedings below cannot be revived. An indictment, &c. cannot be amended after *filed*. See this Dict. titles *Certiorari*, *Amendment*.

FIELD ALE, OR FILKDALE. A kind of drinking in the *field*, by bailiffs of hundreds; for which they gathered money of the inhabitants of the hundred to which they belonged: but it has been long since prohibited. *Bract.* 4 *Inst.* 307.

FILICETUM. A ferny ground. *Co. Lit.* 4.

FILIOLUS. Is properly a little son; a godson. *Dugd. Warwicksh.* 697.

FILUM AQUÆ. The thread or middle of the stream where a river parts two lordships. *Et habeant istas buttas usque ad* filum aquæ *prædictæ*. *Mon. Angl. tom.* 1. *f.* 390. *File du Mer* the high tide of the sea. *Rot. Parl.* 11 *H.* 4. It is also the middle of any river or stream which divides counties, townships, parishes, manors, liberties, &c.

FINDERS. Mentioned in several ancient statutes, seem to be the same with those which we now call *Searchers*, who are employed for the discovery of goods imported, or exported, without paying custom. See title *Customs*.

## FINE OF LANDS.

The Law on this subject, of itself very extensive, is also closely implicated with that of *Recoveries*. A definition of both terms is therefore here given, with some idea of the distinct nature of those assurances. See further this Dict. title *Recovery*, for what relates exclusively thereto.

A Fine, *Finis*, or *Finalis Concordia*; from the words with which it begins; [and, also from its effect in putting a *final* end to all suits and contentions.] A solemn amicable agreement or composition of a suit, (whether that suit be real or fictitious) made between the demandant and tenant, with the consent of the judges; and enrolled among the records of the court, where the suit was commenced; by which agreement freehold property may be transferred, settled and limited. See *Cruise on Fines*, 1st. edit. 4. 89. 92.

*Shepherd* says, sometimes it is taken for "a final agreement or conveyance upon record for the settling and securing of lands and tenements;" and so it is designated by some to be, "an acknowledgment, in the king's court, of the land or other things to be his right that doth complain:" and by others "a covenant made between parties and recorded by the justices:" and by others "a friendly, real, and final agreement amongst parties, concerning any land, or rent, or other thing whereof any suit or writ is hanging between them in any court: and by others more fully "an instrument of record of an agreement concerning lands, tenements, or hereditaments; duly made by the king's licence, and acknowledged by the parties to the same, upon a writ of covenant, writ of right, or such like, before the Justices of the Common Pleas or others thereunto authorised, and engrossed of record in the same court; to end all controversies thereof, both between themselves which be parties and privies to the same, and all strangers not suing or claiming in due time." *Shep. Touchst. c.* 3. and the authorities there cited.

The most distinguishable properties of a Fine are, 1. The extinguishing dormant titles by *barring strangers;* unless they claim within five years. 2. Barring the *issue in tail* immediately. [But not barring the remainders or reversions, which depend on the estate-tail barred; except where the tenant in tail has the *immediate reversion* in fee in himself. See *Cruise on Fines*, 2d *edit.* 176. 1 *Show.* 370. 1 *Salk.* 338. 4 *Mod.* 1.] 3. Binding *Femes Covert*, see *post*, IV.—These constitute the peculiar qualities on account of which a fine is most usually, if not always, resorted to, as one of the most valuable of the *Common Assurances* of the realm; being now in fact *a fictitious proceeding to transfer or secure real property* by a mode more efficacious than ordinary conveyances. 1 *Inst.* 121 *a. note* 1. 2. for which see at full length, *Mr. Hargrave's* excellent abridgment of the History of Fines and their purposes.

Fines being agreements solemnly made in the king's courts were deemed to be of equal notoriety with judgments in writs of right; and therefore the common law allowed them to have the same quality of barring all who should not claim within a year and a day. See *Plowd.* 357. Hence we may probably date the origin and frequent use of *Fines* as feigned proceedings. But this puissance of a Fine was taken away by *stat.* 34 *E.* 3. *c.* 16. and this statute continued in force till *stat.* 1 *Ric.* 3. *c.* 7. and 4 *H.* 7. *c.* 24. which revived the ancient law, though with some change; proclamations being required to make fines more notorious, and the time for claiming being enlarged, from a *year and a day* to *five years*. See *post*, I. The force of Fines on the rights of strangers being thus regulated, it has ever since been a common practice to levy them merely for better guarding a title against claims, which, under the common statutes of limitation, might subsist with a right of *entry* for 20 years and with a right of *action* for a much longer time. 1 *Inst. ubi supra*, and see *post*.

A Recovery—in its most extensive sense is a restitution to a former right by the solemn judgment of a court of justice. In its general acceptation a *Common Recovery* is a judgment in a fictitious suit, brought against the tenant of the freehold, obtained in consequence of a default made by the person who is last vouched to warranty in such fictitious suit. *Cruise on Recoveries*, 1. 120, 121. 137.

The common Recovery that is used for assurance of land is nothing else but *fictio juris* or a certain form or course set down by law to be observed for the better assuring of lands and tenements to men. And this is somewhat after the example of Recovery upon title, which is without consent and contrary to the will of him against whom the same is had: for

there is in this a colourable suit, wherein there is a demandant who is called the recoveror, and a tenant who is called the recoveree; and one that is called (or vouched) to warrant upon a supposed warranty, who is called the vouchee. *Shep. Touchst. c.* 3. and the authorities there cited.

Considered as a legal assurance or conveyance, it is a *Fiction of law*, adopted for the purpose of destroying that species of perpetuity which was created by the statute *de donis;* (13 *E.* 1. *st.* 1. *c.* 1.) and whereby all tenants in tail are enabled, by pursuing the proper form, to bar their estates-tail. 10 *Rep.* 37. And not only this, but it is also a bar to ALL *remainders* and *reversions depending* on such estates-tail so barred; and to all *charges* and *incumbrances* created by the persons in remainder and reversion. 1 *Rep.* 62. But a common recovery does not bar an executory devise unless the executory devisee comes in as a vouchee. *Fearne*, 306. *Pigot*, 134. *Cro. Jac.* 590. *Palm*, 131.—And by *stat.* 12 *H.* 8. *c.* 15. no estate held by statute-merchant, staple, or elegit shall be avoided by means of a feigned recovery.—And see also this *stat.* and *stat. of Gloucester*, 1 *E.* 1. *c.* 11. as to termors for years.

DISTINCTIONS. Though a Recovery, generally speaking, is a more extensive species of conveyance than a Fine, to guard an estate against all claims and incumbrances; yet the operation of each is not seldom necessary in aid of the other. A Fine is therefore often levied for the purpose of creating a good tenant to the præcipe, on which the Recovery is suffered: and a Recovery is frequently suffered in order to operate as a discontinuance of an estate-tail, for the purpose of barring remainders or reversions depending on such estates-tail; and thus a conveyance by *Fine* and *Recovery*, if *unreversed*, bars all the world.

A Fine is technically said to be *levied*—A Recovery to be *suffered*—Good writers however have but too frequently confounded the terms.

I. *Generally, of the Nature, several Kinds, and Effect, of a Fine.*
II. *Of the various Sorts of Fines; and how a Fine operates: and of Deeds to lead or declare the Uses of a Fine.*
III. *Of what Things a Fine may be levied.*
IV. *By whom, and to whom it may be levied, and see post,* VI.
V. *Before whom, and in what Manner, it may be levied.*
VI. *Who may be barred by a Fine, and who not.*
VII. *How a Fine may be reversed, for Error or Fraud; and of amending Fines.*

I. Under this head it will be necessary to explain, 1. The nature of a Fine. 2. Its several kinds. 3. Its force and effect.

1. A Fine is sometimes said to be a feoffment of record; *Co. Lit.* 50. though it might with more accuracy be called an acknowledgment of a feoffment on record. By which is to be understood, that it has at least the same force and effect with a feoffment, in the conveying and assuring of lands: though it is one of those methods of transferring estates of freehold by the common law, in which livery of seisin is not necessary to be actually given; the supposition and acknowledgment thereof in a court of record, however fictitious, inducing an equal notoriety. But, more particularly, a Fine may be described to be an amicable composition or agreement of a suit, either actual or fictitious, by leave of the king or his justices; whereby the lands in question become, or are acknowledged to be, the right of one of the parties. *Co. Litt.* 120. In its original it was founded on an actual suit commenced at law for recovery of possession of the land or other hereditaments; and the possession thus gained by such composition was found to be so sure and effectual, that fictitious actions were, and continue to be, every day commenced, for the sake of obtaining the same security.

Fines are of equal antiquity with the first rudiments of the law itself; are spoken of by *Glanvil. l.* 8. *c.* 1. and *Bracton, l.* 5. *tr.* 5. *c.* 28. in the reigns of Henry II. and Henry III.; as things then well known and long established: and instances have been produced of them even prior to the Norman invasion. *Plowd.* 369. So that the *stat.* 18 *E.* 1. called *modus levandi fines*, did not give them original, but only declared and regulated the manner in which they should be levied, and carried on. And that is as follows:

First; The party to whom the land is to be conveyed or assured, commences an action or suit at law against the other, generally an action of covenant, though a Fine may also be levied on a writ of *mesne*, of *warrantia chartæ*, or *de consuetudinibus et servitiis;* (*Finch L.* 278.) by suing out a writ of *præcipe* called a writ of covenant: the foundation of which is a supposed agreement or covenant, that the one shall convey the lands to the other; on the breach of which agreement the action is brought. On this writ there is due to the king by ancient prerogative, a *primer fine*, or a noble for every five marks of land sued for; that is, one-tenth of the annual value. 2 *Inst.* 511.—The suit being thus commenced, then follows:

Secondly; The *licentia concordandi*, or *leave to agree* the suit: for, as soon as the action is brought, the defendant, knowing himself to be in the wrong, is supposed to make overtures of peace and accommodation to the plaintiff; who accepting them, but having upon suing out the writ, given pledges to prosecute his suit, which he endangers if he now deserts it without licence, he therefore applies to the court for leave to make the matter up. This leave is readily granted, but for it there is also another Fine due to the king by his prerogative, which is an ancient revenue of the crown, and is called the *king's silver*, or sometimes the *post fine*, with respect to the *primer fine* before-mentioned. And it is as much as the *primer fine*, and half as much more, or ten shillings for every five marks of land; that is, three twentieths of the supposed annual value. 5 *Rep.* 39. 2 *Inst.* 511. *Stat.* 32 *Geo.* 2. *c.* 14.

Thirdly comes the *concord*, or agreement itself, after leave obtained from the court; this is usually an acknowledgment from the deforciants (or those who keep the other out of possession) that the lands in question are the right of the complainant. And from this acknowledgment, or recognition of right, the party levying the Fine is called the *cognizor*, and he to whom it is levied the *cognizee*. This acknowledgment must be made either openly in the Court of Common Pleas, or before the Lord Chief Justice of that court, or else before one of the judges of that court; or two or more commissioners in the country, empowered by a special authority called a writ of *dedimus potestatem;* which judges and commissioners are bound by *St.* 18 *E.* 1. *st.* 4. to take care that the cognizors be of full age, sound memory, and out of prison. If there be any feme covert among the cognizors, she is privately examined whether she does it willingly and freely, or by compulsion of her husband.

The concord being the complete Fine, it shall be adjudged a Fine of that term in which the concord was made, and the writ of covenant returnable. 1 *Salk.* 341. A concord cannot be of any thing but what is contained in the writ of covenant: and the note of the Fine remaining with the *Chirographer*, it hath been held, *est principale recordum.* 3 *Leon.* 234.

Though one concord will serve for lands that lie in divers counties; yet there must be several writs of covenant. 3 *Inst.* 21. *Dyer*, 227. A concord of a Fine may have an exception of part of the things mentioned therein: and if more acres are named, than a man hath in the place, or are intended to be passed; no more shall pass by the Fine than is agreed upon. 1 *Leon* 81. 3 *Bulst.* 317, 318.

By these acts all the essential parts of a Fine are completed: and if the cognizor dies the next moment after the Fine is acknowledged, provided it be subsequent to the day on which the writ is made returnable, still the Fine shall be carried on in all its remaining parts. *Comb.* 71. See *post*, VII.

Fourthly comes the *note* of the Fine: which is only an abstract of the writ of covenant, and the concord; naming the parties, the parcels of land, and the agreement; this must be enrolled of record in the proper office, by direction of *st.* 5 *H.* 4. *c.* 14.

The fifth part is the *foot* of the Fine, or conclusion of it: which includes the whole matter, reciting the parties, day, year and place, and before whom it was acknowledged or levied. Of this there are indentures made or engrossed at the Chirographer's office, and delivered to the cognizor and the cognizee; usually beginning thus, "*Hæc est finalis concordia*; This is the final agreement;" and then reciting the whole proceeding at length. And thus the Fine is completely levied at common law.

By several statutes, still more solemnities are superadded, in order to render the Fine more universally public, and less liable to be levied by fraud or covin. And first, by *stat.* 27 *E.* 1. *c.* 1. the note of the Fine shall be openly read in the court of Common Pleas, at two several days in one week, and during such reading all pleas shall cease. By *stat.* 5 *H.* 4. *c.* 14. 23 *Eliz. c.* 3. all the proceedings on Fines, either at the time of acknowledgment, or previous, or subsequent thereto, shall be enrolled of record in the Court of Common Pleas. By *stat.* 1 *Ric.* 3. *c.* 7. confirmed and enforced with some alterations, by *st.* 4 *Hen.* 7. *c.* 24. (the latter act superseding the former,) the Fine, after engrossment, shall be openly read and proclaimed in court (during which all pleas shall cease) sixteen times; *viz.* four times in the term in which it is made, and four times in each of the three succeeding terms; which is reduced to one in each term by *stat.* 31 *Eliz. c.* 2. and these proclamations are indorsed on the back of the record. It is also enacted by *stat.* 23 *Eliz. c.* 3. that the Chirographer of Fines shall, every term, write out a table of the Fines levied in each county in that term, and shall affix them in some open part of the Court of Common Pleas all the next term, and shall also deliver the contents of such table to the sheriff of every county, who shall at the next assizes fix the same in some open place in the court, for the more public notoriety of the Fine.

2. FINES thus levied, are of four kinds:

*First*, What, in law French, is called a Fine "*sur cognizance de droit, come ceo que il ad de son done*;" or, a Fine upon acknowledgment of the right of the cognizee, as that which he hath of the gift of the cognizor. This is the best and surest kind of Fine, for thereby the deforciant, in order to keep his covenant with the plantiff, of conveying to him the lands in question, and at the same time to avoid the formality of an actual feoffment and livery, acknowledges in court a former feoffment or gift in possession, to have been made by him to the plaintiff. This fine therefore is said to be a feoffment of record; the livery, thus acknowledged in court, being equivalent to an actual livery: so that this assurance is rather a confession of a former conveyance, than a conveyance now originally made; for the deforciant, or cognizor, acknowledges, *cognoscit*, the right to be in the plaintiff, or cognizee, as that which he hath, *de son done* of the proper gift of himself, the cognizor.

*Secondly*, a Fine "*sur cognizance de droit tantum*," or, upon acknowledgment of the right merely; not with the circumstance of a preceding gift from the cognizor. This is commonly used to pass a *reversionary* interest, which is in the cognizor. For of such reversions there can be no feoffment, or donation with livery supposed; as the possession during the particular estate belongs to a third person. *Moor*, 629. It is worded in this manner, "that the cognizor acknowledges the right to be in the cognizee; and grants for himself and his heirs that the reversion, after the particular estate determines, shall go to the cognizee." *West. Symb. p.* 2. § 95.

*Thirdly* a Fine "*sur concessit*," is where the cognizor, in order to make an end of disputes, though he acknowledges no precedent right, yet grants to the cognizee an estate *de novo*, usually for life or years, by way of supposed composition. And this may be done reserving a rent, or the like; for it operates as a new grant. *West. p.* 2. § 66.

This species of fine may be levied where the intent is to pass several mesne particular estates, and a Reversion in fee, 2 *W. P. Taunton*, 84. The Court of C. P. will not permit a fine *sur concessit* to be levied of a doubtful estate under the description of "all and whatsoever the said —— hath in the premises:" nor will the court permit two operations, as that of a fine *sur concessit*, and one *sur conusance de droit*, to be combined in the same Fine. 2 *W. P. Taunton*, 198.

*Fourthly*, A Fine, "*sur done grant et render*," is a double fine, comprehending the fine *sur cognizance de droit come ceo*, &c. and the Fine *sur concessit*: and may be used to create particular limitations of estate: and this to persons who are strangers, or not named in the writ of covenant; whereas the Fine *sur cognizance de droit come ceo*, &c. conveys nothing but an absolute estate, either of inheritance or at least of freehold. *Salk.* 340. In this last species of Fines, the cognizee, after the right is acknowledged to be in him, grants back again or renders to the cognizor, or perhaps to a stranger, some other estate in the premises. But, in general, the first species of Fine, *sur cognizance de droit come ceo, &c.* is the most used; as it conveys a clear and absolute freehold, and gives the cognizee a seisin in law, without any actual livery; and is therefore called a Fine executed: whereas the others are but executory. See *post*, II.

3. The *force* and *effect* of a Fine principally depend, at this day, on the common law and the two statutes, 4 *H.* 7. *c.* 24. and 32 *H.* 8. *c.* 36. The antient common-law, with respect to this point, is very forcibly declared by the *stat.* 18 *E.* 1. *st.* 4. in these words, "And the reason, why such solemnity is required in passing a Fine, is this, because the Fine is so high a bar, and of so great force, and of a nature so powerful in itself, that it precludes not only those which are parties and privies to the Fine, and their heirs, but all other persons in the world, who are of full age, out of prison, of sound memory, and within the four seas, the day of the Fine levied; unless they put in their claim on the foot of the Fine within a year and a day." But this doctrine of barring the right by *non-claim*, was abolished for a time by 34 *E.* 3. *c.* 16. which admitted persons to claim, and falsify a Fine, at any indefinite distance. *Litt.* § 441. whereby, as Sir *Edward Coke* observes, 2 *Inst.* 581. great contention arose, and few men were sure of their possessions, till the parliament held in 4 *H.* 7. reformed that mischief, and excellently moderated between the latitude given by the statute, and the rigour of the common law. For the statute then made (*stat.* 4 *H.* 7. *c.* 24.) restored the doctrine of non-claim, but extended the time of claim. So that now, by that statute, the right of all strangers whatsoever is barred, unless they make claim, by way of action or lawful entry, not within one year and a day, as by the common law, but within *five* years after proclamations made: except feme coverts, infants, prisoners, persons beyond the seas, and such as are not of whole mind: who have five years allowed to them and their heirs after the death of their husbands, their attaining full age, recovering their liberty, returning into England, or being restored to their right mind.

It seems to have been the intention, to have covertly, by this statute, extended Fines to have been a bar of estates-tail. But doubts having arisen whether they could, by mere implication, be adjudged a sufficient bar, which they were expressly declared *not* to be by the statute *de donis*; the *stat.* 32 *H.* 8. *c.* 36. was thereupon made; which removes all difficulties, by declaring that a Fine levied by any person of full age, to whom, or to whose ancestors lands have been entailed, shall be a perpetual bar to them and their heirs claiming by force of such entail: unless the Fine be levied by a woman after the death of her husband, of lands which were, by the gift of him, or his ancestors, assigned to her in tail for her jointure; or unless it be of lands entailed by Act of Parliament or letters patent, and whereof the reversion belongs to the crown. See *stat.* 11 *Hen.* 7. *c.* 20.

From this view of the common law, regulated by these statutes, it appears, that a Fine is a solemn conveyance on record from the cognizor to the cognizee; and that the persons bound by a Fine are *Parties*, *Privies*, and *Strangers*.

The *Parties* are either the cognizors, or cognizees: and these are immediately concluded by the Fine, and barred of any latent right they might have, even though under the legal impediment of coverture. And indeed, as this is almost the only act that a *feme covert*, or married women, is permitted by law to do, (and that because she is privately examined as to her voluntary consent, which removes the general suspicion of compulsion by her husband,) it is therefore the usual and almost the only safe method, whereby she can join in the sale, settlement, or incumbrance, of any estate. See *post*, IV.

Though a wife may thus join her husband in either a Fine or Recovery to convey her own estate and inheritance, or an estate settled upon her by her husband as her jointure, or to convey the husband's estates discharged of dower; (See *Cruise*, *Piggot*,) yet if a jointress after her husband's death levies a Fine or suffers a Recovery without the consent of the heir, or the next person entitled to an estate of inheritance, the Fine or Recovery is void, and is also a forfeiture of her estate, by *stat.* 11 *H.* 7. *c.* 20. See *post*, IV.

*Privies* to a Fine are such as are any way related to the parties who levy the Fine, and claim under them by any right of blood, or other right of representation. Such are the heirs general of the cognizor; the issue in tail since the statute of *H.* 8. the vendee; the devisee; and all others who must make title by the persons who levied the Fine. For the act of the ancestor shall bind the heir, and the act of the principal, his substitute, or such as claim under any conveyance made by him subsequent to the Fine so levied. 3 *Rep.* 87.

*Strangers* to a Fine are all other persons in the world, except only parties and privies. And these are also bound by a Fine, unless within five years after proclamation made they interpose their claim; provided they are under no legal impediments, and have then a present interest in the estate. The impediments, as hath before been said, are coverture, infancy, imprisonment, insanity, and absence beyond sea; and persons, who are thus incapacitated to prosecute their rights, have five years allowed them to put in their claims after such impediments are removed. Persons also that have not a present, but a future interest only, as in remainder or reversion, have five years allowed them to claim in, from the time that such right accrues. *Co. Litt.* 372. And if within that time they neglect to claim, or (by the *stat.* 4 *Ann. c.* 16.) if they do not bring an action to try the right, within one year after making such claim, and prosecute the same with effect, all persons whatsoever are barred of whatever right they may have, by force of the statute of non-claim. See this Dict. title *Claim*.

But, in order to make a Fine of any avail at all, it is necessary that the parties should have some interest or estate in the lands to be affected by it. Else it were possible that two strangers by a mere confederacy, might defraud the owners by levying Fines of their lands; for if the attempt be discovered, they can be *no sufferers*, as to the estate in question, but must only remain in *statu quo*; whereas if a tenant for life levies a Fine, it is an absolute forfeiture of his estate to the remainder-man or reversioner, if claimed in proper time. *Co. Lit.* 251. It is not therefore to be supposed that such tenants will frequently run so great a hazard; but if they do, and the claim is not duly made within five years after their respective terms expire, the estate is for ever barred by it. 2 *Lev.* 52. Yet where a stranger, whose presumption cannot thus be punished, officiously interferes in an estate which in nowise belongs to him, his Fine is of no effect: and may at any time be set aside (unless by such as are parties or privies thereunto) by pleading that "*partes finis nihil habuerunt.*" *Hob.* 334. And even if a tenant for years, who hath only a chattel interest and no freehold in the land, levies a Fine, it operates nothing, but is liable to be defeated by the same plea. 5 *Rep.* 123. *Hard.* 401. See *post*, VII.—Wherefore when a lessee for years is disposed to levy a Fine, it is usual for him to make a feoffment first, to displace the estate of the reversioner, and create a new freehold by disseisin. *Hardr.* 402. 2 *Lev.* 52. See this Dict. title *Recovery*.

In order to punish criminally such as thus put the estate of another to the hazard, as far as in them lies, the *stat.* 21 *Jac.* 1. *c.* 26. makes it felony without benefit of clergy to acknowledge or procure to be acknowledged, any Fine, Recovery, Judgment, &c. in the name of any person not privy or consenting to the same.

II. Fines are generally divided into those with, and without, proclamations; that with proclamations, is termed a Fine according to the statutes 1 *R.* 3, *c.* 7. 4 *H.* 7. *c.* 24. And such a Fine, every Fine that is pleaded is intended [supposed] to be, if it be not shewn what Fine it is. 3 *Rep.* 86.

If tenant in tail levies a Fine, and dies before all the proclamations are made, though the right of the estate tail descends upon the issue, immediately on the death of the ancestor, yet if proclamations are made afterwards, such right shall be barred by the Fine, by the statutes 4 *H.* 7. *c.* 24. 32 *H.* 8. *c.* 36. 3 *Rep.* 84.

The Fine *without proclamations* is called a *Fine at the Common Law*, being levied in such manner as was used before the *stat.* 4 *H.* 7. *c.* 24. and is still of the like force by the *common law*, to discontinue the estate of the cognisor, if the Fine be executed. A Fine also *with* or *without proclamations* is either *executed* or *executory*: A Fine *executed* is such a Fine as of its own force gives present possession to the cognisee, without any writ of seisin to enter on the lands, &c. as a Fine *sur cognizance de droit come ceo*; and in some respects a Fine *sur Release*, &c. is said to be *executed*. A Fine *executory* doth not execute the possession in the cognisee, without entry or action, but requires a writ of seisin; as the Fine *sur conuzance de droit tantum*, &c. unless the party be in possession of the lands; for, if he be in possession at the time of levying the Fine, there need not be any such writ, or any execution of the Fine; and *then the Fine will enure by way of extinguishment of right*, not altering the estate or possession of the cognisee, however it may better it. *West.* § 20.

Since the statute of uses, 27 *H.* 8. writs of possession are never sued out where Fines are levied to uses; for the statute executing the possession to the use, the cognisee is immediately in possession without attornment; and by *stat.* 4 & 5 *Ann. c.* 16. attornment after a Fine is become unnecessary. *Booth*, 250. *Pig.* 49. *Cruise*, 59.

*Fines* are likewise *single* or *double*: *single*, where an estate is granted by the cognisor to the cognisee and nothing is

thereby rendered back again from the cognisee to the cognisor. The *double* Fine is that which doth contain a grant or render back again from the cognisee, of the land itself; or of some rent, common, or other thing out of it, and by which remainders are limited, &c. *West.* §§ 21. 30. A Fine is also sometimes called a *double* Fine, when the lands lie in several counties.

Lands that are bought of divers persons may pass by one Fine, and then the writ of covenant must be brought by all the vendees against all the vendors, and they must every one of them warrant for himself and his heirs; and such a Fine is good. *Shep. Touchst. c.* 2. *p.* 19. And such *joint Fines* seem reasonable, when the several purchases are of small value, though they are *ex gratiâ*. See *Wils. on Fines*, 47. where an order of the Chancellor is inserted, authorizing the cursitor to stay the writ when there is more than one demandant and one deforciant, except co-parceners, joint-tenants and tenants in common. It is now the practice to permit two separate purchases to be comprized in one Fine, on an affidavit that the value of them together does not exceed 200*l*.

The first kind of Fine *sur conuzance de droit come ceo*, &c. is a single Fine levied with proclamations, according to the *stat.* 4 *H.* 7. *c.* 24. *It is, as has been already said, the principal and surest kind of Fine:* and this because it is said to be executed, as it gives present possession (at least in law) to the cognisee, so that he needs no writ of *hab. fac. seisinam*, or other means for execution thereof; for it admits the possession of the lands, of which the Fine is levied, to pass by the Fine, so that the cognisee may enter and the estate is thereby in him, to such uses as are declared in the deed to lead the uses thereof; but if it be not declared by deed to what use the Fine was levied, such Fine shall be to the use of the cognisor that levied the same. 2 *Inst.* 513.

A Fine *sur conuzance de droit come ceo*, &c. may not be levied to any person but one that is party to the writ of covenant; though a vouchee, after he hath entered into the warranty to the demandant, it is said, may confess the action or levy a Fine to the demandant, for he is then supposed to be tenant of the land, though he is not a party to the writ; and yet a Fine levied by the vouchee to a stranger is void. No single Fine can be with a remainder over to another person not contained in it: But if A. levy a Fine to B. *sur conuzance de droit come ceo*, and B. by the same concord grants back the land again to A. for life, remainder to E. the wife of A. for her life, remainder to A. and his heirs: this will be a good Fine. *Plowd.* 248, 249.

The second sort of Fine *sur conuzance de droit tantum*, is said to be a Fine *executory*, and much of the nature of a Fine *sur concessit*; though it is most commonly made use of *to pass a reversion*, it is also sometimes used by tenant for life, to make a *release* (in nature of a surrender) to him in reversion, but not by the word *surrender*; for it is said a particular tenant, as for life, &c. cannot *surrender* his term to him in reversion by Fine; but he may *grant* and *release* to him by Fine. *Plowd.* 268. *Dyer*, 216. A Fine upon a release, &c. shall not be intended to be to any other use, but *to him to whom it is levied*. 3 *Leon.* 61.

The Fine *sur concessit*, used to *grant away estates for life or years*, is also *executory*, so that the cognisees must enter, or have a writ of *hab. fac. seisinam* to obtain possession; if the parties to whom the estate is limited, at the time of levying such Fine, be not in possession of the thing granted.

The Fine *sur done grant et render*, is partly *executed* and partly *executory*: and as to the *first* part of it, is altogether of the same nature with a Fine *sur conuzance de droit come ceo*; but as to the *second* part containing a grant and render back, *it is taken in law to be rather a private conveyance or charter between party and party*, and not as a writ of judgment upon record: and this render is sometimes of the whole estate, and sometimes of a particular estate, with remainder or remainders over; or of the reversion; and sometimes with reservations of rent and clause of distress, and grant thereof over by the same Fine. 5 *Rep.* 38.

A. B. and C. D. levied a Fine of lands, and the cognisee by the same Fine rendered back the land to A. B. in tail, reserving a rent to himself, &c.; the rent and reversion shall pass, though in one Fine: and it shall enure as several Fines. *Cro. Eliz.* 727.

It is said, a *grant* and *render* of land, cannot be immediately *in primo gradu* to a person who is no party to the writ; but mediately, or *in secundo gradu*, it may. 3 *Rep.* 514. *Bro.* 108. The Fine with *grant* and *render*, differs from the Fine *sur conuzance de droit come ceo*, &c. as that must be levied of the land in the original; but the *grant* and *render* may be of another thing than is expressed in the original: though to make a good *grant* and *render*, the land rendered must pass to the *cognisee* by the Fine; for he cannot render what he hath not. 3 *Rep.* 98. 510.

A man may not by this Fine reserve to himself a less estate by way of remainder than the fee: and the render of a rent (if any be) must be to one of the parties to the Fine, and not to a stranger. *Dyer*, 33. 69. 2 *Rep.* 39. To make a lease for years, &c. by Fine with a render; the lessee must acknowledge the land to be the right of the lessor that is seised thereof; and then such lessor grants and renders the same back again to the lessee, for a certain number of years, reserving rent, &c. and this is a good Fine: but if the lessor be tenant in tail, then to bind him, he and the lessee are to acknowledge the tenements the right of A. B. who is to render the same Fine to *lessee for years*, the *remainder* to the *lessor and his heirs*, &c. 44 *Ed.* 3. *c.* 45. 2 *Leon.* 206.

A *Fine* and *Render* is a *conveyance* at common law, and makes the *cognisor*, on the render back, a *new purchaser*; by which, lands arising on the part of the mother, may go to the heirs on the part of the father, &c. 1 *Salk.* 337.

All sorts of Fines in general *may enure as a confirmation of a former estate, which was defeasible before*. 1 *Saund.* 261. So a Fine may enure by way of *extinguishment*; therefore, if *tenant in tail* makes a lease, or other estate to A. and afterwards levies a Fine to B. the lease, or other estate, shall be indefeasible; for his right during such former estate was extinct by the Fine. *R. Jon.* 60. *Cro. Jac.* 689. See this Dict. title *Estates*.

Where a Fine and Recovery is of so many acres in S. the party interested shall have his election where and in what parts of the estate the Fine and Recovery should operate. *Blany (Ld.)* v. *Mahon*; *Bro. P. C.*

A Fine does not *ascertain*, but only *comprises* the lands whereof it is levied; so that it is in all cases extremely proper to have a declaration of uses; that the very lands comprehended in the Fine, and intended to pass by it, may be precisely ascertained. 1 *Cruise, cap.* 7.

Fine by E. to the use of himself for life, *remainder to his wife that should be at the time of his death, for life*; remainder to the son of E. in tail. E. took to wife A. A fine levied by E. and A. his wife, who afterwards survived him, and other uses declared, is no *bar* to her, because it was uncertain who would be the person; but had the *person been certain*, there perhaps, notwithstanding it was but a possibility, it might have been a bar; *per Walmsley, J. Cro. Eliz.* 826. *pl.* 31.

*Of Deeds to lead or declare the uses of Fines (and Recoveries)*. If a Fine or Recovery be levied or suffered without any good consideration, and without any uses declared, they, like other conveyances, enure only to the use of him who lives or suffers them. And if a consideration appears, yet as the most usual Fine *sur conuzance de droit come ceo*, &c. conveys an absolute estate without any limitations to the cognizee,

and as common recoveries do the same to the recoveror, these assurances could not be made to answer the purpose of family settlements, unless their force and effect were subjected to the direction of other more complicated deeds, wherein particular uses can be more particularly expressed. If the deeds are made previous to the Fine or Recovery, they are called deeds to *lead* the uses; if subsequent, deeds to *declare* them: and the Fine or Recovery shall enure to the uses specified in such deeds, and to no other. *Doug.* 45. 2 *Wils.* 220. If a Fine or Recovery be had without any previous settlement, and a deed be afterwards made between the parties declaring the uses to which the same shall be applied, this will be equally good as if it had been expressly levied or recovered in consequence of a deed directing its operation to these particular uses: for by *stat.* 4 & 5 *Ann. c.* 16. indentures to declare the uses of Fines and Recoveries had and suffered, shall be good and effectual in law, and the Fine and Recovery shall enure to such uses, and be esteemed to be only in trust, notwithstanding any doubts that had arisen on the statute of frauds, 29 *Car.* 2. *c.* 3. to the contrary.

If a feme covert alone declares the uses of a Fine, intended to be levied by husband and wife of her land, and the husband alone declares other uses; it hath been held that both declarations of uses are void, and the use shall follow the ownership of the lands: But in another case it was determined that the uses declared by the wife were void; and the uses declared by the husband, good only against himself, during the coverture. If husband and wife levy a Fine of the lands of the wife, and he alone declares the uses, this shall bind the wife, if her dissent doth not appear; because otherwise it shall be intended that she did consent. 2 *Rep.* 56. 59. Though there be a variance between a deed declaring uses, and the Fine levied; yet, if nothing appears to the contrary, such Fine by construction of law shall be to the uses declared in the deed, and which is evidence thereof: and where a Fine varies from a former description, it has been held that a new deed made after, will declare the uses of the Fine. It is not absolutely necessary, to insert the word *Use*, in the declaration of uses of Fines; for any words which shew the intent of the parties will be sufficient. 1 *Ld. Raym.* 289, 290.

III. A FINE may be levied of every species of real property, as of an *house*, or *messuage*, *manor*, *castle*, *office*, *rent*, &c. and in general it may be laid down as a certain rule, that a Fine may be levied of every thing, whereof a *præcipe quod reddat* lies; &c. or of any thing, whereof a *præcipe quod faciat* lies; as customs, services, &c. or whereof a *præcipe quod permittat*, or *præcipe quod teneat* may be brought. 2 *Inst.* 513.

As Fines may be levied of things in possession, so they may be levied of a remainder, or reversion, or of a right *in futuro*. 3 *Rep.* 90.

So now, since the *stat.* 32 *H.* 8. *c.* 7. (see title *Tithes*,) it may be levied of rectories, vicarages, tithes, pensions, oblations, and all ecclesiastical inheritances made temporal. Of a chantry. So it may be of a seignory. Of all services; as homage, fealty, &c. *West.* Of common of pasture. Of a corody. Of an office; as of the custody of a forest. Of a boilary. Of two pools and a fishery in the water of D. Of an annuity. See *West. Symb.* 6, 7. *Shep. Touchst. c.* 2.

A Fine may be, and usually is, levied of a share in the New River Water, by the description of so much land covered by water; and when a Fine and Recovery of such share is necessary, in regard the New River runs through the several counties of Hertford, Middlesex and London, there must be three several Fines and Recoveries. 2 *P. Wms.* 128.

Where money is agreed to be laid out in lands to be settled in tail, a Fine cannot be levied of the money, but a decree of a court of Equity can bind it, as much as a Fine alone could have bound the land, if it had been bought and settled. 1 *P. Wms.* 130. 2 *Atk.* 453. 3 *Atk.* 447. 1 *Vez.* 146. and see 1 *P. Wms.* 471. 485. 1 *Bro. C. R.* 223.

Fines may be levied of all things *in esse*, *tempore finis*, which are inheritable; but not of things uncertain; or of lands held in tail by the king's letters patent; of land restrained from sale by act of parliament, or of lands in right of a man's wife, without the wife, &c. 5 *Rep.* 225. *West.* § 25. Nor of common without number. *Cruise*, 121.

A Fine may be levied of a rent-charge, or of a chief rent; and if a person who has a rent-charge, levies a Fine of the land, out of which the rent-charge issues, it will bar the rent-charge though the Fine be levied of the land, and not of the rent-charge. *Cruise*, *c.* 7. and the authorities there cited.

A Fine may be levied of an undivided moiety, or fourth part of a manor, as well as of the whole. 3 *Rep.* 88. But where a Fine is levied of a manor, nothing but a real manor will pass, and not a manor by reputation only. *Cruise*, *c.* 7.

The word *tenement* is not a sufficient description of any thing whereof a Fine is to be levied: for a tenement may consist of an advowson, a house or land of any kind: and therefore a Fine levied of a tenement is void, or at least voidable by writ of error; but a Fine of a *messuage or tenement* would probably be now held good. *Cruise*, *c.* 7. See title *Ejectment*.

And almost any kind of contract may be made and expressed by a Fine, as by a deed, and therefore it may be so made that one of the parties shall have the land, and the other a rent out of it; and that one shall have it for a time, and another for another time; also a lease for years, or a jointure for a wife, may be made; and a gift in tail, and a remainder over, may be limited and created thereby. 1 *Rep.* 76. See further *post*, VI. as to the effect of Fines.

IV. THE KING, and all persons who may lawfully grant by deed, may levy a Fine; but not infants, ideots, lunatics, &c. 7 *Rep.* 32. A corporation-sole may levy a Fine of land which he has in his corporate capacity; but bishops, deans, and chapters, parsons, &c. are restrained from levying of Fines to bind their successors. But a fine cannot be levied by a corporation aggregate; for it cannot act but by attorney, and it cannot make conusance by attorney. All persons that may be grantees, or that may take by contract, may take by Fine; though in cases of infants, feme coverts, persons attainted, aliens, &c. who it is said, may take by Fine, before the ingrossing of the Fine, there goes a writ to the justices of C. B. *quod permittant finem levari*. *Lit.* 669. Tenant in fee-simple, fee-tail general, or special, tenant in remainder or reversion, may levy a Fine of their estates; so may tenant for life, to hold to the cognisee for life of tenant for life; but a person who is tenant, or hath an interest only for years, cannot levy a Fine of his term to another. 3 *Rep.* 77. 5 *Rep.* 124.

It is not necessary to be in possession of the freehold, in order to levy a Fine: but if any one entitled to the inheritance, or to a remainder in tail, levies a Fine, it will bar his issue, and all heirs who derive their title through him. *Hob.* 333.

A Fine by a man *non compos*, though it ought not to be levied, binds for ever when it is levied. So a Fine by a man attainted for treason, or felony, binds all but the king, or the lord of the fee. *West. Symb.* 3. *a.* See 2 *Wils.* 220. So a Fine by an infant, or feme covert without her husband, binds till it be avoided. Vide *Com. Dig.* tit. *Baron* and *Feme*, (P. 1.) *Enfant*, (B. 2.)—See 2 *Black. Rep.* 1205. a Fine acknowledged *de bene esse* by a *feme covert*, whose husband was abroad, before the Lord Chief Justice then in Court.

Where the estate of a married woman had been regularly sold, with the consent of her husband, the conveyance executed by him, and the purchase money paid, the court of

C. P. allowed the wife to levy a Fine, although her husband had in the interim become *non compos*. *New. Rep. C. P.* 312.

But the court refused to interfere to authenticate a Fine levied by a married woman in the absence of her husband, though he had become a bankrupt, and omitted to surrender himself, and was gone beyond seas. 1 *W. P. Taunton*, 37.

If commissioners take a Fine of an infant, &c. the court will grant an attachment against them; and upon examination and inspection, the Fine shall be vacated. *R. Skin.* 24.

The Court of C. P. will not permit a Fine to be levied in which it appears that the Conusor is an alien enemy. 1 *W. P. Taunton*, 144.

Lands assured for dower, or term of life, or in tail, to any woman by means of her husband, or his ancestors, cannot be conveyed away from her by Fine, &c. without her act; but if a woman and her husband levy a Fine of her jointure, she is barred of the same; though if the jointure be made after coverture, when the wife hath an election to have her jointure or dower on the husband's death, it is said this will be no bar of her dower in the residue of the land of the husband. *Dyer*, 358. *Leon.* 185. See titles *Dower*, *Jointure*.

No Fine of the husband alone, of the lands of the wife, shall hurt her, but that she or her heirs, or such as have right may avoid it; but if she joins with him, it shall bind her and her heirs. Women covert ought to be cautious in levying Fines with their husbands of their own lands; and if a married woman under age levies a Fine of her lands, she cannot reverse it during her husband's life, nor after his death, if she be full of age when he dies; but if the husband dies during her minority, she may. *Dyer*, 359. *Wood's Inst.* 243. A married woman ought not to be admitted alone without her husband to levy a Fine; and if she be received, the husband may avoid the Fine by entry; but if he do not, it is good to bar her and her heirs, except she be an infant at the time of the Fine levied; the husband and wife together may dispose of her land, &c. 12 *Rep.* 122. If baron and feme levy a Fine, the feme within age, she may be brought into court by *habeas corpus*, and if it be found by inspection, that she is under age, it hath been adjudged, where the baron and feme brought a writ of error, that as to both, *quod finis revocetur*. 1 *Leon.* 116, 117. 3 *Salk.* 168.

Husband and wife, tenants in special tail, the husband only levies a Fine, this bars the issue in tail; but it remains in right to the wife as to herself, and to all the estates and remainders depending upon it, and all the consequences of benefit to herself and others, so long as she lives, as if the Fine had not been levied. *Hob.* 257. 259. If a husband make a feoffment of the wife's land, upon condition; which is broken, and the feoffee levies a Fine, and the husband and wife die having issue, and five years pass; the heir is barred to enter as heir to the father upon the condition, but he shall have five years after the death of his father, as heir to his mother. *Plowd.* 367. When the husband and wife join in a Fine of the wife's lands, all the estate passeth from her, and he is joined only for conformity; so that if the Fine levied by husband and wife in such a case be reversed, she shall have restitution. 2 *Rep.* 57. 77. A husband and his wife covenanted to levy a Fine of the lands of the wife, to the use of the heirs of the body of the husband on the wife, remainder to the husband in fee; both dying without issue, it was held that the heir of the wife had the title, because the limitation, to the heirs of the body of the husband, was merely void, there being no precedent estate of freehold for life, &c. to support it as a remainder. 2 *Salk.* 675. 4 *Mod.* 253.

As to *femes covert*, the books which say, that a Fine shall not bind a woman under coverture unless she be examined, must not be understood as if it were in her power to reverse the Fine for want of her examination, but they are to be understood in this sense, that the Judge ought not to receive a Fine from a feme covert without examining her, lest it should not proceed from her own freedom and choice; but if such a Fine be once admitted, and recorded without any examination, though the judge has omitted a very necessary part of his duty, yet the Fine shall stand, and neither the feme nor her heirs shall be admitted to aver that she was not examined; for that were to lessen the credit of the judgment of the courts of justice, which is the highest evidence of the law. 2 *New. Abr.* 527. See 1 *Inst.* 121. *a*, in the note already referred to; in which arguments are brought to prove (apparently with great force and justice) that the common notion, of a Fine binding *femes covert* merely by reason of the secret examination of the wife by the judges, is incorrect. If the secret examination by itself was so operative, the law would provide the means of effectually adding that form to ordinary conveyances, and so make them conclusive to *femes covert* equally with a Fine. But it is clearly otherwise; and except in the case of conveyance by custom there must be a *suit depending* for the freehold, and inheritance; or the examination, being extra-judicial, is ineffectual. This mode of binding *femes covert* by the judgment of the court in a real action, appears to have arisen from admitting them and their husbands jointly to defend actions brought against the feme for her estate, the adverse judgment on which was final against the feme.—When the transition was made to the case of friendly suits, the form of secret examination was introduced to avoid any undue influence of the husband. That the examination of a feme in other cases does not bind her to the alienation of her property. See 2 *Inst.* 673. *Keilw.* 4—20.—The just explanation therefore of the subject seems to be, that the pendency of a real action for the freehold of the land, in consequence of previously taking out an original writ, (without which preliminary, even at this day a Fine is a nullity,) should be deemed the *primary* cause of a Fine's binding a feme covert: and that her secret examination on taking the acknowledgment of the Fine, is only a secondary cause of this operation of Fines; See this Dict. title *Baron and Feme*, VIII.

If a widow having an estate in dower accept by a Fine, and by the same Fine render back the land for 100 years, &c. *this is a forfeiture of her estate* within the *stat.* 11 *H.* 7. *c.* 20. See *ante*, 1, 3.

A. seised in fee levied a Fine to himself for life, remainder to his wife in tail male for her jointure: had issue male; husband and wife levied a Fine and suffered a recovery.—After the death of the husband and wife issue male entered by force of the *stat.* 11 *H.* 7. and held lawful. This case is out of the letter, though within the remedy of the statute, for she neither levied the Fine, &c. being sole, or with any after-taken husband but by herself with the husband who made the jointure. *Co. Litt.* 365, *b.* See further *Vin. Abr.* Jointress I. K. *Bac. Abr.* Discontinuance (D): as to what shall be deemed a forfeiture within the *stat.* 11 *H.* 7. *c.* 20. and who shall take advantage of it.

If tenant for life grants a greater estate by Fine, than for his own life, it is a forfeiture; and if there be *tenant for life*, and *remainder for life*, and the tenant for life levy a Fine to him in remainder and his heirs, both their estates are forfeited; the tenant for life by levying the Fine, and the remainder-man for life by accepting it. 2 *Lev.* 209. Where a Fine is levied by tenant for life, for a greater estate, the Fine may be good; but it is a forfeiture of the estate of tenant for life, whereof he in remainder, &c. may take present advantage and enter: and when a person enters for a forfeiture, all estates are avoided. *Dyer*, 111. Though if such a tenant for life levy a Fine *sur grant et release* to the cognisee for the life of tenant for life; or by a Fine grant a rent out of the land for a longer time, the Fine is good, and there will be no forfeiture of the estate of tenant for life: so likewise if a Fine

be levied of lands by tenant for life to a stranger, who thereby acknowledges all his right to be in the tenant for life, and releases to him and his heirs. 27 *Ed.* 1. 1. 44 *Ed.* 3. 36.

If there be tenant in tail upon condition not to alien, or discontinue the lands, &c. if he doth, the donor to re-enter; and his issue levy a fine of the land, this is a forfeiture of the estate. 1 *Leon.* 292. An estate being settled on husband and wife for life, remainder to first and other sons in tail, with remainders over; after the birth of their eldest son, they by release and Fine, mortgaged the lands: on a bill exhibited against the son to redeem, &c. he pleaded the marriage settlement of his father and mother, whereby they were but tenants for life, and that his Fine was a forfeiture of their estate: and so it was adjudged. *Preced. Canc.* 591. But it is said where a wife by settlement has only a trust for life, if she joins with her husband in a mortgage in fee and Fine of the lands; this trust is not forfeited, as it would be in a case of a legal estate. 1 *P. Wms.* 147.

As to Fines levied by an *infant*, though strictly speaking all contracts made by infants are in their own nature void, *because a contract is an act of the understanding, which during their infancy, they are presumed to want;* yet civil societies have so far supplied that defect, and taken care of them, as to allow them to contract for their benefit and advantage, with power to recede from and vacate it when it may prove prejudicial to them; now the method to set aside such a contract must be by matter of equal notoriety with the manner in which it was made; and therefore if an infant levies a Fine which is no more than his own agreement recorded as the judgment of the court, he must reverse it by writ of error, and this must be brought during his minority, that the court of B. R. may by inspection determine the age of the infant; but the judges may in such cases inform themselves by witnesses, church-books, &c. 2 *New. Abr.* 526. *Co. Lit.* 380 *b. Moor*, 76. 2 *Rol. Abr.* 15. *Bro.* tit. *Error. Bro.* tit. *Fines*, 74. 79. 2 *Inst.* 482. 2 *Bulst.* 320. 12 *Co.* 122. See this Dict. title *Infant*, and the *stat.* 7 *Ann. c.* 19. there cited.

With regard to *ideots* and *lunaticks*, it is necessary to distinguish between their acts done *in pais*, and those solemnly acknowledged on record; though the law is clear, that in neither case are they admitted to disable themselves, for the insecurity that may arise in contracts from counterfeit madness and folly, but their heirs and executors may avoid such acts *in pais* by pleading the disability; because, if they can prove it, it must be presumed real, since nobody can be thought to counterfeit it, when he can expect no benefit from it himself. 4 *Co.* 124. 12 *Co.* 124. *Co. Lit.* 247. *Bro.* tit. *Fait*, 62. *Cro. Eliz.* 398. 622. *F. N. B.* 202.

But neither the lunatick himself, nor his heir, can vacate any act of his done in a *court of record;* and therefore if a person *non compos* acknowledges a Fine, it shall stand against him and his heirs; for though the judge ought not to admit of a Fine from a man under that disability, yet when it is once received, it shall never be reversed, because the record and judgment of the court being the highest evidence in the law, presumes the conusor, at that time, capable of contracting; and therefore the credit of it is not to be contested, nor the record avoided by any averment against the truth of it. 4 *Co.* 124. 12 *Co.* 124. 2 *Inst.* 483. *Bro.* tit. *Fines*, 75. *Co. Lit.* 247. See this Dict. titles *Ideots* and *Lunaticks*.

By the Common-law if an infant or ideot has by any neglect or contrivance been permitted to levy a Fine, his declaration of the uses thereof will be good, so long as the Fine remains in force; and if the Fine is never reversed, his declaration of the uses will be binding and conclusive on him and his heirs for ever: because the law will not presume that a Fine, which is a solemn act on record, has been levied by a person labouring under such disabilities; and therefore until the Fine, which is the principal, is annulled, the declaration of the uses thereof will remain good. Thus stands the Common-law on this point: but as the Court of Chancery has, in many instances, compelled persons who had obtained estates under a Fine in a fraudulent manner to reconvey them to those who were really entitled thereto; so that Court will interpose its authority in cases of this kind, and not suffer the declaration of uses of a Fine levied by an ideot to bar his heirs; as no species of fraud can be more evident, than that of obtaining a conveyance from a person of this description. *Cruise, c.* 15. and see *post*, VII. and tit. *Recovery*.

V. Fines are now levied in the court of Common Pleas at Westminster, on account of the solemnity thereof, ordained by the *stat.* 18 *Ed.* 1. *st.* 4. and 27 *Ed.* 1. *st.* 1. *c.* 1. before which time they were sometimes levied in the Exchequer, in the County Courts, Courts Baron, &c. They may be acknowledged before the Lord Chief Justice of the Common Pleas, as well in, as out of, court; and two of the justices of the same court, have power to take them in open court; also justices of assize may do it by the general words of their patent or commission; but they do not usually certify them without a special writ of *dedimus potestatem*. 2 *Inst.* 512. *Dyer*, 224. The chief Justice of C. P. may, by the prerogative of his place, take cognisance of Fines in any place out of the court, and certify the same without any writ of *dedimus potestatem*. But the Chief Justice of England cannot, nor any other of the justices, except the Chief Justice of C. P. who hath this special authority by custom and not by any statute. 9 *Co. Read.*

If an acknowledgment of a Fine is taken before the Chief Justice, no *dedimus* is necessary; and while a judge is in town, no *dedimus* can be directed to any other commissioners; if the acknowledgment be taken before a judge or serjeant, a *dedimus* to authorise it may issue afterwards, but in the case of all other commissioners the *dedimus* must issue before the acknowledgment taken. 3 *W. P. Taunton*, 49.

The King by patent or commission, with a *non obstante*, may give power to A. and B. justices of assize in a circuit, when A. is not a judge of either of the benches, only a serjeant at law, &c. to take the cognisance of all Fines jointly and severally; and upon such a commission, the cognisance of a Fine taken by A. will be good, without any *dedimus potestatem* sued out before or after it. *Jenk. Cent.* 277.

Fines may be and are levied in the city of Chester, by *stat.* 43 *Eliz. c.* 15. In the county palatine of Chester, by *stat.* 2 & 3 *E.* 6. *c.* 28. In the county palatine of Lancaster, *stat.* 37 *H.* 8. *c.* 19. In that of Durham, by *stat.* 5 *Eliz. c.* 27. And in the courts of great sessions in Wales, by *stat.* 34 & 35 *H.* 8. *c.* 26. § 40.

The tenure of *Ancient Demesne* being a species of privileged villenage, the tenants thereof could not sue or be sued for their lands in the King's courts of Common-law, but had the privilege of having justice administered to them in the court of the manor by *petit writ* of *droit close* directed to the bailiffs of the King's manors or to the lord of the manor whereof the lands were held. In consequence of this principle no fine could be levied by a tenant in ancient demesne in the court of Common Pleas; but as such tenants were allowed to commence actions in the court of the manor, they were also permitted to compound their suits; by which means Fines have at all times been levied of lands held in ancient demesne upon little writs of right close in the court of the manor. These Fines work a discontinuance; and the reason is because the freehold is recovered in the action; every recoveror being supposed to recover a fee simple; and the recovery of the fee-simple must work a discontinuance. 1 *Cruise*, 93 *b.* edition 1786. By *stat.* 59 *Geo.* 3. *c.* 80. *Recoveries* in courts of ancient demesne may be suffered by attornies for the vouchees, &c.

Fines are also taken by commissioners in the country, impowered by *dedimus potestatem;* the writ of *dedimus* doth surmise, that the parties who are to acknowledge the Fine are not able to travel to Westminster for the doing thereof; these commissions, general and special, issue out of the Chancery. By the *Common law* all Fines were levied in Court; but the *Stat.* of *Carlisle*, 15 *Ed.* 2. allows the *dedimus potestatem* to commissioners, who may be punished for abuses, and the Fines taken before them set aside: and it is said an information may be brought by him in reversion against commissioners, who take the caption of a Fine, where a married woman, &c. is an infant. 3 *Lev.* 36.

In the levying of Fines in court, a pleader shall say *Sir justice congé d' accorder*, &c. i. e. he desires *leave to accord or agree:* and when the sum for the King's Fine is agreed, after proclamation and crying the peace the pleader shall repeat the substance of the Fine, &c. See *Stat. de Finibus*, 18 *Ed.* 1. *st.* 4.

Touching the *form of Fines*, it is to be considered upon what writ or action the *concord* is to be made: and there must first pass a pair of indentures between the cognisor and cognisee, whereby the cognisor covenants to pass a Fine to the cognisee of such things, by a time limited; and these indentures preceding the Fine are said to *lead the uses* of the Fine. But by the *stat.* 4 *Ann. c.* 16. the uses of a Fine, &c. may be declared *after the fine levied*, and be good in law. Upon this the *writ of covenant* is brought by the cognisee against the cognisor, who then yields to pass the Fine before the judge; and so the acknowledgment being recorded, the cognisor and his heirs are presently concluded, and all persons (strangers not excepted) after five years past; and if the writ, whereon the Fine is grounded, be not a *writ of covenant*, which is usual, but of *warrantia chartæ*, or a writ of right, or of customs and services, &c. then the writ is to be served upon the party that is to acknowledge the Fine; and he appearing doth it accordingly. *West.* § 23. *Dyer*, 179.

It is the statute *de finibus* 18 *E.* 1. *st.* 4. which directs that a *final concord* cannot be levied in the King's court, without original writ. And when a Fine is passed, it is to be in the presence of the parties, who are to be of full age, and good memory; and if a feme covert be one, she is to be privately examined if she consent freely; for if she doth not, the Fine cannot be levied. By *stat.* 1 *R.* 3. *c.* 7. when a fine is engrossed and read and proclaimed in the court of C. B. a transcript is to be sent to the justices of assise, and another to the justices of the peace of the county where the land lieth, to be openly *proclaimed* at their several sessions, which being certified, concludes all persons; but quere whether this is not superseded by the *stat.* 4 *H.* 7. *c.* 24. which declares that the proclamations in court being made, the Fine shall be final? See *ante*, I.

The day and year of acknowledging a Fine, and warrant of attorney for the suffering a recovery, are to be certified with the concord: and an office is erected for the *inrolment* of writs for Fines, &c. the fees whereof are limited and appointed by *stat.* 23 *Eliz. c.* 3.

Every Fine at the time of signing the Judge's *allocatur* thereon, shall have the writ of covenant made out and annexed thereto. *Reg. Gen. C. P. Trin.* 30. *G.* 3.

No Fine which appears to have been acknowledged more than twelve months, can pass the King's Silver Office, without a rule of court or Judge's order. In such case, if the Conusor be living, an affidavit must be made thereof; if dead, the affidavit must state the time of his death; and the application for a rule or order, that the Fine may pass the King's Silver Office, shall be made on motion to the court, if in term time; if in vacation to a judge at chambers: and the rule or order must be filed with the præcipe and concord at the King's Silver Office. *Reg. Gen. C. P. Pasch.* 36 *G.* 3.

If under a *dedimus potestatem*, to take the acknowledgment of nine persons to a Fine, the commissioners take the acknowledgment of six on one piece of parchment, and of three on another, the court will not allow the Fine to pass. 3 *Bos. & Pull.* 366.

A Fine of lands in Scotland was permitted to be acknowledged before persons who were not writers to the signet, none such residing within 100 miles, and the parties in fact being unable to travel. 7 *W. P. Taunton*, 696.

VI. See GENERALLY as to the effect of a Fine, *ante*, I. 3. —More particularly,

*Interests* in estates which may be barred by Fine, are either *interests* by *Common-law*, or by *custom;* as copyholds, &c. And if I have a fee-simple, and am disseised, and the disseisor levies a Fine with proclamations, and I do not claim within five years after, I and my heirs (allowance being made for impediments) are barred for ever. *Plowd.* 353. 3 *Rep.* 79. If a man purchase lands of another in fee, and after finding his title to be bad, and that a stranger hath right to the land, levies a Fine thereof with intent to bar him; and he suffers five years to pass without claim, &c. he is barred of his right for ever: and in these cases none shall be relieved in equity. 3 *Rep. Doct. & Stud.* 83. 155.

*Femes covert* have five years after the death of their husbands, to avoid the Fine of the husband of the wife's lands; and also to claim their dower; and if they do not make their claim in that time by action or entry, they are barred by statute. *Dyer*, 72. 2 *Rep.* 93.

An *infant* shall have five years after he comes of age, although he was in his mother's womb at the time of the Fine levied. *Plowd.* 359. And an infant is allowed time, during his minority, to reverse his own Fine and prevent the bar; and if not reversed during that time, their Fines will be good. *Aff. pl.* 53.

*Strangers* out of the realm at the time of the Fine levied, shall have five years after their return to prevent the bar; and so if they were in England when the Fine was levied, and within five years are sent in the King's service by his commandment. *Plowd.* 366. A person in Scotland or Ireland shall be said to be *out of* the realm. 4 *H.* 7. *c.* 24.

Lunatics, &c. shall have five years after the cure of their maladies, though the infirmity happen after the Fine levied, if before the last proclamation. *Plowd.* 367. *Dyer*, 233.

And they who have *divers defects* have five years after the last infirmity removed; but if the party dies, his heir shall *not* have a new five years. *Plowd.* 375. *Dyer*, 233.

If a *feme covert* dies during the coverture, being no party to the Fine, &c. or if an *infant* being party to the Fine, and having present right, dies in his infancy: if a *person beyond sea* when the Fine was levied, never return, &c. a *person in prison* dies whilst therein: or if one *non compos*, &c. dies such in all these cases, their heirs are not limited to any time. 2 *Inst.* 519, 520.

Five years are given after *a remainder* falls; and five years after the *forfeiture* of tenant for life. *Plowd.* 374. See *stat.* 4 *H.* 7. *c.* 24.

When once the five years, allowed to an infant to make an entry for the purpose of avoiding a Fine, begin, the time continues to run, notwithstanding any subsequent disability: Neither will subsequent insanity stop the running of a Fine once commenced. 4 *Term Rep. K. B.* 300. 306. *n.*

A *future interest* of another person, cannot be barred by Fine and non-claim, until five years after it happens; as in case of a *remainder* or *reversion*. 2 *Rep.* 93. *Raym.* 151.

The *stat.* 4 *H.* 7. *c.* 24. contains a saving for reversionary and future rights if claim be made within 5 years after title accrued: the Court of C. P. have determined, 1. That he who will take the benefit of this saving must be other than a

party or privy to the Fine. 2. That the right must first come to him. 3. That it must so first come after the Fine and proclamations; and 4. It must come by matter existing before the Fine. 1 *W. P. Taunton*, 578.

Where there is no present nor future right in land, &c. only a *possibility* at the time of levying the Fine, a person may enter and claim when he pleases. 10 *Rep.* 49. Also when there is only *right* to a rent, &c. issuing out of lands, and not the land in the Fine, the persons that have it are not barred at all. 5 *Rep.* 124.

No fine bars any estate in *possession* or *reversion*, which is *not devested*, or *put to a right*. 9 *Rep.* 106. He that at the time of a Fine levied had not any *title* to enter shall not be immediately barred by the Fine: but this is in case of *an interest* not turned to a *right* where a man is not bound to claim; and not in the case of tenant in tail, barring his issue. See *stat.* 32 *H.* 8. *c.* 36.

When an estate is *put to a right*, and there comes a Fine and non-claim, it is a perpetual bar. *Carter*, 82. 162. A Fine, *sur grant et render* was levied, and a *scire facias* brought and judgment given, and also writ of seisin awarded but not executed, and afterwards a second Fine was levied and executed, and five years passed; it was the opinion of the court that the second Fine barred the first. *March's Rep.* 194. 2 *Nels. Abr.* 864.

If a man *attainted of treason* or *felony*, levy a *fine* of his land, this, as to the King, and lord of whom the land is held, is *void*, and no bar to their *title of forfeiture*: but as to all others it is a good bar. 2 *Shep. Abr.* 241. One levied a *fine*, and then was *outlawed for treason* and died; the heir reversed the outlawry, and it was held the wife should have her dower, if she bring her action within five years. *Moor*, *c.* 876. A fine is levied by the lessee for life, &c. who continues the possession, and pays the rent; it shall not bind the lessor, who shall have five years claim after the determination of the lessee's estate, &c. 3 *Rep.* 77, 78. If one doth levy a Fine of my land, while I am in possession, this will not hurt me; nor where a stranger levies a Fine of my lands let to a tenant, if the tenant pays me his rent duly: and if there is tenant in tail, or for life, remainder in tail, &c. and the first tenant in tail, or for life, bargains and sells the land by deed enrolled, and levies a Fine to the bargainee, the remainders are not bound; *for the law adjudges them always in possession.* 9 *Rep.* 106.

Lessees who pretend title to the inheritance of the lands, cannot by Fine bar the inheritance. 3 *Rep.* 77. But if a lease is made for years, and the lessor before entry of the lessse levies a Fine with proclamations, and the lessee doth not make his claim within five years, the lessee is barred, and no relief can be had for him; for though the lessee for years cannot levy a Fine, yet he shall be barred by a Fine levied by the tenant of the land, &c. 5 *Rep.* 124. If a person hath a remainder depending on an estate for years, and the termor is disseised, and a Fine is levied and five years past, &c. the termor and reversioner are barred: because the termor might presently have entered, and he in remainder had an assise. *West.* § 183. In case a person enters upon, and puts out a copyholder, and the disseisor doth levy a Fine of the lands, if the copyholder suffer five years to pass after the disseisin and Fine, without making any claim, the interest of the copyholder, and his lord are hereby barred for ever: and if a copyholder makes a feoffment in fee upon good consideration, and the feoffee levies a Fine with proclamations, and five years pass, the lord is barred; but if a copyholder himself levies a Fine, and five years do pass, the lord is not barred, for the copyholder not having a freehold, the Fine will be void. *Wood's Inst.* 247, 248.

A Fine of *cestui que trust* shall bar and transfer a trust, as it would an estate at law, if it were on a good consideration. *Chan. Rep.* 49. And it is said that such a Fine with proclamations and five years non-claim, will bar the *remainder* of a *trust estate*. 1 *Vern.* 226. And Fines of *cestui que use* are as good as if levied of immediate possessions, &c. 2 *Nels. Abr.* 860.

Where husband and wife granted to trustees an estate, of which the wife's father was seised in fee-simple, and afterwards in the life of the father they levied a fine of the lands to the use of the settlement: and the father afterwards died leaving the wife one of the co-heiresses: The court of K. B. on a case out of Chancery, held, that the wife's moiety of the estate became subject to the uses of that settlement by reason of the Fine, as an Estoppel against the husband and wife, and all persons claiming title under them. *Helps & Ux.* v. *Hereford*, *Term Rep. K. B. Hil.* 59 *G.* 3. 242.

Where the ancestor is barred by the Fine, there for the most part the heir is barred also. 9 *Rep.* 105. Although the *issue in tail* be within age, out of the realm, &c. when a Fine is had and the proclamations passed, the estate tail shall be barred. 3 *Rep.* 84. The tenant in tail, to him and the heirs male of his body, hath three sons, the second levies a *Fine* in the life of the father, and the father dies; here the eldest is not barred. But if the elder die without issue, living the second, it is a bar to the third. *Hob.* 333. *Jenk. Cent.* 96. Tenant in tail discontinues: the discontinuee levies a Fine with proclamations, and five years pass without claim in the life of tenant in tail: in this case the issue may have a *formedon*, and shall not be barred; for his father could not claim. It is otherwise where he is disseised, and the disseisor levies such Fine; there the tenant in tail may claim, &c. *Jenk. Cent.* 192.

A tenant for life, and he that is next in remainder in tail join in a Fine; it is a good bar to the issue in tail for ever, so long as that estate-tail shall continue. 10 *Rep.* 96.

If one makes his title as heir by another, and not by him that levied the Fine, he is not barred. Also *he that is privy in blood only, and not in estate, is not within the statutes to be barred* by a Fine: as if lands are given to a man and the heirs female of his body, and he hath a son and a daughter, and the son levies a Fine, and dies without issue, this is no bar to the daughter; for notwithstanding she be heir to his blood, yet she is not heir to the estate, nor need make her conveyance to it by him: but if her father had levied the Fine, it would have been otherwise. *Trin.* 21 *Jac.* See *Cro. Jac.* 689.

A Fine, &c. cannot destroy an *executory* estate, which depends upon *contingencies*, as it is uncertain whether there will ever be an estate *in being for the Fine to work upon*; but a *Fine and Recovery* will bar an estate in *remainder*, as that is an estate *vested*. 1 *Lill. Abr.* 617. See title *Recovery*. Estates by statute-merchant, statute-staple, and *elegit*, may be barred, if a Fine is levied, and those that have right suffer five years to pass without claim, &c. 5 *Rep.* 124. If a Fine be levied of lands in ancient demesne it doth not bar by the statute of non-claim. *Lut.* 781.—See *ante*, V.

In the case of *Bourne* v. *Hunt*, where tenant in tail of lands in ancient demesne levied a Fine, in the court of ancient demesne for three lives with warranty; then levied a second Fine with warranty to the use of himself and his heirs; and then bargained and sold to one and his heirs, the following points were determined: 1st. That a Fine may be levied in courts of ancient demesne.—2dly. That such Fines are no bar to the issue in tail, but that they work a discontinuance. 3dly. That the discontinuance determined with the three lives, and that the second Fine made no discontinuance. 4thly. That the issue in tail have twenty years to make their entry after the expiration of the lease for lives.—See 1 *Com. Rep.* 93. (*Rose's* ed.) *Bro. P. C.*

As *Deans*, *Bishops*, *Parsons*, &c. are prohibited by statute

to levy Fines, and may not have a writ of right, they are not barred by five years non-claim, and their non-claim will not prejudice their successors. *Plowd.* 238. 375.

By the ancient Common-law he that had right was to make his claim, &c. *within a year and a day of the Fine levied and the execution thereof*, or he was barred for ever: but this bar is now gone; and if Fine *without proclamations* according to the Common-law, be now levied, he that hath right may make his claim or entry, at any time to prevent the bar. *Co. Lit.* 254. 262.

Where a Fine may be a bar as to some lands, and not as to other lands. See *F. N. B.* 98. A Fine was levied, and five years passed without bringing a writ of error; and it was held a good bar within the *stat.* 4 *H.* 7. *c.* 14. *Cro. Jac.* 333. But it has been adjudged that where five years pass, that shall not hinder, where the Fine is erroneous. 2 *Nels. Abr.* 838.

Although a bill in equity is not such an action as will avoid a Fine, if the subject matter of the suit be of legal jurisdiction, yet still in some instances the filing a bill in a Court of equity, will prevent the bar from a Fine and *nonclaim:* and in cases of this kind the court will direct a trial at law, with an order that the defendant shall not set up a Fine in bar of the plaintiff's claim: upon the same principles that such court sometimes directs that the defendants in a suit at law shall not plead the statute of Limitations. 1 *Cruise*, 329. See *Pincke* v. *Thornycroft*, 1 *Bro. C. R.* 289. *Bro. P. C.*

A. seised in fee levied a Fine to himself for life, remainder to his wife in tail-male for her jointure; had issue male; husband and wife levied a Fine and suffered a recovery. After the death of the husband and wife issue-male entered by force of the *stat.* 11 *H.* 7. and held lawful. This case is out of the letter, though within the remedy of the statute, for she neither levied the Fine, &c. being sole, or with any after-taken husband, but by herself with the husband who made the jointure. *Co. Litt.* 365. *b.*—See further, *Vin. Abr. Jointress* I. K. *Bac. Abr. Discontinuance* (D.) as to what shall be deemed a forfeiture within the *stat.* 11 *H.* 7. *c.* 20. and who shall take advantage of it.

A. seised in fee of lands dies, leaving B. his heir, a feme covert. Upon his death a stranger makes a tortious entry on the lands, continues in possession and levies a Fine *sur conisance de droit come ceo* with proclamations: B. afterwards dies under coverture, no entry having been made on her behalf to avoid the Fine, leaving C. her heir of the age of twenty-one, of sound mind, out of prison, and within the realm. The Fine is a bar to the right of C. unless he make his claim within five years after the death of B. 2 *H. Blackst.* 584.

VII. FINES MAY BE REVERSED for error, so as the writ of error be brought in *twenty years*, &c. and not afterwards by *stat.* 10 & 11 *W.* 3. *c.* 14. Which twenty years are to be computed from the time of the Fine levied, and not from the time the title accrued. 2 *Stra.* 1257. See title *Recovery* and *stat.* 23 *Eliz. c.* 3. there stated.

No person can bring a writ of error to reverse a Fine, or any judgment, that is *not entitled* to the land of which the Fine was levied; for the courts of law will not turn out the present tenant, unless the *demandant* can make out a *clear title, possession always carrying with it the presumption of a good title till the right owner appears;* besides, where the plaintiff in the writ of error cannot make out a title, he can receive no damage by the Fine, which the writ of error always supposes to be done, though it should be erroneous; and therefore it is no less than trifling with the courts of justice, to seek relief when he cannot make it appear that he has received any injury. 1 *Rol. Abr.* 747. *Dyer*, 90. 3 *Lev.* 36.

But if there be several parties to an erroneous Fine, they shall *all join* with the party that is to *enjoy* the land, though they themselves cannot have any thing. 1 *Roll. Abr.* 747. *Dyer*, 89.

There must generally be an *actual entry* to avoid a Fine. The delivery of a declaration in ejectment does not amount to an entry sufficient for this purpose; even though the defendant appears to it, and confesses lease entry and ouster; for there must be an actual entry made *animo clamandi*, whereas in ejectment there is only a fictitious or supposed entry for the purpose of making a demesne. *Berrington*, v. *Parkhurst*, *Bro. P. C.* 2 *Stra.* 1086. See 1 *Vent.* 42. 3 *Burr.* 1897. *Doug.* 433. 435.—But no entry is necessary where the Fine is levied without proclamations; for the *stat.* 4 *H.* 7. *c.* 24. does not extend to such a Fine, and it may be avoided at any time within twenty years. 2 *Wils.* 45.—The entry, when necessary, must be made by the person who has a right to the lands, or by some one appointed by him. 1 *Inst.* 258, *a.*

Tenant for life remainder to R. P. in fee; tenant for life leases for her life and dies in 1799, and lessee continues in possession without paying rent, till his death in 1805, when his son takes possession and continues without paying rent, and in 1807 levies a fine with proclamations. The court of K. B. held that the heir of R. P. might maintain an ejectment against the son without an actual entry to avoid the fine, or a notice to determine the tenancy. *Doe, d. Burrell*, v. *Perkins*, *Term Rep. K. B. Mic.* 55 *Geo.* 3. 271.

If one of two tenants in common of a reversion levy a fine of the whole, such fine does not require an actual entry by the other tenant in common to avoid it. *Roe, d. Truscott*, v. *Elliott*, *Term Rep. K. B. Mic.* 58 *Geo.* 3. 85.

Nothing can be assigned for error that contradicts the record: for the records of the courts of justice, being things of the greatest credit, cannot be questioned but by matters of equal notoriety with themselves; wherefore, though the matter assigned for error should be proved by witnesses of the best credit, yet the judges would not admit it. 1 *Roll. Abr.* 757.

If there be error in proclamations it shall be taken as a good Fine at common law. 3 *Rep.* 86. A Fine may stand though the proclamations according to the statute are irregular, for Fines are matters of record, and remain in substance and form as they were before. *Plowd.* 265.

Hence it is, that in a writ of error to reverse a Fine, the plaintiff cannot assign that the conusor died before the *teste* of the *dedimus potestatem*, because that contradicts the record of the conusance taken by the commissioners, which evidently shews, that the conusor was then alive, because they took his conusance after they were armed with the commission and the *dedimus* issued. *Dyer*, 89, *b.* 1 *Rol. Abr.* 757. *Cro. Eliz.* 469.

But the plaintiff in error may say, that *after* the *conusance* taken, and *before* the *certificate* thereof returned, the *conusor* died; because this is consistent with the record. 1 *Rol. Abr.* 757.

By the chirograph of a Fine the caption appeared to be on the 23d of December, whereas in fact the Fine was not acknowledged till the 2d of March following, and this was offered to be proved. But the court refused to admit the evidence, being of opinion, that no proof of the time of acknowledging a Fine ought to be admitted contrary to, or against the chirograph thereof: and that the record which is the chirograph of a Fine, cannot be falsified till it is vacated or reversed. *Say and Sele Ld.* v. *Lloyd.* 1 *Salk.* 341. 13 *Mod.* 40. *Bro. P. C.*

If there is any difference between the record of the Fine, which remains in the possession of the chirographer, deemed the *principale recordum*, and the record which remains with the *custos brevium*, the latter shall be amended, and made according to the former. 3 *Leon.* 188.

If a lessee for years, or a disseisee, or one that hath right only to a reversion or remainder, levy a Fine to a stranger that

hath nothing in the land, this Fine will be void or voidable as to the stranger; and he that hath cause to except against it, may shew *that the frechold and seisin was in another at the time of the Fine levied*, and that *partes finis nihil habuerunt tempore levationis finis*, and by this avoid the Fine: and yet a disseisor, who hath a fee-simple by wrong in him, may levy a Fine to a stranger that hath nothing in the land, like unto one that is rightfully seised of land in fee, &c. and it will be a good Fine. *Plowd.* 353. 3 *Rep.* 87. If the *cognisor* of a Fine hath nothing in the land passed, at the time of the Fine levied, the Fine may be avoided: but where the *cognisor* or *cognisee* is seised of an estate of freehold, whether by right or by wrong, the Fine will be a good Fine in point of estate. 41 *E.* 3. *c.* 14. 22 *H.* 6. *c.* 43.

Fines are not reversible for rasure, interlineation, misentry, &c. or any want of form; but it is otherwise if of substance. *Stat.* 23 *Eliz. c.* 3. A Fine shall not be reversed for small variance, which will not hurt it; nor is there occasion for a precise form in a render upon a Fine, because it is only an *amicable assurance* upon record. 5 *Rep.* 38. If a Fine be levied of lands in a wrong parish, though the parish in which they lie be not named, it will be a good Fine, and not erroneous, being an amicable assurance: and a Fine of a close may be levied by a *lieu conus* in a town, without mentioning the town, vill, &c. *Godb.* 440. *Cro. Jac.* 574. 2 *Mod.* 47. If there be want of an original, or no writs of covenant for lands in every county; or if there is any notorious error, in the suing out a Fine, or any fraud or deceit, &c. writ of error may be had to make void the Fine. *Co. Lit.* 9. *Cro. Eliz.* 469. So if either of the parties dies before finished, &c. And if the cognisor of a Fine die before the return of the writ of covenant (though after the caption of the Fine) it is said it may be reversed. 3 *Salk.* 168.

If either of the parties cognisors die after the king's silver is entered, the Fine shall be finished, and be good. *Cro. Eliz.* 469.

If the king's silver is not entered before the conusor's death, the Fine may be reversed for error. 3 *Mod.* 140. But in 2 *Ld. Raym.* 850. it is said, if a Fine be acknowledged before commissioners in the conntry in the long vacation, and before the next term the conusor dies; though no writ of covenant was sued, nor king's silver entered; yet the Common Pleas will permit the conusee to enter the Fine, as of Trinity Term preceding. See further *Vin. Abr. Fine. F. b.* 6. In the case of *Watts* v. *Birkett*, however, where the conusor died before the return of the writ of the covenant, the Fine was set aside after it had been completed, because the Post Fine or king's silver, due at the return of the writ of covenant, *and not before*, became due and was paid after the death of the conusor. 1 *Wils. part.* 1. *p.* 115.

A writ of error may be brought in B. R. to reverse a Fine levied in C. B. and the transcript only, not the very record of the Fine, is removed in these cases: but if the court of B. R. adjudge it erroneous; then a *certiorari* goes to the chirographer to certify the Fine itself, and when it comes up it is cancelled. 1 *Salk.* 341. And where on a writ of error in B. R. to reverse a Fine in C. B. the Fine was affirmed; a *writ of error coram vobis residen'* hath been allowed to lie. *Ibid.* 357. The court of B. R. will not reverse a Fine without a *sci. fac.* returned against the tertenant, because the cognisees are but nominal persons. *Ibid.* 339. Though a Fine may be set aside, by pleading *that neither of the parties had any thing in the estate, at the time of levying the Fine;* yet those that are *privy to the person* that levied the Fine, are estopped to plead this plea. 3 *Rep.* 88. In pleading a Fine or recovery to uses, the deed need not be set forth; but the pleader is to say, that the Fine, &c. was levied *to such uses*, and produce the deeds in evidence to prove the uses. 8 *W.* 3 *B. R.*

Fines may be avoided where they are obtained by fraud, covin, or deceit, though there be no error in the process; and that may be done either by writ of disceit or averment setting forth the fraud or covin. *Cro. Eliz.* 471.

Thus if a Fine be levied of land in ancient demesne, the lord shall have a writ of disceit against the conusor and the tenant, and by that avoid the Fine. *F. N. B.* 93, *a. Moor*, 6. See *ante*, V. VI.

If a Fine be levied to secret uses to deceive a purchaser, and the conusee pleads the Fine in bar, the purchaser may aver the fraud in avoidance of the Fine, by 27 *Eliz. cap.* 4. and such averment is not contrary to the record, *because it admits the Fine, but sets it aside for the covin and fraud in obtaining it.* 3 *Co.* 8, *a. Plowd.* 49, *a.*

So if a Fine be levied upon *an usurious contract*, it may be avoided by *averment*, because such Fine being levied for ends the law has prohibited, the law will not encourage any evasion out of the act, nor suffer such *usurious contracts* to be supported by the solemn acts of the courts of justice against the intention of the act. 3 *Co.* 80.

A fraudulent obtaining of a Fine, or irregularity therein, cannot be relieved against in *Chancery;* but the relief must be sought in the court where the Fine was levied, though the officers may be examined and punished, if they did it *criminaliter*. And where one was personated on levying a Fine, it was not set aside in equity, but a reconveyance ordered of the land. *Prec. Ch.* 150, 151. For though the court of Chancery does not set aside a Fine so fraudulently obtained, nor send the party aggrieved to the court of C. P. to get it reversed, yet it considers all those who have taken an estate by such a Fine, with notice of the fraud, as trustees for the persons who have been defrauded, and decrees a reconveyance of the lands: on the general ground of laying hold of the ill conscience of the parties to make them do that which is necessary for restoring matters to their situation. 1 *Cruise*, 314. See *Toth.* 101. 1 *Eq. Ab.* 259. 1 *Vez.* 289. 2 *Vern.* 307.

In some cases the court will vacate a Fine upon motion to prevent the parties the trouble and expence of a writ of error. 3 *Lev.* 36. 2 *Wils.* 115. In *Hubert's case*, (*Cro. Eliz.* 521.) where one levied a Fine in the name of another, not privy nor consenting thereto, the Fine was declared void by a *vacat* on the roll; and the Lord Keeper in that case said he had always noted this difference—If one of my name levy a Fine of my land, I may well confess and avoid the Fine by shewing the especial matter, for that stands well with the Fine. But if a stranger who is not of my name levies a Fine of my land in my name, I shall not be received to aver, that I did not levy the Fine, but another in my name; for that is merely contrary to the record; and so it is of all recognizances and other matters of record; but I conceive when the fraud appears to the court, as here, they may well enter a *vacat* on the roll, and so make it no Fine; although the party cannot avoid it by averment during the time that it remains as a record.—The offence of levying a Fine in another's name is punished with death by the *stat.* 2 *Jac.* 1. *c.* 26. before mentioned. See *ante* I. 3. *ad fin.* If a Fine be levied by a person who got possession under a forged deed, equity will decree against the Fine. 2 *Atk.* 380.

A record of a Fine may be amended, (if the king's silver is paid) for misprision of the clerk. 5 *Rep.* 43.

While the parties are alive, the court will not grant leave for the amendment of a Fine, in the christian name of the plaintiff, for that amounts to making a new Fine. 2 *Black. Rep.* 816.—Neither while the parties are alive will they permit the fine to be amended in the term. 2 *Black. Rep.* 783. 3 *Wils.* 249, 250.

Where the deed to lead the uses is general, and it appears only by affidavit that the intent was to levy the Fine of a greater nnmber of acres than it mentions, the court will not

permit an amendment to increase the number of acres. 2 *Black. Rep.* 202, 203.

The court refused to amend a Fine passed two years before, by altering the surnames of the deforciant, though it was sworn that a wrong name had been inserted by mistake. 2 *Bos. & Pul.* 455.

Where one of the deeds to lead the uses of a Fine, the lease contained the word *tithes*, but the other deed, the release, omitted that word, the court refused to amend the writ of entry by inserting the word *tithes*, though the release had the words all "hereditaments and appurtenances whatever to the said lands, &c. belonging or in any way appertaining." 3 *Bos. & Pull.* 362.

The concord of a Fine being lost before it passed the custos brevium office, the court suffered a new concord and acknowledgment to be prepared, and the Fine to be perfected. 4 *W. P. Taunton*, 193.

The day upon which an acknowledgment was taken being left blank, was permitted to be supplied by affidavit. 4 *W. P. Taunton*, 589.

If an attorney employed to levy a Fine mislay the papers, and does not complete it within the time required by the rule of court; the court will not permit the Fine to be afterwards perfected, but will, if the parties be alive, direct a new Fine to be levied at the expence of the attorney. 4 *W. P. Taunton*, 600. See 5 *W. P. Taunton*, 305.

A Fine was allowed to be amended by inserting the word *Advowson*, the word *Rectory* being thought insufficient. 4 *W. P. Taunton*, 257.

In a Fine where the original writ is insensible, the court will permit it to be amended. 4 *W. P. Taunton*, 644.

Fine amended by inserting a parish not named in the deed to lead the uses, it being certain, by the deed specifying the quantity and occupiers, that the land was intended to pass. 5 *W. P. Taunton*, 207.

Fines or Recoveries shall not be amended on the last day of the term. *Reg. Gen.* 5 *W. P. Taunton*, 586. Nor will the court on that day receive motions either for amending or passing Fines or Recoveries. 6 *W. P. Taunton*, 632. 652.

The court cannot amend a deed to lead the uses. 6 *W. P. Taunton*, 145. The court are not induced to amend Fines by the difficulties raised by purchasers. *Ibid.* 162. A Fine cannot be amended without an affidavit connecting the Fine with the deed produced to warrant the amendment. *Ibid.* 432. Fine amended by a certified copy of the memorial of a lost deed registered. 7 *W. P. Taunton*, 79.

When Fines may be set aside in equity, see *ante;* and 1 *Eq. Ab.* 258. 2 *Eq. Ab.* 474.—When avoided for fraud or aided when defective; *Com. Dig.* Chancery, (3 N.) 1 *Ves.* 289.

More fully how Fines may be avoided or reversed, and by whom; *Com. Dig.* Fine (H); Pleader, (3 B.) 9. *Vin. Abr.* Fine, D. 11. *Bac. Abr.* Fines, 11.

For further matter relative to Fine, in general, see 3 *Com. Dig.* and *Viner's Abr.* tit. *Fines. Shep. Touchst. c.* 2. *Cruise on Fines:* and this Dict. title *Recovery.*

FINE ADULLANDO LEVATO DE TENEMENTO QUOD FUIT DE ANTIQUO DOMINICO. A writ directed to the justices of C. B. for disannulling a Fine levied of lands in *antient demesne*, to the prejudice of the lord. *Reg. Orig.* 15. See title *Fine.*

FINES FOR ALIENATIONS. Were Fines paid to the king by his tenants in *chief*, for licence to *alien* their lands according to the *stat.* 1 *Ed.* 3. *c.* 12. But these are taken away by the *stat.* 12 *Car.* 2. *c.* 24. abolishing all tenures but free and common socage.

The premiums given on renewal of leases, are also termed Fines; and there are Fines for alienations of copyholds paid to the Lord. See titles *Lease, Copyhold.*



FINES, FOR OFFENCES. Fine, in this sense, is amends, pecuniary punishment, or recompence for an offence committed against the king and his laws, or against the lord of a manor. In which case a man is said *finem facere de transgressione cum rege*, &c. *Reg. Jud. f.* 25. *a. Cowell.*

It seems that originally all punishments were corporal; but that after the use of money, when the profits of the courts arose from the money paid out of the civil causes, and the Fines and confiscations in criminal ones, the commutation of punishments was allowed of, and the corporal punishment, which was only *in terrorem*, changed into pecuniary, whereby they found their own advantage.

This begat this distinction between the greater and the lesser offences; for in the *crimina majora* there was at least a Fine to the king, which was levied by a *capiatur;* but upon the lesser offences there was only an amercement, which was affeered, and for which a *distringas*, or action of debt lay. 2 *New. Ab.* 502.

The discretionary *Fines* (and discretionary length of imprisonment) which the courts of justice are enabled to impose, may seem an exception to the general rule, that the punishment of every offence is ascertained by the law. But the *general nature* of the punishment, is in these, as in other cases, fixed and determinate; though the duration and quantity of each must frequently vary, from the aggravations, or otherwise, of the offence, the quality and condition of the parties, and from innumerable other circumstances.

The *quantum* in particular of pecuniary Fines, neither can nor ought to be ascertained by an invariable law. Our statute law, therefore, has not often ascertained the quantity of Fines, nor the common law, ever; it directing certain offences to be punished by Fine in general, without specifying the certain sum; which is fully sufficient, when we consider that however unlimited the power of the Court may seem, it is far from being wholly arbitrary; but its discretion is regulated by law. For the Bill of Rights, *st.* 1 *W. & M. st.* 2. *c.* 2. has particularly declared, that excessive Fines ought not to be imposed, nor cruel and unusual punishments inflicted; and the same statute further declares, that all grants and promises of Fines and forfeitures of particular persons, before conviction, are illegal and void. Now the Bill of Rights was only declaratory, of the old constitutional law; and accordingly we find it expressly holden, long before, that all such previous grants are void; since thereby, many times, undue means, and more violent prosecution, would be used for private lucre, than the quiet and just proceeding of law would permit. 2 *Inst.* 48.

The reasonableness of Fines in criminal cases has also been usually regulated by the determination of *Magna Charta*, *c.* 14. concerning amercements for misbehaviour by the suitors in matters of civil right. "*Liber homo non amercietur pro parvo delicto nisi secundum modum ipsius delicti, et pro magno delicto, secundum magnitudinem delicti; salvo contenemento suo: et mercator eodem modo, salvâ mercandisâ suâ; et villanus eodem modo amercietur, salvo wainagio suo.*" A rule that obtained even in Henry II's time (*Glan. l.* 9. *cc.* 8. 11.) and means only, that no man shall have a larger amercement imposed upon him than his circumstances or personal estate will bear: saving to the land-holder his contenement or land; to the trader his merchandize; and to the countryman his wainage or team and instruments of husbandry. In order to ascertain which, the great charter also directs, that the amercement, which is always inflicted in general terms (*sit in misericordia*) shall be set, *ponatur*, or reduced to a certainty by the oath of good and lawful men of the neighbourhood. Which method, of liquidating the amercement to a precise sum, was usually performed in the superior courts by the assessment or *affeerment* of the coroner, a sworn officer chosen by the neighbourhood, under the equity of the *stat. West.* 1.

*c.* 18. and then the judges estreated them into the Exchequer. *F. N. B.* 76. But in the court-leet and court-baron it is still performed by *affeerors* or suitors sworn to *afferee*, that is, tax and moderate the *general* amercement according to the particular circumstances of the offence and the offender: the affeeror's oath is conceived in the very terms of *Magna Charta*, *Fitzh. Surv. c.* 11. Amercements imposed by the superior courts on their own officers and ministers were affeered by the judges themselves; but when a pecuniary mulct was inflicted by them on a stranger (not being party to any suit) it was then denominated a Fine. 8 *Rep.* 40. And the antient practice was, when any such Fine was imposed, to inquire by a jury *quantum inde regi dare valeat per annum, salva sustentatione sua et uxoris, et liberorum suorum. Gilb. Exch. c.* 5. And since the disuse of such inquest it is never usual to assess a larger Fine than a man is able to pay, without touching the implements of his livelihood: but to inflict corporal punishment, or a limited imprisonment, instead of such Fine as might amount to imprisonment for life. And this is the reason why Fines in the King's court are frequently denominated Ransoms, because the penalty must otherwise fall upon a man's person unless it be redeemed or ransomed by a pecuniary Fine. *Mirr. c.* 5. § 3. *Lamb. Eir.* 575—According to an ancient maxim, *qui non habet in crumenâ luat in corpore.* Yet where any statute speaks both of Fine and ransom, it is holden that the ransom shall be treble to the Fine at least. *Dyer*, 232.—See 4 *Comm.* 378—380.

I. *Who may fine and amerce, and for what.*
II. *How Fines, &c. may be mitigated and aggravated; as also how they may be recovered, and to whom they are payable.*

I. Where a statute imposes a Fine at the will and pleasure of the king, that is intended of his judges, who are to impose the Fine. 4 *Inst.* 71. Courts of record only can *fine* and *imprison* a person (except as aftermentioned). And such a court may fine for an offence committed in court in their view, or by confession of the party recorded in court. 1 *Lil. Ab.* 621. A man shall be fined and imprisoned for all contempts done to any court of record, against the commandment of the king's writ, &c. 9 *Rep.* 60.

If a person is arrested coming to the courts of justice to answer a writ, the offender doing it shall be fined for the contempt. But there has been a difference made where it is done by the plaintiff in the writ, and a stranger, who it is said shall not be fined. 9 *H.* 6. *c.* 55. 1 *Danv.* 469.

If an officer of the court neglects his duty, and gives not due attendance; a clerk of the peace doth not draw an indictment well in matter of form, or return thereof, upon a *certiorari* to remove the indictment in B. R.; if a sheriff, &c. make an insufficient return of a *habeas corpus* issuing out of B. R. &c. or if justices of the peace proceed on an indictment after a *certiorari* issued to remove the indictment; the court may fine them. 1 *Lill.* 620. When a juror at the bar will not be sworn, he may be fined. 7 *H.* 6. *c.* 12. And if one of the jury depart without giving his verdict; or any of the jury give their verdict to the court before they are all agreed, they may be fined. 8 *Rep.* 28. 40 *Ass.* 10.

Also the sheriff in his torn, and the steward of a court-leet, have a discretionary power, either to award a Fine, or amercement for contempt to the court; as for a suitor's refusing to be sworn, &c. and the steward of a court-leet may either amerce or fine an offender, upon a presentment, &c. for an offence not capital, within his jurisdiction. *Keilw.* 66. *Kitchin*, 43. 51.

It is said, that some courts may imprison, but not fine, as the constables at the petit sessions. 11 *Co.* 44. 1 *Rol. Rep.* 74. 11 *Co.* 43. *b.* Also some courts cannot fine or imprison, but amerce, as the county, hundred, &c. 11 *Co.* 43. *b.* But some courts can neither fine, imprison, nor amerce; as ecclesiastical courts held before the Ordinary, archdeacon, &c. or their commissaries, and such who proceed according to the *Canon*, or *Civil Law.* 11 *Co.* 44. *a.*

Every *court of record* may enjoin the people to keep silence under a pain; and impose reasonable Fines, not only on such as shall be convicted before them of any crime, on a formal prosecution, but also on all such as shall be guilty of any contempt in the face of the court; as by giving opprobrious language to the judge, or disturbing the court, or obstinately refusing to do their duty as officers of the court. 11 *H.* 6. 12 *b.* 1 *Rol. Abr.* 219. 8 *Co.* 38. 11 *Co.* 43. *Cro. Eliz.* 581. 1 *Sid.* 145. 6 *Term Rep. K. B.* 530.

If a dead body in prison, or other place whereon an inquest ought to be taken, be interred, or suffered to lie so long, that it putrefy, before the coroner hath viewed it, the gaoler, or township, shall be amerced, 1 *Keb.* 278. 2 *Hawk. P. C.* If any homicide be committed, or dangerous wound given, whether with or without malice, or even by misadventure, or in self-defence, in any town, or in the lanes or fields thereof, in the day-time, and the offender escape, the town shall be amerced; and if out of a town, the hundred shall be amerced. 3 *Inst.* 53. 4 *Inst.* 183. *Cro. Car.* 252. 3 *Leon.* 207. 2 *Inst.* 315. *Dyer*, 210.

Besides Fines imposed for offences, it seems, that regularly there was a Fine or amercement in all actions; for if the plaintiff or demandant did not prevail, it was thought reasonable that he should be punished for his unjust vexation; and therefore there was judgment against him, *quod sit in misericordia pro falso clamore.* 8 *Co.* 59. *F. N. B.* 75.

Hence when the plaintiff takes out a writ, the sheriff, before the return of it, was formerly obliged to take pledges of prosecution, which, when Fines and amercements were considerable, were real and responsible persons, and answerable for those amercements; but being now so very inconsiderable that they are never levied, they are only formal pledges entered, *viz. John Doe* and *Richard Roe.*—1 *Saund.* 227. See this Dict. tit. *Bail.*

In all actions, where the judgment is against the defendant, it was to be entered with a *misericordia*, or a *capiatur*; and herein the difference is, that if it be an action of debt, or founded on a contract, the entry is *ideo in misericordia*, without assessing any sum in certain, which was afterwards affeered by the coroners in the proper county; but if it were in action of trespass, the court set the Fine, and levied it by a *capiatur.* 8 *Co.* 60. 1 *Rol. Abr.* 212. 219. *Cro. Eliz.* 814. *Cro. Jac.* 255. Therefore,

In actions *quare vi et armis*, as trespass, and the like; if judgment pass against the defendant in a court of record, he shall be fined. 8 *Rep.* 59. But in actions which have not something of force, or fraud, or deceit to the court; if the defendant come the first day he is called, and tender the thing demanded to the plaintiff, he is not to be fined. 4 *Rep.* 49. 8 *Rep.* 59, 60. 99. 3 *Ass.* 9. 22 *Ass.* 82. 1 *Danv. Abr.* 471. 1 *Vent.* 116.

All *capiatur Fines* are taken away by *stat.* 4 & 5 *W. & M. c.* 12. See title *Capias pro Fine.*

II. A Fine may be mitigated the same term it was set, being under the power of the court during that time; but not afterwards. *T. Raym.* 376. And Fines assessed in court by judgment upon an information, cannot be afterwards mitigated. *Cro. Car.* 251. If a Fine certain is imposed by statute on any conviction, the court cannot mitigate it; but if the party comes in before conviction, and submits to the court, they may assess a less Fine; for he is not convicted, and perhaps never might. The court of Exchequer may mitigate a Fine certain, because it is a court of equity, and they have a privy seal for it. 3 *Salk.* 33.

If an excessive Fine is imposed at the sessions, it may be mitigated at the King's Bench. 1 *Vent.* 336. A defendant being indicted for an assault, confessed it, and submitted to a small Fine; and it was adjudged that in such a case he may produce affidavits to prove on the prosecutor, that it was *son assault*, and that in mitigation of the Fine; though this cannot be done after he is found Guilty. 1 *Salk.* 55. If a person is found Guilty of a misdemeanor upon indictment, and fined, he cannot move to mitigate the Fine, unless he appear in person; but one absent may submit to a Fine, if the clerk in court will undertake to pay it. 1 *Vent.* 206, 207. 1 *Salk.* 55. 2 *Hawk.* 446.

The court of B. R. refused to mitigate a fine imposed by the court of Great Sessions in Wales, on the sheriff of the county for not attending; the record whereof was removed by certiorari. 8 *Term Rep. K. B.* 615.

It is a common practice in the court of B. R. to give a defendant leave to speak with the prosecutor, *i. e.* to make satisfaction for the costs of the prosecution, and also for damages sustained, that there may be an end of suits; the court at the same time shewing, on that account, an inclination to set a moderate Fine on behalf of the King. *Wood's Inst.* 653. And in cases where costs are not given by law, after a prosecutor has accepted costs from the defendant, he cannot aggravate the Fine; because having no right to demand costs, if he takes them, it shall be intended by way of satisfaction of the wrong. 2 *H. P. C.* 292. See this Dict. title *Costs*.

All Fines belong to the King, and the reason is, *because the courts of justice are supported at his charge;* and wherever the law puts the King to any charge for the support and protection of his people, it provides money for that purpose. *Bract.* 129. When a person is fined to the King, notwithstanding the body remains in prison, it is said the King shall be satisfied the Fine out of the offender's estate. 4 *Leon. c.* 393.

By the Common-law, the King, or Lord may, at their election distrain, or bring an action of debt for a Fine or amercement. *Cro. Eliz.* 581. *Savil.* 93. *Rast. Ent.* 151. 553. 606. 2 *H.* 4. 24. *b.* 10 *H.* 6. 7. *Raym.* 68. But with respect to Fines, set in inferior courts, every avowry, or declaration of this kind ought expressly to shew that the offence was committed within the jurisdiction of the court, for if it were not, all the proceedings were *coram non judice*, and a court shall not be presumed to have jurisdiction where it doth not appear to have one. *Hob.* 129. *Rast. Ent.* 553. *Co. Ent.* 572. Also it is advisable to alledge, that the offence was committed, as well as presented, and to shew the names of the presentors and the affeerors in setting forth a presentment or affeerment, and also to shew that proper notice was given of holding the court. But for this, See *Hawk. P. C.*

Of common right, a distress is incident to every Fine and amercement, in a torn or leet, for offences within the jurisdiction thereof; but if the offence were only the neglect of a duty created by custom, and of a private nature, it is clear, that *there must be a custom to warrant a distress*, and perhaps such custom is also necessary, though the duty be of a public nature. 2 *Hawk. P. C.*

Also the Sheriff, or Lord may for such Fines or amercements distrain the goods of the offender even in the highway, or in land not holden of the lord, unless such land be in possession of the crown. 1 *Rol. Abr.* 670. 2 *Inst.* 104. But such Fines and amercements being for a personal offence, no stranger's beasts can lawfully be distrained for them, though they have been levant and couchant upon the lands of the offender. *Owen*, 146. *Noy*, 20.

A joint award of one Fine against divers persons is erroneous; it ought to be several against each defendant, for otherwise one who hath paid his part might be continued in prison till the others have paid theirs, which would be in effect to punish for the offence of another. 2 *Hawk. P. C.* Fines to the King are *estreated* into the Exchequer. See *Joint Fines*.

FINES TO THE KING; *Fines le Roy.*] Under this head are included Fines for *original writs*. On originals on trespass on the case, where the damages are laid above 40*l.* a Fine is paid, *viz.* from 40*l.* damages to 100 marks, (66*l.* 13*s.* 4*d.*) 6*s.* 8*d.* From 100 marks to 100*l.* the Fine is 10*s.* From 100*l.* to 200 marks, 13*s.* 4*d.* From 200 to 250 marks, 16*s.* 8*d.* From 250 to 300 marks or 200*l.* it is 1*l.* Fine; and so for every 100 marks more, you pay 6*s.* 8*d.* and every 100*l.* further 10*s.* Every 100*l.* pays 10*s.* Fine. *R. II.* 6. *IV. & M.* Fines are also paid for original writs in *debt;* for every writ of 40*l.* debt, 6*s.* 8*d.* and if it be of 100 marks, but 6*s.* 8*d.* and for every 100 marks, 6*s.* 8*d.* &c. also for every writ of *plea of land*, if it be not a writ of right patent, which is for the yearly value of 5 marks, 6*s.* 8*d.* and so according to that rate. 19 *H.* 6. 44. 7 *H.* 6. 33. *New Nat. Br.* 212. See title *Fines of Lands*.

FINE PRO REDISSEISINA CAPIENDA. A writ that lies for the release of one imprisoned for a *redisseisin*, on payment of a reasonable Fine. *Reg. Orig.* 222.

FINE FORCE. Is where a person is *forced* to do that which he can no ways help; so that it seems to signify an absolute necessity or constraint not avoidable. *Old Nat. Br.* 63. *Stat.* 35 *H.* 8. *c.* 12.

FINIRE. To Fine, or pay a Fine upon composition, and making satisfaction, &c. The same with *finem facere*, mentioned in *Leg. H.* 1. *c.* 53. And in *Brompton, p.* 105. and in *Hovedon, p.* 783.

FINITIO. Death, so called; because *vita* finitur *morte*, *Blount*.

FINORS OF GOLD AND SILVER. Are those persons who purify and separate gold and silver from coarser metals, by fire and water. They are not to allay it; or sell the same, save only to the master of the mint, goldsmiths, &c. *stat.* 4 *H.* 7. *c.* 2.

FIRDFARE AND FIRDWITE. See *Ferdfare* and *Ferdwit*.

FIRDERINGA. A preparation to go into the army. *Leg. H.* 1.

FIRE-ARMS. By *stats.* 53 *Geo.* 3. *c.* 115. 55 *Geo.* 3. *c.* 59. regulations are made to insure the proper and careful manufacturing of Fire-Arms, in England; and for proving the barrels of Fire-arms, usually called small arms, at the proof-house of the *Gun-makers* company in London; or at the gun barrel proof-house in Birmingham. These acts do not extend to arms for military service.

FIRE AND FIRE-COCKS. By *stat.* 14 *Geo.* 3. *c.* 78. (the last building act,) Churchwardens in London and within the bills of mortality, are to fix *fire-cocks*, &c. at proper distances in streets, and keep a large engine and hand-engine for extinguishing fire, and ladders and fire-escapes, under the penalty of 10*l.* § 75. And to prevent fires, workmen in the city of London, &c. must erect party-walls between buildings of brick or stone, of a certain thickness, &c. under penalties, inflicted by various sections of the act. On the breaking out of any fire, all the constables and beadles shall repair to the place with their staves to protect property and be assisting in putting out the fire, and causing people to work, § 85. No action shall be had against any person in whose house or chamber a fire shall accidentally begin, § 86. See this Dict. title *Waste*, and also *stat.* 6. *Ann. c.* 31. now said to be made perpetual. 1 *Inst.* 530. *in n.* 7.

By the said *stat.* 14 *Geo.* 3. *c.* 78. Rewards for assistance are payable to the first turncock 10*s.*—To the first engine *not exceeding* 30*s.*—The second not exceeding 20*s.*—The third 10*s.*—To be paid by the churchwardens or overseers, but not without the approbation of an alderman or justice of the peace.—The churchwardens, &c. to be repaid by the inhabitant if the fire begins in a chimney, §§ 76, 77, 78.—In-

surance offices may lay out the insurance in rebuilding the premises, if the party suffering does not give security to do so: or in case of disagreement, not settled within 60 days. § 83.

Firemen exempt from being impressed. § 82.—Penalty on servants firing houses by negligence, 100*l.* or 18 months imprisonment. § 84. Restrictions on boiling turpentine, 25 *Geo.* 3. *c.* 77. See this Dict. tit. *Arson*, *Burning*, *Police*.

FIREBARE, Sax.] A *beacon* or high tower by the sea-side, wherein are continual lights, either to direct sailors in the night, or to give warning of the approach of an enemy. See title *Beacon*.

FIREBOTE. Fuel for *firing* for necessary use, allowed by law, to tenants out of the lands, &c. granted them. See *Estovers*.

FIRE-ORDEAL. See title *Ordeal*.

FIRE-WORKS. No person whatsoever shall make, sell, &c. squibbs, rockets, serpents, &c. or cases, moulds, &c. for making such squibbs, and every such offence shall be adjudged *a common nuisance*, and persons making or selling squibbs shall forfeit, 5*l.*

Persons throwing or firing squibbs, &c. or suffering them, &c. to be thrown or fired from their houses, incur a penalty of 20*s.* Likewise persons throwing, casting or firing, or aiding or assisting in the throwing, casting or firing of any squibbs, rockets, serpents, or other fire-works, in or into any public street, house, or shop, river, highway, road or passage, incur the like penalty of 20*s.* and on non-payment may be committed to the house of correction. *Stat.* 9 & 10 *W.* 3. *c.* 7.

This statute does not take from any person injured, by throwing of squibbs, &c. the remedy at Common-law; for the party may maintain a special action on the case or trespass, &c. for recovery of full damages.

FIRE AND SWORD. Letters of; these antiently issued from the privy council in Scotland, directed to the sheriff of the county, authorising him to call for the assistance of the county to dispossess a tenant retaining possession, contrary to the order of a judge, or judgment of a court.

FIRMA. Victuals or provisions; also rent, &c. See title *Farm*.

FIRMA ALBA. Rent of lands let to farm, paid in silver not in provision for the lord's house. See *Alba Firma*.

FIRMA NOCTIS. A custom or tribute antiently paid towards the entertainment of the King for one night according to *Domesday*.—*Comes Meriton* T. R. E. *reddebat* firmam *unius* noctis, &c. *i. e.* provision or entertainment for one night, or the value of it. *Temp. Reg. Edw. Confess.*

FIRMAM REGIS. Antiently *pro* villâ regia, *seu* regis manerio. *Spelm.*

FIRMATIO. *Firmationis Tempus.* *Doe* season, as opposed to *buck* season. 31 *H.* 3. *Firmatio* signifies also a supplying with food. *Leg. Inæ*, *cap.* 34.

FIRMURA. *Free firmage*, *W. de Cressi* gave to the monks of *Blyth*, a mill, *cum libera firmura* of the dam of it. *Reg. de Blyth.* This has been interpreted liberty to scour and repair the mill dam, and carry away the soil, &c. *Blount.*

FIRST-FRUITS. *Primitiæ.*] The profits after avoidance, of every spiritual living for the first year, according to the valuation thereof in the King's books. These were given in antient times to the Pope throughout all christendom; and were first claimed by him in England of such foreigners as he bestowed benefices on here by way of provision; afterwards they were demanded of the clerks of all spiritual patrons, and at length of all other clerks on their admission to benefices; but upon the throwing off the Pope's supremacy in the reign of Hen. VIII. they were translated to, and vested in, the King; as appears by the *stat.* 26 *H.* 8. *c.* 3. and a new *valor beneficiorum*, was then made by which the clergy are at present rated. This *valor beneficiorum* is what is commonly called, The King's books; a transcript of which is given in *Ecton's Thesaurus* and *Bacon's Liber Regis.* And for the ordering thereof, there was a court erected, 32 *H.* 8. but dissolved soon after. See *Valor Ecclesiasticus.*

Though by *stat.* 1 *Eliz. c.* 4. these profits are reduced again to the crown, yet the court was never restored; for all matters formerly handled therein, were transferred to the Exchequer, within the survey of which court they now remain.

By *stat.* 26 *H.* 8. *c.* 3. (extended to Ireland by Irish act, 28 *H.* 8. *c.* 26.) the Lord Chancellor, Bishops, &c. are impowered to examine into the value of every ecclesiastical benefice and preferment in their several dioceses; and clergymen entered on their livings before the *First-fruits* are paid or compounded for, are to forfeit double value. But *stat.* 1 *Eliz. c.* 4. ordains, that if an incumbent on benefice do not live half a year, or is ousted before the year expire, his executors are to pay only a fourth part of the *First-fruits:* and if he lives the year, and then dies, or be ousted in six months after, but half the First-fruits shall be paid; if a year and a half, three quarters of them; and if two years then the whole; not otherwise. The archbishops and bishops, have four years allowed for the payment, and shall pay one quarter every year, if they live so long upon the bishoprick: other Dignitaries in the church pay theirs in the same manner as rectors and vicars. By the *stat.* 27 *H.* 8. *c.* 8. no tenths are to be paid for the first year, as then the *First-fruits* are due, and by several statutes of *Anne*, if a benefice be under 50*l. per annum* clear yearly value, it shall be discharged of the payment of *First-fruits* and tenths.

This Queen also restored to the church what had at first been thus indirectly taken from it, not by remitting the tenths and *First-fruits* entirely, but by applying these superfluities of the larger benefices to make up the deficiencies of the smaller; for this purpose she granted a charter, confirmed by *stat.* 2 *Ann. c.* 11. whereby all the revenue of the *First-fruits* and tenths is vested in trustees for ever, to form a perpetual fund for the augmentation of poor livings, under 50*l.* a year. This is usually called *Queen Anne's bounty*, which has been still further regulated by subsequent statutes; though it is to be lamented that the number of such poor livings is so great, that this bounty, extensive as it is, will be slow, and almost imperceptible in its operation; the number of livings under 50*l.* certified by the bishops at the commencement of the undertaking being 5597; the revenues of which, on a general average, did not exceed 23*l. per ann.* See 1 *Comm.* 285, 286. *cum notis*, *ib.* See also the *Statutes*, 5 *Ann. c.* 24. 6 *Ann. c.* 27. 1 *Geo.* 1. *c.* 10. and 45 *Geo.* 3. *c.* 84.—In Ireland similar benefits are secured under the board of First-fruits by the Irish acts; 2 *Geo.* 1. *c.* 15. 8 *Geo.* 1. *c.* 12. 10 *Geo.* 1. *c.* 7. 1 *Geo.* 2. *c.* 18. 9 *Geo.* 2. *c.* 12. 29 *Geo.* 2. *c.* 18. 11, 12 *Geo.* 3. *c.* 16. 25 *Geo.* 3. *c.* 63. 29 *Geo.* 3. *c.* 26. and by annual grants of parliament.—See also the acts 43 *Geo.* 3. *c.* 106. 46 *Geo.* 3. *c.* 60. and 48 *G.* 3. *c.* 65. and more fully this Dict. titles *Clergy*, *Parson*, &c.

## FISH, FISHERIES, AND FISHING.

MANY acts of parliament have been made to regulate domestic and foreign fisheries, and the sale of fish.—The following is a very general abridgment of them.

By *stat.* 1 *Eliz. c.* 17. (made perpetual by *stat.* 3 *Car.* 1. *c.* 4.) No fisherman shall use any net or engine, to destroy the fry of fish: and persons using nets for that purpose, or taking salmon or trout out of season, or any fish under certain lengths, are liable to forfeit 20*s.* and justices of the peace, and the lords of leets have power to put the acts in force. By *stat.* 2 *H.* 6. *c.* 15. No person may fasten nets, &c. across rivers to destroy fish, and disturb passage of vessels, on pain of 5*l.*—By *stat.* 31 *H.* 8, *c.* 2. None shall fish in any

pond or mote, &c. without the owner's licence, on pain of three months' imprisonment. Under *stats.* 22 & 23 *Car.* II. *c.* 25. and 4 *W.* & *M.* *c.* 23. No person shall take any fish in any river, without the consent of the owner, under the penalty of 10*s.* for the use of the poor, and treble damage to the party grieved, leviable by distress of goods; and for want of distress, the offender is to be committed to the house of correction for a month: also nets, angles, &c. of poachers may be seised, by the owners of rivers, or by any persons by warrant from a justice of peace, &c. See title *Game*, and *post*, *Fishing*, *right of*.

By *stat.* 5 *Geo.* 3. *c.* 14. persons stealing or destroying fish in fish ponds, or receiving stolen fish, are to be *transported* for *seven years*. See tit. *Black Act*.—And a forfeiture of 5*l.* to the owner of the fishery, recoverable either by information or action, is made payable by persons taking or destroying (or *attempting* so to do) any fish in any river or other water within any inclosed ground being private property.

The landing, in a common meadow, of fish taken at night by hooks laid in a river bounding the meadow, the river being the several fishery of one to whom the ground where the fish are landed did not belong, was held not to be a taking of fish in a stream in an inclosed ground, within the *stat.* 5 *Geo.* 3. *c.* 14. 5 *W. P. Taunton*, 440.

In a conviction founded on that statute it must be distinctly stated in the information, and in the evidence, that the proceeding is at the instance of the owner of the fishery: and therefore where it was merely stated in the memorandum of a conviction, that the proceeding was at the instance of such owner, and where the information, without containing any such allegation, concluded with a mere prayer of judgment on behalf of such owner, and the evidence was totally silent on the subject, the conviction was held to be bad. *R.* v. *Daman*. *Term Rep. K. B. Hil.* 59 *Geo.* 3. 378. and see 4 *Burr.* 2279. *R.* v. *Corden*.

The *stat.* 4 & 5 *Ann.* *c.* 21. was made for the increase and preservation of salmon in rivers in the counties of Southampton and Wilts; requiring that no salmon be taken between the 1st of August and 12th of November, or under size, &c. And by *stat.* 1 *Geo.* 1. *c.* 18. (altered as to the river *Ribble*, by *stat.* 23 *Geo.* 2. *c.* 26.) Salmon taken in the rivers Severn, Wye, Were, Ouse, &c. are to be 18 inches long at least; or the persons catching them shall forfeit 5*l.*; and sea fish sold must be of the length following, *viz.* Bret and turbot 16 inches, brill and pearl 14, codlin, bass and mallet 12, sole and place 8, flounders 7, whiting 6 inches long, &c. on pain of forfeiting 20*s.* to the poor and the fish. By *stat.* 9 *Geo.* 2. *c.* 33. Persons that import any fish, contrary to the 1 *Geo.* 1. *c.* 18. for better preventing *fresh* fish taken by *foreigners* being imported into this kingdom, &c. shall forfeit 100*l.* to be recovered in the courts at Westminster, one moiety to informers, and the other to the poor; and masters of smacks, boys, boats, &c, in which the fish shall be imported, or brought on shore, forfeit 50*l.*

Besides the above, thus particularized, the following statutes relate to the same subject.—*West.* 2. (13 *E.* 1.) *c.* 47. and 13 *R.* 2. *c.* 19. (altered by 9 *Ann.* *c.* 26. 1 *Geo.* 1. *st.* 2. *c.* 18. 23 *Geo.* 2. *c.* 26. 43 *Geo.* 3. *c.* lxi. & 45 *Geo.* 3. *c.* xxxiii.) as to *Salmon* and their fence months.—31 *E.* 3. *st.* 2. *c.* 1. and 35 *E.* 3. (*Ordin of Herrings*) as to forestalling *Herrings*.—31 *E.* 3. *st.* 2. *c.* 2. selling of herrings at Yarmouth.—*Id.* *c.* 3. as to *Stock-fish* and *Salmon*.—17 *R.* 2. *c.* 9. appoints justices to be conservators of rivers.—14 *H.* 6. *c.* 6. as to foreigners selling fish.—22 *E.* 4. *c.* 2. 11 *H.* 7. *c.* 23. as to *pickled* salmon and herrings.—2 & 3 *E.* 6. *c.* 6. forbids the granting licences to fish in foreign parts.—5 *Eliz.* *c.* 5. as to toll of fish.—39 *Eliz.* *c.* 10. (continued by 3 *Car.* 1. *c.* 4. and 16 *Car.* 1. *c.* 4. though repealed by 43 *Eliz.* *c.* 9.) as to aliens fishing.—1 *Jac.* 1. *c.* 23. as to trespass by herring fishers.—3 *Jac.* *c.* 12. wears.—13 & 14 *Car.* 2. *c.* 28. as to *pilchard* fishery.—15 *Car.* 2. *c.* 16.—Packing herrings. *Newfoundland* fishery.—30 *Car.* 2. *c.* 9. *Severn* fishery.—4 *Ann.* *c.* 15. *Stower* fishery.—2 *Geo.* 2. *c.* 19. 31 *Geo.* 3. *c.* 51. 48 *Geo.* 3. *c.* 144. *Oyster* fishery in *Medway*, &c. (and see tit. *Oysters*.)—9 *Geo.* 2. *c.* 33. *Lobster* fishery on the coast of Scotland.—11 *Geo.* 3. *c.* 27. 15 *Geo.* 3. *c.* 46. *Salmon* fishery in the *Tweed*.—*Salmon* fishery in *England*, 58 *Geo.* 3. *c.* 43.—16 *Geo.* 3. *c.* 36. *Cornwall* Pilchard fishery; and see also *stat.* 31 *Geo.* 3. *c.* 45. 45 *Geo.* 3. *c.* 102. 48 *Geo.* 3. *c.* 68.

Various statutes have been made as to the particular supply and sale of fish in London and Westminster, *viz.*

*Stat.* 17 *R.* 2. *c.* 9. appoints the Mayor of London conservator of the Thames.—*Stats.* 10 & 11 *W.* 3. *c.* 4. 9 *An.* *c.* 26. 3 *Geo.* 3. *c.* 27. and 2 *Geo.* 3. *c.* 15. for regulating Billinsgate market; The Water bailiff's duty: and the Fishmongers' Company.—A long and particular *stat.* 22 *Geo.* 2. *c.* 49. to establish an open fish-market in Westminster, was not ever put in force. See *stat.* 30 *Geo.* 3. *c.* 51. which vests the estate and property of the trustees of Westminster Fish market in the marine Society.—*Stat.* 30 *Geo.* 2. *c.* 21. regulates the fishery in the Thames and Medway, and *stat.* 24 *Geo.* 2. *c.* 44. was passed to protect officers in their duty, under the several statutes against forestallers of fish, &c.—Finally the *stats.* 29 *Geo.* 2. *c.* 39. and 33 *Geo.* 2. *c.* 27. were made to regulate the sale of fish at the first hand in the fish markets in London and Westminster; and to prevent salesmen of fish buying fish to sell again on their own account; and to allow bret and turbot, brill, and pearl, although under the respective dimensions mentioned in 1 *Geo.* 1. *c.* 18. to be imported and sold; and to punish persons who shall take or sell any spawn, brood, or fry of fish, unsizeable fish, or fish out of season, or smelts under the size of five inches. These acts are amended, as to the sale of eels by *stat.* 42 *Geo.* 3. *c.* 19.

By this latter act every master of a vessel is to give a true account of the several sorts of fish brought alive to the Nore in his vessel, and if after such arrival, he shall wilfully destroy or throw away any of the said fish, not being unwholesome or unmarketable, &c. he is liable to be committed to the house of correction, and kept to hard labour for any time not exceeding two months nor less than one. And see farther *stat.* 2 *Geo.* 3. *c.* 15. for the better supplying the cities of London and Westminster with fish, by means of fish machines, and to reduce the exorbitant price thereof; and to protect and encourage Fishermen.—The *stat.* 2 *Geo.* 3. *c.* 15. is repealed by *stat.* 50 *Geo.* 3. *c.* 108. so far as relates to the exemption from being impressed, except as to existing protections under that act; and new regulations are established for the protection of mariners employed in the fisheries on the coasts. The exemption from being impressed, contained in § 2. of 50 *Geo.* 3. *c.* 108. extends to a lobster Fishery carried on by British subjects at Heligoland, to supply London with that fish. 1 *Maul.* & *Selw.* *Rep.* 223.

For so much concerning the several national fiheries as relates to the commerce and navigation of the country, see title *Navigation Acts*, V.

The *Newfoundland* Fisheries are at present regulated under *stats.* 10 & 11 *W.* 3. *c.* 24, 25. 15 *Geo.* 3. *c.* 31. 26 *Geo.* 3. *c.* 26. 28 *Geo.* 3. *c.* 35. 29 *Geo.* 3. *c.* 53.—By 38 *Geo.* 3, *c.* 76. a Court of Judicature was established there.

*Greenland* Fishery.—*Stats.* 4 & 5 *W.* & *M.* *c.* 17. 1 *An.* *st.* 1. *c.* 16. 26 *Geo.* 3. *c.* 41. 29 *Geo.* 3. *c.* 53. 32 *Geo.* 3. *c.* 22. 42 *Geo.* 3. *c.* 22 & 44 *Geo.* 3. *c.* 35. continued by several subsequent acts. And see 55 *Geo.* 3. *c.* 39. 58 *Geo.* 3. *c.* 15.

*Southern Whale* Fishery.—35 *Geo.* 3. *c.* 92. 38 *Geo.* 3. *c.* 57. 42 *Geo.* 3. *c.* 77. 43 *Geo.* 3. *c.* 90. 48 *Geo.* 3. *c.* 124. 51 *Geo.* 3. *c.* 34. 53 *Geo.* 3. *c.* 111. 55 *Geo.* 3. *c.* 45.

*British White Herring* Fishery. 26 *Geo.* 3. *c.* 81. 27 *Geo.* 3. *c.* 10. 35 *Geo.* 3. *c.* 56. 39 *Geo.* 3. *c.* 100. 48 *Geo.* 3. *c.* 110. 51 *Geo.* 3. *c.* 101. 52 *Geo.* 3. *c.* 153. 55 *Geo.* 3. *c.* 94.

*Scotch* Fisheries. 13 *Geo.* 1. *c.* 26. 30. 29 *Geo.* 2. *c.* 23. 26 *Geo.* 3. *c.* 81, 106. 48 *Geo.* 3. *c.* 110.

*Salt* is, under certain temporary regulations, allowed to be used in the Fisheries free of duty; but it is doubted how far these regulations are either effectual or beneficial. See title *Salt*.

For the encouragement and improvement of the Fisheries on the coast of Ireland, See *stat.* 59 *Geo.* 3. *c.* 109.

For regulating the Fisheries on the coasts of Newfoundland, Labrador, &c. and permitting the Americans to fish in certain districts there, See *stat.* 59 *Geo.* 3. *c.* 38.

By the custom of the whale Fishery among the Gallipagos islands, he who strikes a whale with a loose harpoon is entitled to receive half the produce from him who kills it. But unless he who strikes a fish, continues his dominion until he has reduced it into possession, any other person who kills it acquires the entire property. 1 *W. P. Taunton*, 241.

FISHING, RIGHT OF, AND PROPERTY OF FISH. It has been held, that where the lord of the manor hath the soil on both sides the river, it is a good evidence that he hath the *right* of fishing, and it puts the proof upon him who claims a free fishery; but where a river ebbs and flows, and is an arm of the sea, there it is *common to all*, and he who claims a privilege to himself must prove it; for if trespass is brought for fishing there, the defendant may justify that the place where, is an arm of the sea, in which every subject of our late lord the king hath and ought to have free fishery.

In the Severn, the soil belongs to the owners of the land on each side; and the soil of the river Thames, is in the king, &c. but the fishing is common to all. 1 *Mod.* 105. He who is owner of the soil of a private river, hath a separate or several fishery; and he that hath *free-fishery* hath a property in the fish, and may bring a possessory action for them; but *communis piscaria* is like the case of all other commons. 2 *Salk.* 637.

There are three sorts of Fisheries or *Piscaries*. Free Fishery; Several (or separate) Fishery; and Common of Piscary.

*Common of Piscary* is a liberty of fishing in another man's water. 2 *Comm.* 34. 1 *Inst.* See tit. *Common*. *A Free Fishery*, or exclusive right of fishing in a public river, is a royal franchise; this differs from a *Several Fishery;* because he that has a *several fishery* must also be (or at least derive his right from) the owner of the soil. It differs also from a *common of piscary*, in that the free fishery is an exclusive right, the common of piscary is not so; and therefore in a *free fishery* a man has property in the fish before they are caught: in a *common of piscary*, not till afterwards. 2 *Comm.* 39, 40. and 1 *Inst.* 122. (*a*) *n.* 7. which see. As to a *free fishery* no new franchise can at present be granted of it, by the express provision of *Magna Charta*, *c.* 16. and the franchise must be at least as old as the reign of Hen. II. 2 *Comm.* 417. One that has a close pond in which there are fish, may call them *pisces suos* in an indictment, &c. But he cannot call them as *bona & catalla*, if they be not in trunks. There needs no privilege to make a fish pond; as there doth in case of a warren. *Mod. Ca.* 183.

There may be a prescriptive right in a subject to a several fishery in an arm of the sea. 4 *Term Rep. K. B.* 439.

*Primâ facie*, every subject has a right to take fish found upon the sea shore between high and low water mark. But such general right may be abridged by the existence of an exclusive right in some individual. 2 *Bos. & Pull.* 472.

See further this Dict. title *Game*.

FISHERMEN. By *stat.* 9 *Ann. c.* 26. there shall be a master, wardens and assistants of the Fishmongers' Company in London, chosen yearly at the next court of the Lord Mayor and Aldermen after the tenth of June, who are constituted a court of assistants; and they shall meet once a month at their common hall, to regulate abuses in fishery, register the names of fishermen, and mark their boats, &c.

FISHGARTH. A dam or wear in a river, made for the taking of fish; especially in the rivers of Ouse and Humber.

FISH ROYAL. *Whale* and *Sturgeon* which the King is intitled to when either thrown on shore or caught near the coasts. *Plowd.* 315. See tit. *King*.

FISK, (from *Fiscus*, the Treasury.) The right of the crown, to the moveable estate of a person denounced Rebel. *Scotch Dict.*

FLACO. A place covered with standing water. *Mon. Angl. tom.* 1. *p.* 209.

FLAX. See *Hemp*.

FLECTA. A feathered or fledged arrow; a *fleet arrow*.

FLEDWITE OR FLIGHTWITE, from Sax. *Flyth, Fuga, et* Wite, *Mulcta.*] In our ancient law signified a discharge from amerciaments, where a person having been a *fugitive* came to the peace of our Lord the King of his own accord, or with licence. *Rastal.*

FLEET, Sax. *Fleot*, i. e. *Flota*, a place of running-water, where the tide or *float* comes up.] A *prison* in London, so called from a river or ditch that was formerly there, on the side whereof it stood. To this prison men are usually committed for contempt to the King and his laws, particularly against the courts of justice; or for debt, when persons are unable or unwilling to satisfy their creditors; there are large rules, and a *Warden* or *Keeper* belonging to the Fleet Prison, &c. See titles *Gaol*, *Gaoler*, *Prisoner*.

FLEET OF SHIPS. See title *Navy*.

FLEM, *Flema*, from Sax. *Flean*, to kill or slay.] An outlaw; and by virtue of the word *Flemaflare* were claimed *bona felonum;* as may be collected from a *quo warranto*, *Temp. Ed.* 3.

FLEMENEFRIT, FLEMENESFRINTHE, FLYMENAFRYNTHE.] The receiving or relieving of a fugitive or outlaw. *Leg. Inæ. c.* 29. 47. *LL. H.* 1. *c.* 10. 12.

FLEMESWITE, Sax.] *Fleta* interprets it *habere catalla fugitivorum. Lib.* 1. *c.* 47.

FLETWIT OR FLITWIT. Is to be quit of contention and convictions, and that you may have plea thereof in your own courts and the amerciaments. *Flit* in English is treason. *Termes de la Ley.* But see *Fledwite*.

FLETA. The title of an ancient law-book, supposed to have been written by a Judge who was confined in the Fleet prison. *Temp.* E. 1. *Nicholson's Historical English Library*, 225.

FLIGHERS. Masts for ships, *Mon. Angl. tom.* 1. *p.* 799.

FLIGHT. For crimes committed. See *Fugam fecit*.

FLOATSAM. See *Flotsam*.

FLOOD MARK. The mark which the sea makes on the shore, at flowing water and the highest tide: it is also called *High water Mark*.

FLORENCE. An ancient piece of English gold coin; every pound weight of old standard gold was to be coined into fifty Florences, to be current at six shillings each; all which made in tail fifteen pounds, or into a proportionate number of *half Florences* or *quarter* pieces; by indenture of the *Mint*. 18 *Ed.* 3.

FLORIN. A foreign coin; in Spain, 4*s.* 4*d.* Germany, 3*s.* 4*d.* and Holland, 2*s.*

FLOTA NAVIUM. A fleet of ships.—*Rot. Francia*, 6 *R.* 2. *m.* 21.

FLOTAGES. Such things as by accident swim on the top of great rivers; the word is sometimes used in the commissions of *Water Bailiffs*.

FLOTSAM. Is where a ship is sunk or cast away, and the goods are *floating* upon the sea. 5 *Rep.* 106. *Flotsam*,

*Jetsam* and *Lagan* are mentioned together: *Jetsam* being where any thing is cast out of the ship when in danger, and the ship notwithstanding perisheth; and *Lagan* is when heavy goods are thrown over board before the wreck of the ship, which sink to the bottom of the sea, but are tied to a cork or buoy in order to be found again. 5 *Rep.* 106. The King shall have *Flotsam*, *Jetsam*, and *Lagan*, when the ship is lost, and the owners of the goods are not known; but not otherwise. *F. N. B.* 122. Where the proprietors of the goods may be known, they have a year and a day to claim *Flotsam*. 1 *Keb.* 657. *Flotsam*, *Jetsam*, &c. any person may have by the King's grant, as well as the Lord Admiral, &c. See 1 *Comm.* 292. and this Dict. title *Wreck*.

Foreign Liquors and Tobacco, derelict, *Flotsam*, *Jetsam*, or *Lagan* are made liable to duties of customs as if regularly imported; *stats.* 52 *Geo.* 3. *c.* 149. 54 *Geo.* 3. *c.* 81. § 20.—22.

FOCAGE, *Focagium.*] *House-bote*, or *Fire-bote*.

FOCAL. A right of taking fire wood. *Mon. Angl.* i. 779.

FODDER, Sax. *Foda*, i. e. *Alimentum.*] Any kind of meat for horses, or other cattle: among the *Feudists* it was used for a prerogative of the Prince, to be provided with corn and other meat for his horses, by his subjects, in his wars or other expeditions. *Hotom. de verb. Feudal.*

FODERTORIUM. Provision or fodder, to be paid by custom to the King's purveyor. *Cartular.* MS.

FŒNUS NAUTICUM. *Bottomry.* See that title; and title *Insurance*.

FŒSA, Fr. *Foisson.*] Grass, herbage. *Mon. Angl.* ii. 506.

FOGAGE, *Fogagium.*] Fog, or rank after-grass, not eaten in summer. *LL. Forestar, Scot. c.* 16.

FOITERERS. Vagabonds. *Blount.* See *Failours*.

FOLC-LANDS, Sax.] Copyhold lands; so called in the time of the Saxons, as charter lands were called *Boclands*, *Kitch.* 174. *Folkland* was *terra vulgi*, or *popularis*, the land of the vulgar people, who had no certain estate therein, but held the same under the rents and services accustomed or agreed, at the will only of their Lord the *Thane;* and it was therefore not put in writing but accounted *prædium rusticum et ignobile. Spelm. of Feuds. cap.* 5. See this Dict. titles *Copyhold*, *Tenure*, *Bockland*.

FOLC-MOTE, or FOLK-MOTE, Sax. *Folgemot*, *Conventus populi.*] Is compounded of *Folk*, *populus*, and *mote* or *gemote*, *convenire;* and signified originally, as *Somner* in his *Saxon Dictionary* says, a general assembly of the people to consider of, and order matters of the commonwealth. See *Leg. Edw. Confess. cap.* 35. *Spelman* says the *folcmote* was a sort of annual parliament, or convention of the Bishops, Thanes, Aldermen and Freemen, upon every *May-day* yearly; where the laymen were sworn to defend one another, and the King, and to preserve the laws of the kingdom, and then consulted of the common safety. But *Dr. Brady* infers from the laws of our Saxon Kings that it was an inferior court, held before the *King's Reeve* or steward, every month to do *Folk* right, or compose smaller differences, from whence there lay appeal to the superior courts. *Brady's Gloss. p.* 48. *Squire* seems to think the *Folcmote* not distinct from the *shiremote*, or common general meeting of the county. *Angl. Sax. Gov.* 155, *n.*

*Manwood* mentions *folkmote* as a court holden in London, wherein all the *folk* and people of the city did complain of the Mayor and Aldermen, for misgovernment within the said city; and this word in *Stowe's* time continued in use among the *Londoners;* and denoted *Celebrem ex tota civitate conventum. Stowe's Survey.*

According to *Kennet*, the *folkmote* was a common council of all the inhabitants of a city, town or borough, convened often by sound of bell to the *Mote Hall* or *House;* or it was applied to a larger congress of all the freemen within a county, called the *Shire-mote*, where formerly all knights and military tenants did fealty to the King, and elected the annual sheriff on the first of October; till this popular election, to avoid tumults and riots, devolved to the King's nomination. After which the *City Folkmote* was swallowed up in a select committee or *Common Council*, and the *County Folkmote*, in the *Sheriff's Tourn* and *Assises*. The word *Folkmote* was also used for any kind of popular or public meeting; as of all the tenants at the *Court-Leet* or *Court Baron*, in which signification it was of a less extent. *Paroch. Antiq.* 120.

FOLKMOOT signifies, according to Lambard, in his Exposition of Saxon words, two kinds of courts, the one now called the County-court, and the other the *Sheriff's Tourn*. In London it signifies an assembly convened from the whole city, or Common-hall. *Termes de la Ley.*—See further title *Parliament*.

FOLK-MOTE. See *Folc-mote*.

FOLDAGE AND FOLDCOURSE. A liberty to fold sheep, &c. See *Faldage*, *Faldfee*.

FOLGARII. Menial servants; *Bract. lib.* 3. *tract.* 2. *c.* 10. House-keepers by the Saxons were called *Husfastenc*, and their servants or followers, *Folgheres* or *Folgeres*. *LL. Hen.* 1. *c.* 9.

FOOL. A Natural; one so from the time of his birth. See titles *Ideots* and *Lunatics*.

FOOT OF A FINE. See title *Fine of Lands*.

FOOT-GELD. From Sax. Fot. *Pes;* and Geldan *solvere. Pedis redemptio.*] An amercement for not cutting out and *expeditating* the balls of great dogs' feet in the *forest:* to be quit of *foot-geld* is a privilege to keep dogs within the forest unlawed, without punishment. *Manwood, par.* 1. *p.* 86. See title *Forest*.

FORAGE, Fr. *Fourage.*] Hay and straw for horses, particularly for the use of horse in an army.

FORAGIUM. Straw when the corn is thrashed out. *Cowel.*

FORBALK, *Forbalka.*] Lying forward or next the highway. *Petr. Blesensis Contin. Hist. Croyland, p.* 116.

FORBARRE. To bar or deprive one of a thing for ever. See *stats.* 9 *R.* 2. *c.* 2. 6 *H.* 6. *c.* 4.

FORBATUDUS. The aggressor slain in combat.

FORCE, *Vis.*] Is most commonly applied *in pejorem partem*, the evil part, and signifies any unlawful violence. It is defined by *West*, to be an offence, by which violence is used to things or persons; and he divides it into *simple* and *compound; simple force*, is that which is so committed that it hath no other crime accompanying it; as if one by *force* do only enter into another man's possession, without doing any other unlawful act: mixed or *compound* force, is when some other violence is committed with such a fact, which of itself alone is criminal; as where any one by *force* enters into another man's house, and kills a man, or ravishes a woman, &c. And he makes several other divisions of this head. *West. Symbol. pa.* 2. *sect.* 65. *Lord Coke* says, there is also a *force implied* in law; as every trespass, rescous, or disseisin, implieth it; and an *actual force*, with weapons, number of persons, &c. where threatening is used to the terror of another. *Co. Lit.* 257. By law any person may enter a tavern; and a landlord may enter his tenant's house to view repairs, &c. But if he that enters a tavern, commits any *force* or violence; or he that enters to view repairs, breaketh the house, &c. it shall be intended that they entered for that purpose. 8 *Rep.* 146. All *force* is against the law; and it is lawful to repel *force* by *force;* there is a maxim in our law, *quod alias bonum et justum est, si per vim vel fraudem petatur, malum et injustum est.* 3 *Rep.* 78. Where a crime in itself capital, is endeavoured to be committed by force, it is lawful to repel that force by the death of the party attempting. 4 *Comm.* 181. See titles *Duress*, *Murder*, *Robbery*.

## FORCIBLE ENTRY AND DETAINER.

An Offence against the public peace which is committed by violently *taking* or *keeping* possession of lands and tenements, with menaces, arms, and force, and without the authority of the law; whereby he who hath right of entry is barred or hindered. See 4 *Comm.* 148. At Common-law, any one who had a right of entry into lands, &c. might regain possession thereof by force; but this liberty being much abused, to the breach of the public peace, it was found necessary that it should be restrained. By *stat.* 5 *R.* 2. *st.* 1. *c.* 8. all forcible entries are punished with imprisonment and ransom at the King's will. And by *stats.* 15 *R.* 2. *c.* 2. 8 *H.* 6. *c.* 9. 31 *Eliz. c.* 11. 21 *Jac.* 1. *c.* 15. upon any forcible entry or forcible detainer after peaceable entry, into any lands (or benefices of the church) one or more justices of the peace, taking sufficient power of the county, may go to the place, and there record the force upon his own view, as in case of riots; and upon such conviction may commit the offender to gaol till he makes fine and ransom to the King. And moreover the justice or justices have power to summon a jury to try the forcible entry or detainer complained of: and if the same be found by that jury, then besides the fine on the offender, the justices shall make restitution, by the sheriff, of the possession, without enquiring into the merits of the title; for the *force* is the only thing to be tried, punished and remedied by them; and the same may be done by indictment at the general sessions. But this provision does not extend to such as endeavour to *maintain* possession by force, where they themselves or their ancestors have been in peaceable enjoyment of the lands, &c. for three years immediately preceding. 4 *Comm.* 148. And this may be alledged in stay of restitution, and restitution is to be stayed till that be tried, if the other will traverse the same. &c. *Dalt.* 312. See *T. Raym.* 85. 1 *Sid.* 149. *Salk.* 260.

Indictment for *forcible entry* must be laid of *liberum tenementum*, &c. to have restitution by *stats.* 15 *R.* 2. *c.* 2. 8 *H.* 6. *c.* 9. &c. But by *stat.* 21 *Jac.* 1. *c.* 15. justices of peace may give like restitution of possession to tenants for years, tenant by *elegit*, statute staple, &c. and copyholders, as to freeholders, since which statute the estate of the person ousted must be stated, for perhaps he is only tenant at will. *Semb.* 1 *Salk.* 260. *R.* 1 *Sid.* 102. See farther as to what shall be a good indictment, *Com. Dig.* title *Forcible Entry.* (D. 4.)

Having said thus much generally, we may proceed more particularly to enquire,

I. *What shall be deemed a Forcible Entry and Detainer under the foregoing Statutes.*
II. *What Remedy is provided in such Cases.*

I. By *stat.* 5 *R.* 2. *st.* 1. *c.* 8. "None shall make any entry into any lands or tenements, (or benefice of holy church *stat.* 15 *R.* 2. *c.* 2. or other possessions. *stat.* 8 *H.* 6. *c.* 9. § 2.) but where entry is given by the law; and in such case not with strong hand or with multitude of people, but only in peaceable and easy manner; on pain of imprisonment and ransom at the King's will.

When one or more persons armed with unusual weapons violently enter into the house or land of another: or where they do not enter violently, if they forcibly put another out of his possession; or if one enters another's house, without his consent, although the door be open, &c. these are all forcible entries punishable by law. *Co. Lit.* 257. So when a tenant keeps possession of the land at the end of his term against the landlord, it is a forcible detainer. And if a lessee takes a new lease of another person, whom he conceives to have better title, and at the end of the term keeps possession against his own landlord, this is a forcible detainer. *Cro. Jac.* 199. Also persons continuing in possession of a defeasible estate after the title is defeated, are punishable for forcible entry; *for continuing in possession afterwards, amounts in law to a new entry. Co. Lit.* 256, 257. And an infant or feme-covert may be guilty of forcible entry within the statutes in respect of violence committed by them in person; but not for what is done by others at their command, their commands being void. *Co. Lit.* 257. 357.

If a man have two houses next adjoining, the one by a defeasible title, and the other by a good title; and he uses force in that he hath by the good title to keep persons out of the other house, this is a forcible detainer. 2 *Shep. Abr.* 203. A man enters into the house of another by the windows, and then threateneth the party, and he for fear doth leave the house, it is a forcible entry: so if one enter a house when no person is therein, with armed men, &c. *Moor. Cas.* 185. If a person after peaceable entry, shall make use of arms to defend his possession, &c. it will be forcible detainer: a man puts another out of his house by force, if he then puts in one of his servants in a peaceable manner, who keeps out the party, &c. it will be a forcible entry, but not a detainer; but if himself remaineth there with force, this makes a *forcible detainer.* If I hear that persons will come to my house to beat me, &c. and I take in force to defend myself, it is no *forcible detainer;* though where they are coming to take lawful possession only, it is otherwise. 2 *Shep.* 203.

This offence may be committed of a rent, as well as of a house or land: as where one comes to distrain, and the tenant threatens to kill him, or *forcibly* makes resistance, &c. 2 *Shep.* 201. But forcible entry cannot be of a *way* or other easement: or of a common or office. 1 *Hawk. P. C.* So no man can be guilty of *forcible entry*, for entering with violence into lands or houses in his own sole possession at the time of entry; as by breaking open doors, &c. of his house detained from him by one who has the bare custody of it; but joint-tenants, or tenants in common, may be guilty of *forcible entry*, and holding out their companions. A person is not guilty of a *forcible* detainer, by barely refusing to go out of a house, and continuing therein in despite of another. And no words alone can make a *forcible entry*, although violent and threatening, without force used by the party. 1 *Lil. Abr.* 514.

A forcible entry may be committed by a single person as well as by twenty, and all who accompany a man when he makes a forcible entry shall be adjudged to enter with him, whether they actually come upon the lands or not. 1 *Hawk. P. C. c.* 64.

The same circumstances of violence or terror which will make an entry forcible will make a detainer forcible also. And a detainer may be forcible whether the entry were forcible or not. 1 *Hawk. P. C. c.* 64.

If a justice of peace come to view a force in a house, and they refuse to let him in; this of itself will make a *forcible detainer* in all cases; but it must be upon complaint made. *Dalt.* 312.

II. The Remedy may be, by action: or by justices of peace upon view; or by indictment or inquisition.

By *stat.* 8 *H.* 6. *c.* 9. § 6. "If any person be put out or disseised of any lands or tenements in forcible manner, or put out forcibly and after holden out with strong hand; the party grieved shall have assize of novel disseisin, or writ of trespass against the disseisor; and if he recover, (or if any alienation be made to defraud the possessor of his right, which is also declared by the statute to be void,) he shall have treble damages, and the defendant shall also make fine and ransom to the King."

But in an action on this statute if the defendant make title which is found for him, he shall be dismissed without any enquiry concerning the force; however punishable he may be for that at the King's suit. 1 *Hawk. P. C. Dalt. c.* 129.

If in trespass or assise upon this statute the defendant is condemned by *non sum informatus;* he shall pay treble damages and treble costs; adjudged, and affirmed in error. For the words of the statute give them where the recovery is by verdict, or otherwise in due manner. *Jenk. Cent.* 197.

The party grieved if he will lose the benefit of his treble damages and costs may be aided and have the assistance of the Justices at the general Sessions by way of indictment on this same statute. Which being found there, he shall be restored to his possession by a writ of restitution granted out of the same court to the sheriff. *Dalt. c.* 129.

Indictment of *forcible entry* lies not only for lands, but for tithes; also for rents; but not against a lord entering a common with force, for which the commoner may not indict him, because it is his own land. *Cro. Car.* 201. 486.

For a more speedy remedy the party grieved may complain to any one justice or to a mayor, sheriff or bailiff, within their liberties; and it is provided by *stats.* 15 *R.* 2. *c.* 2. 8 *H.* 6. *c.* 9. that after complaint made to such justice, &c. he shall within a convenient time, at the costs of the party grieved, take sufficient power of the county, and go to the place where such force was made, and if he shall find such force, shall cause the offenders to be arrested, and make a record of such force by him viewed; and the offenders so arrested shall be put in the next gaol, there to abide convict by the record of the same justice until they have made fine and ransom to the King.

As to restitution to the party injured, it is enacted by the said *stat.* 8 *H.* 6. *c.* 9. though that the persons making such entry be present, or else departed before the coming of the Justice, he may notwithstanding in some town next to the tenements so entered, or in some other convenient place, have power to enquire by a jury of the county as to the persons making such forcible entry and detainer; and the Justice may make his precept to the sheriff, who is to summon the jury. And if such forcible entry or detainer be found before such Justice, then the said Justice shall cause to reseise the lands and tenements so entered or holden, and shall restore the party put out to the full possession of the same. And by the *stat.* 31 *Eliz. c.* 11. if on an indictment of forcible entry, &c. it is found against the party indicted, he shall pay such costs and damages as the judges or justices shall assess.

Under the above *stat.* 15 *R.* 2. *c.* 2. any justice of the peace upon view of the *force*, may make a record of it, and commit the offender. And this, without a writ directed to him to execute the statutes: and upon any information without a complaint of the party. So every justice may take the sheriff, and *posse comitatus*, to restrain; or he may break open a house to remove the *force. Dalt. c.* 44. The record made by a Justice upon view, shall be a conviction, and is not traversable: and ought to be certified to B. R. or the next assises, or quarter-sessions. And if a defect appears, in the conviction to B. R. it shall be quashed. 1 *Sid.* 156. See 8 *Co.* 121. The justices have power to fine on view; but are not bound to do it on the spot, but may take a reasonable time to consider. See *Str.* 794. *Ld. Raym.* 1515.

The Justices, on *forcible detainer*, may punish the force upon view, and fine and imprison the offenders. *Sid.* 156. And it hath been held, that in *forcible entry* and detainer, the jury are to fine *all* or *none;* and not the detainer, without the *forcible entry*. 1 *Vent.* 25.

An indictment will lie at Common law for a forcible entry, though generally brought on the above statutes. But it must shew on the face of it sufficient actual force. 3 *Burr.* 1702. 1732. 8 *Term Rep. K. B.* 357.

An indictment for a *forcible detainer*, ought to shew, *that the entry was peaceable. Cro. Jac.* 151.

Indictments for *forcible entry* must set forth that the entry was *manu forti*, to distinguish this offence from other trespasses *vi et armis;* and there are many niceties to be observed in drawing the indictment, otherwise it will be quashed. *Cro. Jac.* 461. *Dalt.* 298. There must be certainty in this indictment; and no repugnancy, which is an incurable fault. An indictment of forcible entry was quashed, for that it did not set forth the estate of the party: so where the *defendant* hath *not* been in *possession peaceably three years* before the indictment, without saying *before the indictment found*, &c. And force shall not be intended when the judgment is generally laid, for it must be always expressed. 2 *Nels. Abr.* 867. 869.

The justice may make restitution, (after inquisition found) to the party ousted, by himself, or by his precept to the sheriff. *T. Raym.* 85. *Carth.* 496. So *restitution* shall be made upon an indictment at the quarter-sessions. *H. P. C.* 140.

An indictment of *forcible entry* may be removed from before justices of peace into the court of B. R. *coram rege*, which court may award restitution. 11 *Rep.* 65. See *Ann.* 174. *Latch.* 172. 4 *Inst.* 176. And the justices, before whom such indictment was found, may, after traverse tendered, certify or deliver the indictment into the King's Bench, and refer the proceeding thereupon to the justices of that court.

So justices of gaol delivery, upon an indictment before them. So re-restitution shall be, after an ill restitution awarded. *Sav.* 68. *Cro. Jac.* 151. So restitution shall be to a disseisor ousted by the force of the disseisee. To a lessee, though the lessor, who was disseised, thereby opposes it. To a copyholder, though his lord opposes it. Vide *Dalt. c.* 132. *Contrà before stat.* 21 *Jac. c.* 15. See *Dy.* 142 *a. in marg.*

A copyholder cannot be *disseised*, because he hath no freehold in his estate; but he may be *expelled.* And a copyhold tenant may be restored, where he is wrongfully expelled; but if the indictment be only of disseisin, as he may not be disseised, there can be no restitution but at the prayer of him who hath the freehold. *Yelv.* 81. *Cro. Jac.* 41. Possession of the termor is the possession of him in reversion; and when a lessee for years is put out of possession by force, restitution must be to him in reversion, and not to the lessee; and then his lessee may re-enter. 1 *Leon.* 327. A termor may say that he was expelled, and his landlord in reversion disseised; or rather that the tenant of the freehold is disseised, and he, the lessee for years, expelled. 4 *Mod.* 248. 2 *Nels. Abr.* 869. If a disseisee within three years makes a lawful claim, this is an interruption of the possession of the disseisor, *H. P. C.* 139. Though it hath been adjudged, that it is not the *title* of the possessor, but the *possession* for three years, which is material. *Sid.* 149. Since the *stat.* 5 *R.* 2. *st.* 1. *c.* 8. if one be seised of lands, and another having good right to enter, doth accordingly enter *manu forti*, he may be indicted notwithstanding his right, &c. 3 *Salk.* 170. For a *forcible* detainer only it is said there is no restitution; the plaintiff never having been in possession. 1 *Vent.* 23. *Sid.* 97. 99.

No *restitution* shall be awarded to an *advowson, common, rent*, &c. for it shall only be to *land. Dalt. c.* 44. Nor where he, who used force has the possession by *operation of law:* as if a disseisee enters, and afterwards, by force, ousts his disseisor, the possession shall not be restored; for it was revested in the disseissee by his entry. *Dalt. c.* 132. Nor, if a lessor enters by force, upon the lessee, for a forfeiture; nor to any other than him who was ousted by *force*, or to his heir. *Salk.* 587. Or any abator, after the death of the ancestor. *Dalt. c.* 132. Nor if the party tenders a traverse to the inquisition. 1 *Sid.* 287. Upon a *certiorari* delivered to remove an indictment, it shall be stayed. *H. P. C.* 141. Or, if the indictment appears insufficient. *H. P. C.* 140. And

in such case *restitution* granted may be stayed before execution. *H. P. C.* 140. So *restitution* shall not be, *after* a *conviction* by a *justice* upon his *view*. 1 *Vent.* 308. Nor by *justices* of *assise*, *gaol delivery*, or *justices* of *peace*; if the indictment was not found before them. *H. P. C.* 140. *Dalt. c.* 44. 131. So *restitution* shall not be, unless *immediately*; not four or five years afterwards. *Carth.* 496.

A record of justices of peace of *forcible entry*, is not traversable; but the entry and force, &c. may be traversed in writing, and the justices may summon a jury for trial of the traverse. 1 *Salk.* 353. The finding of the force being in nature of a presentment by the jury, is traversable; and if the justices of peace refuse the traverse, and grant restitution, on removing the indictment into B. R. there the traverse may be tried; and on a verdict found for the party, &c. a *re-restitution* shall be granted. *Sid.* 287. 2 *Salk.* 588. If *no force* is found at a trial thereof before justices, *restitution* is not to be granted; nor shall it be had till the force is tried; nor ought the justices to make it in the absence of the defendant, without calling him to answer. 1 *Hawk. P. C. c.* 64.

No other justices of peace but those before whom the indictment was found, may either at sessions, or out of it, award restitution; the same justices may do it in person, or make a precept to the sheriff to do it, who may raise the power of the county to assist him in executing the same. 1 *Hawk. P. C. c.* 64. And the same justices of peace may also supersede the restitution, before it is executed; on insufficiency found in the indictment, &c. But no other justices, except of the court of B. R. A *certiorari* from B. R. is a *supersedeas* to the restitution; and the justices of B. R. may set aside the restitution after executed, if it be against law, or irregularly obtained, &c. 1 *Salk.* 154. If justices of peace exceed their authority, an information may be brought against them. A conviction for *forcible entry*, before a fine is set, may be quashed on motion; but after a fine is set it may not; the defendant must bring writ of error. 2 *Salk.* 450.

If a plaintiff proceeds not criminally by indictment for *forcible entry*, but commences a civil action on the case, on *stat.* 8 *Hen.* 6. *c.* 9. the defendant is to plead *Not Guilty*; or *may plead any special matter, and traverse the force*; and the plaintiff in his replication must answer the special matter, and not the traverse: and if it be found against the defendant, he is convicted of the force of course; whereupon the plaintiff shall recover treble damages and costs. 3 *Salk.* 169.

A reversioner cannot bring action of *forcible entry*, because he cannot be expelled, though he may be disseised. *Dyer*, 141. The words in the writ to maintain the action are, that the defendant *expulit et disseisivit*, &c. yet it is said that every disseisin implies an expulsion in *forcible entry*. *Cro. Jac.* 31.

Though *forcible entry* is punishable either by indictment or action; the action is seldom brought, but the indictment often. But in many cases it may be much more for the benefit of the party to bring the action.

If a forcible entry or detainer shall be made by three persons or more, it is also a riot, and may be proceeded against as such, if no enquiry hath before been made of the force. *Dalt. c.* 44.

See further on this subject. 1 *Hawk. P. C. c.* 64. at length: and *Burn's Justice*, title *Forcible Entry*.

FORCIBLE MARRIAGE. See this Dict. titles *Marriage*, *Guardian*.

FORD, *farda*.] A shallow place in a river. *Mon. Ang. tom.* 1. *p.* 657. See title *Ferry*.

FORDOL, from Sax. *fore*, before, and *dæle*, a part or portion.] A butt or head-land, shooting upon other bounds.

FORECHEAPUM, from Sax. *fore*, *ante*, and *ceapean*, i. e. *Nundinari*, *emere*.] Præ-emption. *Chron. Brompton-col.* 897, 898. LL. *Æthelredi*, *c.* 23.

FORECLOSED. Shut out or excluded; as the barring the equity of redemption on mortgages, &c. See title *Mortgage*.

FOREGOERS. The King's Purveyors; they were so called from their *going before* to provide for his household. 36 *Ed.* 3. 5.

FOREIGN, Fr. *foraign*, Lat. *forinsecus*, *extraneus*.] Strange or outlandish, of another country, or society; and in our law, is used adjectively, being joined with divers substantives in several senses. *Kitch.* 126.

Foreign Apposer. See title *Exchequer*.

Foreign Bought and Sold. A custom within the city of London, which being found prejudicial to the sellers of cattle in Smithfield, was abolished.

Foreign Attachment. See titles *Attachment*, *Foreign*.

Foreign Court. At Lemster, (anciently called Leominster) there is the borough and the *foreign court*; which last is within the jurisdiction of the manor, but not within the liberty of the bailiff of the borough; so there is a *foreign court* of the honour of *Gloucester*. *Claus.* 8 *Ed.* 2.

Foreign Kingdom; Foreign Laws and Customs. A Foreign Kingdom is one under the dominion of a *foreign* prince: so that Ireland, or any other place, subject to the crown of England, cannot with us be called *foreign*; though to some purposes they are distinct from the realm of England. If two of the king's subjects fight in a *foreign kingdom*, and one of them is killed, it cannot be tried here by the common law: but it may be tried and determined in the court of the *Constable and Martial*, according to the *civil law*; or the fact may be examined by the Privy Council, and tried by commissioners appointed by the king in any county of England, by statute 33 *H.* 8. *c.* 23. 3 *Inst.* 48. One Hutchinson killed Mr. Colson abroad in Portugal, for which he was tried there and acquitted, the exemplification of which acquittal he produced under the Great Seal of that Kingdom; and the king being willing he should be tried here, referred it to the judges, who all agreed, that the party being already acquitted by the laws of Portugal, could not be tried again for the same fact here. 3 *Keb.* 785.

If a stranger of Holland, or any *foreign kingdom*, buys goods at London, and gives a note under his hand for payment, and then goes away privately into Holland; the seller may have a certificate from the Lord Mayor, on proof of sale and delivery of the goods: upon which the people of Holland will execute a legal process on the party. 4 *Inst.* 38. Also at the instance of an ambassador or consul, such a person of England, or any criminal against the laws here, may be sent from a *foreign kingdom* hither. Where a bond is given, or contract made in a *foreign kingdom*, it may be tried in the King's Bench, and laid to be done in any place in England. *Hob.* 11. 2 *Bulst.* 322.

An agreement made in France, on two French persons marrying, touching the wife's fortune, has been decreed here to be executed, according to the laws of England: and that the husband surviving should have the whole; but relief was first given for a certain sum, and the rest to be governed by the custom of Paris. *Preced. Chanc.* 207, 208.

A. and B. being inhabitants of the United States of America, while those States were colonies of Great Britain, and before the rebellion of them as colonies, B. executes a bond to A.—During the rebellion, after the declaration of independence by the American Congress, but before the Independence of America was acknowledged by Great Britain, both parties are attainted; their property confiscated, and vested in the respective States of which they were inhabitants, by the legislative acts of those States then in rebellion, and a fund provided for the payment of the debts of B. Afterwards the independence of America is acknowledged by Great Britain. Under all these circumstances A. may

maintain an action on the bond against B. in England. *Parl. Cases*, 8vo. *Judgment* of the court of King's Bench (affirming the judgment of C. P.) affirmed.

Though all these judgments appear unanimous, the two former, and perhaps all three of them, were given in some measure upon different grounds. But it appears upon the two first decisions to be a principle not judicially controverted, that "the *penal laws* of one country cannot be taken notice of to affect the laws and rights of citizens (or subjects of such country, becoming citizens,) of another; the penal laws of foreign countries being strictly local, and affecting nothing more than they can reach, and can be seized by virtue of their authority." See 3 *Term Rep.* 733. 735. 1 *H. Black. Rep.* 135.

In the case of *Dudley* v. *Folliot*, the court having no doubt about the law, and thinking that it would lead to the discussion of improper topics, *would not permit the question to be argued*. That was the case of a covenant in a conveyance of lands in America, made during the time of the rebellion, (April, 1780) "that the grantor had a legal title, and that the grantee might peaceably enjoy, &c. without the least interruption, &c. of the grantor and his heirs, or *of any other person* whomsoever."—The court were of opinion that this covenant was not broken by the States of *America* seizing the lands, as forfeited, for an act done previous to the conveyance, notwithstanding the subsequent acknowledgment of independence. 3 *Term Rep.* 584.

A foreigner may gain a settlement, in England by occupying a tenement of 10*l.* a year, for forty days. 4 *East's Rep.* 103.

A natural born subject of Great Britain, may be also a citizen of a foreign country, for the purposes of commerce, and entitled to all advantages as such under a treaty with that country—and the circumstance of his coming over to Great Britain for a temporary purpose, does not deprive him of those advantages. 8 *Term Rep. K. B.* 31. Affirmed in the Exchequer Chamber. 1 *Bos. & Pull.* 430.

As to the effect of judgments in foreign courts, upon the property of British subjects within their jurisdiction, and how far such judgments shall be allowed to interfere with the laws of this country. See 2 *H. Blackst.* 409, &c.

In covenant to indemnify plaintiff from all debts due from the late partnership, of plaintiff, defendant, and D. B. and from all suits, &c. proof by a copy of the proceedings in a foreign court in a suit there, instituted against the late partners for the recovery of a partnership debt, in which a decree passed against them for want of answer, whereby a sequestration issued against the plaintiff's estate, and he was obliged to pay the debt, was held to be conclusive evidence against the defendant, and that he was at liberty to show that the proceedings were erroneous. *Tarleton* v. *Tarleton*, *Term Rep. K. B. East.* 55 *Geo.* 3. *pa.* 20.

Foreign Plantations; and Dominions of the Crown. As to the former of these, see this Dict. tit. *Plantations*. As to any foreign dominions which may belong to the person of the king by hereditary descent, by purchase or other acquisition, as the territory of Hanover and His Majesty's other property in Germany; as these do not in any wise appertain to the crown of these kingdoms they are entirely unconnected with the laws of England, and do not communicate with this nation in any respect whatsoever. The English Legislature, warned by past experience, wisely inserted in the Act of Settlement, which vested the crown in the present family, the following clause, "That in case the crown and imperial dignity of this realm shall hereafter come to any person not being a native of this kingdom of England, this nation shall not be obliged to engage in any war for the defence of any dominions or territories which do not belong to the crown of England, without consent of Parliament." *Stat.* 12 & 13 *W.* 3. *c.* 3.

Foreign Plea. A plea in objection to a judge, where he is refused as incompetent to try the matter in question because it arises out of his jurisdiction. *Kitch.* 75. *Stat.* 4 *Hen.* 8. *c.* 2. If a plea of issuable matter is alledged in a different county from that wherein the party is indicted or appealed, by the common law, such pleas can only be tried by juries returned from the counties wherein they are alledged. But by the *stat.* 23 *H.* 8. *c.* 14. § 5. all *foreign pleas* triable by the country, upon an indictment for petit treason, murder or felony, shall be forthwith tried without delay, before the same justices before whom the party shall be arraigned, and by the jurors of the same county where he is arraigned, notwithstanding the matter of the pleas is alledged to be in any other county or counties: though as this statute extends not to treason, nor appeals, it is said a *foreign* issue therein must still be tried by the jury of the county wherein alledged. 3 *Inst.* 17. *H. P. C.* 255. 2 *Hawk. P. C. c.* 40. §§ 6, 7. In a *foreign plea* in a civil action the defendant ought to plead to that place where the plaintiff alledges the matter to be done in his declaration; and the defendant may plead a *foreign plea* whether the matter is transitory, or not transitory; but in the last case he must swear to it. *Sid.* 234. 2 *Nels.* 871. When a *foreign plea* is pleaded, the court generally makes the defendant put it upon oath, that it is true; or will enter up judgment for want of a plea. See 5 *Mod.* 335. *Foreign answer* is such an answer as is not triable in the county where made; and *foreign matter* is that matter which is done in another county, &c. See further titles *Pleading*, *Indictment*.

Foreign Service. Is that whereby a mesne lord holds of another, without the compass of his own fee: or that which the tenant performs either to his own lord, or to the lord paramount out of the fee. *Kitch.* 299. See *Bract. lib.* 2. *c.* 16. *Foreign service* seems also to be used for *knight's service*, or *escuage* uncertain. *Perkins.* 650.—*Salvo Forinseco Servitio. Mon. Ang. tom.* 2. *p.* 637.

*Felonies in serving Foreign States*, are restrained and punished by *stat.* 3 *Jac.* 1. *c.* 4. which makes it felony for any person whatever to go out of the realm, to serve any foreign Prince or State, without having first taken the oath of allegiance before his departure. And by this act it is felony also for any Gentleman or person of higher degree, or who hath born office in the army, to go out of the realm to serve such foreign Prince or State, without previously entering into a bond with two sureties, not to be reconciled to the See of Rome, nor enter into any conspiracy against his natural Sovereign. See the *stat.* §§ 18, 19.—By *stat.* 9 *Geo.* 2. *c.* 30. enforced by *stat.* 29 *Geo.* 2. *c.* 17. it was enacted, that if any subject of Great Britain enlisted himself, or if any person procured him to be enlisted in any foreign service, or retained or embarked him for that purpose without licence under the king's sign manual, he should be guilty of felony without benefit of clergy; but if the person so seduced, within 15 days discovered his seducer, he was, on conviction of the seducer, indemnified.—By *stat.* 29 *Geo.* 2. *c.* 17. it was enacted that to serve under the French King, as a military officer, should be felony without benefit of clergy: and to enter into the Scotch brigade in the Dutch service without previously taking the oaths of allegiance and abjuration should incur a forfeiture of 500*l.*

By *stat.* 59 *Geo.* 3. *c.* 69. the acts 9 *Geo.* 2. *c.* 30. and 29 *Geo.* 2. *c.* 17. (as also two Irish acts, 11 & 19 *Geo.* 2. *in pari materia*) were repealed; but the *stat.* 3 *Jac.* 1. *c.* 4. is not referred to.

By this act, 59 *Geo.* 3. any subject enlisting or engaging to enlist or serve in foreign service, military or naval (after certain times specified in the act) and any person retaining or procuring others to enlist are declared guilty of a misdemeanor punishable by fine and imprisonment. The same act

provides, that vessels with persons on board engaged in foreign service may be detained at any port in any of the King's dominions. A penalty of 50*l.* per head is imposed on masters of ships taking on board persons enlisted contrary to the act. Persons fitting out armed vessels, without the King's licence, to aid in military operations with any foreign powers, or issuing commissions for such ships, are declared guilty of misdemeanor punishable as aforesaid: as also persons aiding or increasing the warlike equipment of vessels of foreign states, without such licence. The act excepts persons entering into the military service of any Asiatic power by licence of the presidency of Bengal.

See further this Dict. titles *Allegiance, Contempt, Treason.*

FOREIGNERS. See title *Alien.*

FOREJUDGER, *forisjudicatio.*] A judgment whereby a person is deprived of, or put by, the thing in question. *Bract. lib.* 4. To be *forejudged* the court, is when an *officer* or *attorney* of any court is expelled the same for some offence, or for not appearing to an action, on a bill filed against him. See title *Attorneys at Law.*

FORM OF A FOREJUDGER OF AN ATTORNEY.

BE it remembered, *that on the day of, &c. this same term, A. B. came here into this court, by, &c. his attorney, and exhibited to the justices of our Sovereign Lord the King, his bill against C. D. Gent. one of the attornies of the Common Bench of our said Sovereign Lord the King, personally present here in the court; the tenor of which bill follows in these words, that is to say: To the justices of our Sovereign Lord the King, ss. A. B. by, &c. his attorney, complains of C. D. one of the attornies, &c. for that whereas, &c.* (setting forth the whole bill.) *The pledges for the prosecution are* John Doe *and* Richard Roe: *whereupon the said C. D. being solemnly called, came not; thereby he is forejudged from exercising his office of attorney of this court for his contumacy, &c.*

FORESCHOKE, *Derelictum.*] *Forsaken;* in one of our statutes, it is specially used for lands or tenements seized by a lord, for want of services performed by the tenant, and quietly held by such lord *beyond a year and a day;* now the tenant, who seeth his land taken into the hands of the lord, and possessed so long, and doth not pursue the course appointed by law to recover it, doth in presumption of law disavow or *forsake* all the right he hath to the same; and then such lands shall be called *foreschoke.* See *stat.* 10 *Ed.* 2. *c.* 1.

## FOREST.

FORESTA; SALTUS.] A great or vast wood; *locus sylvestris et saltuosus.* Our law writers define it thus; Foresta *est locus ubi feræ inhabitant vel includuntur;* others say, it is called *Foresta quasi ferarum statio, vel tuta mansio ferarum. Manwood* in his *Forest Laws,* gives this particular definition of it. A *Forest* is a certain territory or circuit of woody grounds and pastures, known in its bounds and privilege, *for the peaceable being and abiding of wild beasts, and fowls of* forest *chase and warren, to be under the king's protection for his princely delight:* replenished with beasts of venary or chase, and great coverts of *vert* for succour of the said beasts; for preservation whereof there are particular laws, privileges, and officers belonging thereunto. *Manw. par.* 2. *c.* 1.

*Forests* are of that antiquity in England, that (except the *New Forest* in Hampshire, erected by William called The Conqueror, and *Hampton Court,* erected by King Hen. VIII. see *stat.* 31 *H.* 8. *c.* 5.) it is said there is no record or history doth make any certain mention of their erections and beginnings; though they are mentioned by several writers and in divers of our laws and statutes. 4 *Inst.* 319. Our ancient historians tell us, that *New Forest* was raised by the destruction of twenty two parish churches, and many villages, chapels and manors, for the space of thirty miles together; which was attended with divers judgments, as they are termed, on the posterity of King William I. who erected it; for William Rufus was there shot with an arrow, and before him Richard the brother of Hen. I. was there killed; and Henry, nephew to Robert, the eldest son of the Conqueror, did hang, by the hair of the head in the boughs of the forest like unto Absalom. *Blount.*

Besides the *New Forest,* there are *sixty-eight* other *Forests* in England; thirteen chases, and more than seven hundred parks: the four principal *Forests* are *New Forest* on the Sea, *Shirewood Forest* on the Trent, *Dean Forest* on the Severn, reafforested by *stat.* 20 *Car.* 2. *c.* 3. and *Windsor Forest* on the *Thames.* The way of making a *Forest* is thus: Certain commissioners are appointed under the Great Seal of England, who view the ground intended for a *Forest,* and fence it round with metes and bounds; which being returned into the Chancery, the King causes it to be proclaimed throughout the county where the land lieth, that it is a *Forest,* and to be governed by the laws of the *Forest,* and prohibits all persons from hunting there without his leave; and then he appointeth officers fit for the preservation of the vert and venison, and so it becomes a *Forest* on record. *Manw. c.* 2. Though the King may erect a *Forest* on his own ground and wastes, he may not do it in the ground of other persons, *without their consent;* and agreements with them for that purpose ought to be confirmed by parliament. 4 *Inst.* 300.

Proof of a *Forest* appears by matter of record; as by the *eyres* of the justices of the *Forests,* and other courts, and officers of *Forests,* &c. and not by the name in grants. 12 *Rep.* 22. As parks are enclosed with wall, pale, &c. so *Forests* and chases are inclosed *by metes and bounds;* such as rivers, highways, hills; which are an inclosure in law; and without which there cannot be a *Forest.* And in the eye of the law, *the boundaries of a* forest *go round about it as it were a brick wall, directly in a right line the one from the other, and they are known either by matter of record, or prescription.* 4 *Inst.* 317. Bounds of a *Forest* may be ascertained by commission from the Lord Chancellor; and commissioners, sheriffs, officers of *Forests,* &c. are impowered to make inquests thereof. *Stat.* 16 & 17 *Car.* 1. *c.* 16. Also the boundaries of *Forests* are reckoned *a part* of the *Forest:* for if any person kill or hunt any of the King's deer in any highway, river or other inclusive boundary of a *Forest,* he is as great an offender as if he had killed or hunted deer within the *Forest* itself. 4 *Inst.* 318.

By the grant of a *Forest,* the game of the *Forest* do pass; and beasts of the *Forest* are the hart, hind, buck doe, boar, wolf, fox, hare, &c. The seasons for hunting whereof are as follow, *viz.* that of the hart and buck begins at the Feast of St. John Baptist, and ends at Holy-rood day; of the hind and doe, begins at Holy-rood, and continues till Candlemas; of the boar, from Christmas to Candlemas; of the fox, begins at Christmas, and continues till Lady-day; of the hare, at Michaelmas, and lasts till Candlemas. *Dyer,* 169. 4 *Inst.* 316.

Not only game, &c. are incident to a *Forest,* but also a *Forest* hath divers special properties. 1. A *Forest* truly and strictly taken, cannot be in the hands of any but the King; for none but the King hath power to grant commission to any one to be a *Justice in the Eyre of the Forest;* but if the King grants a *Forest* to a subject, and granteth further that upon request made in Chancery, he and his heirs shall have justices of the *Forest,* then the subject hath a *Forest* in law. 4 *Inst.* 314. *Cro. Jac.* 155.

The *second* property of a *Forest* is the *Courts;* as the *Justice seat,* the *Swainmote,* and court of *Attachment.* The *third* property is the officers belonging to it; as first, the *justices* of the *Forest,* the *warden* or warder, the *verderors, foresters, agisters, regarders, keepers, bailiffs, beadles,* &c. See title *Attachment of the Forest.*

As to the COURTS. The most especial court of a *Forest* is the *Swainmote*, which is no less incident to it than a court of *piepowder* to a fair; and if this fail, there is nothing remaining of the *Forest*, but it is turned into the nature of a *Chase*. *Manw. c.* 21. *Crompt. Jur.* 146.

The court of *Attachment* or woodmote in *Forests*, is kept every forty days; at which the *Foresters* bring in the attachments *de viridi et venatione*, and the presentments thereof, and the verderors do receive the same, and inrol them; but this court can only inquire, not convict. The court of *Swainmote* is holden before the verderors as judges, by the steward of the Swainmote, thrice in the year; the swains or freeholders within the *Forest* are to appear at this court to make inquests and juries; and this court may inquire *de superoneratione Forestariorum et aliorum ministrorum* Forestæ, *et de eorum oppressionibus populo nostro illatis:* and also may receive and try presentments certified from the court of Attachments, against offences in vert or venison. And this court may inquire of offences, and convict also, but not give judgment, which must be at the justice seat. 4 *Inst.* 289.

The *Court of Regard*, or Survey of Dogs, is holden likewise every third year, for expeditation, or lawing of dogs, by cutting off to the skin three claws of the fore feet, to prevent their running at or killing of deer. No other dogs but mastiffs are to be thus lawed or expeditated, for none other were permitted to be kept within the precincts of the Forest, it being supposed that the keeping of these, and these only, was necessary for the defence of a man's house. 4 *Inst.* 308.

The principal court of the Forest is the Court of the *Chief Justice in Eyre*, or *Justice Seat*, which is a court of record, and hath authority to hear and determine all trespasses, pleas, and causes of the *Forest*, &c. within the *Forest*, as well concerning vert and venison, as other causes whatsoever; and this court cannot be kept oftener than *every third year*. As before other Justices in Eyre, it must be summoned forty days at least before the sitting thereof; and one writ of summons is to be directed to the sheriff of the county, and another writ *Custodi* Forestæ, *Domini Regis vel ejus locum tenenti*, &c. Which writ of summons consists of two parts: *First*, to summon all the officers of the *Forest*, and that they bring with them all records, &c. *Secondly*, All persons who claim any liberties or franchises within the *Forest*, and to shew how they claim the same. It may also proceed to try presentments in the inferior courts of the Forest, and to give judgment upon conviction of the Swainmote. And the Chief Justice may therefore after presentment made, or indictment found, but not before, issue his warrant to the officers of the Forest to apprehend the offenders. *Stat.* 1 *E.* 3. *c.* 8. 7 *R.* 2. *c.* 4. This court being a court of record, may fine and imprison for offences within the Forest, and therefore if there be erroneous judgment at the justice-seat, the record may be removed by writ of error into B. R. or the Chief Justice *in Eyre* may adjourn any matter to that court. 4 *Inst.* 291. 5. 313.

These Justices in *Eyre* were instituted by Henry II. A. D. 1184; and their courts were formerly held very regularly; but the last court of Justice seat of any note was that holden in the reign of Charles I. before the Earl of Holland; the rigorous proceedings at which are reported by Sir W. Jones. After the restoration another was held, *pro forma* only, before the Earl of Oxford; but since the æra of the Revolution in 1688, the Forest laws have fallen into total disuse, to the great advantage of the subject. See 3 *Comm.* 73.—Much therefore of what follows is matter rather of curiosity than use. There is but one *Chief Justice* of the *Forests* on this side Trent, and he is named *Justiciarius Itinerans Forestarum*, &c. *citra Trentam*; and there is another, *Capitalis Justiciarius*; and he is *Justiciarius Itinerans omnium Forestarum ultra Trentam*, &c. who is a person of greater dignity, than knowledge in the laws of the *Forest*; and therefore when *Justice seats* held, there associated to him such as the King shall appoint, who, together with him, determine *omnia placita forestæ*, &c. 4 *Inst.* 315.—By *stat.* 32 *H.* 8. *c.* 35. Justices of the King's Forests may make deputies. By *stat.* 57 *Geo.* 3. *c.* 61. the offices of these Justices in Eyre are abolished on the termination of the existing interests.

A *Justice in Eyre* cannot grant licence to sell any timber, unless it be *sedente curiâ*, or after a writ of *ad quod damnum*: and it hath been resolved by all the judges, that though *Justices in Eyre*, and the King's officers within his *Forests*, have charge of venison, and of vert or green-hue, for the maintenance of the King's game, and all manner of trees for covert, browse and pannage; yet when timber of the *Forest* is sold, it must be cut and taken by power under the *Great Seal, or the Exchequer Seal*, by view of the *Foresters*, that it may not be had in places inconvenient for the game: and the Justice in Eyre, or any of the King's officers in the *Forest*, cannot sell or dispose of any wood within the *Forest* without commission; so that the Exchequer and the officers of the *Forest* have *divisum imperium, the one for the profit of the King, the other for his pleasure.* Also no officer of the *Forest* can claim windfalls, or dotard trees, for their perquisites, because they were once parcel of the King's inheritance; but they ought to be sold by commission, *for the King's best benefit. Read. on Stat.* 3 *vol. p.* 304, 305.

If any officers cut down wood, not necessary for browse, &c. they forfeit their offices. 9 *Rep.* 50. The lord of a *Forest* may by his officers enter into any man's wood within the regard of the *Forest*, and cut down browsewood for the deer in winter. A prescription for a person to take and cut down timber-trees in a *Forest*, without view of the *Forester*, it is said may be good: but of this *quære*, without allowance of a former *eyre*, &c. If a man hath wood in a *Forest*, and hath no such prescription, the law will allow him to fell it, so as he does not prejudice the game, but leave sufficient vert; but it ought to be by writ of *ad quod damnum*, &c. 4 *Inst. Cro. Jac.* 155. And every person in his own wood in a *forest* may take *house-bote*, and *hay-bote* by view of the *Forester*; and so may freeholders by prescription, copyholders by custom, &c. 1 *Ed.* 3. *st.* 2. *c.* 2. The wood taken by view of the *Forester*, ought to be presented at the next *Court of Attachment*, that it was by view, and may appear of record.

Fences, &c. in *Forests* and chases, must be with low hedges, and they may be destroyed, though of forty years' continuance, if they were not before. *Cro. Jac.* 156. He whose wood is in danger of being spoiled, for want of repairing fences by another, ought to request the party to make good the hedges; and if he refuse, then he must do it himself, *and have action on the case against the other that should have done it.* 1 *Jones*, 277.

A person may have action at Common-law for trespass in a *Forest*, as to wood, &c. to recover his right. *Sid.* 296.

The *Chief Warden* of the *Forest* is a great officer, next to the Justices of the *Forest*, to bail and discharge offenders; but he is no judicial officer; and the constable of the castle where a *Forest* is, by the *Forest* law is Chief Warden of the *Forest*, as of Windsor Castle, &c.

A *Verderor* is a judicial officer of the *Forest*, and chosen in full county, by the King's writ: his office is to observe and keep the assises or laws of the *Forests*, and view, receive, and inrol; the attachments and presentments of all trespasses of the *Forest*, of vert and venison, and to do equal right and justice to the people: the verderors are the chief judges of the *Swainmote* court; although the Chief Warden, or his deputy, usually sits there. 4 *Inst.* 292.

The *Regarder* is to make regard of the *Forest*, and to view and inquire of offences, concealments, defaults of *Foresters*, &c. Before any justice-seat is holden, the *Regarders* of the *Forest* must make their regard, and go through and view the

whole *Forest*, &c. They are ministerial officers, constituted by letters patent of the King, or chosen by writ to the sheriff. 4 *Inst.* 291.

A *Forester* is, in legal understanding, a sworn officer ministerial of the *Forest*, and is to watch over the vert and venison, and to make attachments and true presentments of all manner of trespasses done within the *Forest*: a *Forester* is also taken for a *Woodward*: this officer is made by letters patent, and it is said the office may be granted in fee, or for life. 4 *Inst.* 293. Every *Forester*, when he is called at a court of justice seat, ought upon his knees to deliver his horn to the Chief Justice in Eyre; so every Woodward ought to present his hatchet to my Lord.

A *Riding Forester* is to lead the King in his hunting. 1 *Jones*, 277. The office of *Forester*, &c. though it be a fee-simple, cannot be granted or assigned over without the King's licence. 4 *Inst.* 316. If a *Forester* by patent for life, is made justice of the same forest *pro hac vice*, *the forestership* is become void; for these offices are incompatible, as the *forester* is under the correction of the justice, and he cannot judge himself. 1 *Inst.* 313.

An *Agister's* office is to attend upon the King's woods and lands in a *Forest*, receive and take in cattle, &c. by agistment, that is to depasture within the forest, or to feed upon the pannage, &c. And this officer is constituted by letters patent. 4 *Inst.* 293. Persons inhabiting in the forest may have common of herbage for beasts commonable within the Forest; but by the Forest law, sheep are not commonable there, because they bite so close that they destroy the vert; and yet it has been held, that *sheep* may be commonable in Forests by prescription. 3 *Bulst.* 213.

There may be a prescription for common in a Forest at all times of the year; though it was formerly the opinion of our judges, that the *fence-month* should be excepted. 3 *Lev.* 127. A Forest may be *disafforested* and laid open; but right of common shall remain. *Poph.* 93. He that hath a grant of the herbage or pannage of a park, or Forest, cannot take any herbage or pannage, but of the surplusage over and above a competent and sufficient pasture and feeding for the game; and if there be no surplusage, he that hath the herbage and pannage cannot put in any beasts; if he doth, they may be driven out. *Read. on Stat. vol.* 3. 305. None may gather nuts in the Forest without warrant.

A *Ranger* of a Forest is one whose business is to rechase the wild beasts from the *purlieus* into the Forest, and to present offences within the purlieu, and the Forest, &c. And though he is not properly an officer in the Forest, yet he is a considerable officer of, and belonging to it.

The *Beadle* is a forest officer, that warns all the courts of the Forest, and executes process, makes all proclamations, &c. 4 *Inst.* 313.

There are also *Keepers* or *Bailiffs* of walks in Forests and chase, who are subordinate to the Verderors, &c. And these officers cannot be sworn on any inquests, or juries out of the Forest. If any man hunts beasts within a Forest, although they are not beasts of the Forest, they are punishable by the Forest laws; because all hunting there, without warrant, is unlawful. 4 *Inst.* 314.

If a deer be hunted in a Forest, and afterwards by hunting it is driven out of the Forest, and the *Forester* follows the chase, and the owner of the ground where driven kills the deer there; yet the *Forester* may enter into the lands and retake the deer: for property in the deer is in this case by pursuit. 2 *Leon.* 201. He that hath any manner of licence to hunt in a Forest, chase, park, &c. must take heed that he do not abuse his licence, or exceed his authority; for if he do, he shall be accounted a trespasser *ab initio*, and be punished for that fact as if he had no licence at all. *Manw.* 280. 288.

Every lord of parliament, sent for by the King, may, in coming and returning, kill a deer or two in the King's Forest or chase through which he passes; but it must not be done privily, without the view of the Forester, if present; or, if absent, by causing one to blow a horn, because otherwise he may be a trespasser, and seem to steal the deer. *Chart. Forest. c.* 11. 4 *Inst.* 308.

*Lex Forestæ* is a private law, and must be pleaded. 2 *Leon.* 209. But it hath been observed, that the laws of the Forest are established by act of parliament, and for the most part contained *in Charta de Foresta*. 9 *H.* 3. *st.* 2. *c.* 2. 34 *Ed.* 1. *stat.* 5.

By the law of the Forest, receivers or trespassers in hunting or killing of deer, knowing them to be such, or any of the King's venison, are principal trespassers; though the trespass was not done to their use or benefit, as the Common-law requires; by which the subsequent agreement amounts to a commandment: but if the receipt be out of the bounds of the Forest, they cannot be punished by the laws of the Forest, being not within the Forest jurisdiction, which is local. 4 *Inst.* 317.

If a trespass be done in a Forest, and the trespasser dies, it shall be punished after his death in the life-time of the heir, contrary to the Common-law. *Hue* and *cry* may be made by the Forest-law for trespass, as to venison; though it cannot be pursued but only within the bounds of the Forest. 4 *Inst.* 294. And for not pursuing hue and cry in the Forest, a township may be fined and amerced. In every trespass and offence of the Forest in vert or venison, the punishment is, to be imprisoned, ransomed, and bound to the good behaviour of the Forest, which must be executed by a judicial sentence by the Lord Chief Justice in *Eyre* of the Forest.

If any Forester find any person hunting without warrant, he is to arrest his body, and carry him to prison, from whence he shall not be delivered without special warrant from the King, or his justices of the Forest, &c. But by *stat.* 1 *Ed.* 3. *c.* 8. Persons are bailable if not taken *in the manner*, as with a bow ready to shoot, carrying away deer killed, or smeared with blood, &c. Though if one be not thus taken, he may be attached by his goods. 4 *Inst.* 289.

The Warden of the Forest shall let such to mainprise until the *eyre* of the Forest; or a writ may be had out of the Chancery to oblige him to do it; and if he refuse to deliver the party, a writ shall go to the sheriff to attach the Warden, &c. who shall pay treble damages to the party grieved and be committed to prison, &c. *Stat.* 1 *Ed.* 3. *c.* 8. No Officer of the Forest may take or imprison any person without due indictment, or *per main ouvre*, with his hand at the work; nor shall constrain any to make obligation against the assise of the Forest, on pain to pay double damages, and to be ransomed at the King's will. *Stat.* 7 *R.* 2. *c.* 4.

A Forester shall not be questioned for killing a trespasser, who (after the peace cried unto him) will not yield himself; so as it be not done out of some former malice, *stat.* 21 *Ed.* 1. *st.* 1. But if trespassers in a Forest, &c. kill a man who opposes them, although they bore no malice to the person killed, it is murder; because they were upon an unlawful act, and therefore malice is implied. *Rol. Abr.* 548. And if murder be committed by such trespassers, all are principals. *Kel.* 87.

If a man comes into a Forest in the night-time, the Forester cannot justify beating him before he makes resistance; but if he resists, he may justify the battery. Persons may be fined for concealing the killing of deer by others; and so for carrying a gun, with an intent to kill the deer; and he that steals venison in the *Forest*, and carries it off on horseback, the horse shall be forfeited, unless it be that of a stranger ignorant of the fact. Where heath is burnt in a *Forest*,

the offenders may be fined: and if any man cuts down bushes and thorns, and carries them away in a cart, he is fineable, and the cart and horses shall be seized by the *Forest* laws.—But a man may prescribe to cut wood, &c. And every freeman within the *Forest* may on his own ground make a mill-dyke, or arable land, without inclosing such arable; but if it be a nuisance to others, it is punishable. *Chart. Forest. c.* 11. 12 *Rep.* 22. And if any having woods in his own ground, within any *Forest*, or chase, shall cut the same by the King's licence, &c. he may keep them several and inclosed, for seven years after felling. *Stat.* 22 *E.* 4. *c.* 7.

By *Charta de Foresta*, 9 *H.* 3. *c.* 2. No man shall lose life or member for killing the King's deer in a *Forest*, &c. but shall be fined; and if he have nothing to pay the fine, he shall be imprisoned a year and a day; and then be delivered, if he can give good security not to offend for the future; and if not, he shall abjure the realm: Before this statute, it was felony to hunt the King's deer. 2 *Rol.* 120. To hunt in a *Forest*, park, &c. in the night, disguised, if denied or concealed, upon examination before a justice of the peace, it is *felony*; but if confessed, it is only fineable. *Stat.* 1 *H.* 7. *c.* 7. Keepers, &c. may seize instruments used in unlawful cutting of trees. *Stat.* 4 *Geo.* 3. *c.* 31.

The cruel and insupportable hardships which the Forest laws created to the subject, occasioned our ancestors to be as zealous for their reformation, as for the relaxation of the feodal rigours and the other exactions introduced by the Norman family. And accordingly we find, in history the immunities of *Charta de Foresta* as warmly contended for, and extorted from the King with as much difficulty, as those of Magna Charta itself. By this charter confirmed in parliament many Forests were disafforested or stripped of their oppressive privileges; and regulations made in the regimen of such as remained. And by a variety of subsequent statutes together with the long acquiescence of the Crown without exerting the Forest laws, this prerogative is become no longer a grievance to the subject. *Comm.*

Lands in Scotland conveyed by the Crown with the right of forestry, carried all the privileges of a royal forest, but no such grants have been made there since 1680.

*Stat.* 28 *Geo.* 2. *c.* 19. Imposes a fine of from 40*s.* to 5*l.* on persons convicted of setting fire to goss, furze, heath or fern, in Chases or Forests.

See further as to the Forest law, titles *Black Act*, *Deer-Stealing*, *Game*, *Chase*, *King*, *Park*, *Purlieu*, *Drift of the Forest*, *Timber*, &c.

In the years 1787—1793, a series of Reports (17 in number) was made by Commissioners specially appointed to enquire into the state of the Woods, Forests, and Land-revenues of the Crown. The 3d Report gives a list of the forests, parks, and chases in England, then under the survey of the surveyor general of the woods, in which there was any stock of timber: these are in *Berkshire*, Windsor Forest, Cranburn Chase and Windsor Great and Little Park. *Essex*, Waltham Forest, anciently called the Forest of Essex, and sometimes Epping or Hainault Forest. *Gloucestershire*, Dean Forest. *Hampshire*, the New Forest, Alice Holt and Woolmer Forest, Bere Forest. *Kent*, Greenwich Park. *Middlesex*, St. James's Park, Hyde Park, Bushy Park and Hampton Court Park. *Northamptonshire*, the Forests of Whittlewood, Salcey, and Rockingham. *Nottinghamshire*, Sherwood Forest. *Oxfordshire*, Whichwood Forest. *Surrey*, Richmond Park. Of these, Sherwood is the only one North of Trent; the others all being South of Trent.

By several acts, passed in consequence of these Reports and further enquiries, the boundaries of several of these and other Forests have been ascertained, and regulations made for disafforesting and inclosing them in part or in the whole; and applying them to the benefit of the public; *viz.*

*Alice Holt Forest*, 52 *Geo.* 3. *c.* 72.

*Brecknock Forest*, 48 *Geo.* 3. *c.* 73. 55 *Geo.* 3. *c.* 190.

*Dean Forest*, 48 *Geo.* 3. *c.* 72. 59 *Geo.* 3. *c.* 86.

*Exmoor Forest* in Somersetshire and Devonshire, 55 *Geo.* 3. *c.* 138.

*New Forest*, 39 40 *Geo.* 3. *c.* 86. 41 *Geo.* 3. *c.* 108. 48 *G.* 3. *c.* 72. 50 *Geo.* 3. *c.* 116. 52 *Geo.* 3. *c.* 161. 59 *Geo.* 3. *c.* 86.

*Rockingham Forest*, 52 *Geo.* 3. *c.* 161.

*Sherwood Forest*, 58 *Geo.* 3. *c.* 100.

*Windsor Forest*, 46 *Geo.* 3. *c.* 143. 47 *Geo.* 3. *st.* 2. *c.* 46. 53 *Geo.* 3. *c.* 158. 55 *Geo.* 3. *c.* 12. 56 *Geo.* 3. *c.* 132.

*Woolmer Forest*, 52 *Geo.* 3. *c.* 71.

By statute 50 *Geo.* 3. *c.* 65. his Majesty is authorised to appoint three persons to be "Commissioners of his Majesty's Woods, Forests, and Land-revenues," in whom are vested all the powers of surveyor general of the land revenues, and surveyor general of the woods, &c.

By *stat.* 52 *Geo.* 3. *c.* 161. § 5, &c. the Treasury are empowered to alienate small parcels of crown lands in the Forests, intermixed with the property of subjects, upon report of the commissioners of his Majesty's woods, &c. and to make compensation and grant leases to persons relinquishing purprestures or incroachments in the forests: and by § 11, 15. of the same act, additional powers are given to the Court of Attachments in Forests for preventing and punishing unlawful inclosures, and regulating the conduct of regarders, underforesters, under keepers, and other officers of the Forest.

By *stat.* 55 *Geo.* 3. *c.* 55. § 11. the Commissioners of the woods, forests, and land revenues are empowered to contract for and sell his Majesty's rights and interests in small parcels of lands belonging to subjects within the royal forests.

FORESTAGIUM. Duty payable to the King's *Foresters*, *Chart.* 18 *Ed.* 1.

FORESTALL. To be quit of amerciaments and chattels arrested within your land, and the amerciaments thereof coming. *Termes de la Ley.*

FORESTALLING. *Forestallamentum*, from the Sax. *fore*, before, & stal, a *stall*.] To intercept on the highway. *Spelman* says, it is *viæ obstructio, vel itineris interceptio*; with whom agrees *Coke on Lit.* fol. 161. And, according to *Fleta*, forestalling *significat obstructionem viæ vel impedimentum transitûs et fugæ averiorum, &c. lib.* 1. *c.* 24. In our law, *forestalling* is the buying or bargaining for any corn, cattle or other merchandise, by the way, as they come to fairs or markets to be sold, before they are brought thither; to the intent to sell the same again, at a higher and dearer price.

All endeavours to inhance the common price of any victuals or merchandise, and practices which have an apparent tendency thereto, whether by spreading false rumours, or buying things in a market before the accustomed hour, or by buying and selling again the same thing in the same market, &c. are highly criminal by the Common-law; and all such offences anciently came under the general appellation of *forestalling*. 3 *Inst.* 195, 196. And so jealous is the Common-law of practices of this nature, which are a general inconvenience and prejudice to the people, and very oppressive to the poorer sort, that it will not suffer corn to be sold in the sheaf before thrashed: for by such sale the market is in effect *forestalled*. 3 *Inst.* 197. *H. P. C.* 152.

*Forestalling*, *Ingrossing*, and *Regrating*, are offences generally classed together as of the same nature and equally hurtful to the Public. *Ingrossing* seems derived from the words *in* and *gross* great or whole; and *regrating* from *re*, again, and *grater* Fr. to scrape, from the dressing or scraping of cloth or other goods in order to sell the same again.

Several statutes were from time to time made against these offences in general, and also specially with respect to particular species of goods according to their several circumstances; all of which, from the 5 & 6 *E.* 6. *c.* 14. downwards,

and all acts for enforcing the same are repealed by *stat.* 12 *Geo.* 3. *c.* 71; by the preamble of which it should seem that the remedy was found worse than the disease. But these offences still continue punishable upon indictment at the Common-law by fine and imprisonment.

The following were declared to be offences at Common-law, and not done away by the repeal of the *stat.* of 5 & 6 of *Ed.* 6. *c.* 14, *viz.*

Spreading rumours with intent to enhance the price of hops, in the hearing of hop planters, dealers, and others, that the stock of hops was nearly exhausted, and that there would be a scarcity of hops, &c. with intent to induce them not to bring their hops to market for sale for a long time, and thereby greatly to enhance the price.—Engrossing large quantities of hops, by buying from many persons, certain quantities with intent to resell the same for an unreasonable profit, and thereby to enhance the price.—Getting into his hands large quantities, by contracting with various persons for the purchase, with intent to prevent the same being brought to market, and to resell at an unreasonable profit, &c. —Engrossing hops then growing, by forehand bargains, with like intent.—Buying all the growth of hops on certain lands, in certain parishes, by forehand bargains, with intent to sell at an unreasonable price, &c. *Rex* v. *Waddington.* 1 *East's Rep.* 143—169.—In which case it was ruled that to forestall any commodity which is become a common victual and necessary of life, or used as an ingredient in the making or preservation of any victual, though not formerly used or considered as such, is an offence at Common-law.

Indictment for engrossing a *great quantity* of fish, geese and ducks, held bad, without specifying the quantity of each. *Rex* v. *Gilbert*, 1 *East Rep.* 583.

The offence of *forestalling* the market is an offence against public trade. This was described by the said *stat.* 5 & 6 *E.* 6. *c.* 14. to be the buying or contracting for any cattle, merchandize or victual coming in the way to the market, or dissuading persons from bringing their goods or provisions there; or persuading them to enhance the price when there; any of which practices makes the market dearer to the fair trader.

*Regrating* was described by the same statutes to be the buying of corn, or other *dead* victual, in any market; and selling it again in the same market, or within 4 miles of the place. For this also inhances the price of the provisions, as every successive seller must have a successive profit.

*Ingrossing* was also described to be the getting into one's possession or buying up large quantities of corn or other dead victuals with intent to sell them again. This must be of course injurious to the Public, by putting it in the power of one or two rich men to raise the price of provisions at their own discretion.

The above descriptions given by the statute serve as a guide for the indictment of these offences at Common-law, and are therefore here preserved.

The total ingrossing of any commodity, with intent to sell it at an unreasonable price, is an offence indictable and fineable at Common-law. *Cro. Car.* 232.

See *stat.* 2 & 3. *E.* 6. *c.* 15. which seems yet in force; prohibiting butchers, brewers, bakers, poulterers, cooks and fruiterers, from conspiring not to sell victuals, but at certain prices, on penalty of 10*l.* for the first offence, 20*l.* for the second, 40*l.* for the third, &c. and if such conspiracy be made by any company, or body corporate, the corporation shall be dissolved.

See further this Dict. title *Monopoly*, and the several articles to which the same is applied.

FORESTER. See title *Forest.*

FORETHOUGHT FELONY. See *Murder.*

FORETOOTH. Striking out the foretooth is a *Mayhem.* See title *Maihem.*



FORFANE OR FORFENG, from the Sax. *Fore, ante, &* fangen, *prendere. Antecaptio vel Preventio.*] The taking of provision from any one in fairs or markets, before the King's *Purveyors* are served with necessaries for his majesty. *Chart. Hen.* 1. *Hosp. Sanct. Barth. Lond. Anno* 1133.

FORFEITURE.

FORISFACTURA, from the Fr. *Forfait.*] The effect, or penalty, of transgressing some law. For an ingenious discussion to prove the propriety and policy of such punishment, see Mr. *Charles Yorke's* "*Considerations on the Law of Forfeitures,*" corrected and enlarged. 8vo. 1775.—See also this Dict. title *Tenures*, III, 10.

*Forfeiture* is defined by *Blackstone* to be a punishment annexed by law to some illegal act or negligence in the owner of lands, tenements or hereditaments: whereby he loses all his interest therein, and they go to the party injured, as a recompence for the wrong, which either he alone or the public together with him hath sustained. 2 *Comm.* 267.

Lands, tenements and hereditaments may be forfeited in various degrees and by various means. Forfeitures may therefore be divided into *civil* and *criminal.* The latter will be presently considered more at large under this title.

Civil Forfeitures arise either by alienation contrary to law; as in *mortmain;* for which see this Dict. under that title; to *Aliens*, see title *Alien;* or by particular tenants when they are greater than the law entitles them to make. This latter alienation divests the remainder or reversion, and is also a forfeiture to him whose right is attacked thereby. 1 *Inst.* 251.

Forfeiture in civil cases may also accrue by non-presentation to a benefice, when it is called a *Lapse;* see this Dict. tit. *Advowson.* By *Simony;* see that title. By non performance or *Conditions;* see title *Condition.* By *Waste;* see that title. By breach of copyhold customs; see title *Copyhold;* or lastly by *Bankruptcy;* see that title. *Offices* may be forfeited for neglect of duty; see title *Office.*

I. *Of Forfeitures in Civil Cases.*
II. *Of Forfeitures in Criminal Cases: and herein,*
1. *Generally, for what Crimes such Forfeitures are inflicted; and to what Time they bear relation.*
2. *More particularly; what Estates are subject to Forfeiture.*
3. *When Forfeitures may be seized.*

I. As to alienations *by particular tenants;* if tenant for his own life aliens, by feoffment or fine for the life of another, or in tail, or in fee; these being estates, which either must or may last longer than his own, the creating them is not only beyond his power, and inconsistent with the nature of his interest, but is also a Forfeiture of his own particular estate to him in remainder or reversion. *Litt.* § 415. For this there seem to be two reasons; First, because such alienation amounts to a renunciation of the feodal connection and dependence; it implies a refusal to perform the due renders and services to the lord of the fee, of which fealty is constantly one, and it tends in its consequence to defeat and divest the remainder or reversion expectant: as therefore that is put in jeopardy, by such act of the particular tenant, it is but just, that, upon discovery, the particular estate should be forfeited and taken from him, who has shewn so manifest an inclination to make an improper use of it: The other reason is, because the particular tenant, by granting a larger estate than his own, has by his own act determined and put an entire end to his own original interest; and on such determination the next taker is entitled to enter regularly, as in his remainder or reversion. 2 *Comm.* 274.

Another reason assigned for these Forfeitures is, that the act done is incompatible with the estate which the tenant holds, and against the implied condition on which he holds it.

As in the case of a tenant for life or years enfeoffing a stranger in fee-simple, this is a breach of the condition which the law annexes to his estate, *viz.* that he shall not attempt to create a greater estate than he himself is entitled to. 1 *Inst.* 215. So if tenant for life, or years, or in fee, commit felony, this is a breach of the implied condition annexed to every feodal donation that they should not commit felony. 2 *Comm.* 153.

The same law, which is thus laid down with regard to tenants for life, holds also with respect to all tenants of the mere freehold, or of chattel interests: But if tenant in tail aliens in fee, this is no immediate Forfeiture to the remainder man, but a mere discontinuance of the estate-tail, which the issue may afterwards avoid by due course of law; for he in remainder or reversion hath only a very remote, and barely possible interest therein, until the issue in tail is extinct. See this Dict. tit. *Discontinuance.*

But in case of such Forfeitures, by particular tenants, all legal estates by them before created, (as if tenant for 20 years grants a lease for 15,) and all charges by them lawfully made on the lands shall be good and available in the law. For the law will not hurt an innocent lessee for the fault of his lessor; nor permit the lessor, after he has granted a good and lawful estate, by his own act to avoid it, and defeat the interest which he himself hath created. 1 *Inst.* 233. 2 *Comm.* 275.

Equivalent, both in it's nature and it's consequences, to an illegal alienation by the particular tenant, is the civil crime of *Disclaimer;* as to which see this Dict. title *Disclaimer.*

If tenant, for life, in dower, by the curtesy, or after possibility of issue extinct, or lessee for years, tenant by statute-merchant, staple, or *elegit*, of lands or tenements that lie in *livery*, shall make any absolute or conditional feoffment in fee, gift in tail, lease for any other life than his own, &c. or levy a fine *sur conusance de droit come ceo*, &c. or suffer a common recovery thereof: or being impleaded in a writ of right brought against him, join the *mise* upon the mere right, or admit the reversion to be in another; or in a *quid juris clamat*, claim the fee-simple; or if lessee for years being ousted, bring an assise *ut de libero tenemento*, &c.—by either of these things, there will be a *Forfeiture* of estate. *Plowd.* 15. 1 *Rep.* 15. 8 *Rep.* 144. *Co. Lit.* 251. *Dyer*, 152. 321. 1 *Bulst.* 219.

But where the land granted by tenant for life, or years, is not well conveyed; or the thing does not lie in *livery*, as a rent, common, or the like; he will not *forfeit* his estate: and therefore if a feoffment, gift in tail, or lease for another's life, made by the tenant for life, is not good, for want of words in making it, or due execution in the livery and seisin, this shall *not* produce a *Forfeiture.* 2 *Rep.* 55.

When tenant in tail makes leases, not warranted by the statute; a copyholder commit waste, refuses to pay his rent, or do suit of court; one to whom an estate is granted upon condition, does not perform the same; in all these cases Forfeitures are incurred. 1 *Rep.* 15.

*Entry* for a *Forfeiture* ought to be by him, who is next in reversion, or remainder after the estate forfeited. As, if tenant for life or years commits a *Forfeiture*, he who has the *immediate* reversion, or remainder, ought to enter; though he has the fee, or only an estate-tail. 1 *Rol.* 857. *l.* 45. 50. 858. *l.* 5.

The lord may enter for waste committed by copyholder for life, though there be an intermediate estate in remainder between that of the copyholder and the lord's reversion. 2 *Maul. & Selw. Rep.* 68. See title *Copyhold.*

It shall be a dispensation of the *Forfeiture*, if he in reversion, or remainder be a party to the estate made, and accept it: as if a husband, seised in right of his wife for life, leases to him in reversion for his own life. 1 *Rol.* 856. *l.* 10.

II. 1. The true reason, and only substantial ground, of any FORFEITURE FOR CRIMES, consists in this: that all property is derived from Society, being one of those civil rights conferred on individuals in exchange for that degree of natural freedom, which every man must sacrifice when he enters into social communities. If therefore a member of any national community violates the fundamental contract of his association, by transgressing the municipal law, he forfeits his right to such privileges as he claims by that contract; and the State may very justly resume that portion of property, or any part of it which the laws have before assigned him. Hence, in every offence of an atrocious kind, the laws of England have exacted a total confiscation of the moveables or personal estate; and in many cases perpetual, in others only a temporary loss of the offender's immoveables or landed property: and have vested them both in the King, as the person supposed to be offended, being the one visible magistrate in whom the majesty of the Public resides. 1 *Comm.* 299.

The offences which induce a Forfeiture of lands and tenements are principally the following six. 1. *Treason.* 2. *Felony.* 3. *Misprision of Treason.* 4. *Præmunire.* 5. *Drawing a weapon on a Judge;* or *striking any one* in the presence of the King's courts of justice. 6. *Popish Recusancy;* or non-observance of certain laws enacted in restraint of papists.

*Forfeiture* in *criminal Cases* is two fold; of real and personal estates. First as to *Real Estates.*

By Common-law on attainder of high treason a man forfeits to the King all his lands and tenements of inheritance, whether fee-simple or fee-tail, and all his right of entry on lands and tenements, which he had at the time of the offence committed, or at any time afterwards: to be for ever vested in the Crown. And also the profits of all lands and tenements, which he had in his own right for life or years, so long as such interest shall subsist. *Co. Lit.* 392. 3 *Inst.* 19. 1 *Hal. P. C.* 240. 2 *Hawk. P. C. c.* 49.

This forfeiture relates backwards to the time of the treason committed so as to avoid all intermediate sales and incumbrances, but not those before the fact. 3 *Inst.* 211. A wife's jointure is not forfeitable for the treason of her husband; because settled upon her previous to the treason committed. But her dower is forfeited by the express provision of *stat.* 5 & 6 *Ed.* 6. *c.* 11. repealing in that particular *stat.* 1 *Ed.* 6. *c.* 12. The husband notwithstanding shall be tenant by the curtesy of the wife's lands if the wife be attainted of treason, for that is not prohibited by the statute. 1 *Hal. P. C.* 359. But though, after attainder, the forfeiture relates back to the time of the treason committed, yet it does not take effect unless an attainder be had, of which it is one of the fruits: and therefore if a traitor dies before judgment pronounced, or is killed in open rebellion, or is hanged by martial law, it works no Forfeiture of his lands; for he never was attainted of treason; and by the express provision of *stat.* 34 *E.* 3. *c.* 12. there shall be no Forfeiture of lands for treason, of dead persons, not attainted in their lives.—Yet if the Chief Justice of the King's Bench (the supreme coroner of all England) in person upon the view of the body of one killed in open rebellion, records it, and returns the record into his own court, both lands and goods shall be forfeited. 4 *Rep.* 57.

Forfeiture of lands and tenements to the Crown for treason is by no means derived from the feodal policy, but was antecedent to the establishment of that system in this island. See this Dict. title *Tenures* III, 10. But in certain treasons relating to the coin, it is provided by some of the more modern statutes which constitute the offence, that it shall work no Forfeiture of lands, save only for the life of the offender: and, by all, that it shall not deprive the wife of her dower.

See *stats.* 5 *Eliz. c.* 11. 18 *Eliz. c.* 1. 8 *&* 9 *W.* 3. *c.* 26. 15 *&* 16 *Geo.* 2. *c.* 28.—And with a view to abolish such hereditary punishment entirely, it was provided by *stat.* 7 *An. c.* 21. § 10. that after the decease of the Pretender, no attainder for treason should extend to the disinheriting of any heir, nor to the prejudice of any person other than the traitor himself. By a subsequent statute, namely the *stat.* 17 *Geo.* 2. *c.* 39. the operation of the indemnifying clauses in *stat.* 7 *Ann. c.* 21. was still farther suspended till the death of the sons of the late Pretender. And by 39 *Geo.* 3. *c.* 93. the provisions of both these acts were repealed: so that the Forfeiture for Treason stands as it did before the passing of 7 *Ann. c.* 21. See 4 *Comm.* 384. and this Dict. titles *Attainder*, *Corruption of Blood.*

In petit treason, misprision of treason and felony, the offender also forfeits all his chattel interests absolutely; and the profits of all estates of freehold during life; and after his death all his lands and tenements in fee-simple, (but not those in tail) to the Crown for a short period of time: for the King shall have them for a year and a day, and may commit therein what waste he pleases, which is called the King's *Year, Day*, and *Waste.* 2 *Inst.* 37. 3 *Inst.* 392. Formerly the King had a liberty of committing waste on the lands of felons, by pulling down their houses, extirpating their gardens, ploughing their meadows, and cutting down their woods. But this tending greatly to the prejudice of the public, it was agreed in the reign of Hen. I. that the King should have the profits of the land for a year and a day, in lieu of the destruction he was otherwise at liberty to commit; and therefore *Magna Charta, c.* 22. provides that the King shall only hold such lands for a year and a day, and then restore them to the lord of the fee; without any mention of waste. See *Mirr. c.* 4. § 16. *Flet. l.* 1. *c.* 28. But the statute 17 *E.* 2. *de prærogativâ regis* seems to suppose that the King shall have his year, day, *and* waste, and not the year and day *instead of* waste: which *Lord Coke* and *the Mirror* very justly consider as an encroachment, though a very ancient one, of the royal prerogative. *Mirr. c.* 5. § 2. 2 *Inst.* 37.

This year, day, and waste are now usually compounded for; but otherwise they regularly belong to the crown, and after their expiration; the land would have descended to the heir, (as in *gavel kind* tenure it still does,) did not its feodal quality intercept such descent and give it by way of escheat to the Lord. See titles *Tenure*, *Escheat.* But see *stat.* 54 *Geo.* 3. *c.* 145. and title *Corruption of Blood.*

These forfeitures of lands for felony also arise only upon attainder; and therefore a *felo de se* forfeits no lands of inheritance or freehold, for he never is attainted as a felon. 3 *Inst.* 55. They likewise relate back to the time of the offence committed, as well as Forfeitures for treason; so as to avoid all intermediate charges and conveyances. 4. *Comm.* 386.

These are all the Forfeitures of real estates created by the Common-law as consequential upon attainders by judgment of death or outlawry. The particular Forfeitures created by the statutes of *Præmunire* and others are here omitted, being rather a part of the judgment and penalty inflicted by the respective statutes, than *consequences* of such judgment, as in treason and felony they are. See *post*, II.

As a part of the Forfeiture of real estates, may be mentioned, the Forfeiture of the profits of lands during life: which extends to two other instances besides those already spoken of; the striking in *Westminster Hall*, or drawing a weapon upon a judge there sitting in the King's courts of justice. 3 *Inst.* 141. And it seems that the same Forfeiture is incurred by rescuing a prisoner in or before any of the courts there, committed by the judges. *Cro. Jac.* 367.

*The Forfeiture of Goods and Chattels* accrues in every one of the higher kinds of offence; in high treason or misprision thereof; petit treason; felonies of all sorts, whether clergyable or not: self-murder, or *felo de se*; petit larceny; standing mute; challenging above 35 Jurors; and the above mentioned offences of striking, &c. in *Westminster Hall.* For *Flight* also, on an accusation of treason, felony, or even petit larceny, whether the party be found guilty or acquitted, if the jury find the flight, the party shall forfeit his goods and chattels; for the very flight is an offence, carrying with it a strong presumption of guilt; and is at least an endeavour to elude and stifle the course of justice prescribed by the law. But the jury very seldom find the flight; Forfeiture, being looked upon, since the vast increase of personal property, as too large a penalty for an offence to which a man is prompted by the natural love of liberty. 4 *Comm.* 387.

There are some remarkable differences between the Forfeiture of lands, and of goods and chattels. 1. Lands are forfeited upon *attainder*, and not before: goods and chattels are forfeited by *conviction.* Because in many of the cases where goods are forfeited there never is any attainder; which happens only where judgment of death or outlawry is given; therefore in those cases the Forfeiture must be upon conviction, or not at all; and being necessarily upon conviction in those, it is so ordered in all other cases: for the law loves uniformity. 2. In outlawries for treason or felony lands are forfeited only by the judgment, but the goods and chattels are forfeited by a man's being first put in the exigent, without staying till he is *quinto exactus*, or finally outlawed, for the secreting himself so long from justice is construed a flight in law. 3 *Inst.* 232. (See this Dict. tit. *Outlawry.*) 3. The forfeiture of lands has relation to the time of the fact committed so as to avoid all subsequent sales and incumbrances; but the Forfeiture of goods and chattels has no relation backwards, so that those only which a man has at the time of conviction shall be forfeited. Therefore a traitor or felon may *bonâ fide* sell any of his chattels real or personal for the sustenance of himself or family between the fact and conviction. 2 *Hawk. P. C. c.* 49. For personal property is of so fluctuating a nature, that it passes through many hands in a short time; and no buyer could be safe if he were liable to return the goods which he had fairly bought, provided any of the prior venders had committed a treason or felony. Yet if they be collusively and not *bonâ fide* parted with, merely to defraud the crown, the law, and particularly *stat.* 13 *Eliz. c.* 5. will reach them; for they are all the while truly and substantially the goods of the offender; and as he, if acquitted, might recover them himself, as not parted with for a good consideration, so in case he happens to be convicted, the law will recover them for the King. 4 *Comm.* 388. See *Gordon's Case*, *Dom. Proc.*

2. Where land comes to the crown, as forfeited by *attainder of treason*, all mesne tenures of common persons are extinct; but if the King grant it out, the former tenure shall be revived, for which a petition of right lies. 2 *Hale's Hist. P. C.* 254. In *Treason*, all lands of inheritance, whereof the offender was seized in his own right, were forfeited by the Common-law; and rights of entry, &c. And the inheritance of things not lying in tenure, as of rent-charges, commons, &c. shall be forfeited in *high treason*; but no *right of action* whatsoever to lands of inheritance is forfeited, either by the common or statute law. 2 *Hawk. P. C. c.* 49. See *Gordon's Case in Dom. Proc.*

By *stat.* 26 *H.* 8. *c.* 13. All lands, tenements, &c. of inheritance are forfeited in *treason.* And the King shall be adjudged in possession of lands and goods forfeited for treason on the attainder of the offender, without any office found, saving the rights of others. See *stat.* 33. *H.* 8. *c.* 20. Lands and hereditaments in *fee simple* and *fee tail*, are forfeited in *high treason*: but lands *in tail* could not be forfeited only for the life of tenant in tail, till the statute 26 *H.* 8. *c.* 13. by which statute they may be forfeited.

Upon *outlawry* in *treason* or *felony*, the offender shall forfeit as much as if he had appeared, and judgment had been given against him; so long as the outlawry is in force. 3 *Inst.* 52, 212.

*Gavelkind* land in *Kent* is not forfeited by committing of *felony*; and by a *felony only*, *intailed lands* are *not* forfeit. *S. P. C.* 3. 26.

Land that one hath in trust; or goods and chattels in right of another, or to another's use, &c. will not be liable to Forfeiture. Though leases for years, in a man's own, or his wife's right, estates in jointenancy, &c. and all statutes, bonds, and debts due thereby, and upon contracts, &c. shall be forfeited. *Co. Lit.* 42. 151. *Staund.* 188.

A married man guilty of *felony*, forfeits his wife's term; and if a wife kill her husband, the husband's goods are forfeited. *Jenk. Cent.* 65. In *manslaughter*, the offender forfeits *goods* and *chattels*, and in *chance-medley* and *se defendendo*, *goods* and *chattels*; but the offenders may have their pardon of course. *Co. Lit.* 319.

Those that are hanged by *Martial Law* in the time of war, forfeit no lands. *Co. Lit.* 13. And for robbery or piracy, &c. on the sea, if tried in the court of Admiralty, by the *Civil Law*, and not by jury, there is no forfeiture: but if a person be attainted before commissioners by virtue of the *stat.* 28 *Hen.* 8. *c.* 15. there it works a Forfeiture. 1 *Lill. Abr.*

In cases of felony the profits of lands whereof a person, attainted of felony, is seised of an estate of inheritance in right of his wife; or of an estate for life only in his own right; are forfeited to the King, and nothing is forfeited to the Lord. 3 *Inst.* 19. *Fitz. Ass.* 166.

Goods of persons that *fly* for a felony, are forfeited to the Lord of the franchise, when the flight is found of record. 2 *Inst.* 281.

In a *præmunire*, *lands in fee simple* are forfeited, *with goods and chattels*. *Co. Lit.* 129.

Before the statute of 1 *E.* 6. *cap.* 12. the wife not only lost her dower at Common-law, but also her dower *ad ostium ecclesiæ*, or *ex assensu patris*, or by special custom (except that of gavelkind,) by the husband's attainder of treason, or capital felony, whether committed before or after marriage. *Co. Lit.* 31 *b*: 37 *a*: 41 *a*: *F. N. B.* 150: *Perk.* § 308: *Bro.* tit. *Dower* 82: *Plowd.* 261.

But the wife forfeited lands given jointly to her husband and her, whether by way of frank marriage or otherwise, only for the year, day, and waste. *Co. Lit.* 37: 3 *Inst.* 216.

By *stat.* 1. *E.* 6. *cap.* 12. *par.* 17. It was enacted that albeit any person shall be attainted of any treason or felony whatsoever; yet notwithstanding every woman, that shall fortune to be the wife of the person so attainted, shall be endowable and enabled to demand, have, and enjoy her dower, in like manner and form as though her husband had not been attainted, &c. This however was *repealed* as to *treason* by 5 & 6 *E.* 6. *cap.* 11. *par.* 9. See *ante*, I.

Though Lord *Coke* expressly makes dower *ex assensu patris*, as well as the dowers at Common-law and *ad ostium ecclesiæ*, liable to be defeated at Common-law, by the husband's treason or felony; 1 *Inst.* 27 *a*: yet some have inclined to think that this *stat.* 5 & 6 *E.* 6. *c.* 11. doth not extend to dower *ex assensu patris*, so that that shall not be forfeitable on the treason of the husband.—And in 1 *Inst.* 35 *b.* Lord *Coke* mentions, that according to some opinions the wife loses dower *ex assensu patris*, if after the assent the *father* was attainted of treason. See 1 *Inst.* 41 *a*: *in note*.

If the husband seised of lands in fee, makes a feoffment and then commits treason, and is attainted of it, the wife shall not recover dower against the feoffee. *Benal* 56: *Dyer* 140: *Co. Lit.* 111 *a.* So if the husband is attainted of treason, and afterwards pardoned, yet the wife shall not recover dower; but of lands purchased by the husband after the pardon, the wife shall be endowed. 3 *Leon.* 3: *Perk. sect.* 391.

If a husband having levied a fine with proclamation, is erroneously attainted of treason, and the five years pass after his death, and then the outlawry is reversed, the fine and non-claim are no bar till five years are passed after the reversal, because the wife could not sue for her dower while the attainder stood in force, neither could she any way reverse it. 3 *Inst.* 216. *Moor.* 639. *pl.* 8, 9.

After the making of the above mentioned statute 1 *E.* 6. *cap.* 12. it seems to have been doubted, whether the wife should not lose her dower in case of any new felony made by act of parliament; therefore where several offences have been made felony since, care has been taken to provide for the wife's dower. 2 *New Abr.* 584. See 12 *Vin. Abr.* tit. *Forfeiture*. 2 *Hawk P. C. c.* 49.

If a woman after a *rape*, consent to the ravisher, she shall lose her dower after the death of her husband, &c. *Stat.* 6 *R.* 2. *c.* 6. And if any maiden or woman child *above* twelve, and under sixteen years of age, shall agree to be taken away and deflowered, or contract with any man for marriage against the will and without the consent of her father, or, if he be dead, her mother or guardian appointed by her father's will, she shall *forfeit* her land for her life. *Stat.* 4 & 5 *P.* & *M. c.* 8.

*Artificers* going out of the kingdom and teaching their trades to foreigners, are liable to *forfeit* their lands, &c. by *stat.* 5. *Geo.* 1. *c.* 27. Similar Forfeitures likewise are inflicted by several other penal statutes. See title *Manufacturers*.

In all cases where a penalty or Forfeiture is given by statute, without saying to whom it shall be, or a limitation for a recompence for the wrong to the party, it belongs to the King. *Stra.* 50. 828. 2 *Vent.* 267. And such Forfeitures shall be construed favourably. *Cowp.* 583. 8.

3. Goods or lands of one arrested for felony, shall not be seized before he is convict or attaint of the felony; on pain of *forfeiting* double value. *stat.* 1 *R.* 3. *c.* 3. Goods of a felon, &c. cannot be seized before *Forfeited*; though they may be inventoried, and a charge made thereof before indictment. *Wood's Inst.* 659. Where goods of a felon are pawned before he is attainted, the King shall not have the *Forfeiture* of the goods till the money is paid to him to whom they were pawned. 3 *Inst.* 17. 2 *Nels. Abr.* 874. 875.

After conviction by judgment or outlawry, for high-treason, &c. a commission goes to persons named by the King or by the Attorney General, to inquire, what lands and tenements the offender had at the time of the treason committed, and the value; and that they seize them into the King's hands. And the inquisition taken thereon shall be returned to the Court of *Exchequer*, and filed in the office of the King's Remembrancer. *Lut.* 997. So after conviction for felony, a *scire facias* shall go against the will, or any other, who has the goods in his custody. *S. P. C.* 194. But if any one has title to the goods or lands found by inquisition to be the goods or lands of the offender, he may make his claim by pleading his title. *Lut.* 998. To which the Attorney General shall demur, or reply. *Vid. Com. Dig.* title *Prærogative*, (D. 83. 84.)

A copyholder surrenders to the use of his will; the devisee is convicted of felony and hanged before admittance, the lands are not forfeited to the lord but descend to the heir of the surrenderor. 2 *Wilf.* 13.

*Forfeiture* differs from *confiscation*, in that *Forfeiture* is more general; whereas *confiscation* is particularly applied to such as are *forfeit* to the King's *Exchequer*. *Staundf. P. C.* 186.

There is a full *Forfeiture*, *plena forisfactura*, otherwise called *plena wita*, which is a *Forfeiture* of life and member, and all that a man hath, *Leg. H.* 1. *c.* 88. And there is mention in some statutes, or *Forfeiture*, at the King's will, of body, land, and goods, &c. 4 *Inst.* 66. See further on this subject this Dict. titles *Attainder*, *Corruption of Blood*, *Felony*, *Treason*, &c. and *Com. Dig.* tit. *Forfeiture*.

FORFEITURE OF MARRIAGE, *Forisfactura maritagii.*] A writ which anciently lay against him, who, holding by knight's service, and being under age, and *unmarried*, refused her whom the lord offered him without his disparagement, and married another. *F. N. B. fol.* 141. *Reg. Orig. fol.* 163. See title *Tenure.*

FORFEITED ESTATE. Several statutes have been from time to time passed, appointing *Commissioners of Forfeited Estates*, on rebellions in this kingdom and *Ireland*. Thus by *stat.* 11 & 12 *W.* 3. *c.* 3. all lands and tenements, &c. of persons attainted or convicted of treason or rebellion in *Ireland*, were vested in several commissioners and trustees for sale thereof. And by several *stat. temp. Geo.* 1. commissioners were appointed to inquire of *Forfeited Estates* in *England* and *Scotland*, on the rebellion at *Preston*, &c. And the estates of persons attainted of treason were vested in His Majesty for public uses; but afterwards in trustees, to be sold for the use of the Public; and it was provided, that the purchasers should be *Protestants.*

FORGAVEL, *Forgabulum.*] A small reserved rent in money, or quit-rent. *Cartular. Abbat. de Rading. MS. f.* 88.

FORGE, *Forgia.*] A smith's *Forge*, to melt and work iron. *Chart. Hen.* 2.

FORGERY, From Fr. *Forger, i. e. accudere, fabricare*, to beat on an anvil to *forge* or form.] The fraudulent making or alteration of any Record, Deed, Writing, Instrument, Register, Stamp, &c. to the prejudice of another man's right. 4 *Comm.* 247. A false making, a making *malo animo*, of any written instrument for the purpose of fraud or deceit; including every alteration of or addition to a true instrument. 2 *East's P. C. c.* 19. *c.* 1. § 49. An offence punishable, according to its circumstances, by fine, imprisonment, pillory, transportation and death.

It were to be wished that some one general statute law had been or could be framed to embrace the full principle of *Forgery* as applied to all possible written instruments; and to supersede the necessity of the numerous partial statutes, each of which are liable to misinterpretation or objection on confined grounds.—Paper Credit has produced the greatest part of this multitude of penal statutes, which appear to add to the sanguinary code of law, by creating a multiplicity of offences, but which in fact are all of one nature and degree, and all, in a commercial country, absolutely necessary to be coerced by that capital punishment which alone can prevent them, and make the title and transfer of property secure for the benefit of the possessors.

These Forgeries by statute are very minutely detailed in the latest and one of the best Treatises on crimes and misdemeanours, *Russell's*, under the following divisions. It will be sufficient for the purpose of this Dictionary to refer shortly to the statutes, which in that work are stated at length.

1. Forging or avoiding of *Records* and *Judicial Process.*—By *st.* 8 *H.* 6. *c.* 12. § 3. if any record or parcel thereof, writ, return, panel, process, or warrant of attorney, in the King's Courts of Chancery, Exchequer, King's Bench, or Common Pleas, or in his Treasury, is wilfully (stolen, &c. or) avoided by any clerk or other person, by reason whereof any judgment shall be reversed, the offenders and their abettors shall be guilty of [single] felony. The term 'avoid' in this act, includes rasing, clipping, or mutilating the roll, so as to make a judgment reversible. 3 *Inst.* 72. 1 *Hawk. P. C. c.* 47. § 8. 2 *East's P. C. c.* 19. § 9.—By *stat.* 8 *Ric.* 2. *c.* 4. if any judge or clerk offend by false entering of pleas, or rasing of rolls, to the disherison of any, he is punishable by fine to the King, and shall make satisfaction to the party. See title *Records.*—By *stat.* 21 *Jac.* 1. *c.* 26. § 2. persons acknowledging fines, judgments, bail, &c. in the name of persons not privy to the same, are guilty of capital felony.—By *stats.* 32 *Geo.* 2. *c.* 14. 52 *Geo.* 3. *c.* 143. §. 5. the forging of the hand-writing of the receiver of the præfines at the Alienation Office upon writs of covenant, is a capital felony.

2. Forgeries relating to the *Public Funds*, and Stocks of Public Companies.—By *stat.* 8 *Geo.* 1. *c.* 22. § 1. forging letters of attorney, &c. to transfer shares, or receive dividends in the capital stock or fund of any body politic or corporate, established by act of parliament, or forging the name of any proprietor, or personating them, is a capital felony; and this is extended to future stocks by *stat.* 31 *Geo.* 2. *c.* 22. § 77; 4 *Geo.* 3. *c.* 25. § 15. By *stat.* 33 *Geo.* 3. *c.* 30. further provision is made to prevent forgeries and frauds in transferring stock at the Bank of England by false entries, erasures, &c. which are made capital felonies. By § 4 of this last act, clerks at the Bank making out false dividend-warrants are punishable by 7 years' transportation. By 37 *Geo.* 3. *c.* 22. forging names of witnesses to false letters of attorney, at the Bank, South Sea House, or East India House, is a felony punishable by transportation or otherwise.—*Stat.* 9 *Geo.* 1. *c.* 12. § 4. makes it a capital felony to forge orders, receipts, &c. for annuities payable at the Exchequer. See also 35 *Geo.* 3. *c.* 66. 37 *Geo.* 3. *c.* 46. as to dividends on Irish stock, payable at the Bank of England; and 52 *Geo.* 3. *c.* 129. as to forging affidavits, &c. relating to life annuities grantable by the Commissioners for the reduction of the National Debt, under 48 *Geo.* 3. *c.* 142; 49 *Geo.* 3. *c.* 64; and see 54 *Geo.* 3. *c.* 70. § 38. as to transfers, &c. by the Treasury, or Board of Woods. See also the several loan-acts, passed in every session of parliament, as 59 *Geo.* 3. *c.* 42. § 24. The forgery of *Exchequer Bills* was always made a capital felony by the several acts under which they were issued, as it is now by the act 48 *Geo.* 3. *c.* 1. for the general regulation of the issuing and paying off Exchequer Bills; which act is referred to by every subsequent act for raising money by Exchequer Bills.

3. Forging Securities of the *Bank of England:* By *stat.* 8, 9 *W.* 3. *c.* 20. § 36. forging the common seal, or any bank-bill or bank-note, were made a capital felony. Several other acts were also passed to protect these securities viz. 11 *Geo.* 1. *c.* 9; 12 *Geo.* 1. *c.* 32; 15 *Geo.* 2. *c.* 13; 13 *Geo.* 3. *c.* 79; 41 *Geo.* 3. *c.* 39. & 45 *Geo.* 3. *c.* 89. By § 2 of which last act the forgery, &c. of any bank-note, bank-bill, dividend-warrant, or bond of the Bank, or the uttering thereof, or demanding the money thereon, is a capital felony; and by § 6 of that act, the purchasing, or receiving, or having in possession such forged notes, &c. is felony punishable by 14 years' transportation. By 13 *Geo.* 3. *c.* 79. § 1. the having in possession any frame or mould for making bank paper, is a capital felony. By § 2 of that act, persons engraving plates to imitate bank notes are punishable by six months' imprisonment. By § 3 of 45 *Geo.* 3. *c.* 89. the making or possessing moulds for certain bank paper is felony punishable by 14 years' transportation: and by § 7 of that act, the engraving the form of bank notes without authority is subject to the same punishment; and like punishment for a similar offence is inflicted by 52 *Geo.* 3. *c.* 138. § 5. (As to relief of private bankers against this penalty, see 53 *Geo.* 3. *c.* 139.)

4. Forging the Securities of *other Public Companies.*—See *stats.* 9 *Ann. c.* 21. §. 57. as to the common seal and bonds of the South Sea Company.—*Stat.* 6 *Geo.* 1. *c.* 4. and *c.* 11. § 50. as to the receipts or warrants of that Company.—*Stat.* 12 *Geo.* 1. *c.* 32. § 9. as to bonds of the South Sea or East India Company. All these are capital felonies. Especial provisions have been made by special acts, respecting certain Insurance Companies, and others of a more private nature; but which are also under the protection of the general act hereafter noticed, as extending to the forgery of private papers, securities, and documents.

5. Forging, &c. of *Stamps*.—*Stat.* 52 *Geo.* 3. *c.* 143. § 1. provides that all offences relating to revenue laws, which by former acts were declared felonies without clergy, shall be felonies within clergy, unless specified as capital felonies in the said act. By § 7 of this act, the forging any stamps, denoting stamp-duties on paper, parchment, cards, ivory, or plate, is declared a capital felony. By § 8 of the act the like penalty is inflicted on transposing stamps from plate to other plate, or inferior metal. By § 9 the unauthorised making or having in possession any paper for excise permits is made a capital felony. By *stat.* 55 *Geo.* 3. *c.* 184. § 7. the penalty of capital felony in forging stamps is extended to the removing stamps from one paper or parchment to another. By 55 *Geo.* 3. *c.* 185. the like penalty is extended to forging, &c. of stamps for almanacks, newspapers, and licences. By 55 *Geo.* 3. *c.* 185. § 7. the penalties on forging the stamps on gold and silver plate, are further defined and enforced: *See* also the act 56 *Geo.* 3. *c.* 56. as to stamps in Ireland, by which such forgeries are felonies punishable by transportation for life; and 56 *Geo.* 3. *c.* 78. as to duties of excise on paper. Forging the assay marks on gold or silver plate was a capital felony by 31 *Geo.* 2. *c.* 32. § 14, 15. but now punishable by transportation under 13 *Geo.* 3. *c.* 59. § 1, 2. 24 *Geo.* 3. *st.* 2. *c.* 53. 38 *Geo.* 3. *c.* 69. By *stat.* 12 *Geo.* 3. *c.* 48. the transposing stamps from one writ, &c. to another is felony punishable by 7 years' transportation. By 49 *Geo.* 3. *c.* 81. (reciting four inefficient acts) the forging, &c. of stamps, denoting the excise duty on the manufacture of paper is made felony punishable by 7 years' transportation. By *stat.* 10 *Ann. c.* 19. § 97. the forging seals or stamps for linen, calico, &c. is punishable by 100*l.* penalty. By *stat.* 13 *Geo.* 3. *c.* 56. § 5. (reciting *stats.* 10 *Ann. c.* 19. 12 *Ann. stat.* 2. *c.* 9. 3 *Geo.* 1. *c.* 7. § 1. and 6 *Geo.* 1. *c.* 1. § 1.) the forging any stamp provided by the commission of excise is made a capital felony. See also *stat.* 27 *Geo.* 3. *c.* 31. § 13, 14. 43 *Geo.* 3. *c.* 69. § 4.

6. Forging *Official Papers*, *Securities* and *Documents*, (and see ante as to *Records*.)—By 42 *Geo.* 3. *c.* 116. § 194. 52 *Geo.* 3. *c.* 143. § 6. the forgery of contracts and certificates for the redemption and sale of the land tax is a capital felony. By *stats.* 23 *Geo.* 3. *c.* 70. § 9. 52 *Geo.* 3. *c.* 143. § 9. the forgery of excise permits is capital, as is also the forgery of customs or excise debentures by 52 *Geo.* 3. *c.* 143. § 10. and the forgery of the name or hand-writing of the receiver-general or comptroller of excise by 46 *Geo.* 3. *c.* 75. § 8. or the receiver-general of the stamp duties, 46 *Geo.* 3. *c.* 76. § 9. or of the customs, 46 *Geo.* 3. *c.* 150. § 10. By 48 *Geo.* 3. *c.* 1. § 9. the forgery of *Exchequer Bills*, (see *ante*, 2.) is capital. So of certificates and receipts relating to Exchequer Bills, 51 *Geo.* 3. *c.* 15. § 71. or to the discharge of them, by the acts passed for that purpose. Forging franks for letters is punishable by 7 years' transportation by *stats.* 24 *Geo.* 3 *st.* 2. *c.* 37. § 9. 42 *Geo.* 3. *c.* 63. §. 14. and so in Ireland by 43 *Geo.* 3. *c.* 28. § 22. By 54 *Geo.* 3. *c.* 169. § 14. (and 55 *Geo.* 3. *c.* 103. as to Ireland) the forging of post office marks to avoid the postage is a misdemeanor punishable by fine and imprisonment. Forging the hand-writing of the receiver-general of the post-office, or his clerk, &c. is capital by *stats.* 46 *Geo.* 3. *c.* 83. § 9. 47 *Geo.* 3. *st.* 2. *c.* 59. § 3. By *stat.* 1 *Geo.* 1. *st.* 2. *c.* 25. § 6. 39, 40 *Geo.* 3. *c.* 89. § 26. the counterfeiting tickets or certificates of the navy board is punishable as a misdemeanor. By 53 *Geo.* 3. *c.* 151. § 12. the forging the name of the registrar of the court of admiralty for obtaining the suitor's money is single felony. By 46 *Geo.* 3. *c.* 45. § 9. the forging the hand of the treasurer of the ordnance, or his deputy, is capital; and so of the agent general for volunteers and local militia, 54 *Geo.* 3. *c.* 151. § 16. Forgery and falsely personating another for the purpose of obtaining prize money, pay, &c. of persons in the naval or marine service, have been from time to time made capital by several acts, the last, consolidating all former provisions, being 57 *Geo.* 3. *c.* 127. § 4. Personating, &c. widows of naval officers entitled to pensions, is felony punishable by 14 years' transportation by *stat.* 49 *Geo.* 3. *c.* 35. § 9, 10. as is the personating, &c. persons entitled to allowances or half-pay in the navy or marines, by 49 *Geo.* 3. *c.* 45. § 10, 11. The personating out-pensioners of Greenwich-Hospital is a capital felony by *stats.* 3 *Geo.* 3. *c.* 16. § 6. and 54 *Geo.* 3. *c.* 110. § 6. [But see *stat.* 59 *Geo.* 3. *c.* 56. as to payment of navy prize orders, by which offences relating to them are made misdemeanors only.] By 55 *Geo.* 3. *c.* 60. § 30. signing false petitions, &c. to the treasurer of the navy, to obtain certificates from the inspector of seamen's wills, is felony, punishable by 14 years' transportation. By 56 *Geo.* 3. *c.* 101. § 4. forging certificates, bills of exchange, &c. used in drawing half-pay pensions, &c. is capital. Forging testimonials of soldiers and mariners was made capital by 39 *Eliz. c.* 17. § 3. Forging admiralty Mediterranean passes is capital by 4 *Geo.* 2. *c.* 18. § 1. Forging certificates, &c. as to the slave trade, is capital by 47 *Geo.* 3. *st.* 1. *c.* 36. So quarantine certificates 46 *Geo.* 3. *c.* 98. § 8. A penalty of 500*l.* is imposed by 47 *Geo.* 3. *st.* 2. *c.* 66. § 26. on counterfeiting licences of the admiralty, custom-house, &c. under the acts for prevention of smuggling. Forging the hand of the accountant-general, &c. to documents relating to money of suitors in the court of Chancery, is capital by *stat.* 12 *Geo.* 1. *c.* 32. § 9. Making false entries in parish registers as to marriages, or forging, &c. marriage licences is capital under *stat.* 26 *Geo.* 2. *c.* 33. By *stat.* 52 *Geo.* 3. *c.* 146. making false entries or copies of register of baptisms, burials or marriages, is felony, punishable by 14 years' transportation. Forging registers, certificates, &c. of ages of nominees or annuitants, secured on the public funds, is capital; See 29 *Geo.* 3. *c.* 41. 48 *Geo.* 3. *c.* 142. § 27. 49 *Geo.* 3. *c.* 64. § 3. By 54 *Geo.* 3. *c.* 133. § 10; *c.* 144. § 11. the forging the hand-writing of underwriters, &c. on policies of insurance, &c. is felony punishable by 7 years' transportation. Forging of lottery tickets or shares is capital by the several lottery acts, see 59 *Geo.* 3. *c.* 65. § 11. 43. Forging licences to hawkers and pedlars is liable to a penalty of 300*l.* *stat.* 50 *Geo.* 3. *c.* 41. § 18. A penalty of 50*l.* is imposed on forging vagrant certificates under 17 *Geo.* 2. *c.* 5. § 18.

7. Forging *Private Papers*, *Securities*, and *Documents*.—By *stat.* 5 *Eliz. c.* 14. to forge or make, or knowingly to publish or give in evidence, any forged *deed*, *court roll*, or *will*, with intent to affect the right of real property, either freehold or copyhold, is punished by a forfeiture to the party grieved, of double costs and damages; by the offender's standing in the pillory, and having both his ears cut off, and his nostrils slit and seared; by forfeiture to the crown of the profits of his lands, and by perpetual imprisonment. For any Forgery relating to a *term of years*, or *annuity*, *bond*, *obligation*, *acquittance*, *release*, or *discharge*, of any debt or demand of any personal chattels, the same forfeiture is given to the party grieved, and on the offender is inflicted the pillory, loss of one ear, and a year's imprisonment.—The second offence, in both cases, being felony without benefit of clergy. The penalties of this act are extended to false memorials of deeds registered in Yorkshire or Middlesex. See *stats.* 2, 3 *Ann. c.* 4: 5, 6 *Ann. c.* 18: 7 *Ann. c.* 20: 8 *Geo.* 2. *c.* 6.

By *stat.* 2 *Geo.* 2. *c.* 25. the *first offence* in forging or procuring to be forged, acting or assisting therein, or uttering or publishing as true any forged *deed*, *will*, *bond*, *bills of exchange*, *promissory note*, and indorsement or assignment of such bill or note, or any acquittance or *receipt* for money or goods, with an intention to defraud any person; (or corporation, *stat.* 31 *Geo.* 2. *c.* 22. § 78.) is made *Felony* without benefit of clergy.—And by *stats.* 7 *Geo.* 2. *c.* 22; 18 *Geo.* 3. *c.* 18. it is equally penal to forge or cause to be forged, or

uttered as true, a counterfeit *acceptance* of a bill of exchange, or the number or principal sum of any *accountable receipt*, for any note, bill, or other security for money, or any warrant or order for payment of money or delivery of goods. By 43 *Geo.* 3. *c.* 139. § 1. forging &c. of *foreign* bills is felony punishable by 14 years' transportation.

By 45 *Geo.* 3. *c.* 89. § 1. consolidating and amending the provisions of former acts, the penalty of felony without clergy, is enacted against all persons who shall falsely make, forge, counterfeit, or alter, (or cause or procure to be so done, or willingly act or assist in so doing) any deed, will, testament, bond, writing obligatory, bill of exchange, promissory note, or any indorsement, assignment, or acceptance of any such bill or note, or any acquittance or receipt for money or goods, or any accountable receipt for any security for money, or any warrant or order for payment of money or delivery of goods, with intent to defraud any person or corporation: and the like penalty on all persons, who shall offer, dispose of, or put away any such forged deed, will, or instrument, knowing it to be forged, and with intent to defraud as aforesaid.

By *stat.* 41 *Geo.* 3. *c.* 57. persons, not authorised, making any paper, &c. with the name or firm of any private bankers, &c. are punishable by imprisonment from six months to two years for the first offence; and for the second by transportation for 7 years. By the same act the like punishment is imposed on persons engraving plates of private bankers without authority; and persons engraving signatures of private bankers in hair strokes, &c. are punishable by imprisonment from one year to three, and for the second offence to transportation. By *stat.* 43 *Geo.* 3. *c.* 139. § 2. the engraving plates for foreign bills of exchange, is declared a misdemeanor punishable by six months' imprisonment, and whipping and fine, and for the second offence by 14 years' transportation.

By these and other general and special acts and provisions, there is now hardly a case possible to be conceived wherein forgery that tends to defraud, whether in the name of a real or fictitious person, is not made a capital crime.

A deed forged in the name of a person who never had existence is within the *stat.* 2 *Geo.* c. 25. for the statute doth not use the words *the deed of any person*, or the deed *of another*, or any words of like import, but *any* deed. *Lord Coke's* description of Forgery (3 *Inst.* 169.), "When the act is done in the name of another person," is apparently too narrow, and only takes in that species of Forgery which is most commonly practised; but there are many other species of Forgery which will not come within the letter of that description. *Fost.* 116.

That the use of a name merely fictitious is sufficient to constitute forgery, was solemnly determined in *Bolland's case*, *O. B.* 1772: 1 *Leach*, 83: 2 *East's P. C. c.* 19. § 49.

The offence of Forgery may be complete though there be no publication or uttering of the forged instrument: for the very making, with a fraudulent intention, and without lawful authority, of any instrument which at common law or by statute is the subject of Forgery, is of itself a sufficient completion of the offence before publication; and though the publication of the instrument be the medium by which the intent is usually made manifest, yet it may be proved as plainly by other evidence. 2 *East's P. C. c.* 19. § 4. 44: *Elliot's Case*, 1777: 1 *Leach*, 173: 2 *New Rep.* 93.

*Forgery* by the *common-law* extends to false and fraudulent making or altering of a deed or writing, whether it be a matter of record, in which seems to be included a parish register; which is punishable by fine, imprisonment, and corporal punishment at the discretion of the court, or any other writing, deed, or will. 3 *Inst.* 169. 1 *Rol. Abr.* 65. 1 *Hawk. P. C. c.* 70. Not only where one *makes a false deed*; but *where a fraudulent alteration is made of a true deed*, in a material part of it, as by making a lease of the manor of *Dale*, and it appears to be a lease of the manor of *Sale*, by changing the letter D. into an S. or by altering a bond, &c. for 500*l.* expressed in figures, to 5000*l.* by adding a new cypher, these are *Forgery*: so it is, if one finding another's name at the bottom of a letter, at a considerable distance from the other writing, causes the letter to be cut off, and a general release to be written above the name, &c. 1 *Hawk. P. C. c.* 70. And see as to Forgeries at Common Law, 2 *East's P. C. c.* 19. and *Russel on Crimes, cap.* 27.

A writing may be said to be *forged*, where one being directed to draw up a will for a sick person, doth insert some legacies therein falsely of his own head; though there be no *Forgery* of the hand or seal; for the crime of *Forgery* consists as well in endeavouring to give an appearance of truth to a mere falsity, as in counterfeiting a man's hand, &c. 1 *Hawk. P. C. c.* 70. 3 *Inst.* 170. But a person cannot regularly be guilty of *Forgery* by an act of omission; as by omitting a legacy out of a will, which he is directed to draw for another: though it has been held, that, if the wilful omission of a bequest to one cause a material alteration in the limitation of an estate to another, as if the devisor directs a gift for life to one man, and the remainder to another in fee, and the writer omit the estate for life, so that he in remainder hath a present estate upon the death of the devisor, not intended to pass, this is a *Forgery*. *Noy*, 118. *Moor*, 760.

If a feoffment be made of land, and livery and seisin is not indorsed when the deed is delivered, and afterwards on selling the land for a valuable consideration to another, livery is indorsed upon the first deed; this hath been adjudged *Forgery* both in the feoffer and feoffee; because it was done to deceive an honest purchaser. *Moor*, 665. And when a person knowingly falsifies the date of a second conveyance, which he had no power to make, in order to deceive a purchaser, &c. he is said to be guilty of *Forgery*. 3 *Inst.* 169. 1 *Hawk. P. C. c.* 70.

It seems to be no way material, whether a *forged* instrument be made in such manner, that if it were in truth such as it is counterfeited for, it would be of validity or not. 1 *Sid.* 142.

Although it is a material circumstance that the false instrument should carry on the face of it the semblance of that for which it is counterfeited, yet it is not necessary that this resemblance to the known instrument should be exact. 2 *East's P. C. c.* 19. § 6. 44.

If a person engraves a counterfeit stamp (for medicines under 44 *Geo.* 3. *c.* 98.) similar in some parts, dissimilar in others, to the legal stamps, and cutting out the dissimilar parts, utters the similar parts as genuine, concealing, by a seal, the space whence the dissimilar part is cut out, the offence is complete under the act. 4 *W. P. Taunton*, 400.

The counterfeiting writings of an inferior nature, as letters and such like, it hath been said, is not properly *Forgery*; but the deceit is punishable.—But in the case of John Ward, of Hackney, it was determined that to forge a release or acquittance for the delivery of goods, although not under seal, was Forgery at common law. See *Barn. K. B.* 10. *Ld. Raym.* 737. 1461. 5 *Mod.* 137. *Raym.* 81. *Stra.* 747. And this case is considered as having now settled the rule that the counterfeiting of any writing with a fraudulent intent, whereby another may be prejudiced, is Forgery at common law. 2 *East's P. C. c.* 19. § 7.

Where there is a penalty in an obligation, &c. the party grieved by a *forged* release thereof, shall recover double the *penalty* as damages, and not double the debt appearing in the condition. 3 *Inst.* 172. If a person is informed by another that a deed is *forged*, if he afterwards publishes it as true, he is within the danger of the statute. 3 *Inst.* 171. The King may pardon the corporal punishment of *Forgery*

which tends to common example; but the plaintiff cannot release it: if the plaintiff release or discharge the judgment or execution, &c. it shall only discharge the costs and damages; and the judges shall proceed to judgment upon the residue of the pains, and award execution upon the same. 5 *Rep.* 50.

A person convicted of *Forgery*, and adjudged to the pillory, &c. whereby he becomes infamous, is not allowed to be a witness; but such conviction is a good exception to his evidence. And one convicted of this crime, may be challenged on a jury, so as to be incapable to serve as a juror; and it hath been holden, that exceptions to persons found guilty of perjury or *Forgery*, as well as felony, &c. are not salved by a pardon. 2 *Hawk. P. C. c.* 43. § 25.

The offence of Forgery at common law cannot be tried at the Quarter Sessions, nor can they take cognizance of it as a cheat. 2 *Hawk. P. C. c.* 8. § 64: 2 *East. P. C. c.* 19. § 7. The trial of Forgery must be had in the county where the offence is committed, as the indictment can only be preferred in that county.

The court of B. R. will not ordinarily, at the prayer of the defendant, grant a *certiorari* for a removal of an indictment of *Forgery*, &c. 1 *Sid.* 54.

See title *Certiorari*, *Indictment*. See further on this subject of *Forgery*, 1 *Hawk. P. C. c.* 70. 2 *East's P. C. c.* 19. *Russel on Crimes*, c. 27—34. where this crime is treated of with great minuteness and accuracy.

In Scotland the punishment of Forgery is not expressly laid down by statute, but the common law and practice of that country hath been to inflict a capital punishment in all cases of gross Forgery. *Bell's Scotch Law Dict.*

FORINSECUS. Outward, or on the outside. *Kennet's Gloss.*

FORINSECUM MANERIUM. The Manor as to that part of it which lies without the town, and not included within the liberties of it. *Paroch. Antiq.* 351.

FORINSECUM SERVITIUM. The payment of extraordinary aid, opposed to *intrinsecum servitium*, which was the common and ordinary duties, within the lord's court. *Kennet's Gloss.* See title *Foreign Service.*

FORISBANITUS. Banished. *Mat. Paris. Ann.* 1245.

FORISFAMILIARI. When a son accepts of his father's part of lands, in the life-time of the father, and is contented with it; he is said *forisfamiliari* to be discharged from the family, and cannot claim any more. *Blount.* Hence *forisfamiliation* signifies in general the separation of a child from the family of the father.

FORLAND, or *Foreland*, *Forelandum*.] Lands extending further or lying before the rest. A *Promontory*. *Mon. Angl. tom.* 2 *fol.* 332.

FORLER-LAND. Land in the bishoprick of Hereford, granted or leased *dum episcopus in episcopatu steterit*, so as the successor might have the same for his present revenue: this custom has been long since disused, and the land thus formerly granted is now let by lease as other lands, though it still retains the name by which it was anciently known. *Butterfield's Surv.* 56.

FORM. Is required in law proceedings, otherwise the law would be no art; but it ought not to be used to ensnare or intrap. *Hob.* 232. Matters of *Form* in pleas that go to action, may be helped on a general demurrer; as when a plea is only in abatement. 2 *Ld. Raym.* 1015. The formal part of the law or method of proceeding, cannot be altered but by parliament: for, if once those were demolished, there would be an inlet to all manner of innovation in the body of the law itself. 1 *Com.* 142.

FORMA PAUPERIS. See title *Costs*, II.

FORMEDON, *Breve de formâ donationis.*] A writ that lieth for him who hath right to lands or tenements by virtue of any *intail.*

Upon alienation by a tenant in tail, whereby the estate tail is discontinued, and the remainder or reversion is, by failure of the particular estate, displaced and turned to a mere right, the remedy is by this action of *formedon* (*secundum formam doni*) which is in the nature of a writ of right, and is the highest action that tenant in tail can have. *Finch. L.* 257. *Co. Lit.* 316. For tenant in tail cannot have an absolute writ of right, which is confined to such only as claim in fee-simple; and for that reason this writ of *formedon* was granted him by the statute *de donis*; (*Westm.* 2. 13 *E.* 1. *c.* 1.) which is therefore emphatically called *his* writ of right. *F. N. B.* 255.

This writ is distinguished into three species; a *Formedon* in the *descender*, in the *remainder*, and in the *reverter*.

A writ of *Formedon* in the *descender* lieth where a gift in tail is made, and the tenant in tail aliens the lands intailed, or is disseised of them and dies; in this case the heir in tail shall have this writ of formedon in the descender, to recover these lands so given in tail, against him who is then the actual tenant of the freehold. In which case the demandant is bound to state the manner and form of the gift in tail, and to prove himself heir *secundum formam doni*. *F. N. B.* 211, 212.

A *Formedon* in the *remainder* lieth where a man giveth lands to another for life or in tail, with remainder to a third person in tail or in fee; and he who hath the particular estate dieth without issue inheritable, and a stranger intrudes upon him in remainder, and keeps him out of possession. In this case the remainder-man shall have this writ of formedon in the remainder, wherein the whole form of the gift is stated, and the happening of the event upon which the remainder depended. This writ is not given in express words by the *statute de donis*: but is founded upon the equity of the statute, and upon this maxim in law, that if any one hath a right to land, he ought also to have an action to recover it. See *F. N. B.* 217.

A *Formedon* in the *reverter* lieth where there is a gift in tail, and afterwards by the death of the donee or his heirs without issue of his body, the reversion falls in upon the donor, his heirs or assigns; in such case the reversioner shall have this writ to recover the lands, wherein he shall suggest the gift, his own title to the reversion minutely derived from the donor, and the failure of issue upon which his reversion takes place. *F. N. B.* 219. 8 *Rep.* 88. This lay at common law, before the *statute de donis*, if the donee aliened before he had performed the condition of the gift by having issue, and afterwards died without any. *Finch. L.* 268.

The time of limitation in a *Formedon*, by *stat.* 21 *Jac.* 1. *c.* 16. is twenty years, within which space of time after his title accrues, the demandant must bring his action, or else is for ever barred. See 3 *Comm.* 191—193.

There is a writ of *Formedon in descender*, where *partition* of lands, held in tail, is made among parceners, &c. and one alieneth her part; in this case her heir shall have this writ; and by the death of one sister without issue, the partition is made void, and the other shall have the whole land as heir in tail. Also there is a writ of *formedon insimul tenuit*, that lies for a coparcener against a stranger upon the possession of the ancestor; which may be brought without naming the other coparcener who hath her part in possession. This writ may be likewise had by one heir in *Gavelkind*, &c. of lands intailed; and where the lands are held without partition. *New. Nat. Brev.* 476, 477. 481.

Where a fee-simple is demanded in a *Formedon in reverter*, the taking of the profits ought to be alledged in the donor, and donee: if an estate tail is demanded, it must be alledged in the donee only. 1 *Lutw.* 96.

There are several pleas both in bar and in abatement, which the tenant may plead to this action; such as non-tenure, which is a plea in abatement, and by which the tenant shews,

that he is not tenant of the freehold, or of some part thereof, at the time of the writ brought, or at any time since; which is called the pleading non-tenure generally. *Booth*, 28.

Special non-tenure is where the tenant shows what interest and estate he hath in the land demanded, as that he is tenant for years, in ward, by statute merchant, *elegit*, or the like; and therefore the plea of special non-tenure must always shew who is tenant. *Booth*, 29. See 1 *Brownl.* 153.

At common law, non-tenure of parcel of an intire thing, as a manor, &c. abated the whole writ; but now by the *stat.* 25 *E.* 3. *cap.* 16. it is enacted, "That by the exception of *non-tenure* of *parcel*, no writ shall be abated, but only for *that parcel* whereof the non-tenure was alledged." *Booth*, 29. 1 *Mod.* 181.

If the tenant pleads *non-tenure* of the *whole*, he need not shew who is tenant; but in a plea of *non-tenure* of *parcel*, he must shew who is tenant, and this even before the statute: for the common law would not suffer a writ, good in part, to be wholly destroyed, except the tenant showed the demandant how he might have a better. 1 *Mod.* 181. The tenant cannot after a general imparlance, plead non-tenure of part, though he may plead non-tenure of the whole. 3 *Lev.* 55.

The writ of *Formedon* is now rarely brought; the trying titles by *Ejectment* supplying its place, in an easier manner. See *Booth of Real Actions.*

FORMELLA. A certain weight of above 70lbs. mentioned in the *statute of weights and measures. Stat.* 51 *H.* 3.

FORMS *of Court.* See *Practice, Process.*

FORNAGIUM, or *Furnagium*, Fr. *Fournage, Furnage.*] The fee taken by a lord of his tenant bound to bake in the lord's common *oven*, (*in furno domini*) or for a permission to use their own; this was usual in the Northern parts of England. *Plac. Parl.* 18 *Ed.* 1. And see *Assisa panis et cervisiæ.* 51 *H.* 3.

FORNICATION, *Fornication;* [from *the Fornices* in Rome, where lewd women prostituted themselves for money.] Whoredom, or the act of incontinency in single persons: for if either party is married, it is *Adultery.* The *stat.* 1 *H.* 7. *c.* 4. mentions this crime; which by an act made *anno* 1650. *c.* 10. during the times of the Usurpation, was punished with three months' imprisonment for the first offence; and the second offence, was made felony without Clergy: Adultery was made felony without Clergy in both parties on the first offence. *Scobel's Collect.* 121. The Spiritual Court hath cognizance of this offence; but by *stat.* 27 *Geo.* 3. *c.* 44. the suit must be instituted within eight months, and not at all after the intermarriage of the parties offending: and formerly *courts-leet* had power to inquire of and punish *Fornication* and *adultery;* in which courts the king had a fine assessed on the offenders, as appears by the book of *Domesday.* 2 *Inst.* 488.

FORPRISE, *Forprisum.*] An exception or reservation: This word is frequently inserted in leases and conveyances, wherein *excepted* and *forprised* is an usual expression. In another signification it is taken for any exaction; according to *Thorn. anno* 1285.

FORSCHOKE. Seems to signify *forsaken.* It is especially used in *stat.* 10 *Edw.* 2. for lands or tenements seized by the lord for want of services due from his tenant, and so quietly held and possessed beyond the year and day. *Termes de la Ley.*

FORSES, *Catatudæ.*] Water-falls, so called in *Westmorland. Camd. Britan.*

FORSPEAKER. An attorney or advocate in a cause. *Blount. Scotch Dict.*

FORTALICE. A fortress or place of strength, which anciently did not pass without especial grant. *Scotch Dict.* See also *stat.* 11 *H.* 7. *c.* 18.

FORTHCOMING, *Action of.* In the Scotch law, is an action in the Nature of a Foreign Attachment. See *Attachment.*

FORTIA. Power, dominion or jurisdiction: whence *infortiare Placitum*, to enforce a plea by judges assembled. *Leg. H.* 1. *c.* 29.

FORTIORI, *à fortiori* or *multo fortiori.* Is an argument often used by *Littleton*, to this purpose: If it be so in a feoffment passing a new right, *much more* is it for the restitution of an ancient right, &c. *Co. Lit.* 253. 260.

FORTLETT, Fr.] A place or fort of some strength; or rather a little fort. *Old Nat. Brev.* 45.

FORTS AND CASTLES. The *stat.* 13 *Car.* 2. *c.* 6. extends to forts and other places of strength within the realm; the sole prerogative as well of erecting, as manning, and governing of which belongs to the king, in his capacity of General of the kingdom. 2 *Inst.* 30.

No subject can build a castle or house of strength imbattled, or other fortress defensible without the license of the king, for the danger which might ensue, if every man at his pleasure might do it. 1 *Inst.* 5. 1 *Comm.* 263.

FORTUNA. Treasure-trove.

FORTUNE TELLERS. See title *Conjuration.*

FORTUNIUM. A tournament or fighting with spears; or an appeal to *fortune* therein. *Mat. Paris. anno* 1241.

FORTY-DAYS COURT. The court of *Attachment* in forests, or *Woodmote Court.* See title *Forest.*

FORUM. The court to the jurisdiction of which a party is liable.

FOSSA. A ditch full of water; wherein women commiting felony were drowned: it has been likewise used for a grave, in ancient writings. See *Furca.*

FOSSATUM, FOSSATURA, *Lat.*] A ditch, or place fenced round with a ditch or trench; also it is taken for the obligations of citizens to repair the city ditches. The work or service done by tenants, &c. for repairing and maintenance of ditches is called *fossatorum operatio;* and the contribution for it *fossagium. Kennet's Gloss.*

FOSSEWAY, or the *Fosse*, from *Fossus, digged.*] One of the four ancient Roman ways through England. See title *Wattling Street.*

FOSTERLEAN, *Sax.*] A nuptial gift; the jointure or stipend for the maintenance of the wife.

FOTHER OR FODDER, From Teuton. *Fuder.*] A weight of lead containing eight *pigs*, and every *pig* one and twenty stone and a half; so that it is about a ton or common cart load: Among the *plumbers* in London it is nineteen hundred and a half; and at the mines it is two and twenty hundred weight and a half. *Skene.*

FOUNDATION. The founding and building of a college or hospital is called *foundatio, quasi fundatio*, or *fundamenti locatio, Co. lib.* 10. The king only can *found* a *college;* but there may be a college in reputation, founded by others. *Dyer*, 267. If it cannot appear by inquisition, who it was that founded a *church* or *college*, it shall be intended it was the king; who has power to *found* a new church, &c. *Moor*, 282. The king may *found* and erect an *hospital*, and give a name to the house, upon the inheritance of another, or license another person to do it upon his own lands; and the words *fundo, creo*, &c. are not necessary in every *foundation*, either of a college or hospital made by the king; but it is sufficient if there be words equivalent. The incorporation of a college or hospital is the very *foundation;* but he who endows it with land is the *founder;* and to the erection of an hospital nothing more is requisite but the incorporation and *foundation.* 10 *Rep. Case of Sutton's Hosp.*

Persons seised of estates in fee simple, may erect and *found hospitals* for the poor, by deed inrolled in Chancery, &c. which shall be incorporated, and subject to such visitors as the *founder* shall appoint, &c. *Stat.* 39 *Eliz. c.* 5. Where a corporation is named, it is said the name of the *founder* is parcel of the corporation. 2 *Nels.* 886. Though the *founda-*

*tion* of a thing may alter the law, as to that particular thing; yet it shall not work a general prejudice. 1 *Lil. Abr.* 634. By *stat.* 7 & 8 *W.* 3. *c.* 37. the Crown may grant licence to alien in *mortmain*. By *stat.* 9 *Geo.* 2. *c.* 36. gifts in *mortmain* by *will*, *&c.* are restrained; but there are exceptions with respect to *Universities* and *Royal Colleges*. See this Dict. titles *Corporation*, *University*, *Mortmain*.

FOUNDER OF METAL, from Fr. *Foundre*, to melt or pour.] He that melts metal, and makes any thing of it by pouring or casting it into a mould. See *stat.* 17 *R. c.* 1. this Dict. title *Money:* hence *Bell-founder*, a *fount* of letter, &c.

FOURCHER. Fr. *Fourchir*, Lat. *Furcare*, because it is two-fold.] A putting off, or delaying of an action; and has been compared to stammering, by which the speech is drawn out to a more than ordinary length of time; so a suit is prolonged by *fourching*, which might be brought to a determination in a shorter space. The device is commonly used when an action or suit is brought against two persons, who being jointly concerned, are not to answer till both parties appear; and is where the appearance or *essoign* of one will excuse the other's default, and they agree between themselves that one shall appear or be essoigned one day, and for want of the other's appearing, have day over to make his appearance with the other party; and at that day allowed the other party doth appear, but he that appeared before doth not, in hopes to have another day by adjournment of the party who then made his appearance. *Termes de Ley.*

This is called *fourcher;* and in the statute of *West.* 1. (3 *Ed.* 1.) *c.* 43. it is termed *fourcher by essoin;* where are words to this effect, *viz.* conparceners, jointenants, &c. may not *fourch* by *essoin* to essoin severally: but shall have only one essoin, as one sole tenant. And in *stat. Glouc.* 6 *Ed.* 1. *c.* 10. it is used in like manner: the defendants shall be put to answer without *fourching*, &c. 2 *Inst.* 250. So by *stat.* 9 *E.* 3. *st.* 1. *c.* 3. executors are in like manner prevented from *fourching* by *essoin.*

FRACTION. The law makes no *fraction* of a day; if any offence be committed, in case of murder, &c. the year and day shall be computed from the beginning of the day on which the wound was given, &c. and not from the precise minute or hour. See *Co. Lit.* 225. and this Dict. titles *Murder*, *Appeal.*

An act of record will not admit any division of a day, but is said to be done the first instant of the day. *Mo.* 137.

In presumption of law, when a thing is to be done upon one day, all that day is allowed to do it in, for the avoiding of fractions in time, which the law admits not of, but in case of necessity. *Sti.* 119.

Insurance for H.'s life; H. died on the last day; *per Holt* Ch. J. the law makes no fraction in a day; yet, in this case, he dying after the commencement, and before the end of the last day, the insurer is liable, because the insurance is for a year, and the year is not complete till the day be over; yet if A. be born on the 3d day of September, and on the second day of September, twenty-one years afterwards, he makes his will, this is a good will, for the law will make no fraction of a day, and by consequence he was of age. 2 *Salk.* 625.

Where the sheriff took possession under a *fi. fa.* and at a later hour of the same day, the defendant surrendered in discharge of his bail, and afterwards lay in prison two months, and thereby committed an act of bankruptcy under the statute of James, as from the time of his arrest: The court of K. B. held, in an action by his assignees to recover the value of the goods, that they would notice the fraction of a day; and therefore that the sheriff, having entered before the bankrupt had surrendered in discharge of his bail, the assignees were not entitled to recover. *Thomas* v. *Desanges*, *Term Rep. K. B. East.* 59 *Geo.* 3. 586.

See further titles *Bond*, *Condition*, *Infant*, *&c.*

FOUTGELD. See *Footgeld.*

FRACTITIUM. Arable land. *Mon. Angl. tom.* 2. 873.

FRACTURA NAVIUM. Wreck of shipping at sea.

FRAMES, or *Frame-work-knitting Machines.* By a temporary act 57 *Geo.* 3. *c.* 126. (repealing a former act 54 *Geo.* 3. *c.* 42.) the penalty of felony without clergy is imposed on persons entering by force into any house or place, with intent to cut or destroy any frame-work-knitted pieces, stockings, lace, or other articles; or with intent to destroy any frame, machine, engine, or loom, used in the making such articles; or destroying or cutting the articles; or breaking, destroying, or damaging the frames, &c. See title *Mischief*, *Malicious.*

FRAMPOLE FENCES. Such *fences* as the tenants in the manor of Writtle in Essex, set up against the lord's demesnes; and they are entitled to the wood growing on those *fences*, and as many poles as they can reach from the top of the ditch with the helve of an axe, towards the reparation of their *fences.* It is thought the word *frampole* comes from the Sax. *frempul* profitable; or that it is a corruption of *francpole*, because the poles are free for the tenants to take. But Chief Justice Brampton, whilst he was steward of the court of the manor of Writtle, acknowledged that he could not find out the reason why those *fences* were called *frampole;* so that we are at a loss to know the truth of this name etymologically. *Blount.*

FRANCHILANUS. A freeman. *Chart. H.* 4. *Francus homo* is used for a freeman, in *Domesday book.*

FRANCHISE, Fr.] A privilege or exemption from ordinary jurisdiction; as for a corporation to hold pleas to such a value, &c. And sometimes it is an immunity from tribute, when it is either *personal* or *real*, that is belonging to a person immediately; or by means of this or that place whereof he is a chief or member. *Cromp. Jurisd.* 141.

There is also a *Franchise royal;* which seems to be that where the King's writ runs not. 21 *H.* 6. *c.* 4. But *Franchise royal* is said by some authors to be where the King grants to one and his heirs, that they shall be quit of toll, &c. *Bract. lib.* 2. *c.* 5.

*Franchises*, are a species of incorporeal hereditaments. *Franchise* and *Liberty* are used as synonymous terms; and their definition is "A royal privilege or branch of the King's prerogative, subsisting in the hands of a subject." *Finch L.* 164.—Being therefore derived from the crown, they must arise from the King's grant; or in some cases may be held by prescription, which pre-supposes a grant. *Finch L.* 164. The kinds of them are various and almost infinite: they may be vested either in natural persons, or in bodies politic; in one man or many: but the same identical franchise that has before been granted to one, cannot be bestowed on another, for that would prejudice the former grant. 2 *Rol. Ab.* 191. *Keilw.* 196.

The *Principality of Wales* is a Franchise.—To be a *County-Palatine* is also a Franchise, vested in a number of persons. It is likewise a Franchise for a number of persons to be incorporated, and subsist as a *Body politick;* with a power to maintain perpetual succession, and do corporate acts: and each individual member of such corporation is also said to have a Franchise or freedom. Other Franchises are, to hold a *Court-Leet;* to have a *Manor* or Lordship; or at least to have a lordship paramount: to have *Waifs*, *Wrecks*, *Estrays*, *Treasure-trove*, *Royal-fish*, *Forfeitures* and *Deodands;* to have a *Court* of one's own, or liberty of holding pleas, and trying causes: to have the *Conusance of Pleas*, which is a still greater liberty, being an exclusive right, so that no other court shall try causes arising within that jurisdiction: (See this Dict. title *Cognizance:*) to have a *Bailiwick*, or liberty exempt from the sheriff of the county, wherein the grantee only and his

officers are to execute all process: to have a *Fair* or *Market*, with the right of taking *Toll*, either there or at any other public places, as at bridges, wharfs, or the like; which tolls must have a reasonable cause of commencement (as in consideration of repairs, or the like,) else the Franchise is illegal and void. 2 *Inst.* 220. (See this Dict. titles *Fair; Toll.*) Or lastly to have a *Forest*, *Chase*, *Park*, *Warren* or *Fishery*, endowed with privileges of royalty, *F. N. B.* 230. See this Dict. title *Forest*, *&c.*

*Usage* may uphold *Franchises*, which may be claimed by *prescription*, without record either of creation, allowance or confirmation; and wreck of the sea, waifs, strays, fairs and markets, and the like, are gained by *usage*, and may become due without any matter of record. But goods of felons and outlaws, and such like, grow due by *charter*, and cannot be claimed by usage, &c. 2 *Inst.* 281; 9 *Rep.* 27.

It hath been adjudged that grants of *Franchises*, made before the time of memory, ought to have allowance, within the time of memory, in the King's Bench; or before the barons of the Exchequer, or by some confirmation on record; and it is said they are not records pleadable, if they have not the aid of some matter of record within time of memory; and such ancient grants, after such allowance, shall be construed as the law was when they were made, and not as it hath been since altered; but *Franchises* granted within time of memory are pleadable without any allowance or confirmation; and if they have been allowed or confirmed as aforesaid, the *Franchises* may be claimed by force thereof, without shewing the charter. 9 *Rep.* 27, 28. 2 *Inst.* 281. 494.

There have been formerly several ancient prerogatives derived from the crown; besides the *Franchises* aforementioned; as power to pardon felony, make justices of assise, and of the peace, &c. But by the *stat.* 27 *H.* 8. *c.* 24. they were resumed and re-united to the crown. The King cannot grant power to another to make strangers born, denizens here, because such power is by law inseparably annexed to his person. 7 *Rep.* 25.

By *Magna Carta*, *c.* 1. and several ancient statutes, the *Church* shall have all her liberties and *Franchises* inviolable: And the *Lords spiritual* and *temporal* shall enjoy their liberties, &c. and the King may not deprive them of any of them. 14 *Ed.* 3. *st.* 2. *c.* 1. 2 *H.* 4. *c.* 1.

By *Magna Carta*, *c.* 37. The *Franchises* and liberties of the city of London, and all other cities, towns, &c. are confirmed. By *stat.* 27 *H.* 8. *c.* 24. all writs, processes, &c. in *Franchises*, are to be made in the King's name; and stewards, bailiffs, and other ministers of liberties, shall attend the justices of assise, and make due execution of process, &c.

Some *Franchises*, as *York*, *Bristol*, &c. have return of writs, to whom mandates are directed from the courts above, to execute writs and process: And a mayor or bailiff of a town, may have liberty to keep courts, and hold pleas in a certain place, according to the course of the Common-law; and power to draw causes out of the King's courts, by an *exclusive jurisdiction*: But the causes here may be removed to the superior courts. *Co. Lit.* 114. 4 *Inst.* 87. 224.

Sheriffs of counties, within which is any *Franchise*, the lord whereof is intitled to a return of writs, shall, on his request, appoint one or more deputies, to reside at some place near, there to receive all writs in the sheriff's name, and under his seal to issue warrants for their due execution; and the Lord Chancellor is to settle the charges to be paid any such deputy, &c. *Stat.* 13 *Geo.* 2. *c.* 18.

A *Franchise* hath no relation to the county wherein it lies, as has been generally held; for it is not necessary to set forth the county when any thing is shewn to be done within a liberty or *Franchise*. *Trin.* 23 *Car. B. R.*

If a *Franchise* fails to administer justice within the same, the *Franchise* shall not be allowed; but on any such failure, the court of B. R. may compel the owners of the *Franchise*, &c. to do justice; for that court ought to see justice equally distributed to all persons. 1 *Lill. Abr.* 635.

Wherever the King is party to a suit, as in all informations and indictments, the process ought to be executed by the sheriff, and not by the bailiff of any *Franchise*, whether it have the clause *non omittas*, &c. or not; for the King's prerogative shall be preferred to any *Franchise*. 2 *Hawk. P. C.* A sheriff upon a *non omittas*, or on a *capias utlagatum*, or *quo minùs*, may enter and make arrests in a *Franchise*. 1 *Lill.* 635. An arrest by the sheriff within a *Franchise* on a common writ, is said to be good, though the officer be subject to an action at the suit of the lord of the *Franchise*, &c. See title *Arrest*.

*Franchises* may be forfeited and seized where they are abused, for mis-user, or non-user, and when there are many points, a mis-user of any one will make a Forfeiture of the whole on a *quo warranto* brought. *Kitch.* 65. For contempt of the King's writ, in a county palatine, &c. the liberties may be seised, and the offenders fined; and the temporalities of a bishop have been adjudged to be seized until he satisfied the King for such a contempt, on information exhibited, &c. *Cro. Car.* 253. The bishop of Durham pretending he had such a *Franchise*, that the King's writ was not to come there, and because one brought it thither he imprisoned him; this being proved upon an information brought against him, it was adjudged he should pay a fine to the King, and lose his liberties. 2 *Shep. Abr.* 250.

If a person claims *Franchises* which he ought not to have, it is an usurpation upon the King: and not shewing his title the King shall take from him his *Franchise*. *Poph.* 180. 1 *Bulst.* 54. The King's Bench will not grant an information on private usurpation of *Franchises*, but the proper remedy is to proceed by *quo warranto*. *Hardw.* 261.

If Franchises and liberties are granted to the King, which were before *in esse*, as flowers of his crown, and afterwards by escheat, surrender or otherwise, come back to the crown, they are re-united to the crown, and the King has them *in jure coronæ* as before. 9 *Co.* 256. So if liberties, franchises, &c. which were appendant to a manor, come with the manor to the King, the appendancy is extinct, and the King is reseised of them in *in jure coronæ*. 9 *Co.* 25 *b. Cro. Eliz.* 591. 1 *And.* 87. See *Jon.* 285. But if Franchises, liberties, &c. created *de novo*, by the King come back to the crown, they are not merged or extinguished in the crown. 9 *Co.* 25 *b.* 1 *And.* 87.—See *Cro. El.* 592. *Dy.* 327 *a. Com. Dig.* title *Franchise* (G).

Disturbance of Franchises happens when a man has the Franchise of holding a court-leet, of keeping a fair or market, of free warren, of taking toll, of seizing waifs or estrays, or, in short, any other species of Franchise whatsoever, and he is disturbed or incommoded in the lawful exercise thereof. As if another by distress, menaces, or persuasions, prevail upon the suitors not to appear at my court; or obstruct the passage to my fair or market; or hunts in my free warren; or refuses to pay me the accustomed toll; or hinders me from seizing the waif or estray, whereby it escapes, or is carried out of my liberty: In all cases of this kind, and which are of a variety too extensive to be here enumerated, an injury is done to the legal owner of the Franchise; his property is damnified: and the profits arising from such his Franchise are diminished. To remedy which, as the law has given no other writ, he is therefore entitled to sue for damages by a special action on the case: or in case of toll, may make a distress, if he pleases. 3 *Comm.* 236.

See further as to Franchises under the several titles and names of the different subjects, above concisely mentioned; and more at large under titles *Cognisance*, *Quo Warranto*. *Com. Dig.* titles *Franchises*, *Liberties*.

FRANCIGENÆ. Was anciently the general appellation of all foreigners. Vide *Englecery*.

FRANCLAINE. Used in ancient authors to denote a freeman or a gentleman. *Fortescue.*

FRANK. A French gold coin, worth twenty *sols*, which is a *livre*, about ten pence ½*d.* English money.

FRANKALMOIGN, *Libera Eleemosyna*, *Free Alms.*] A tenure by spiritual service, where an ecclesiastical corporation, sole or aggregate, holdeth land to them and their successors, of some lord and his heirs in free and perpetual alms: And *perpetual* supposes it to be a fee simple; though it may pass without the word *successors*. *Litt.* § 133. *Co. Lit.* 94. A lay person cannot hold in free alms: And when a grant is in *Frankalmoign*, no mention is to be made of any manner of service. *Lit.* 137. None can hold in *Frankalmoign* but by prescription, or by force of some grant made before the statute of *Mortmain*, 7 *Ed.* 1. *st.* 2. 18 *Ed.* 1. *st.* 1. *c.* 3. So that the tenure cannot at this day be created, to hold of a founder and his heirs in free alms: But the King is not restrained by the statutes: nor a subject licensed or dispensed with by the King, to make such a grant, &c. *Co. Lit.* 98, 99. And if an ecclesiastical person holds lands by fealty and certain rent, the lord may at this time confirm his estate, to hold to him and his successors in *Frankalmoign*; for the former services are extinct, and nothing is reserved but that he should hold of him, which he did before; whereby this change and alteration is not within the *stat.* 18 *Ed.* 1. of *quia emptores terrarum*. *Lit.* § 140. 340. *Co. Lit.* 99. 306.

Tenure in *Frankalmoign* is incident to the inheritable blood of the donor or founder; except in case of the King, who may grant this tenure to hold of him and his successors. *Lit.* 135. And the reason why a grant in *Frankalmoign*, since the *stat.* 18 *Ed.* 1. (*quia emptores*) is void, except in the case of the King, &c. is because none can hold land by this tenure, but of the donor; whereas the statute injoins, that it be held of the Chief Lord, by the same service by which the feoffer held it; though the King may grant away any estate, and reserve the tenure to himself. *Co. Lit.* 99. 223.

The service which ecclesiastical corporations were bound to render for lands held in *Frankalmoign* was not certainly defined, but only in general, to pray for the souls of the donor and his heirs, dead or alive; and therefore they did no fealty (which is incident to all other services but this) because this divine service was of a higher and more exalted nature. *Lit.* § 134, 135.

This is the tenure by which almost all the ancient Monasteries and Religious houses held their lands; and by which the parochial clergy and very many ecclesiastical and eleemosynary foundations hold them to this day. The nature of the service being, upon the Reformation, altered and made conformable to the doctrines of the Church of England. It was an old Saxon tenure, and continued under the Norman Revolution; from the respect then shewn to religion and religious men: which is also the reason that tenants in *Frankalmoign* were discharged of all other services, except the *trinoda necessitas* of repairing the highways, building castles, and repelling invasions. See *Bract. l.* 4. *tr.* 1. *c.* 28. § 1. *Seld. Jan.* 1. 42.

Even at present, this is a tenure of a nature very distinct from all others, being not in the least feodal, but merely spiritual. For this reason, if any person that holds lands or tenements in *Frankalmoign*, make any failure in doing such divine service as they ought, the lord may make complaint of it to the Ordinary or visitor; which is the King, if he be founder, or a Subject where he was appointed visitor upon the foundation; and the Ordinary, &c. may punish the negligence, according to the ecclesiastical laws. *Lit.* 136. *Co. Lit.* 96.

In this particular, tenure in *Frankalmoign* materially differs from what was called tenure *by Divine Service*: in which tenants were obliged to do some special divine services in certain: as to sing so many masses, to distribute such a sum in alms, and the like; which being expressly defined and prescribed, could with no kind of propriety be called free *alms*; especially as for this, if unperformed, the lord might distrain without any complaint to the visitor. *Lit.* § 137. *Britt. c.* 66.

These donations in *Frankalmoign* are now out of use, as none but the King can make them; but they are expressly excepted, by name, in the *stat.* 12 *Car.* 2. *c.* 24. (§ 7.) abolishing tenures, and therefore subsist in many instances at the present day. 2 *Comm.* 101. *c.* 6.

See further on this subject this Dict. title *Mortmain.*

FRANK-BANK. See *Free Bench.*

FRANK-CHASE. A liberty of *free chase*; by which all persons that have lands within the compass thereof, are prohibited to cut down any wood, &c. without the view of the forester, though it be in their own demesnes. *Comp. Juris.* 187.

FRANKED LETTERS. See titles *Post*, *Parliament.*

FRANK-FEE. Freehold lands which are held exempted from all services, but not from homage. In the *register* of writs we find that is *frank-fee*, which a man holds at the Common-law, to him and his heirs; and not by such service, as is required in ancient demesne, according to the custom of the manor; and that the lands in the hand of King Edward the Confessor, at the making of the book of *Domesday*, were ancient demesne, and all the rest *frank-fee*; wherewith *Fitz-Herbert* agrees. *Reg. Orig.* 12. *F. N. B.* 161. These lands were exempted from all services, but not from homage.—*Bro.* tit. *Demesne*, 32, says, that land which is in the hands of the King or lord of any manor, or being ancient demesne of the crown (*viz.* the demesnes) is called *Frank-fee*; and that which is in the hands of the tenant, is ancient demesne only. The author of the *Terms of the Law* defines a *Free-fee* to be a tenure pleadable at the Common-law; and not in ancient demesne. *Cowel. Blount.* See title *Ancient Demesne.*

FRANK-FERM. Lands or tenements, changed in the nature of the fee by feoffment, &c. out of knight service, for certain yearly services. *Britton, c.* 66. See title *Fee farm.*

FRANK-FOLD. See *Foldage.*

FRANK-LAW. *Libera Lex.*] The benefit of the free and Common-law of the land. You may find what it is by the contrary, from *Crompton* in his *Justice of Peace*; where he says, he that for any offence loseth his *Frank-law*, falls into these mischiefs, *viz.* He may never be impannelled upon any jury or assise; or be permitted to give any testimony: If he hath any thing to do in the King's courts, he must not attend them in person, but appoint his attorney therein for him: And his lands shall be estreated, and his body committed to prison, &c. *Cromp. Juris.* 156. *Lib. Assis.* 59.

FRANK-MARRIAGE, *Liberum Maritagium.*] A tenure in tail special where a man seised of land in fee-simple, gives it to another with his daughter, sister, &c. in marriage; to hold to them and their heirs: This tenure groweth from these words in the gift, *i. e. Sciant, &c. me* A. B. *dedisse & concessisse, &c.* T. B. *filio meo, &c.* Annæ *uxori ejus, filiæ, &c. in* linerum maritagium, *unum messuagium, &c. Litt.* § 17. *West. Symb. par.* 1. *lib.* 2. § 303. The effect of which words is, that they shall have the land to them and the heirs of their bodies: and shall do no services to the donor, except fealty, until the fourth degree. *Glanvil. lib.* 7. *c.* 18. And *Fleta* gives this reason why the heirs do no service until the fourth degree: *Ne donatores vel eorum hæredes per homagii receptionem a reversione repellantur.* And why in the fourth descent and downward, they shall do services to the donor; *quia in quarto gradu vehementer præsumitur, quod terra est pro defectu hæredum donatorum reversura. Fleta. lib.* 3. *c.* 11; and see *Bracton. lib.* 2. *c.* 7.

*Bracton* also divides marriage into *liberum maritagium* and *maritagium servitio obligatum*; which last was where lands were given in marriage, with a reservation of the services to

the donor, which the donee and his heirs were bound to perform for ever; but neither he, or the next two heirs, were obliged to do homage, which was to be done when it came to the fourth degree, and then, and not before, they were required to be performed, both services and homage. *Bract. lib.* 2. A gift of lands by one man to another with a wife in *frank-marriage*, amounts by implication of law to a gift in tail; which in this case may be created without the words *heirs* or *body*. *Lit.* 17. *Wood's Inst.* 120. A gift in *Frank-marriage* might be made as well after as before marriage: And such a gift was a fee simple before the statute of *Westm.* 2; but since, it is usually a fee-tail: Though this tenure is now grown out of use it is still capable of subsisting in law: It is liable to no service but fealty. See tit. *Tail and Fee-tail.*

FRANK-PLEDGE, *Franci plegium*, from Fr. *Franc*, Liber, and *pledge*, fidejussor.] A *pledge* or surety for the behaviour of *Freemen*; it being the ancient custom of this kingdom, borrowed from the Lombards, that for the preservation of the public peace, every free-born man at the age of fourteen, (religious persons, clerks, &c. excepted) should give security for his truth towards the King and his subjects, or be committed to prison, whereupon a certain number of neighbours usually became bound one for another, to see each man of their *pledge* forth-coming at all times, or to answer the transgression done by any gone away: And whenever any one offended, it was forthwith inquired in what *pledge* he was, and then those of that *pledge* either produced the offender within one and thirty days, or satisfied for his offence. This was called *Frank-pledge;* and this custom was so kept, that the sheriffs at every *county-court*, did from time to time take the oaths of young persons as they grew to fourteen years of age, and see that they were settled in one *decennary* or other; whereby this branch of the sheriff's authority was called *visus franci plegi*, or *view of Frank-pledge*. At this day no man ordinarily giveth other security for the keeping of the peace, than his own oath; so that none answereth for the transgression of another, but every person for himself. 4 *Inst.* 78. Living under *Frank-pledge* has been termed living under *law*, &c. See this Dict. titles *Court-leet; Decennary; Deciner.*

FRANK-TENEMENT. A possession of *freehold* lands and tenements. See *Freehold.*

FRASSETUM. A corruption of *fraxinetum.*] A wood or woody ground, where *ash-trees* grow. *Co. Lit.* 4.

FRATER CONSANGUINEUS. A brother by the father's side.

FRATER NUTRICIUS. Used in ancient deeds for a bastard brother. *Malmsb.*

FRATER UTERINUS. A brother by the mother's side.

FRATERIA. A fraternity, brotherhood, or society of religious persons, who were bound to pray for the good health and life, &c. of their living brethren, and the souls of those that were dead: in the statutes of the cathedral church of St. Paul in London, collected by Ralph Baldock, Dean, A. D. 1295, there is one chapter *de frateria beneficiorum ecclesiæ S. Pauli, &c.*

FRATERNITIES. See title *Corporation.*

FRATRES CONJURATI. Sworn brothers or companions: sometimes those were so called who were sworn to defend the King against his enemies. *Hoveden, p.* 44, 5. *Leg. W.* 1. *Leg. Ed.* 1. *c.* 35.

FRATRES PYES, *Pied friars.*] Certain friars wearing black and white garments: of whom mention is made by *Walsingham, p.* 124.

FRATRIAGIUM. A younger brother's inheritance; Whatever the sons or brothers possess of the estate of the father, they enjoy it *ratione fratriagii*, and are to do homage to the elder brother for it, who is bound to do homage for the whole to the superior lord. *Bract. lib.* 2. *c.* 35.

FRAUD, *Fraus, Lat.*] Deceit in grants and conveyances of lands, and bargains and sales of goods, &c. to the damage of another person; which may be either by suppression of the truth, or suggestion of a falsehood. On this subject of FRAUD, we may enquire,

I. *What Acts are fraudulent at Common law, and in Equity.*
II. *What Acts are fraudulent by Statute.*

I. It may be laid down as a general rule, that, without the express provision of any act of parliament, all deceitful practices in defrauding or endeavouring to defraud, another of his known right, by means of some artful device, contrary to the plain rules of common honesty, are condemned by the Common-law, and punishable according to the heinousness of the offence. *Co. Lit.* 3. *b. Dyer*, 295. Such as causing an illiterate person to execute a deed to his prejudice, by reading of it over to him in words different from those in which it was written, &c. 1 *Sid.* 312. 431.

Also it is a rule, that a wrongful manner of executing a thing shall avoid a matter that might have been executed lawfully. *Co. Lit.* 35. 41 *Ass.* 28. 47 *Ass.* 29. 1 *Rol. Abr.* 420. 549. *Co. Lit.* 357. *Poph.* 64. 100.

A deed not fraudulent at first may become so afterwards. And if one add a seal to a note which is good without it, he shall lose his security. 2 *Vern.* 123. 162.

As to frauds in contracts and dealings, the Common-law subjects the wrong-doer, in several instances, to an action on the case; as if a person, having the possession of goods, sell them to another, affirming them to be his own, when in truth they are not, an action on the case lies, 1 *Rol. Ab.* 90. *Cro. Jac.* 474. But if A. possessed of term for years, offers to sell it to B. and says, that a stranger would have given him twenty pounds for this term, by which means B. buys it, though in truth A. was never offered twenty pounds, no action on the case lies, though B. is hereby deceived in the value. 1 *Rol. Abr.* 91. 101. 1. *Sid.* 146. *Yelv.* 20. *S. P.*

If on a treaty for the purchase of a house, the defendant affirms the rent to be more than it is, whereby the plaintiff is induced to give more than the house is worth, this is a fraud. 1 *Salk.* 211. 1 *Lev.* 102. 1 *Sid.* 146. 1 *Keb.* 510. 518. 522. *S. P.* And see *Kel.* 24, 81. 1 *Show.* 50. 51.

Where a person is party to a fraud, all that follows by reason of that *Fraud* shall be said to be done by him. *Cro. Jac.* 4. 9. But when *Fraud* is not expressly averred, it shall not be presumed; nor shall the court adjudge it to be so, till the matter is found by a jury. 10 *Rep.* 56.

All frauds and deceits, for which there is no remedy by the ordinary course of law, are properly cognisable in equity; and it is admitted, that matters of Fraud were one of the chief branches to which the jurisdiction of Chancery was originally confined. 4 *Inst.* 84. It would be endless to enumerate the several cases, wherein relief has been given against Frauds: but the following instances are too material to be omitted.

Wherever Fraud or surprise can be imputed to, or collected from the circumstances of the transaction, Equity will interpose and relieve against it. *Toth.* 101. 2. 2 *Ch. Ca.* 103. *Finch.* 161. 2 *P. Wms.* 203. 270. 3 *P. Wms.* 130. 2 *Vern.* 189. 2 *Atk.* 324. 2 *Vez.* 407. It is said however that it must not be understood, from cases of this kind being generally brought into equity, that the courts of law are incompetent to relieve; for where the Fraud can be clearly established, courts of law exercise a concurrent jurisdiction with courts of equity; and will relieve by making void the instrument obtained by such corrupt agreement or Fraud. 1 *Burr.* 396. *Wood's Inst.* 296. Therefore where the obligor was an unlettered man, and the bond was not read over to him, he was allowed to plead this circumstance in an action on the bond. 9 *H.* 5. 15. *cited* 11 *Co.* 27 *b.* So if the bond be in part read to an unlettered man, and some of its material contents be omitted or

misrepresented. 2 *Rol. Ab.* 28. *p.* 8. It is observable that Lord *Coke* in the same passage where he confines the jurisdiction of courts of equity to such "frauds covin and deceit, for which there is no remedy by the ordinary course of law," seems to admit that all frauds were not relievable at law. See 3 *Inst.* 84.

The Chancery may decree a conveyance to be *fraudulent*, merely for being voluntary, and without any trial at law; yet it has been insisted, that *Fraud* or not, was triable only by a jury. *Pre. Ch.* 14, 15.

A poor man was drawn in to sell an estate, at a great undervalue; but no *Fraud* appearing, though the purchase was not a fair bargain, the seller could not be relieved in equity, to set it aside. *Preced. Chanc.* 206.

There does not appear to be a single case in the books in which it has been held that mere inadequacy of price alone is a ground for a court of equity to annul an agreement, though executory, if the same appear to have been fairly entered into, and understood by the parties, and capable of being specifically performed; still less does it appear to have been considered as a ground for rescinding an agreement actually executed. See *Gilb. Rep.* 155. *Bro. P. C. Keen* v. *Stukeley*—2 *Atk.* 251. *Ambl.* 18. To set aside a conveyance there must be an inequality of price so strong, gross, and manifest, that it must be impossible to state it to a man of common sense, without producing an exclamation at the inequality of it. 1 *Bro. C. R.* 9. and see 2 *Bro. C. R.* 179 *in n.* A strong argument in support of this rule may be drawn from those cases in which losing bargains have been actually established and decreed. See 2 *Vern.* 423. 1 *Eq. Ab.* 170. 2 *Vez.* 422. 1 *Bro. C. R.* 158.—But though courts of equity will not relieve against agreements merely on the ground of the consideration being inadequate, yet if there be such inadequacy as to shew that the person did not understand the bargain he made, or was so oppressed that he was glad to make it, knowing its inadequacy, it will shew a command over him which may amount to a Fraud. 2 *Bro. C. R.* 175. See also 1 *Bro. C. R.* 558. *Herne* v. *Meers*, 2 *Vez.* 155. 2 *P. Wms.* 203.

A. being tenant in tail, remainder to his brother B. in tail, A. not knowing of the intail, makes a settlement on his wife for life for her jointure, without levying a fine, or suffering a recovery, which B. who knew of the intail ingrosses, but does not mention any thing of the intail, because, as he confessed in his answer, if he had spoke any thing of it, his brother, by a recovery, might have cut off the remainder, and barred him; and although after A.'s death B. recovered in ejectment against the widow by force of the intail; yet she was relieved in Chancery, and a perpetual injunction granted for this Fraud in B. in concealing the intail; which if it had been disclosed, the settlement might have been made good by a recovery. *Preced. Chanc.* 35. 2 *Vern.* 239.

So where a mother being absolute owner of a term, the same being limited to her in tail, is present at a treaty for her son's marriage, and hears her son declare, that the term was to come to him at his mother's death, and is a witness to the deed, whereby the reversion of the term is settled on the issue of the marriage after the mother's death; she was compelled in equity to make good the settlement. 2 *Vern.* 150.

Where the defendant, on a treaty of marriage for his daughter with the plaintiff, signed a writing comprising the terms of the agreement, and afterward desiring to elude the force thereof, and get loose from his agreement, ordered his daughter to put on a good humour, and get the plaintiff to deliver up that writing, and then marry him, which she accordingly did, and the defendant stood by at the corner of a street to see them go by to be married; the plaintiff was relieved on the point of Fraud. 1 *Eq. Ab.* 20. 2 *Vern.* 373.

It seems agreed that if a woman on the point of marriage, charge, or convey her property to a mere stranger, for whom she was not under even a moral obligation to provide, that such conveyance will be decreed a Fraud on the marital rights. 2 *C. R.* 41. 2 *Vez.* 264.

If A. has a prior incumbrance on an estate, and is a witness to a subsequent mortgage, but does not disclose his own incumbrance; this is such a *Fraud* in him for which his incumbrance shall be postponed. 2 *Vern.* 151. And see 2 *Vern.* 554. So if A. having a mortgage on a leasehold estate lends the mortgage deed to the mortgagor, with an intent to borrow more money; that is such a *Fraud* in the mortgagee, for which his mortgage shall be postponed to the subsequent incumbrance. 2 *Vern.* 726. 1 *Eq. Ab.* 321.—See this Dict. title *Mortgage*.

If a copyholder, by his will, intending to give the greatest part of his estate to his godson, and the other part to his wife, is persuaded by the wife to nominate her to the whole, on a promise that she would give the godson the part designed for him; it will be decreed against the wife on the point of *Fraud*, though there was no *memorandum* thereof in writing pursuant to the statute of Frauds and Perjuries. *Preced. Canc.* 3.

Since the cases of *Kerrich* v. *Bransby*, (*Bro. P. C.*) and *Webb* v. *Cleverden*, (2 *Atk.* 424.) it appears to have been settled that a will cannot be set aside in equity for Fraud and imposition; because a will of personal estate may be set aside for Fraud in the ecclesiastical court, and a will of real estate may be set aside at law: for in such cases, as the *animus testandi* is wanting, it cannot be considered as a will. 2 *Atk.* 324. 3 *Atk.* 17.—Though equity will not set aside a will for fraud, nor restrain the probate of it in the proper court, yet if the Fraud be proved, it will not assist the party practising it, but will leave him to make what advantage he can of it. 2 *Vern.* 76. But if the validity of the will has been already determined and acted upon, equity will restrain proceedings in the prerogative court, to controvert its validity. 1 *Atk.* 628. That the party prejudiced by the Fraud may file a bill in equity for a discovery of all its circumstances is unquestionable; the invariable practice in such cases is to seek relief, and the issue directed is to furnish the ground upon which the court is to proceed in giving relief. *Fonblanque's Treat. Eq. c.* 2. § 3. *in n.*

If a security be obtained from a person by Fraud and practice, upon a pretence of a demand that is fictitious, it will be relieved against in equity. 2 *Vern.* 123. 632.

But no man can be allowed to allege his own fraud to avoid his own deed: and therefore when a deed of conveyance of an estate from one brother to another was executed to give the latter a colourable qualification to kill game: It was held that as against the parties to the deed it was valid and was sufficient to support an ejectment for the premises. *Doe, d. Roberts* v. *Roberts*, *Term Rep. K. B. Hil.* 59 *Geo.* 3. 367.

There are several instances, where a parol agreement intended to be reduced into writing, but prevented by *Fraud* has been decreed in equity, notwithstanding the statute of Frauds and Perjuries; as where upon a marriage treaty, instructions were given by the husband to draw a settlement, which he privately countermanded, and afterwards drew in the woman by persuasions and assurances of such settlement to marry him: It was decreed, that he should make good the settlement. 1 *Eq. Ab.* 19. So where a parol agreement was concerning the lending of money on a mortgage, and the covenants proposed were an absolute deed from the mortgagor and a deed of defeasance from the mortgagee, and after the mortgagee had got the deed of conveyance, he refused to execute the defeasance; it was decreed against him on the point of Fraud. 1 *Eq. Ab.* 90. See title *Agreement*.

II. By *stat.* 1 *R.* 2. *c.* 9. no gift or feoffment of lands or goods shall be made by Fraud for maintenance. And the disseisees shall have their recovery against the first disseisors as well of their lands as of double damages, without regard to

such alienations. See also *stats.* 4 *H.* 4. *c.* 7. 11 *H.* 6. *c.* 3. and this Dictionary, titles *Disseisin, Forcible Entry.*

By *stat.* 3 *H.* 7. *c.* 4. (and see *stat.* 50 *E.* 3. *c.* 6.) all deeds of gift of goods made in trust for the use of persons making the said gifts, with intent to defraud creditors, shall be null and void.

By *stat.* 13 *Eliz. c.* 5. (made perpetual by *stat.* 29 *Eliz. c.* 5.) Every feoffment, gift, alienation and conveyance of lands or goods, leases, rents, &c. and every bond, judgment and execution with intent to defraud creditors or others, shall (only against creditors and others whose actions shall be thereby defrauded or delayed) be of none effect: all parties and privies to such conveyances, bonds, &c. shall forfeit one year's value of the lands; and the whole of the goods, or money contained in the bond, &c. half to the crown and half to the party grieved; and suffer half a year's imprisonment. —This statute not to extend to any estate made on good consideration *bonâ fide* to persons not having notice of such Fraud. As to determinations on this Statute, see *post.*

By *stat.* 27 *Eliz. c.* 4. (made perpetual by *stat.* 39 *Eliz. c.* 18.) Every conveyance, charge, lease or incumbrance, of any lands made with intent to defraud purchasers shall be deemed utterly void as against such purchasers and all claiming under them.—The parties and privies to such conveyances shall forfeit one year's value of the land and suffer half a year's imprisonment.—The statute expressly excepts any conveyance made for good consideration and *bonâ fide.*— If any person shall make any conveyance or limitation of lands with a clause of revocation, and after such conveyance shall convey or charge the same lands for money or other good consideration, the said first conveyance against the said vendees shall be void.—Lawful mortgages made *bonâ fide* on good consideration are excepted.—By the same act *statutes-merchant* and *statutes-staple* are to be entered in the office of the clerk of the recognizances. See this Dict. those titles.

By *stat.* 29 *Car.* 2. *c.* 3. (known more commonly by the name of *The Statute of Frauds,* and by which various provisions are made as to *Contracts, Wills,* &c. which see in this Dict. under titles *Agreement, Assumpsit, Wills,* &c.) all leases, estates of freehold, or terms for years, or any uncertain interest in lands, made by livery and seisin only, or by parol, and not put in writing and signed by the parties or their agents shall have the force of leases at will only.—Except leases not exceeding the term of three years at two thirds of the improved value.—And no leases, estates or interests of lands, either of freehold or terms of years, or any uncertain interest, not being copyhold, shall be assigned, granted or surrendered, unless by deed or note in writing signed by the parties or their agents: or by the operation of law.

A. being tenant from year to year, underlet the premises to B., and the original landlord, with the assent of A., accepted B. as his tenant; but there was no surrender in writing of A's interest; Rent being subsequently in arrear the landlord distrained on B.'s goods: Held that these circumstances constituted a valid surrender of A.'s interests, by operation of law, within the *stat.* 29 *Car.* 2. *c.* 3. § 3. *Thompson* v. *Cooke, Term Rep. K. B. Mic.* 59 *Geo.* 3. 119.

By *stat.* 3. (or 3 & 4) *W. & M. c.* 14. made perpetual by *stat.* 6 *W.* 3. *c.* 14. all wills or appointments of lands, or of any rent, &c. out of the same shall be deemed, only as against *Creditors* by bond or specialty binding the heir, to be fraudulent and void.—And every such creditor shall have his action of debt upon his bonds and specialties against the heir at law of such obligators, and such devisees jointly.—This statute however excepts dispositions for the payment of debts and raising portions for children in pursuance of marriage contracts made before marriage: It further provides, that where any heir at law shall be liable to pay his ancestor's debt, in respect of lands descended to such heir, and shall alien the same before action brought, such heir shall be answerable to the creditor in an action of debt to the value of the land aliened; but the lands *bonâ fide* aliened before action brought shall not be liable.—Every devisee made liable by the statute, shall be chargeable, in the same manner as the heir, though the lands devised shall be aliened before action brought.

The *stats.* 50 *E.* 3. *c.* 6. 3 *H.* 7. *c.* 4. expressly declare all gifts, &c. of goods and chattels intended to defraud creditors, to be null and void: creditors might however still in some cases be defrauded, by their debtors executing powers of appointment (vested in them by settlement, &c.) in favour of meer volunteers, unless courts of equity interposed, and made such voluntary appointment in the first place subject to payment of debts. 2 *Vern.* 319 465. 2 *Vez.* 1. But though courts of equity will subject a voluntary appointment to payment of debts, yet they will not interfere where the debtor has not executed his power of appointment. 2 *Vern.* 465. 2 *Vez.* 1. See also *Hob.* 9. as to the rule of law.

As the *stat.* 13 *Eliz. c.* 5. not only declares all deeds made in Fraud of creditors to be null and void, but subjects the parties to such Fraud, to the penalties and forfeitures above mentioned, it should seem that the provisions of this act ought to be construed strictly; but Lord *Mansfield* has said that the *stats.* 13 *El. c.* 5. 27 *El. c.* 4. cannot receive too liberal a construction, or be too much extended in suppression of Fraud. *Cowp.* 434.

The object of the Legislature was evidently to protect creditors from those Frauds which are frequently practised by debtors under the pretence of discharging a moral obligation: for as to those gifts or conveyances which want even a good or meritorious consideration for their support, their being voluntary seems to have been always a sufficient ground to conclude that they were fraudulent: but though the statute protects the legal right of creditors against the Fraud of their debtors, it anxiously excepts from such imputation the *bonâ fide* discharge of a moral duty. It therefore does not declare all *voluntary* conveyances, but all *fraudulent* conveyances to be void: and whether the conveyance be fraudulent or not is declared to depend on the consideration being good, *and* also *bonâ fide.* 1 *Ch. Ca.* 99. 291. 1 *Vent.* 194. 1 *Mod.* 119. 1 *Atk.* 15. *Cowp.* 708.

A *good* consideration is that of blood, or of natural love and affection. See this Dict. title *Consideration.* A gift made for such consideration ought certainly to prevail, unless it be found to break in upon the legal rights of others; in that case it is equally clear it ought to be set aside. If therefore a man being indebted convey to the use of his wife or children, such conveyance would be within the statute; for though the consideration be *good,* yet it is not *bonâ fide;* that is, the circumstances of the grantor render it inconsistent with that good faith which is due to his creditors. *Fonblanque's Treat. Eq. c.* 4. § 12 *in notes.*

If there be a voluntary conveyance of real estate, or chattel interest by one not indebted at the time, though he afterwards becomes indebted, if that voluntary conveyance was for a child, and there is no particular evidence or badge of Fraud to deceive subsequent creditors, that will be good; but if any mark of fraud, collusion or intent to deceive subsequent creditors appear, that will make it void. 2 *Vez.* 11. See also 2 *Atk.* 481. 1 *Atk.* 13. *Cowp.* 711.

But the grantor's not being indebted is not the only badge of Fraud; several other circumstances are enumerated in *Twyne's Case* (3 *Rep.*) as furnishing a strong presumption that the transaction is *malâ fide.* Gifts made in secret are liable to suspicion of *Fraud;* a general gift of all a man's goods may be reasonably suspected to be *fraudulent,* even though there be a true debt owing to the party to whom

made. The several marks or badges of *Fraud*, in a gift or grant of goods are, if it be general, without exception of some things of necessity; if the donor still possesses and uses the goods: if the deed be secretly made; if there be a trust between the *parties*; or if it be made pending the action. 3 *Rep.* 80—82.—If also the conveyance contain a power of revocation, or a power to mortgage, it will be considered as fraudulent against creditors. 2 *Vern.* 510.—So if the grantor be allowed to continue in possession of lands, the conveyance being absolute. 2 *Bulst.* 218.—So if the conveyance or gift be in general of the whole or the greater part of the grantor's property, such conveyance or gift would be presumed to be fraudulent; for no man can voluntarily divest himself of all or the most of what he has, without being aware that future creditors will probably suffer for it. In short if the transaction be chargeable with any circumstance sufficiently strong to raise a presumption of its being a Fraud, it cannot be supported, unless some other consideration be interposed to obviate the objection arising from the general nature of the transaction; as where the husband after marriage being indebted conveyed an estate to trustees, to the separate use of his wife; it was held that the trustees, having undertaken to indemnify him against his wife's debts, was sufficient to support the settlement as a valuable consideration. 2 *Bro. C. R.* 90. But if this transaction had been with a view to defraud creditors, it would probably have been set aside; for if the transaction be not *bonâ fide*, the circumstance of its being even for a valuable consideration will not alone take it out of the statute. *Cowp.* 434. 2 *Atk.* 477.

But though creditors may under the above and other circumstances avoid a voluntary conveyance, yet it is binding on the party making it and all claiming under him. *Cro. Jac.* 270. 1 *Eq. Ab.* 168. 22 *Vin. Ab.* 16—18. 1 *Vern.* 100. 152. 464. 2 *Vern.* 475. 22 *Vin. Ab.* 24. *pl.* 3. And if there be two or more voluntary conveyances, the first shall prevail, unless the latter be for payment of debts. 1 *Ch. Rep.* 92. 2 *Ch. Rep.* 199.

A conveyance, if made of lands by *Fraud*, is not void by the *stat.* 13 *El. c.* 5. against all persons; but only against those who afterwards come to the land upon valuable consideration. *Cro. Eliz.* 445. *Cro. Jac.* 271.

A distinction has been taken between the claims of real creditors, and a debt founded *in maleficio:* for A. having brought an action against B. for criminal conversation with A.'s wife B. assigned his estates to trustees in trust to pay the several debts mentioned in a schedule, and such other debts as he should name. A. recovered 5000*l.* damages, and brought his bill to set aside this deed as fraudulent, but the Court held that it was not fraudulent either in law or equity: for the plaintiff was no creditor at the time of making the deed: and though it were made with an intent to prefer his real creditors before this debt when it should come to be such, yet it was conscientious so to do. But the plaintiff was held to have an interest in the surplus after payment of the other debts. *Pre. Ch.* 105.

Where a debtor being sued, pending the suit and before execution, being insolvent, executed an assignment of all his effects to trustees for the benefit of all his creditors, under which possession was immediately taken, the court of K. B. held that this assignment was not fraudulent within the *stat.* 13 *Eliz. c.* 5. although made with intent to deprive the creditor of his execution. *Pickstock* v. *Lystor*, *Term Rep. K. B. Hil.* 55 *Geo.* 3. 371.

A Farmer giving a bill of sale of all his farming stock to secure a debt, the agent of the vendee took possession and resided on the farm while he converted the stock, but the vendor also continued to reside on the farm, and exercised acts of ownership over part of the stock: the court of C. P. held that a debt being *bonâ fide* due, and the bill of sale taken with a view to recover that debt, the jury were warranted in finding the bill of sale good against a judgment creditor taking the stock in execution. *Benton* v. *Thornhill*, 7 *W. P. Taunton*, 149.

A creditor having taken in execution the goods of a defendant who had confessed judgment, and having bought them by public auction, and taken a bill of sale for a valuable consideration from the sheriff, and let the goods to the former owner for a rent which was actually paid, has a title which cannot be impugned as fraudulent by other creditors having executions against the same defendants. 4 *W. P. Taunt.* 823.

On the construction of the *stat.* 27 *Eliz. c.* 4. it has been held that every voluntary conveyance shall be presumed to be fraudulent against a subsequent purchaser. 1 *Vent.* 194. 1 *Cha. Ca.* 100. 217. *Cro. Jac.* 158. But if the conveyance, though voluntary, appear to have been made for a meritorious consideration; and without Fraud or covin, it shall not be void against a subsequent purchaser; for there is no part of the act which affects voluntary settlements *eo nomine* unless they are fraudulent. *Doe* v. *Routledge*, *Cowp.* 708. See also, 2 *Wils.* 356. *Forrest.* 64. 2 *Vern.* 44. As to what shall be deemed a meritorious consideration, see the above cases, and also, 1 *Vern.* 408. 467. 1 *Atk.* 265. And though a conveyance be covinous in its creation it may acquire validity by subsequent matter; as where the land conveyed is afterwards aliened or settled for valuable consideration. 1 *Sid.* 133, 134. *Skin.* 423. 3 *Lev.* 387. It has also been held that a purchaser, to avail himself of this act, must be a purchaser for money or other valuable consideration. 3 *Co.* 83 *a.* *Cro. Eliz.* 444. See also *Com. Dig. Fraud.* 4 I. 2. 1 *Eq. Ab.* 353.

*Gooch's Case*, (5 *Co.* 60 *b.*) determines that a purchaser shall avoid a *fraudulent* conveyance, notwithstanding his notice of the Fraud, but this can by no means bear out the inference that *all voluntary* conveyances are fraudulent, and therefore absolutely void, though the purchaser have notice of them. The terms of *stat.* 27 *Eliz. c.* 4. § 2. seem to be sufficiently distinct to confine its operation to such conveyances as are made with an intent to defraud and deceive subsequent purchasers; but it were difficult to maintain that a conveyance was made with intent to defraud a person who before he became a purchaser had full notice of such conveyance. See 2 *Lev.* 105.—The policy of the act was to prevent Fraud; the construction most favourable to such purpose is that which excludes all temptation to the practice of it. A voluntary deed, as has already been noticed, is binding on the party and all claiming under him as subsequent volunteers; and to allow him to defeat his bounty in favour of a purchaser for valuable consideration without notice is merely to prefer a higher consideration: but to allow a purchaser with notice to supersede the claims of a volunteer seems to encourage a breach of the respect morally due to the fair claims and interests of others; and may render the provisions of a statute, intended by the legislature to be preventive of Fraud, the most effectual instrument of accomplishing it.—This point seems deserving of consideration; for if the construction of this act which has certainly prevailed in favour of purchasers with notice were traced, it would probably appear to have originated in the opinion, that the statute avoids all *voluntary* conveyances whatever; though, as very strongly observed by *Lord Mansfield* in *Doe* v. *Routlege*, (*Cowp.* 708.) it merely affects *fraudulent* conveyances. *Fonblanque*, *Treat. Eq. c.* 4. § 13. *in n.*

Before the above *stat.* 3. *W. & M. c.* 14. against *fraudulent devises* bond and other specialty creditors whose debts did not immediately affect the lands of their debtors, were liable to be defrauded, either by their debtor devising his lands, or by the alienation of the heir before any action could be brought against him. To obviate these the statute was made, by the provisions of which the bond-creditor is in some

degree protected against the Fraud of the debtor or his heir. But the statute having expressly excepted devises for payment of debts or children's portions, bond and other specialty creditors whose demands do in their nature affect the land are still liable to be prejudiced by the right of the debtor to devise his real estate; for if he devise subject to the payment of debts, his simple contract creditors will be entitled to be paid *pari passu* with such bond or other specialty creditors; for in conscience their debts are to be equally favoured, being equally due. 1 *Ch. Ca.* 32. 248. 2 *Ch. Ca.* 54. 3 *Ch. Rep.* 7. 1 *Vern.* 63, 101. 2 *Vern.* 61. 763.—And even creditors who are barred by the statute of Limitations shall be let in. 2 *Vern.* 141. And though it has been held in some cases, that if the estate be devised to the executor for payment of debts; such circumstance will render the estate *legal assets*, yet it seems now to be settled that this shall not occasion the produce of it, when sold, to be applied as it would in the ecclesiastical court, but the estate must nevertheless be considered as *equitable assets*. *Newton* v. *Bennet*, 1 *Bro. C. R.* 135. and *Silk* v. *Prime*, in the note there. But if the estate descends to the heir charged with the payment of debts, it will still be legal assets. 1 *P. Wms.* 430. 2 *Atk.* 290.—See this dict. titles *Executor*, V. 6. *Assets*.

*Fraudulent* gifts, or grants of goods to *defraud* the lord of his heriot, shall be void; and the value of the goods forfeited, under *stat.* 13 *Eliz. c.* 5.

*Fraudulent* conveyances to multiply votes at *election of Knights of the shire*, shall be taken against the persons making them as free and absolute; and all securities for redeeming and restoring, &c. to be void. *Stat.* 10 *Ann. c.* 23. See title *Parliament*.

Gross criminal Frauds are punishable by way of indictment or information; such as playing with false dice, causing an illiterate person to execute a deed to his prejudice, &c. for these and such like offences the party may be punished not only with fine and imprisonment, but also with such farther infamous punishment, as the judges in their discretion shall think proper. *Cro. Jac.* 497. 2 *Rol. Abr.* 78. 2 *Rol. Rep.* 107. 1 *Keb.* 849. 6 *Mod.* 42. 1 *Sid.* 312. 431. *Noy*, 99. 103. *Moor*, 630. *Cro. Eliz.* 531. 1 *Mod.* 46. 2 *Jon.* 64. 6 *Mod.* 105. 1 *Salk.* 379. See title *Cheats*.

For further matter relative to Frauds, and fraudulent conveyances, and obtaining relief against them; and as to the operation of the statute of Frauds, and other statutes before mentioned, See this Dict. titles *Agreement*, III, IV, *Assumpsit*, *Bankrupt*, *Bill of Sale*, *Chancery*, *Contract*, *Conveyance*, *Deeds*, *Equity*, *Execution*, *Judgment*, *Will*, &c.

Frauds and Perjuries, Statute of, See tit. *Frauds*, II.

FRAUNC FERME. See *Frank Ferm*. *Fee-Farm*.

FRAUS LEGIS. If a person having no manner of title to a house, procure an affidavit of the service of a declaration in ejectment, and thereupon gets judgment; and by virtue of a writ of *hab. fac. possessionem*, turns the owner out of possession of the house, and seizes and converts the goods therein to his own use, he may be punished as a felon; because he used the process of the law with a felonious purpose, *in fraudem regis*. *Raym.* 276. Sid. 254.

FRAXINETUM. A wood of ash trees. *Domesday*.

Fray. See *Affray*.

FREDUM. A composition anciently made by a criminal, to be freed from prosecution, of which the third part was paid into the Exchequer. Formerly compositions were paid for crimes in general, particularly for murder. The magistrate was to determine the composition, and protect the offender against the violence of resentment. See *Montesquieu's Spirit of Laws*, *l.* 30. *c.* 20. *Robertson's Charles* V. i. 300.

FREDWIT. A liberty to hold courts, and make amerciaments, &c. *Cowel*.

FREE BENCH, *Francus bancus; sedes libera.*] That estate in copyhold lands which the wife hath on the death of her husband for her dower, according to the custom of the manor; but it is said the wife ought to be espoused a virgin; and is to hold the land only so long as she lives sole and continent. *Kitch.* 102. Of this *Free-Bench* several manors have several customs; and Fitzherbert calls it a *custom*, whereby in certain cities the wife shall have the whole lands of the husband for her dower, &c. *F. N. B.* 150. In the manors of East and West Embourne, in the county of Berks, and the manor of Torre in Devonshire, and other parts of the West of England, there is a custom, that when a copyhold tenant dies, his widow shall have her *Free-bench* in all his customary lands, *dum sola & casta fuerit*; but if she commits incontinency, she forfeits her estate: yet nevertheless, on her coming into the court of the manor, riding backwards on a *black ram*, with his tail in her hand, and saying the words following, the steward is bound by the custom to readmit her to her *Free-bench*; the words are these,

*Here I am,*
*Riding on a* black ram,
*Like a whore as I am:*
*And for my* crincum crancum,
*I have lost my* bincum bancum;
*And for my tail's game,*
*Have done this worldly shame;*
*Therefore pray Mr.* Steward, *let me have my land again.*
*Cowel.*

FREEBORD, *Francbordus.*] Ground claimed in some places more or less, beyond, or without the fence: it is said to contain two foot and a half. *Mon. Angl. tom.* 2. *p.* 141.

FREE-BOROUGH MEN. Such great men as did not engage like the *frank-pledge* men for their *decennier*. See *Friburgh*.

FREE-CHAPEL, *Libera capella.*] A chapel so called, because it is exempt from the jurisdiction of the diocesan. Those *chapels* are properly *Free-chapels* which are of the King's foundation, and by him exempted from the Ordinary's visitation; also *chapels* founded within a parish for the service of God, by the devotion and liberality of pious men, over and above the mother-church, and endowed with maintenance by the founders, which were *free* for the inhabitants of the parish to come to, were therefore called *Free-chapels*. *Reg. Orig.* 40, 41. The *Free-chapel* of *St. Martin-le-Grand* is mentioned in the *stat.* 3 *Ed.* 4. *c.* 4. as are others likewise by ancient statutes: but these chapels were given to the King, with the *chanteries*, &c. By *stat.* 1 *Ed.* 6. *c.* 14. See title *Monasteries*.

FREEHOLD, *Liberum tenementum.*] That land or tenement which a man *holds* in fee-simple, fee-tail, or for term of life. *Bract. lib.* 2. *c.* 9. It is described to be of two sorts: *freehold in deed*, and *freehold in law*; the first being the real possession of lands, &c. in fee or for life; the other, the right a person hath to such lands or tenements, before his entry or seisure. *Freehold* is also extended to *offices*, which a man holds either in fee, or during life; and, in the register of writs it is said, that he who holds land upon an execution of a *statute-merchant* until he is satisfied, the debt holds *as* freehold to him and his assigns, and the same of a tenant by *elegit*; but such tenants are not in fact *Freeholders*, only *as Freeholders* for their time, till they have received the profits of the land to the value of their debt, *Reg. Judic.* 68. 73. A lease for ninety-nine years, &c. determinable upon a life or lives, is not a lease for life to make a *Freehold*, but a lease for years, or chattel determinable upon life or lives; and an estate for one thousand years is not a *Freehold*, or of so high a nature as an estate for life. *Co. Lit.* 6. He that hath an estate for the term of his own life, or the life of an-

ther, hath a *Freehold*, and no other of a less estate; though they of a greater estate have a *Freehold*, as tenant in fee, &c. *Lit.* 57.

When a man pleads *liberum tenementum* generally, it shall be intended that he hath an estate in fee; and not a bare estate for life. *Cro. Eliz.* 87. An estate of *Freehold* cannot by the *Common-law* commence *in futuro*; but it must take place presently in possession, reversion, or remainder. 5 *Rep.* 94.

A man made a deed of gift to his son and his heirs, of lands after his death, and no livery was made; now if there had been *livery*, it had been void, because a *Freehold* cannot commence *in futuro*: and it has been held, that it shall not enure as a covenant to stand seised, by reason of the word *give*; by which was intended a transmutation of the estate and not to pass it by way of use. *March. Rep.* 50, 51. Whatsoever is part of, or fixed to, the *Freehold*, goes to the heir; and glass windows, wainscot, &c. affixed to the house are parcel of the house, and cannot be removed by tenants. 4 *Rep.* 63, 64. But it hath been adjudged, that if things necessary for trade, &c. are affixed to the *Freehold* by the lessee, he may take them down and remove them, so as he do it before the end of the term, and he do not thereby injure the *Freehold*. 1 *Salk.* 368. See title *Heir*.

Any thing fixed to the *Freehold* may not be taken in distress for rent or in execution, &c. It is not felony at *Common-law*, only trespass, to steal or take any thing annexed to the *Freehold*: such as lead on a church, or house, corn or grass growing on the ground, apples on a tree, &c. Though if they are severed from the *Freehold*, whether by the owner or a thief, if he severed them at one time, and took them away at another, it was larceny to take them. 12 *Ass.* 32. 1 *Hawk. P. C.* And now by *stat.* 4 *Geo.* 2. *c.* 32. To steal lead on houses, &c. is made felony.

*Magna Carta*, *c.* 29. ordains, "that no person shall be disseised of his *Freehold*, &c. but by judgment of his peers, or according to the law of the land;" which does not only relate to common disseisins, but the King may not otherwise seize into his hands the *Freehold* of the subject. *Wood's Inst.* 614. None shall distrain any freeholders to answer for their Freeholds, or any thing touching the same, without the King's writ. *Stat.* 52 *H.* 3. *c.* 22. Nor shall any person be compelled to answer for his Freehold, before any lord of a manor, &c. *Stat.* 15 *R.* 2. *c.* 12. See this Dict. title *Liberty*. —As to the Freehold qualifications necessary in certain cases, See this Dictionary titles *Parliament*, *Jury*, &c. and further for the definition and description of Freehold estates, title *Estate*.

FREEHOLDERS. Such as hold any freehold estate. By the ancient laws of Scotland, Freeholders were called *milites*; and freehold, in this kingdom, hath been sometimes taken in opposition to *villenage*, it being lands in the hands of the gentry and better sort of tenants, by certain tenure, who were always Freeholders, contrary to what was in the possession of the inferior people, held *at the will of the lord*. *Lambard*.

FREEMAN, *Liber homo*.] One distinguished from a slave; that is born or made free; and these have divers privileges beyond others. In the distinction of a Freeman from a vassal under the feudal policy, *liber homo* was commonly opposed to *vassus* or *vassallus*; the former, denoting an *allodial* proprietor; the latter, one who held of a superior. See title *Tenures*.

The title of a *Freeman* is also given to any one, admitted to the freedom of a corporate town, or of any other corporate body, consisting, among other members, of those called *Freemen*. See titles *Corporation*, *London*.

FREE-MASONS. See *Masons*.

FREE-WARREN. See *Warren*.

FREIGHT, Fr. *fret*.] The money paid for carriage of goods by sea; or in a larger sense, it is taken for the price paid for the use of a ship to transport goods; and for the cargo, or burthen of the ship. Ships are freighted either by the ton, or by the great: and in respect of time, the freight is agreed for, at so much *per* month, or at a certain sum for the whole voyage. If a ship freighted by the great, happens to be cast away, the freight is lost; but if a merchant agrees by the ton, or at so much for every piece of commodities, and by any accident the ship is cast away, if part of the goods is saved, it is said she ought to be answered her freight *pro rata*: and when a ship is *insured* and such a misfortune happens, the insured commonly transfer those goods over to the assurers, towards a satisfaction of what they make good. *Lex Mercat.*

If freight is agreed for the lading and unlading of cattle at such a port, and some die before the ship arrives there, the whole Freight shall be paid for the living and the dead: but if the agreement be for *transporting* them, Freight shall be only paid for the living: it is the same of slaves. *Ibid.* 85. The lading of a ship in construction of law, is bound for the Freight; the Freight being in point of payment preferred before any other debts to which the goods so laden are liable, though such debts as to time were precedent to the Freight. *Hil.* 27 *Car.* 2. *B. R.* If part of the lading be on ship-board, and through some misfortune happening to the merchant, he has not his full lading abroad at the time agreed, the master shall have Freight by way of damage, for the time those goods were on board; and is at his liberty to contract with another, lest he lose his season and voyage; and where a ship is not ready to take in, or the merchant not ready to lade his goods aboard, the parties are not only so at liberty, but the person damnified may bring an action against the other and recover his damages sustained. *Leg. Rhod.*

If the freighter of a ship shall lade on board prohibited goods, or unlawful merchandize, whereby the ship is detained, or the voyage impeded, he shall answer the Freight agreed for. *Style* 220. And when goods are laden aboard, and the ship hath broke ground, the merchant may not afterwards unlade them; for if he then changes his mind, and resolves not to venture, but will unlade again, by the marine law the Freight becomes due. If a master Freights out his ship, and afterwards secretly takes in goods unknown to the first laders, by the law marine he forfeits his Freight; and if a master of a ship shall put into any other port than what the ship was freighted to, he shall answer damages to the merchant; unless he is forced in by storm, enemies, or pirates; and in that case he is obliged to sail to the port agreed, at his own expence. *Leg. Oleron.* A ship is freighted so much out and so much in, there shall be no Freight due till the voyage is performed; so that if the ship be cast away, coming home, the Freight outwards, as well as inwards, are both gone. 1 *Brownl.* 21. *Mal.* 98. and see 2 *Ch. Ca.* 75. 2 *Vern.* 212. and also *Dougl.* 541, 542. that where a ship perishes, the whole Freight from the last place or time of payment will be lost. And if no Freight be payable till the return, if the ship is lost returning, the Freight outwards shall be lost as well as that inwards. *Mal.* 98.

The goods carried, generally, are a security for the Freight, and the master is not bound to deliver them without payment. *Dougl.* 104.

If the ship is disabled or taken when part of the voyage is performed, without fault of the master, he shall be paid a rateable proportion of the Freight. 2 *Burr.* 882.

The master of a ship has not a lien on the Freight for his *wages*, nor for his disbursements on account of the ship during the voyage, nor for premiums paid by him abroad for the purpose of procuring the cargo. *Smith* v. *Plummer*. *Term. Rep. K. B. T.* 58 *Geo.* 3. 575.

The master has a special property in the vessel, and may declare for the freight of goods as carried in his vessel, though he be not owner. *Shields* v. *Davis*, 6 *W. P. Taunton*. 65.

By charter-party it was covenanted that the owner should receive on board in London, all such goods as the freighter thought fit to lade, and should proceed therewith to Madras, and there, after delivering her outward cargo, receive from the freightor's agents a homeward cargo, and deliver the same in London: and that all the cabins but one, which was reserved for the use of the captain, should be at the disposal of the freightor, who was to appoint a supercargo, to superintend the stowing of the goods: Freight to be paid at *per ton* on the registered tonnage of the ship: the captain and crew were employed and paid by the owner. The court of K. B. held, that there being no express words of demise of the ship itself in the charter-party, the freighter did not by this means become owner for the voyage: but that the possession continued in the owner, and that he therefore had a lien upon the cargo for his freight. *Saville* v. *Campion*, *Term Rep. K. B. East.* 59 *Geo.* 3. 503. [See *Hutton* v. *Bragg*, 7 *W. P. Taunton*, 14. *Tate* v. *Meek*, *Easter*, 1818.]

If a freighted ship becomes disabled without the master's fault, he has his option to re-fit, (if possible, in convenient time) or to hire another ship to carry the goods. If the merchant will not agree to this, the master is entitled to the full Freight for the whole voyage. 2 *Burr.* 882. 1 *Bl. Rep.* 190.

The master shall have his Freight though the goods are spoiled, if the merchant takes them.

A. and B. merchants abroad, ship tobacco for Liverpool, consigned to A. himself there, to whose order the bills of lading are made. One of these bills is sent inclosed in a letter from the shippers to C. at Liverpool, advising him of such consignment to A. and that A. intended to proceed to Liverpool; but in case he should not arrive in time, desiring C. to do the best for them. The tobacco having arrived in a damaged state is required to be landed, and is deposited in the King's warehouse, pursuant to the statute; and afterwards C. acting as agent for A. within the knowledge of the captain, makes an entry of it in his own name in the Custom-house, to avoid seizure. Held, that this was not such an acceptance of the cargo by C. as would make him liable to the captain for the freight. *Ward* v. *Felton*, *T.* 41 *Geo.* 3. 1 *East's Rep.* 507.

The merchant may abandon *all*, though all are not lost: but he cannot abandon some and take some: if he abandon all, he is excused Freight.

A ship owner having first insured his *ship* with A. and his Freight with B. for a certain voyage, and having notice of an embargo laid on the ship in a foreign port, abandons the ship and Freight to the respective underwriters, and receives from them the whole amount of their subscriptions as for a total loss of both; first undertaking, by a memorandum on the *ship* policy, to assign to the underwriters thereon his interest in the ship, and to account to them for it; and afterwards undertaking, by a similar memorandum on the *freight* policy, to assign to those underwriters all right of recovery, compensation, &c. The ship being afterwards liberated, and earning freight, which was received by the assured; held, that however the question of priority as to the title of the Freight might have been as between the different sets of underwriters litigating out of the same fund, and however the weight of argument might preponderate more in favour of the underwriters on the ship; yet that the assured, who had received the freight from the shippers of goods, was at all events liable on his express undertaking to pay it over to the underwriters on Freight; and that without deducting the expences of provisions, wages, &c. which were charges on the owner before the abandonment, and on the underwriters on the ship afterwards. *Thompson* v. *Rowcroft*, 4 *East's Rep.* 34.

Freight may be insured for part of a voyage without notice to the underwriters of the ultimate destination. 15 *East's Rep.* 324.

A policy on Freight at and from the ship's port of lading at J. to her port of discharge, with leave to call at intermediate ports, and there discharge, exchange, or take goods on board, covers the Freight of goods laden at any intermediate port; and therefore where the ship, having sailed with a cargo laden at J. was cast on shore at an intermediate port, and lost part of her cargo, and there took other goods on board and arrived at her port of discharge and earned Freight, the assured who had abandoned to the underwriter, and had adjusted with him as for a total loss, was held liable to the underwriter for the freight of the part of the cargo laden at the intermediate port. *Barclay* v. *Stirling*, *Term Rep. K. B. East.* 56 *Geo.* 3. *p.* 6.

By a charter-party a ship was described to be of the burden of 261 tons, and the freighter covenanted to lade a full and complete cargo. The court of K. B. held that the lading of goods, equal in number of tons to the tonnage described in the charter-party, was not a performance of this covenant: but that the freighter was bound to put on board as much goods as the ship was capable of carrying with safety. *Hunter* v. *Fry*, *Term Rep. K. B. East.* 59 *Geo.* 3. 421.

The flag officers of a fleet have no right to any share in the Freight (or gratuity) which is given by government to a captain of a ship of war for carrying public treasure. *Montague* v. *Janverin*, 3 *W. P. Taunton*, 442.—Nor for carrying the money of individuals. *Warren* v. *Shereff*, *Term Rep. K. B. East.* 56 *Geo.* 3. *p.* 32.

See now *stat.* 59 *Geo.* 3. *c.* 25. for fixing the rate, and directing the disposal of freight-money for conveying specie and jewels on board King's ships.

By charter party the freighter covenanted to pay to the owner Freight, at and after a rate per ton per month for six months at least, and so on in proportion for further time, till her discharge or being lost, &c. to be paid as follows, *viz.* so much as might be earned on arrival of the ship at her destined port abroad, within ten days after her arrival there: and the remainder at specified periods. This was held to constitute one entire covenant, and that the arrival of the ship at her outward bound port was a condition precedent to the owner's right to recover any Freight: and therefore the ship being lost on her outward voyage, the owner was not entitled to recover any portion of Freight. *Gibbon* v. *Mendez*, *Term Rep. K. B. Mic.* 59 *Geo.* 3. *p.* 17. See further this Dict. titles *Charter-party*, *Insurance*, *Merchant*.

FRENCH *Language*, anciently used in the law records. See title *Pleading*.

FRENCHMAN. Heretofore a term for every stranger or outlandish man. *Bract. lib.* 3 *tract.* 2. *c.* 15. See *Francigenæ*.

FRENDLESS-MAN. See *Friendless-man*.

FRENDWITE, From Saxon *freond*, amicus, *&* *wite* mulcta.] A mulct or fine exacted of him who harboured his outlawed friend. *Blount*. But see *Fleta*, *lib.* 1. *c.* 7.

FRESCA. Fresh water, or rain, and land floods. *Charl. Antiq.* in *Somner of Gavelkind*, *p.* 132.

FRESH DISSEISIN. Frisca *disseisina*, from Fr. *frais*, recens; *& disseisin*, *possessione ejicere.*] That *disseisin* which a man might formerly seek to defeat of himself, and by his own power, without resorting to the King, or the law; as where it was not above fifteen days old, or of some other short continuance. *Britton*, *c.* 5. Of this, *Bracton* writes at large, concluding it to be arbitrary. *Lib.* 4. *c.* 5. See title *Disseisin*.

Fresh Fine. A fine levied within a year past: it is mentioned in the statute of *Westm.* 2. 13 *Ed.* 1. *st.* 2. *c.* 45.

Fresh Force, *frisca fortia.*] Is a force newly done in any city, borough, &c. And if a person be disseised of any lands or tenements within such a city, or borough, he who

hath a right to the land, by the usage and custom of the said city, &c. may bring his *assise*, or *bill of fresh force*, within forty days after the *force* committed: and recover the lands. *F. N. B.* 7. *Old. Nat. Br.* 4. This remedy may be also had where any man is deforced of any lands, after the death of his ancestor, to whom he is heir; or after the death of tenant for life, or in tail, in dower, &c. within forty days after the title accrued; and in a bill of *fresh force*, the plaintiff or demandant shall make protestation to sue in the nature of what writ he will, as *assise* of *mortdancestor*, of *novel disseisin*, *intrusion*, &c. *New. Nat. Br.* 15. The assise or bill of *fresh force* is sued out without any writ from the Chancery; but after the forty days, there is to be a writ out of Chancery, directed to the mayor, &c. But this writ is absolute since Ejectments have come in use for recovering the possession of lands, &c.

FRESH SUIT, or *Pursuit, Recens insecutio.*] Such a present and earnest following of an offender, where a robbery is committed, as never ceases from the time of the offence done or discovered, until he be apprehended. Vide *post*. And the benefit of such pursuit of a felon is, that the party pursuing shall have his goods restored to him; which otherwise are forfeited to the King. *Staundf. Pl. Cor. lib.* 3. *cap.* 10. & 12. When an offender is thus apprehended, and indicted, upon which he is convicted, the party robbed shall have restitution of his goods; and though the party robbed do not apprehend the thief presently, but that it be some time after the robbery, if the party did what in him lay to take the offender; and notwithstanding in such case he happen to be apprehended by some other person, it shall be adjudged *fresh pursuit*. *Termes de Ley*. It has been anciently holden, that to make a *fresh suit*, the party ought to make *hue and cry* with all convenient speed, and to have taken the offender himself, &c. But at this day, if the party hath been guilty of no gross negligence, but hath used all reasonable care in inquiring after, pursuing, and apprehending the felon, he shall be allowed to have made sufficient *fresh suit*. 2 *Hawk. P. C. c.* 23. Also it is said, that the judging of *fresh suit* is in the discretion of the court, though it ought to be found by the jury; and the justices may, if they think fit, award restitution without making any inquisition concerning the same. 2 *Hawk. P. C. c.* 23. See title *Hue and Cry*.

Where a gaoler immediately pursues a felon, or other prisoner, escaping from prison, it is *fresh suit*, to excuse the gaoler: and if a lord follow his *distress* into another's ground, on its being driven off the premises, this is called *fresh suit*; so where a tenant pursues his cattle, that escape or stray into another man's lands, &c. *Fresh suit* may be either within the *view*, or without; as to which the law makes some difference; and it has been said, that *fresh suit* may continue for seven years. 3 *Rep. S. P. C.* See titles *Arrest*, *Escape*, *Distress*.

FRETUM BRITANNICUM. It is used in our ancient writings for the *Streights* between Dover and Calais.

FRETTUM; FRECTUM. The freight of a ship or freight money.—*Acquietari facietis* frettum *navium, &c, Claus.* 17. *Joh. m.* 16.

FRIBURGH, OR FRITHBURGH, *Frideburgum*, from the Sax. *frid*, i. e. pax, and *borge*, fidejussor.] The same with *frank pledge*; the one being in the time of the Saxons, and the other since the *Conquest*; of these *Friburghs*, *Bracton* treats, *lib.* 3. *tract.* 2. *c.* 10. And they are particularly described in the laws of King Edward, set out by *Lambard*, *fol.* 143. *Fleta* likewise writes on this subject, *lib.* 1. *cap.* 47. And Spelman makes a difference between *friborg* and *frithborg*; saying the first signifies *libere securitas*, and the other *pacis securitas*. Although *friburghs* or *frithburghers* were anciently required as principal pledges or sureties for their neighbours, for the keeping of the peace, yet certain great persons were a sufficient assurance for themselves, and their menial servants. *Skene*. See title *Court-Leet*.

FRIDSTOLL; FRITHSTOW. Sax. *frid*, pax, and *stol*, sedes.] A seat, chair, or place of peace. In the charter of immunities granted to the church of St. Peter in York, by Hen. I. and confirmed *anno 5 H.* 7. *Fridstoll* is expounded *cathedra pacis & quietudinis, &c.* And there were many such in England; but the most famous was at Beverley, which had this inscription: *hæc sedes lapidea* freedstoll *dicitur*, i. e. *pacis cathedra, ad quam reus fugiendo perveniens, omnimodum habet securitatem. Camd.* See titles *Abjuration*, *Sanctuary*.

FRIENDLESS MAN. The old Saxon word for an *outlaw*: because he was, upon his expulsion from the King's protection, denied all help of *friends*, after certain days: *nam forisfecit amicos. Bract. lib.* 3. *tract.* 2. *c.* 12. See title *Frendwite*.

FRIENDLY SOCIETIES. Associations, chiefly among the most industrious of the lower and middling class of tradesmen for the purpose of affording each other relief in sickness; and their widows and children some assistance at their death. These have been thought worthy the protection of the Legislature, to prevent frauds which had arisen from the irregular principles on which many of them were conducted. For this purpose were passed the *stats.* 33 *Geo.* 3. *c.* 54. 35 *Geo.* 3. *c.* 111. 43 *Geo.* 3. *c.* 111. 49 *Geo.* 3. *c.* 125. and 59 *Geo.* 3. *c.* 128. which latter act provides that the rules and tables of payment, framed by such societies, shall be confirmed at the general quarter sessions; who may make and publish general rules for the formation and government of such societies, on which two or more justices may act in petty sessions. The property of all such societies is vested in their trustees, whose qualifications and duties are regulated by the acts. The provisions of 33 *Geo.* 3. *c.* 54. and 49 *Geo.* 3. *c.* 125. are made applicable to the societies. And the funds may be subscribed into *Savings' Banks* under 57 *Geo.* 3. *c.* 130. 58 *Geo.* 3. *c.* 48.

See *stat.* 57 *Geo.* 3. *c.* 39. by which the provisions of 36 *Geo.* 3. *c.* 90. and 52 *Geo.* 3. *c.* 158. are extended to Friendly Societies, intrusted in any government stocks or funds. See title *Bank of England*.

FRIER, Lat. *Frater*, Fr. *Frere.*] The name of an order of religious persons, of which there were four principal branches, *viz.* 1. *Minors*, *Grey Friers*, or *Franciscans*. 2. *Augustines*. 3. *Dominicans*, or *Black Friers*. 4. *White Friers*, or *Carmelites*; of which the rest descend. See *stat.* 4 *H.* 7. *cap.* 17. *Lyndewood de Relig. Domibus, c.* 1.

FRIER-OBSERVANT, *frater observans.*] A branch of the *Franciscan friers*, who were *minors*, as well as the *Conventuals* and *Capuchins*. They were called *Observants* because they are not combined together in any cloister, convent, or corporation, as the Conventuals are: but tied themselves to *observe* the rules of their order more strictly than the *Conventuals*, and upon a singularity of zeal separated themselves from them, living in certain places of their own chusing. *Zach. de Rep. Eccles. de Regular. c.* 12. They are mentioned in the *stat.* 25 *H.* 8. *c.* 12.

FRILING, FREOLING, From Sax. *Freoh*, *Liber* and *Ling*, progenies.] A freeman born.

FRIPERER, Fr. *Fripier*, i. e. Interpolator.] One that scours and furbishes up old clothes to sell again; a kind of broker. See *stat.* 1 *Jac.* 1. *c.* 21. and title *Brokers*.

FRISCUS. Fresh uncultivated ground.—*Mon. Angl. tom.* 2. *p.* 56.

FRITH, *Sax.*] A wood, from *Frid*, *Pax*; for the English Saxons held woods to be sacred, and therefore made them sanctuaries. Sir Edward Coke expounds it a plain between woods, or a lawn, *Co. Lit.* 5. *Camden* in his *Britannia*, useth it for an arm of the sea, or a streight, between two lands, from the word *Fretum*.

FRITHBRECH, *Pacis violatio.*] The breaking of the peace. *LL. Æthelred, c.* 6. See *Grithbreche.*

FRITHGEAR, From Sax. *Frith.* or *Frid.* Pax, and *Gear,* Annus.] The year of jubilee, or of meeting for peace and friendship. *Somn.*

FRITHGILD. A *Guildhall;* also a company or fraternity.

FRITHMAN. One belonging to such fraternity or company. *Blount.*

FRITHMOTE. Is mentioned in the records of the county palatine of Chester: *Per* Frithmote J. Stanley, *Ar. clamat capere, annuatim de villa de* Olton, *quæ est infra feodum mannerium de, &c.* 10 *sol. quos comites Cestriæ ante confectionem chartæ præd. solebant capere. Pl. in Itin. apud Cestriam* 14 *Hen.* 7.

FRITHSOKE, FRITHSOKEN, From Sax. *Frith, pax.* and *socne, libertas.*] Surety of defence, a jurisdiction for the purpose of preserving the peace; according to *Fleta, libertas habendi franci plegii; seu immunitatis locus.—Cowel, Blount.*

FRODMORTEL, rather FREOMORTEL, From Sax. *Freo, free,* and *Morthdel, Homicide.*] An immunity for committing manslaughter.—*Mon. Angl. tom.* 1. *p.* 173.

FRUIT, *Stealing of.*] By *stat.* 4 *Geo.* 2. *c.* 32. To rob orchards or gardens of fruit growing therein, may be punished by fine, whipping, &c. and by *stat.* 1 *Geo.* 1. *c.* 48. fine and imprisonment may be inflicted on persons destroying fruit trees.—See title *Larceny.*

FRUMGYLD, *Sax.*] The first payment made to the kindred of a person slain, towards the recompence of his murder.—*LL. Edmund.*

FRUMSTOL. The chief seat or mansion house; which is called by some the *Homestal. Leg. Inæ. c.* 38.

FRUSCA TERRÆ. Waste and desart lands. *Mon. Angl. tom.* 2. *p.* 327.

FRUSSURA, From Fr. *Froissure.*] A breaking down; also a ploughing or breaking up: Frussura *domorum* is housebreaking; and Frussura *terræ,* new broke land. *Mon. Angl. tom.* 2. *p.* 394.

FRUSTRUM TERRÆ. A small piece or parcel of land. *Domesday.*

FRUTECTUM. A place where shrubs, or tall herbs do grow. *Mon. Angl. tom.* 3. *p.* 22.

FRYTH. See *Frith.*

FUAGE. In the reign of King Edward III. The Black Prince, having Acquitain granted him, laid an imposition of *fuage* upon the subjects of that dukedom, *i. e.* 12*d.* for every *fire. Rot. Parl.* 25 *Ed.* 3. And it is probable, that the *hearth-money* imposed *Anno* 16 *Car.* 2. took its original from hence. See title *Fumage.*

FUEL. If any person shall sell billet-wood or faggots for *fuel* under the assise, &c. on presentment thereof upon oath by six persons sworn by a justice of peace, the party may be set on the pillory, in the next market town, with a faggot, &c. bound to some part of his body. None are to buy *fuel* but such as will burn it, or retail it to those who do; on pain to forfeit the treble value; also no person may alter any mark or *assise of fuel,* on the like forfeiture. *Stats.* 7 *E.* 6. *c.* 7. 43 *Eliz. c.* 14. See also *Common.*

FUER, Fr. *Fuir,* Lat. *Fugere.*] *Flight* is used substantively though it be a verb; and is two-fold, *fuer in fait,* or *in facto,* when a man doth apparently and corporally *fly;* and *fuer in ley, in lege,* when being called in the county court he appeareth not, which is *flight* in the interpretation of the law. *Standf. Pl. Cor. lib.* 3. *c.* 22.

FUGA CATALLORUM. A drove of cattle; *fugatores carrucarum* waggoners who drive oxen, without beating or goading. *Fleta, lib.* 2. *c.* 78.

FUGACIA. A chase; so *fugatio* is hunting, or the privilege to hunt. *Blount.*

FUGAM FECIT. Is where it is found by inquisition, that a person *fled* for felony, &c. And if *flight* and felony be found on an indictment for felony, or before the coroner, where a murder is committed, the offender shall forfeit all his goods, and the issues of his lands till he is acquitted or pardoned: and it is held, that when one indicted of any capital crime, before justices of *Oyer,* &c. is acquitted at his trial, but found to have fled, he shall, notwithstanding his acquittal, forfeit his goods: but not the issues of his lands, because by acquittal the land is discharged, and consequently the issues. 3 *Inst.* 218. The party may in all cases, except that of the coroner's inquest, traverse the finding of a *fugam fecit;* and the particulars of the goods found to be forfeited, may be always traversed; also whenever the indictment against a man is insufficient, the finding of a *fugam fecit* will not hurt him. 2 *Hawk. P. C. c.* 49. Making default in appearance on indictment, &c. whereby *outlawry* is awarded is a *flight in law.*

In Scotland where a criminal does not obey the citation to answer, the court pronounces sentence of *Fugitation* against him, which induces a forfeiture of goods and chattels to the crown. See this Dict. titles *Exigent, Outlawry, Forfeiture.*

FUGITIO, *Pro* Fuga.—*Knighton, Anno* 1537.

FUGITIVES GOODS, *Bona Fugitivorum.*] The goods of him that *flies* upon felony, which after the flight lawfully found on record, do belong to the King or Lord of the manor. 5 *Rep.* 109.

FUGITIVES OVER SEA. By two ancient and absolute, if not expired, statutes 9 *E.* 3. *c.* 10. 5 *R.* 2. *st.* 2. *c.* 2. To depart this realm over the sea, without the *King's licence,* except it were great men and merchants, and the King's soldiers, incurred forfeiture of goods: and masters of ships, &c. carrying such persons beyond sea forfeited their vessels; also if any searcher of any port, negligently suffered any persons to pass, he should be imprisoned, &c. See titles *Aliens, Allegiance, Foreign Service, Treason.*

FULLAGE. See titles *Age, Infant.*

FULLUM AQUÆ. A fleam or stream of water, such as comes from a mill.

FUMAGE, *Fumagium.*] Dung for soil, or manuring of land with dung. *Chart. R.* 2. *Pat.* 5. *E.* 4. And this word has been sometimes used for *smoke money,* a customary payment for every house that had a chimney. *Domesday.* See 1 *Comm.* 324. and this Dict. title *Taxes.*

FUMADOES. Pilchards garbaged and salted, then hung in the *smoke,* and pressed; so called in Spain and Italy, whither they are exported in great abundance. See titles *Fish, Navigation Acts.*

FUNDITORES. Is used for pioneers, *in Pat.* 10 *Ed.* 2. *m.* 1.

FUNDS. See titles *National Debt, Stocks, Stock-brokers.*

FUNERAL CHARGES. As to the payment of these by an executor. See title *Executor,* V. 2.

A person died in debt, and 600*l.* was laid out in his funeral: decreed the same should be a debt, payable out of a trust estate, charged with payment of debts, he being a man of great estate and reputation in his country, and buried there, but had he been buried elsewhere, it seemed his funeral might have been more private, and the court would not have allowed so much. *Prec. Ch.* 27.

Where a citizen of London devised 700*l.* for mourning, the question was, if it should come out of the whole estate, or out of the legatory part only; it was insisted that if there had been no direction by the will, or if the will had directed that the expences of the funeral should not exceed such a sum, there the deduction must have been out of the whole estate. *Per cur.* Mourning devised by the will, must come out of the legatory part, and not to lessen the orphanage and customary part. 2 *Vern.* 240.

Executor is not liable to pay for funeral expences, unless he contracts for it. 12 *Mod.* 256.

Settlements for separate maintenance of the wife shall never extend to funeral charges; and though she made a will, (according to a power given her) and an executor, and gave several legacies, but there was no residuum for the executor, the husband's estate in the hands of a devisee, subject to the payment of debts was made liable to the funeral charges of the wife. 6 *Mod.* 31.

In strictness no funeral expences are allowable against a creditor, except for the coffin, ringing the bell, parson, clerk, and bearer's fees; but not for pall or ornaments; *per Holt.* 1 *Salk.* 296. Ten pounds are enough to be allowed for the funeral of one in debt; *per Holt.* Baron Powell in his circuit would allow but 11*s.* 6*d.* as all the necessary charge. *Comb.* 342. *Quere*, If 40*s.* is not now the usual sum in case of an insolvent? See *Salk.* 196. *Godolp. p.* 2. *c.* 26. § 2.

FUNGIBLES. Moveable goods which may be estimated by weight, number, or measure. In this sense, jewels paintings, or other works of art or taste, are not Fungibles, their value differing in each individual, without possessing any common standard. *Bell's Scotch Law Dict.*

FURCA ET FOSSA; the gallows and the pit.] In ancient privileges granted by our Kings, it signified a jurisdiction of punishing felons; that is men by *hanging* and women with *drowning*. And *Sir Edward Coke* says, *fossa* is taken away, but that *furca* remains. 3 *Inst.* 58. and see *Skene.*

FURCARE AD TASSUM. To pitch corn with a *fork* in loading a waggon, or in making a rick or mow. *Cowel.*

FURCAM ET FLAGELLUM. The meanest of all servile tenures, when the bondman was at the disposal of his Lord for life and limb. *Placit. Term. Mich.* 2 *Joh. Rot.* 7.

FURIGELDUM. A mulct paid for theft: by the laws of King Ethelred, it is allowed, that they shall be witnesses *qui nunquam* furigeldum *reddiderunt, i. e.* who never were accused of theft.

FURIOSITY. Madness, as distinguished from *Fatuity* or *Ideotcy.*

FURLONG. A quantity of ground containing generally forty poles or perches in length, every pole being sixteen feet and a half; eight of which *Furlongs* make a mile; it is otherwise the eighth part of an acre of land in quantity. *Stat.* 34 *Ed.* 1. *st.* 5. *c.* 6. In the former acceptation, the Romans call it *Stadium*; and in the latter *Jugerum.* Also the word *Furlong* has been sometimes used for a piece of land of more or less acres.

FURNAGIUM. See *Fornagium.*

FURNARIUS. A baker who keeps an *oven*; hence *furniare* signifies to bake or put any thing in the oven. *Mat. Paris, anno* 1258.

FURR, *Furrura*, from the Fr. *Fourer*, i. e. *Pelliculare.*] The coat or covering of a beast. The *stat.* 24 *H.* 8. *c.* 13. mentions different kinds of it, *viz. Sables*; which are a rich *Furr*, of colour between black and brown, the skin of a beast called a *Sable*, of bigness between a pole-cat and an ordinary cat, bred in Russia and Tartary. *Lucerns*, the skin of a beast of that name, near the size of a wolf, in colour neither red nor brown, but between both, and mingled with black spots; which are bred in Muscovy; and is a very rich *Furr. Genets*, a beast's skin so called, in bigness between a cat and a weazle, nailed like a cat, and of that nature; and of two kinds, black and grey, the black most precious which hath black spots upon it hardly to be seen; this beast is the product of Spain. *Foins*, are of fashion like the *sable*, the top of the *Furr* is black, and the ground whiteish; bred for the most part in France. *Marten* is a beast very like the *Sable*, the skin something coarser, produced in England and Ireland, and all countries not too cold; but the best are in Ireland. Besides these, there are the *Fitch* or *Pole-cat*; the *Calabar*, a little beast, in bigness near a *Squirrel*; *Miniver* being the bellies of *Squirrels*; and *Shanks*, or what is called *Budge*, &c. all of them *Furrs* of foreign countries, some whereof make a large branch of their inland traffick.

FURST AND FONDONG, *Sax.*] Time to advise, or to take counsel. *Leg. H.* 1. *c.* 46.

FURTHCOMING. See *Forthcoming.*

FURTUM. Theft or robbery of any kind.

FUSTIANS. No person shall dress *fustians* with any other instrument than the broad sheers, under the penalty of 20*s.* And the master and wardens of the company of Clothworkers in London, &c. have power to search the workmanship of sheermen, as well for *fustian*, as cloth. *Stats.* 11 *H.* 7. *c.* 27. 39 *Eliz. c.* 13. See this Dict. title *Manufacturers.*

FYRDERINGA; FYRTHING; FYRDUNG. From Sax. *Firderung*, i. e. *Expeditionis apparatus.*] A going out to war or a military expedition at the King's command; not going upon which when summoned, was punished by fine at the King's pleasure. *Leg. H.* 1. *c.* 10. *Blount* calls it an expedition; or a fault or trespass for not going upon the same.

# G.

## G A B

GABEL, *Gabella*, *Gablum*, *Gablagium*, in French *Gabelle*, i. e. *Vectigal.*] This word hath the same signification among our ancient writers, as *gabelle* had formerly in France; it is a tax; but hath been variously used; as for a rent, custom, service, &c. And where it was a payment of rent, those who paid it were termed *gablatores*. *Domesday*. *Co. Lit.* 213. It is by some authors distinguished from *tribute;* Gabel being a tax on moveables, *Tribute* on immoveables. When the word *Gabel* was formerly mentioned in France without any addition to it, it signified the *tax on salt;* though afterwards it was applied to all other taxes.

GABLE-END, *Gabulum.*] The head or extreme part of a house or building. *Paroch. Antiq.* 286.

GABULUS DENARIORUM. Rent paid in money. *Selden on Tithes, p.* 321.

GAFOLD-GILD, Sax.] The payment of tribute or custom; it sometimes denotes usury.

GAFOLD-LAND, OR GAFUL-LAND, *Terra censualis.*] Land liable to taxes; and rented or let for rent. *Sax. Dict.*

GAGE, Fr. Lat. *Vadium.*] A pawn or pledge. *Glanv. lib.* 10. *c.* 6.

GAGER DE DELIVERANCE. Is where he that hath taken a distress being sued, hath not delivered the cattle, &c. that were distrained; then he shall not only avow the distress, but *gager deliverance*, i. e. put in surety, or pledges, that he will deliver them. *F. N. B.* 67. 94. This *gager de deliverance* is had on suing out *replevins*, upon the plaintiff's praying the same: and it is said the parties are to be at issue, or there is to be a demurrer in law, before *gager deliverance* is allowed; and if a man claim any property in the goods, or the beasts are dead in the pound, the party shall not *gage*, &c. *Kitch.* 145. See this Dict. titles *Distress*, *Replevin*.

GAGER DEL LEY, *Wager of Law.* See that title.

GAINAGE, *Gainagium*, i. e. *Plaustri apparatus*, Fr. *Gaignage*, viz. *Lucrum.*] The *gain* or profit of tilled or planted land, raised by cultivating it; and the draught, plough, and furniture for carrying on the work of tillage, by the baser kind of *soke-men* or *villeins*. *Gainage* was only applied to arable land, when they that had it in occupation, had nothing thereof but the profit raised by it from their own labour, towards their sustenance, nor any other title but at the Lord's will; and *gainer* is used for a *soke-man*, that hath such land in occupation. *Bract. lib.* 1. *c.* 9. *Old. Nat. Br.* 117. The word *gain* is mentioned by *West. Symb. par.* 2. *sect.* 3. where he says land in demesne, but not in *gain*, &c. And in the *stat.* 51 *H.* 3. *st.* 4. there are these words; "no man shall be distrained by his beasts that *gain* the land."—In the statute of *Magna Carta*, *c.* 14. by *Gainage* is meant no more than the plough-tackle, or implements of husbandry, without any respect to *gain* or profit; where it is said of the knight and freeholder, he shall be amerced *salvo contenemento suo;* the merchant or trader, *salvo merchandisa sua;* and the villein or countryman *salvo gainagio suo*, &c. In which cases it was, that the merchant and husbandmen should not be hindered, to the detriment of the public, or be undone by arbitrary fines; and the villein had his *wainage*, to the end that the plough might not stand still; for which reason the husbandmen at this day are allowed a like privilege by law, that their beasts of the plough are not, in many cases liable to distress. See title *Distress*.

## G A I

GAINERY, Fr. *Gaignerie.*] Tillage, or the profit arising from it, or of the beasts employed therein. *Stat. Westm.* 1. *cc.* 16, 17.

GALEA. A galley, or swift sailing ship. *Hoved. p.* 682. 692.

GALLETI. According to *Somner* were *viri Galeati;* but *Knighton* says they were Welchmen.

GALLIGASKINS. Wide hose or breeches having their name from their use by the Gascoigns. *Dict.*

GALLI-HALFPENCE. A kind of coin, which with *suskins* and *doitkins*, were forbidden by the *stat.* 3 *H.* 5. *c.* 1. It is said they were brought into this kingdom by the *Genoese* merchants, who trading hither in *galleys*, lived commonly in a lane near Tower-street, and were called *Galley-men*, landing their goods at *Galley-key*, and traded with their own small silver coin termed *Galley Halfpence*. *Stow's Survey*, 137. See title *Coin*.

GALLIMAWFRY. A meal of coarse victuals, given to *Galley Slaves*. *Dict.*

GALLIVOLATIUM, (From *Gallus*, a cock.) A cock-shoot or cock glade. *Dict.*

GALOCHES, Fr.] A kind of shoe, worn by the Gauls in dirty weather; mentioned in the *stat.* 14 & 15 *H.* 8. *c.* 9.

GAMBA, GAMBERIA, GAMBRIA, Fr. *Jambiere.*] Military boots or defence for the legs. *Dict.*

GAMBEYSON, *Gambezonum.*] A horseman's coat used in war, which covered the legs: or rather a quilted coat, *cento, vestimentum ex coactili lanâ confectum*, to put under the armour, to make it sit easy. *Fleta. lib.* 1. *c.* 24.

GAME, *Aucupia*, from *Auceps*, *Aucupis*, i. e. *Avium Captio.*] Birds, or prey, got by fowling and hunting.

THE GAME-LAWS are a System of positive regulations introduced and confirmed by several statutes: the provisions of which ascertain and establish certain *Qualifications* of property enabling or allowing persons to kill Game; and imposing *Penalties*, as well on such qualified persons for irregularities in killing Game, as on *unqualified* persons for hunting or killing Game at all.

These laws have been the subject of much discussion; they have been stiled even from the Bench, (See 1 *Term Rep.* 49.) an oppressive remnant of the ancient arbitrary Forest laws, under which, in darker ages, the killing one of the king's deer, was equally penal with murdering one of his subjects. See this Dict. title *Forest*, and 4 *Comm. c.* 33. II. 2. On the other hand the object of them has been well defined to be, the preservation of the several species of those animals which would soon be extirpated by a general liberty: and the prevention of idleness and dissipation in husbandmen, artificers, and others of lower rank. 2 *Comm.* 411. *b.* 2. *c.* 27. Though when the learned Commentator states the other purposes of these laws to be the encouragement of agriculture by giving every man an *exclusive dominion* over his own soil; and the preventing insurrections by *disarming* the bulk of the *people;* he seems rather incorrect; as, in the first of these instances, a Freeholder of 99*l. per annum*, or a leaseholder of 149*l.* whatever may be otherwise his exclusive dominion, has no right to kill Game on his own estate: and the latter motive seems more invidiously stated than is usual with that great and liberal writer; since any person, though unqualified, may keep and use a gun, provided it is not for the purpose of destroying the Game. *Andr.* 255. *Stra.* 496. 1098. 2 *Term Rep.* 18.

Our esteemed Commentator also advances a position, "That no man but he who has a Chase or Free-warren by grant from the Crown, or prescription, which supposes one, can justify hunting or sporting upon another man's soil; nor, indeed in thorough strictness of common law, either hunting or sporting at all," even on his own ground. 2 *Comm.* 416. *b.* 2. *c.* 27. In conformity to which notion he considers the qualifications to kill game as more properly exemptions from the penalties inflicted by statute-law. 4 *Comm.* 175.

These conclusions he deduces from the two following principles; that the King as ultimate proprietor of all the lands in England has a right to take these beasts *feræ naturæ* on the lands of any of his subjects, and that, being *bona vacantia*, they are the King's by the right of his prerogative. It follows then that he has power to grant these franchises to another, to enable him to do the same; and that no person is therefore, by the Game-laws, abridged of any right possessed previously to the making them. The above is the substance of the reasoning of this celebrated writer on this subject; but his premises as well as his conclusion are very strenuously, and apparently successfully combated by his annotator *Mr. Christian*, in his notes on the passages above alluded to; in conformity to which we have already stiled the Game-laws, "A System of positive regulations by the statute-law of the kingdom."

Having said thus much on this topic, any further considerations on the policy or propriety of these laws, would here be unbecoming; strict they certainly are, and by many deemed severe; a very general statement of them is here inserted, under the following heads:

I. *The Qualifications to kill Game.*
II. *Penalties on qualified and unqualified Persons.*
III. *Of Trespasses in Hunting, &c.*
IV. *Of the Appointment of Game-keepers.*

For further matter connected with this title, see this Dict. under the heads, *Forest*, *Chase*, *Park*, *Warren*, *Deer*, *Fish*, *Swans*, *Pigeons*, *Black Act*, and other apposite titles: and the *stat.* 13 *Geo.* 3. *c.* 54. for preservation of the Game in Scotland.

I. The Qualifications for killing Game, to state them as concisely as possible, are, 1. The having a Freehold Estate of 100*l. per ann.* 2. A Life-estate or Leasehold for 99 years of 150*l. per ann.* 3. Being the son and heir apparent of an Esquire, or of any person of superior degree. 4. Being the owner or keeper of a forest, park, chase or warren. 4 *Comm.* 175. All other persons are termed Unqualified.

The *qualification* by estate for killing Game in the reign of Richard II. was 40*s.* a year; in the reign of James I. it was advanced to 10*l.* a year; and after that, in some instances to 40*l.* a year; and at last in the reign of Charles II. it was raised to 100*l.* a year. Not that the laws became gradually more severe; but as the value of money decreased, the qualification was raised in proportion, the estate continuing nearly the same; for an estate of 40*s.* a year in the reign of Richard II. was not much inferior to an estate of 100*l.* a year in the reign of Charles II. And the penalty for destroying the Game was even more severe, than it is now. Those antient laws relating to the Game are still in force, and are generally enacted so to be by the subsequent statutes; it is therefore necessary, in order to have thorough knowledge of this matter, to be acquainted with the provisions contained in them.

The first qualification relating to the Game was by *stat.* 13 *R.* 2. *st.* 1. *c.* 13. by which it is enacted that no layman which hath not lands or tenements of 40*s.* a year, nor clergyman if he be not advanced to 10*l.* a year, shall have or keep any greyhound, hound, nor other dog, to *hunt*; nor shall use ferrets, hays, nets, hare-pipes, nor cords, nor other engines, for to take, or destroy *hares* or *conies*, nor other *Gentleman's Game*, on pain of a year's imprisonment. And see 16 *Geo.* 3. *c.* 30.

The next qualification by estate or degree to kill Game, was by 1 *Jac.* 1. *c.* 27. § 3. whereby it is enacted, that every person who shall keep any greyhound for coursing of *deer* or *hare*, or setting dog, or net to take *pheasants* or *partridges* (except he be seised, in his own right or the right of his wife, of 10*l.* a year estate of inheritance, or 30l. a year of a lives estate, or goods to the value of 200*l.* or be the son of a knight or a lord, or the son and heir apparent of an Esquire,) and be thereof convicted, he shall be committed to gaol for three months; or pay 20*s.* to the use of the poor, and become bound with two sureties not to offend again in like manner.

The next qualification relates to *deer* and *conies* only, in *stat.* 3 *Jac.* 1. *c.* 13. by which it is enacted, that if any person not having hereditaments of 40*l.* a year, or not worth in goods, 200*l.* shall use any gun or bow to kill any deer or conies; or shall keep any buckstall, nets, or coney dogs (except he have grounds inclosed, and used for the keeping of deer or conies, the increasing of which said conies shall amount to the value of 40*s.* a year; or keepers or warreners in their parks, warrens, or grounds); in such case any person *having lands or hereditaments of* 100*l. a year in fee, or for life*, may take from such person to his own use for ever, such guns, bows, buckstalls, nets, and coney dogs.

The next qualification relates to *pheasants* and *partridges* only, and is as follows: every free-warrener, lord of a manor or freeholder seised in his own or his wife's right of 40*l.* a year of inheritance, or lives estate of 80*l.* or worth in goods 400*l.* may take pheasants and partridges (in the day time only) in his own free-warren, manor or free-hold, betwixt Michaelmas and Christmas yearly. *Stat.* 7 *Jac.* 1. *c.* 11. § 7.

The last general qualification by estate or degree to kill Game, and which is now most to be regarded, is in *stat.* 22 and 23 *Car.* 2. *c.* 25. by which every person not having lands and tenements, or some other estate of inheritance, (or for a term of life) in his own or his wife's right, of the clear yearly value of 100*l. per annum*; or having lease or leases of 99 years, or for any longer term, of the clear yearly value of 150*l.* (other than the son and heir apparent of an esquire, or [of] other person of higher degree, and the owners and keepers of forests, parks, chases, or warrens, being stocked with *deer* or *conies* for their necessary use, in respect of the said parks, chases, forests, or warrens,) *is declared to be a person* by the laws of this realm, *not allowed* to have or keep for himself or any other person, any guns, bows, greyhounds, setting dogs, ferrets, coney dogs, lurchers, hays, nets, lowbels, hare-pipes, gins, snares, or other engines for the taking and killing of Game. § 3.

Every person using any dog, gun, or engine for taking Game (except *Game-keepers*: see that title;) shall deliver his name and place of abode to the clerk of the peace, and take out an annual *certificate* or *licence* on a stamp of three guineas. But these certificates not to authorise unqualified persons to kill Game: *stats.* 25 *Geo.* 3. *c.* 50. 31 *Geo.* 3 *c.* 21. See 48 *Geo.* 3. *c.* 55. and title *Taxes*.

One having an estate of 103*l.* a year, mortgaged a part of it of the value of 14*l.* a year, which being copyhold was surrendered to the mortgagee, who was thereupon admitted tenant, but never entered on the premises, the mortgagor continuing in possession and paying interest. It was held that the mortgagor under these circumstances was *not* a qualified person. *Cald.* 230. *Burn J.* title *Game*, IV. and see 8 *Term Rep. K. B.* 221 *n.*

An estate of the value of 150*l.* *per annum*, held by one in his own right under a lease for 99 years to trustees, if he and others should so long live, is a sufficient qualification. 8 *Term Rep. K. B.* 506.

The *stat.* 22 & 23 *Car.* 2. *c.* 25. is loosely worded, and the stops are no part of the original statute. It has been determined that the clause relative to qualification by freehold estate, terminates with the words *per annum*; and that a *life estate* being of an inferior quality, ought to be coupled with leasehold, whereof 150*l.* a year is necessary to constitute a qualification. A clergyman's benefice is a life-estate. *Lowndes* v. *Lewis*, *Cl. Cald.* 188.

In the case of *Jones* v. *Smart*, after much argument it was decided, that a diploma conferring the degree of Doctor of Physic granted by either of the Universities in *Scotland*, does not give a qualification to kill Game under *stat.* 22 & 23 *Car.* 2. *c.* 25; and that an *Esquire* or other person of higher degree *as such* is *not* qualified under that act, though *the son of an Esquire*, or the son of other person of higher degree *is* qualified. 1 *Term Rep.* 44. A Doctor of Physic of the English Universities is not qualified as such. *Id.* 53.

A commission of Captain of Volunteers, signed by the Lord Lieutenant of a County, does not confer the degree of an Esquire, and therefore the eldest son of such Captain is not qualified to kill Game. 1 *W. P. Taunton*, 540.

An exception in a conveyance made A. D. 1655, of the free liberty of shooting and hunting, does not include the liberty of shooting feathered game with a gun. *Moore* v. *Plymouth* (E). 7 *W. P. Taunton*, 614.

II. The Penalties, and regulations for recovering them, are so numerous under the various statutes, and sometimes, if not inconsistent, at least not easily reconcileable, that it is scarcely possible to methodize them in the limits prescribed by this work; or to avoid confusion and uncertainty in the recapitulation of them. Several are here enumerated. The exact Student must consult the *Statute book* and *Burn's Justice*, title *Game*: but must be careful not to trust too implicitly to the latter, or to his own interpretation of the former.

It may be observed, as a preliminary provision, that, by *stat.* 8 *Geo.* 1. *c.* 19. where any person for any offence against any law in being, at the making of the said act for the better preservation of the Game, shall be liable to pay any pecuniary penalty or sum of money, on conviction before a Justice of the peace, the prosecutor may either proceed to recover the same in such manner, or he may sue for the same [before the end of the second term after the offence committed, 26 *Geo.* 2. *c.* 2;] by action of debt, or on the case, bill, plaint, or information, in any court of record at Westminster, wherein if he recovers he shall have double costs: provided that the offender shall not be prosecuted both ways; and in case of a second prosecution, he may plead in his defence the former prosecution pending, or the conviction or judgment thereupon had. And by *stat.* 2 *Geo.* 3. *c.* 19. reciting that a moiety of the penalty by several acts is directed to be applied to the use of the poor of the parish where the offence was committed, by reason whereof inhabitants of the said parish have been disallowed to give evidence; and that actions for such penalties were attended with great costs; it is enacted, that it shall be lawful for any person to sue for the whole of such penalty entirely to his own use, and if he recovers he shall have double costs; such action to be brought within six months after the offence committed.

By 27 *Geo.* 3. *c.* 29. for obviating the objections to the competency of witnesses, it is enacted, the inhabitants of any parish or place, shall be competent witnesses in all cases for proving the commission of any offence within the limits of such parish or place, although the penalty is given wholly or in part, for the benefit of the parish or the poor thereof, provided the penalty does not exceed 20*l.* See this Dict. title *Evidence*.—That this act extends to prosecutions under the *Game Laws*, see 6 *Term Rep. K. B.* 177.

By *stat.* 33 *Hen.* 8. *c.* 6. which is now considered as obsolete, if not superseded by subsequent statutes, shooting with a cross-bow, hand-gun or demihake, by a person not having 100*l.* a year, incurs a penalty of 10*l.* Hand guns are to be of a yard in length in the stock and gun; and in this old statute a power is given to qualified persons to seize and destroy unlawful guns.

No person shall take pheasants or partridges with engines in another man's ground, without licence, on pain of 10*l.* *stat.* 11 *H.* 7. *c.* 17.—If any person shall take or kill any pheasants or partridges, with any net in the night time, they shall forfeit 20*s.* for every pheasant, and 10*s.* for every partridge taken: and hunting with spaniels in standing corn, incurs a forfeiture of 40*s.* *stat.* 23 *Eliz.* *c.* 10. Those who kill any pheasant, partridge, duck, heron, hare, or other *game*, are liable to a forfeiture of 20*s.* for every fowl and hare; and selling, or buying to sell again, any hare, pheasant, &c. the forfeiture is 10*s.* for each hare, or partridge—20*s.* for a pheasant—40*s.* for a deer. *Stat.* 1 *Jac.* 1. *c.* 27.

Killing *in the night* a hare, partridge, or pheasant, by a person qualified or unqualified, 5*l.* *Stat.* 9 *Ann. c.* 25.

Killing, &c. Black Game between December 10 and August 20, or red Game between December 10 and August 12, or Bustard between March 1 and September 1,—first offence, from 20*l.* to 10*l.*; future offences from 30*l.* to 20*l.* 13 *Geo.* 3. *c.* 55. In the New Forest, black Game is not to be killed before the 1st of September. 43 *Geo.* 3. *c.* 112.

To kill, take, or destroy; or to *use* any gun, dog, snare, net, or engine, *with intent* to kill, &c. any hare, partridge, or other game, *in the night*; (*viz.* between 7 at night, and 6 in the morning, from October 12 to February 12; and between 9 and 4 from February 12 to October 12;) or in the day on Sunday or Christmas-day; *first* offence, from 20*l.* to 10*l.*—*second* offence, from 30*l.* to 20*l.*—*third* and other offences, 50*l.*—In case of a third offence, the party shall be bound in a recognizance to be tried at the Sessions, and if the penalty is not paid, may be punished with from twelve to six months' imprisonment. The information to be laid within *one month*. Penalty, half to the informer, and half to the poor. *Stat.* 13 *Geo.* 3. *c.* 80.

*Selling Game*; qualified or unqualified, 5*l.* *stat.* 28 *Geo.* 2. *c.* 12.—Unqualified person selling or exposing to sale hare, partridge, pheasant, or other Game, 5*l.* or three months' imprisonment. The conviction to be within three months. If Game is found in the shop, house or possession of any poulterer, salesmen, fishmonger, cook, or pastry-cook, not qualified to kill, this shall be deemed an exposing to sale.—Higlers, chapmen, carriers, inn-keepers, victuallers, &c. having in their custody, hare, pheasant, partridge, heath-game, &c. (except sent by some person qualified to kill *game*) shall forfeit for every hare and fowl 5*l.* to be levied by distress and sale of their goods, being proved by one witness, before a Justice; and for want of distress shall be committed to the house of correction for three months: one moiety of the forfeiture to the informer, the other to the poor. See *stats.* 5 *Ann. c.* 14. 9 *Ann. c.* 25. § 2. 28 *Geo.* 2. *c.* 12.

By 58 *Geo.* 3. *c.* 75. a penalty of 5*l.* is imposed on all persons, qualified or not qualified, who shall *buy* any hare, pheasant, partridge, moor or heath Game or Grouse; and offenders informing are indemnified.—The time of prosecution is limited to 6 months.

If any persons shall drive wild fowls with nets, between the first day of July and the first of September, they shall forfeit 5*s.* for every fowl: *stats.* 5 *Ann. c.* 14. 9 *Ann. c.* 25. Penalties for killing and destroying *game*, are recoverable not only before justices of peace by the several statutes; but also by

action of debt, bill, plaint, or information, in any of his Majesty's courts at Westminster; and the plaintiff, if he recovers, shall likewise have double costs. *Stat.* 8 *Geo.* 1. *c.* 19.

No *certiorari* shall be allowed to remove any conviction or other proceeding on the *stat.* 5 *Ann. c.* 14. into any court at Westminster, unless the party convicted become bound to the party prosecuting with sufficient sureties, in the sum of 50*l.* to pay the prosecutor his costs and charges, &c. after the conviction confirmed, or a *procedendo* granted. *Stat.* 5 *Ann. c.* 14.

In debt for a penalty under the game laws if the defendant shew a deputation from the lord as game keeper of the manor, it shall be presumed, in the absence of contrary evidence, that the game killed by him was for the use of the lord. 10 *East's Rep.* 413.

The mere fact of keeping a sporting dog is no evidence in an action for keeping *and using* it, or keeping it for the purpose of destroying the game, without some evidence of its having been used for that purpose. 15 *East. Rep.* 271.

A Magistrate who convicts an unqualified person for selling Game and causes his dog to be brought for the purpose of seising it, may order the dog to be killed without any formal adjudication of seizure. 5 *W. P. Taunton*, 416.

A servant attending his qualified master while using dogs for killing the game, and pursuing it by his master's orders, is not liable to the penalty under the *stat.* of *Ann.* 15 *East. Rep.* 460.

Nor is an unqualified person, going out with a qualified person to course, liable to the penalty, though he beat the bushes and take up the game after it is killed. 16 *East Rep.* 49.

Persons convicted of entering warrens, in the night-time, and taking or killing conies there, or aiding or assisting therein, may be punished by transportation, or by whipping, fine or imprisonment. Persons convicted on this act, not liable to be convicted under any former act. This act does not extend to the destroying conies in the day-time, on the sea and river banks in the county of Lincoln, &c. No satisfaction to be made for damages occasioned by such last mentioned entry, unless they exceed 1*s.* *Stat.* 5 *Geo.* 3. *c.* 14.

Killing, carrying, selling, buying, or having in possession, a *partridge* between February 12, [February 1, 39 *Geo.* 3. *c.* 34.] and September 1; or *pheasants* between February 1, and October 1; by any person qualified or not qualified, 5*l.* *stat.* 2 *Geo.* 3. *c.* 19. By the acts 36 *Geo.* 3. *c.* 39 & 54. the time for commencing to kill partridges in England and Scotland, was altered from the 1st to the 14th of September, but these were repealed by 39 *Geo.* 3. *c.* 34, by which the time for killing partridges is limited from 1 September, to 1 February, instead of 12 February, as under 2 *Geo.* 3. *Hawking*, to catch such game between July 1, and August 31; 40*s.* for hawking, and 20*s.* for each partridge, &c. *Stat.* 7 *Jac.* 2. *c.* 11. § 2.

By 48 *Geo.* 3. *c.* 93. so much of *stat.* 1 *Jac.* 1. *c.* 27. as subjected to any penalty, persons in England killing hares with any gun, cross bow, stone bow, or long bow, is repealed. By 48 *Geo.* 3. *c.* 94. the provisions of a Scotch act of *Anne*, against shooting hares, is also repealed.

Keeping or using grey-hounds, setting dogs, lurchers, hays, or engines to kill or destroy game, by one unqualified, 5*l.* *Stat.* 5 *Ann. c.* 14.—Keeping or using the above named, or other dogs or engines for such purpose, 20*s.* or not less than 5*s.* *Stat.* 4, 5 *W. & M. c.* 23.

*Tracing* a hare in the *snow*; by a person qualified or unqualified, 6*s.* 8*d.* *Stat.* 14 & 15 *H.* 8. *c.* 10.—Three months' imprisonment or 20*s.* fine. *Stat.* 1 *Jac.* 1. *c.* 27.

Using Snares for hares; by one qualified, or unqualified; one month's imprisonment or 10*s.* fine. *Stat.* 22 & 23 *Car.* 2. *c.* 25. § 6. Destroying game with engines; 20*s.* for each pheasant, &c. *Stat.* 1 *Jac.* 1. *c.* 27.

A Justice of peace, or Lord of a manor, within his manor, may take away Game out of the possession of an unqualified person: *Stat.* 5 *Ann. c.* 14. § 4.

Before game in the hands of an unqualified person can be seized within a Manor for the use of the lord, he must exercise his judgment on the specific case whether the person possessing the Game is or is not unqualified, but after such judgment exercised the lord may take the game by the hands of another. *Bird* v. *Dale*, *Term Rep. C. P. Tr.* 57 *Geo.* 3. 7 *W. P. Taunton*, 560. See *post*, IV.

Unqualified persons having Game in their possession and not giving an account how they came by it, shall forfeit from 20*s.* to 5*s.* or suffer confinement to hard labour for from one month to ten days. *Stat.* 4 & 5 *W. & M. c.* 23. § 3.

Persons destroying, buying, or selling Game, informing against others buying, or selling Game, or offering so to do, to be indemnified. *Stat.* 5 *Ann. c.* 14. § 3.

Using dogs, guns, or engines for taking or killing Game, without a certificate, 20*l.*—Refusing to produce certificate, or to tell his true name and place of abode to a certificated person, 50*l.* *Stat.* 25 *Geo.* 3. *c.* 50.

By the yearly mutiny acts, if any Officer or Soldier shall, without leave of the lord of the manor under his hand and seal, destroy any hare, coney, pheasant, partridge, pigeon, or other fowl, poultry, or fish, or his Majesty's Game, and be convicted thereof, on oath of one witness, before one justice; every officer so offending shall forfeit 5*l.* to the poor, and the commanding officer upon the place, for every offence committed by any soldier under his command, shall forfeit 20*s.* in like manner. And if upon conviction by the justices, and demand made thereof by the constable or overseers of the poor, he shall not in two days pay the said penalties, he shall forfeit his commission. *Burn, J.*

By *stat.* 4 & 5 *W.* 3. c. 23. § 10. it is provided that whereas great mischiefs do ensue by *inferior tradesmen, apprentices* and other dissolute persons, neglecting their trades and employments, who follow hunting, fishing, and other Game, to the ruin of themselves and damage of their neighbours, therefore if any such person shall presume to hunt, hawk, fish, or fowl (unless in company with the master of such apprentice duly qualified) he shall not only be subject to other penalties (according to the various statutes,) but if he be prosecuted for trespass in coming on any person's lands, and be found guilty, the plaintiff shall not only recover damages against him, but also full costs.

By *stat.* 57 *Geo.* 3. *c.* 90. (repealing former acts 39, 40 *Geo.* 3. *c.* 50; 56 *Geo.* 3. *c.* 130.) persons having entered into any forest, chase, park, wood, plantation, close, or other open or inclosed ground, with intent illegally to destroy take or kill Game or Rabbits, who shall be found *at night* (i. e. between 6 in the evening and 7 in the morning from 1 *October* to 1 *February*, and between 7 in the evening and 5 in the morning from 1 *February* to 1 *April*; and between 9 and 4 in the other part of the year) armed with any *gun, cross bow, fire arm, bludgeon* or other offensive weapon, are declared guilty of a misdemeanour punishable by 7 years' transportation, &c. Offenders may be apprehended by rangers, keepers, &c. of forests or parks, or by any person whatever, and carried before a Justice, or by warrant of a Justice on information on oath, and may be bailed, or in default of bail committed for trial at the Quarter Sessions, &c.—Persons unlawfully entering into or found in any forest or place at night having any *net, engine*, or *instrument* for taking or destroying Game, or who shall wilfully take, destroy or kill Game, may be apprehended and carried before a Justice to be dealt with according to law.

An unqualified person may go out to beat the hedges, bushes, &c. with a qualified person; and to see the Game pursued or destroyed; provided the unqualified person has no gun or other engine with him for the destruction of the Game;

without being subject to any penalty. *R.* v. *Newman, Lofft.* 178. *Burn. J.* tit. *Game*, IV.

Two persons, using a greyhound together to destroy Game cannot be convicted in separate penalties under *stat.* 5 *Ann. c.* 14. § 4; for it is only one offence, and the Magistrate should only convict them in one penalty. 4 *Term Rep.* 809. So if a man not qualified goes a hunting and kills never so many hares on the same day, it is but one offence, and the statute imposes the penalty for the keeping and using the dogs and engines, and not for killing the hares. 10 *Mod.* 26. *Com. Rep.* 274. and *Rose's notes, p.* 278. *Cowp.* 646.

In an *Action qui-tam*, on the Game laws, it is sufficient to say that a person is not *qualified* generally, without shewing that he had not 100*l.* a year, or any other estate which makes a qualification. 2 *Com. Rep.* 522. But on *Convictions* it is necessary that all the qualifications should be negatively set out in the information; and it must be averred that the defendant had not the particular qualifications mentioned in the statute 22 & 23 *C.* 2. *c.* 25. because it must be made out before the justice that he had no such qualification as the law requires; and therefore the justice ought to return that he had no manner of qualification, before he can convict the defendant. See 1 *Burr.* 148. 2 *Lord Raym.* 1415. 1 *Stra.* 66. *Dougl.* 345. But the *evidence* need not (and indeed how can it?) negative every specific qualification. 1 *Term Rep.* 125.

A person was convicted before a Justice of peace upon the statute, for keeping a gun, not having 100*l. per ann.* and the conviction being removed into B. R. was quashed, for not saying *when* the defendant had not 100*l.* a year: for it might be he had such estate at the time when he kept the gun, though not at the conviction, and the offence and time ought to be certainly alledged. 3 *Mod.* 280.

To convict an offender there must be an information on oath, and a summons to appear. 2 *Barn.* B. R. 34. 77. 101. The informer must be sworn, and examined in the presence of the defendant; and it is not sufficient if his deposition previously made is read over in the defendant's presence. 1 *Term Rep.* 125. Or he may be convicted on his own confession before a Justice. *Stra.* 546. The informer cannot be a witness. *Lord Raym.* 1545. *Andr.* 240. These offences, where the justices have summary jurisdiction, are not indictable. *Stra.* 679.

In an action of debt on *stat.* 5 *Ann. c.* 14. for keeping and using a *dog* to kill the Game, it is necessary to shew what sort of dog it was. 2 *Com. Rep.* 575. The word Hound is not sufficiently descriptive, not being mentioned in the statute. 2 *Stra.* 1126. See *Rose's Com. Rep.* 577, in *n.*—Keeping a forbidden dog is penal, though he is not used; keeping and using are distinct offences. *Stra.* 496. *Cald.* 175.

On an information for keeping and using a dog, and also a gun on the same day, the defendant can only be convicted in one penalty. 7 *Term Rep.* K. B. 152.

It is no objection to an information on the game laws that it is not *qui-tam.* 7 *Term Rep.* K. B. 152.

It seems that an apothecary is not an inferior tradesman within the *stat.* 4 & 5 *W.* 3. *c.* 23. § 10. though the word Inferior seems applicable rather to the man than to the trade: so that two persons of the same trade may be, one superior, and the other inferior. 2 *Wils.* 70. *Burn. J.* tit. *Game*, IV. A huntsman going out with hounds without his master, is not a dissolute person within the meaning of that act. He may however be a trespasser; but if the damages recovered against him are under 40*s.* he shall not be liable to full costs. 2 *Black. Rep.* 900.

III. One General Remark on this subject is the most forcible statement of the greatest hardship imposed by the Game Laws; and which might probably be remedied without great inconvenience. Though a freeholder of less than 100*l.* a year, &c. is forbidden to kill a partridge, even upon his own estate, yet nobody else (not even the lord of the manor, unless he hath a grant of free warren) can do it without committing a trespass and subjecting himself to an action. 4 *Comm. c.* 33. II. 2.

If a man starts any Game within his own grounds, and follows it into another's, and kills it there, the property remains in himself. 11 *Mod.* 75. And this is grounded on reason and natural justice: for the property consists in the possession; which possession commences by the finding it in his own liberty, and is continued by the immediate pursuit. And so if a stranger starts Game in one man's *chase*, *or free warren*, and hunts it into another liberty, the property continues in the owner of the chase or warren, this property arising from privilege, and not being changed by the act of a mere stranger. Or if a man starts Game on another's private grounds and kills it there, the property belongs to him in whose ground it was killed, because it was also started there, the property arising *ratione soli*. *Lord Raym.* 251. Whereas if, after being started there, it is killed in the *grounds* of a third person, the property belongs not to the owner of the first ground, because the property is local; nor yet to the owner of the second, because it was not started in his soil; but it vests in the person who started and killed it; though guilty of a trespass against both the owners. *Lord Raym. ib.* 7 *Mod.* 18.—See 2 *Comm.* 419, and Mr. *Christian's* note there; in which he observes that these distinctions never could have existed, if the doctrine were true, that all the Game was the property of the king, for in that case the maxim *in æquali jure potior est conditio possidentis*, must have prevailed. 2 *Comm. c.* 27. II. *ad fin.*

The Common Law allows the hunting of foxes, and other ravenous beasts of prey, in the ground of another person; though a man may not dig and break the ground to unearth them, without licence; if he doth, the owner of the ground may maintain an action of trespass for it. 2 *Roll.* 538. *Cro. Jac.* 321. An action was brought against a person for entering another man's warren; the defendant pleaded that there was a pheasant on his land, and his hawk pursued it into the plaintiff's ground; it was resolved that this doth not amount to a sufficient justification, for in this case he can only follow his hawk, and not take the *game*. *Poph.* 162. Though it is said to be otherwise where the soil of the plaintiff is not a warren. 2 *Rol. Abr.* 567. If a man in hunting starts a hare upon his own ground, and follows and kills it on the ground of another, yet still the hare is his own, because of the fresh suit: but if a man starts a hare upon another person's ground, and hunts and kills it there, he is subject to an action. *Cro. Car.* 553.

If a person hunt upon the ground of another, such other person cannot justify killing of his dogs; as appears by 2 *Roll. Abr.* 567. But see *Cro. Jac.* 44. *contra*, & 3 *Lev.* 28.

One who finds Game on his own ground cannot justify pursuing it in the land of another. *Deane* v. *Clayton.* 7. *W. P. Taunton*, 489.

But a person may justify a trespass in following a *fox* with hounds over the grounds of another, if he do no more than is necessary to kill the fox; because foxes are noxious animals. 1 *Term Rep.* 334. See *Nicholas* v. *Badger*, 2 *Rol. Ab.* 558. *B. p.* 2. S. P.

The plaintiff's dogs having hunted and caught in the defendant's land a hare started on the land of another, the property is thereby vested in the plaintiff, who may maintain trespass against the defendant for afterwards taking up the hare. 14 *East's Rep.* 249.

IV. Game Keeper, Is one who has the care of keeping and preserving the Game, being appointed thereto by a Lord of a Manor.

*Game Keepers* were first introduced by the present qualification act, 22 & 23 *Car.* 2. *c.* 25; and various regulations have been made respecting them by subsequent statutes. As all these statutes seem to be in force in some degree at present, and as it is a subject interesting to Sportsmen, a short abstract of them according to their chronology, will be acceptable.

The *stat.* 22 & 23 *Car.* 2. *c.* 25. authorises lords of manors of the degree of an esquire to appoint under their hands and seals Game-keepers, who shall have power within the manor to seize guns, dogs, nets, and engines, kept by unqualified persons, to destroy Game; and by a warrant from a Justice of peace, to search in the day time the houses of unqualified persons upon good ground of suspicion, and to seize for the use of the lord, or to destroy guns, dogs, nets, &c. kept for the destruction of the Game. This statute does not limit the number of those to whom such power and authority may be given. The *stat.* 4 & 5 *W.* & *M.* *c.* 23. § 4. gives to these Game-keepers the same protection in resisting offenders in the night time, as the law affords to the keepers of antient parks. The *stat.* 5 *Ann.* *c.* 14. § 4. permits any lord or lady of a manor to empower Game-keepers to kill Game within the manor.

The *stat.* 9 *Ann.* *c.* 25. § 1. enacts, that no lord or lady of a manor shall appoint more than one Game-keeper, within one manor, with the power of killing Game; and his name shall be entered with the clerk of the peace.

But by *stat.* 59 *Geo.* 3. *c.* 102. § 3. lords of extensive manors in Wales, and the stewards of the crown manors there, may appoint several Game-keepers for such manors: confining them to their respective districts, and entering their names with the clerk of the peace.

By *stat.* 3 *Geo.* 1. *c.* 11. the Game-keeper who shall have the power to kill Game within the manor, shall either be a qualified person, a domestic servant, or a person employed to kill for the sole use of the lord or lady of the manor. The only use of appointing a qualified person a Game-keeper is to give him the power, as before described, of seizing the dogs, guns, and other engines of unqualified persons within the manor.

By *stat.* 3 *Geo.* 1. *c.* 11, it was enacted that no lord of a manor should make or appoint any person to be a *Game-keeper*, with power to take and kill hare, pheasant, partridge, or other *game*, unless such person were qualified by law so to do; *or* were truly and properly a servant to the said lord, or immediately employed to take and kill *game* for the sole use or benefit of the said lord; and any person not qualified, or not employed as aforesaid, who, under pretence of any qualification from any lord of a manor, should take or kill any hare, &c. or keep or use any dogs to kill and destroy the *game*, was made liable to all forfeitures, pains, and penalties, inflicted by the *stats.* 5 *Ann.* *c.* 14, 9 *Ann.* *c.* 25.

By 48 *Geo.* 3. *c.* 93. this act 3 *Geo.* 1. *c.* 11. is repealed, and it is enacted that any lord or lady of any manor may appoint and depute any person whatever, whether acting as Game-keeper to any other person or not, or whether retained and paid for as the servant of any other person or not, or whether a qualified person or not, to be a Game-keeper to any such manor, with authority to such person to kill Game there for his own use, or for the use of any person, to be specified in such deputation, whether qualified or not.

Deputations of Game-keepers were, under several acts, liable to a stamp duty; but, the duties on such deputations are now transferred to the Commissioners of Taxes.

See *stats.* 52 *Geo.* 3. *c.* 93. (Sched. L) by which a duty was imposed on Game-keepers and also on persons *assisting* in killing Game. This act is modified by *stat.* 54 *Geo.* 3. *c.* 141.

Where *game-keepers* ought to have a Justice of peace's warrant, to take away guns from unqualified persons, see *Comb.* 305.

A Game-keeper, authorised by his deputation to seize greyhounds, setting dogs, ferrets, and to do all things belonging to the office of Game-keeper, according to the direction of the Acts of Parliament, (see title *Game*) is not thereby authorised to seize hounds. *Grant* v. *Halton*, *Term Rep. K. B. Mic.* 53 *Geo.* 3. 134.

By *stat.* 5 *Ann.* *c.* 14. § 4. any Justice of peace may within his county take either game, or dogs, and instruments kept for the destruction of Game, from unqualified persons, and retain them for his own use. But it has been decided, that though Game-keepers are liable to the same penalties as unqualified persons for killing Game out of their respective manors, yet no one is justified in taking from them their dogs and guns when they are out of the limits of their lord's manor, even in pursuit of Game. 2 *Wils.* 387.

No lord of a manor can grant to another person the power of appointing a Game-keeper, without a conveyance also of the manor. A right to a manor cannot be tried in a penal action under the Game-laws. 5 *Term Rep.* 19. This power of appointing a Game-keeper has, no doubt, introduced the very erroneous notion, that a lord of a manor has a peculiar right to the Game, superior to that of any other land-owner within the manor, although the estate of such land-owner be a sufficient qualification to entitle him to follow the amusements of a sportsman.

Game-keepers we have seen, were first created by *stat.* 22 & 23 *Car.* 2. *c.* 25. by the preceding qualification act, 7 *Jac.* 1. *c.* 11. their power was given to the constable and headborough; and it seems that it was transferred to the persons appointed by lords of manors for no other reason than because it was probable they were the most interested in the preservation of the Game, by having in general the most extensive range to pursue it in, *viz.* upon their own estates and wastes. And the *stat.* 22 & 23 *Car.* 2. *c.* 25. appears to be the first instance, either in our statutes, reports, or law treatises in which Lords of manors are distinguished from their land-owners with regard to the Game. 2 *Comm.* 418. *n.*

### Appointment of a Game-keeper, by a Lord of a Manor.

To all People *to whom these presents shall come*, I. T. *lord* A. *lord of the manor of* B. *in the county of, &c. have (by virtue of several acts of parliament lately made for the preservation of the Game) nominated, authorised and appointed, and by these presents do nominate, authorise and appoint* E. D. *of, &c. to be my* Gamekeeper *of and within my manor, &c. in the county of, &c. aforesaid, with full power and authority, according to the direction of the statutes in that case made, to kill Game for my use; and to take and seize all such guns, greyhounds, setting dogs, and other dogs, ferrets, trammels, hays, or other nets, snares or engines, for the taking, killing or destroying of hares, pheasants, partridges, or other Game, as within the said manor of, &c. and the precincts thereof, shall be kept or used by any person or persons not legally qualified to do the same; and farther to act and do all and every thing and things which belong to the office of a* Game-keeper, *pursuant to the direction of the said acts of parliament, during my will and pleasure; for which this shall be his sufficient warrant.* Given *under my hand and seal, &c.*

By *stat.* 59 *Geo.* 3. *c.* 102. persons seised of a freehold in lands within the principality of Wales of 500*l.* a year, not being within the bounds of any manor, or being alienated from any manor, are authorised to appoint Game-keepers to pursue the Game or kill it for the use of the person appointing.

GAMING, or GAMES UNLAWFUL, *Ludi vani.* The playing at tables, dice, cards, &c. King *Ed.* III. in the 39th year of his reign, enjoined the exercise of shooting and of artillery, and forbad the casting of the bar, the hand and foot-balls, cock-fighting, & *alios ludos vanos;* but no effect fol-

lowed from it, till they were some of them forbidden by act of parliament. 11 *Rep.* 87. In the 28*th* of *Hen.* VIII. proclamation was made against all unlawful games, and commissions awarded into all the counties of England, for the execution thereof; so that in all places, tables, dice, cards and bowls, were taken and burnt. *Stow's Annals*, 527. At length by *stat.* 33 *H.* 8. *c.* 9. the Legislature interfered; and Justices of peace, and head officers in corporations, are by that act impowered to enter houses suspected of unlawful Games; and to arrest and imprison the *gamesters*, till they give security not to play for the future: also the persons keeping unlawful *gaming* houses, may be committed by a justice, until they find sureties not to keep such houses; who shall forfeit 40*s.* and the Gamesters 6*s.* 8*d.* a time: and if the King license the keeping of Gaming-houses, it is against law and void.—The same statute also provides that, no artificer, apprentice, labourer, or servant, shall play at any tables, tennis, dice, cards, bowls, &c. out of Christmas time, on pain of 20*s.* for every offence; and at Christmas, they are to play in their master's house, or presence: but any nobleman or gentleman, having 100*l. per annum* estate, may license his servants or family to play within the precincts of his house, or garden, at cards, dice, tables, or other games, as well among themselves, as others repairing thither. This act is to be proclaimed once a quarter, in every market-town by the respective mayors, &c. and at every assizes and sessions.

A person was convicted of keeping a cock pit; and the Court resolved it to be an unlawful Game, within the *stat.* 33 *Hen.* 8. *c.* 9. and fined him 40*s.* a day. *Keb.* 510. But if the guests in an inn or tavern, call for a pair of dice, or tables, and for their recreation play with them, or if any neighbours play at bowls, for their recreation, or the like, these are not within the statute; if the house be not kept for Gaming, nor the Gaming be for lucre or gain. *Dalt. c.* 46.

By the *stat.* 16 *Car.* 2. *c.* 7. if any person of what degree soever, shall by fraud, deceit, or unlawful device, in playing at cards, dice, tables, bowls, cock-fighting, horse-races, foot-races, or other Games or pastimes, or bearing a share in the stakes, betting, &c. win any money, or valuable thing, he shall forfeit treble the value, one moiety to the crown, and the other to the party grieved, prosecution being in six months; in default whereof, the last mentioned moiety is to go to such other person as will prosecute within one year, &c. And by the said statute if any person shall play at cards, &c. other than for ready money; or bet, and shall lose above 100*l.* at one time or meeting, upon tick (*i. e. ticket*) he shall not be bound to make it good, but the contract or tick and security shall be void, and the winner shall forfeit treble the value.

By the *stat.* 9 *Ann. cap.* 14. all *notes*, *bills*, *bonds*, *judgments*, *mortgages*, or *other securities*, given for money, won by playing at cards, dice, tables, tennis, bowls, or other Games; or by betting on the sides of such as play at any of those Games, or for repayment of any money knowingly lent for such *gaming* or betting, shall be void; and where lands are granted by such mortgages or securities, they shall go to the next person, who ought to have the same as if the grantor were actually dead, and the grants had been made to the person so intitled after the death of the person so incumbering the same. If any person playing at cards, dice, or other Game, or betting, shall *lose the value of* 10*l. at one time*, to *one or more persons*, and *shall pay the money*, he may *recover the money lost by action of debt*, within three months afterwards; and if the loser do not sue, *any other person may* do it, and recover the same, and *treble the value with costs*, one moiety to the prosecutor, and the other to the poor: and the person prosecuted shall answer upon oath, on preferring a bill to discover what sums he hath won.—Persons by *fraud* or *ill practice*, in *playing* at cards, dice, or by bearing a share in the stakes, &c. or by *betting*, *winning any sum above* 10*l.* shall *forfeit five times the value* of the thing won, and *suffer such infamy and corporal punishment*, as in cases of *wilful perjury*, being convicted thereof on indictment or information; and the penalty shall be recovered by action, by such person as will sue for the same. And if any one shall *assault* and *beat*, or *challenge* to fight any other person, on account of money won by *gaming*, upon conviction thereof, he shall *forfeit all his goods and suffer imprisonment for two years.* Also by this statute, any two or more Justices of peace, may cause such persons to be brought before them as they suspect to have no visible estates, &c. to maintain them; and if they do not make it appear that the principal part of their expences is got by other means than *gaming*, the Justices shall require securities for their good behaviour for a twelvemonth; and in default of such security, commit them to prison until they find it: and playing or betting during the time, to the value of 20*s.* shall be deemed a breach of good behaviour, and a forfeiture of their recognisances. This statute does not make the contract void but *voidable* only, and therefore the loser cannot receive the goods or money, after three months, though the winner can shew no title to them, except what arises from having won them at play. 2 *New. Rep. C. P.* 413.

If the jury on an indictment on the statute of 9 *Ann. c.* 14. find that the assault was on account of money won at play, the case is within the statute, though the assault were committed at a subsequent time and place, and after abusive language between the parties in respect of such money won, 4 *East Rep.* 174.

Where it shall be proved before any Justice of peace, that any person hath used unlawful *games* contrary to *stat.* 33 *Hen.* 8. *c.* 9. the Justice may commit such offender to prison, till he enter into a recognisance that he shall not from thenceforth, at any time to come, play at any unlawful Game. *Stat.* 2 *Geo.* 2. *cap.* 28.—For better preventing excessive and deceitful *gaming*; the ace of hearts, faron, basset, and hazard, are declared to be lotteries by cards or dice; and persons setting up these *games* are liable to the penalty of 200*l.* And every person who shall be an adventurer, or play or stake therein, forfeits 50*l.* Likewise the sale of any house, plate, &c. in the way of lottery by cards, &c. is adjudged void as to the winner, and the things to be forfeited to any person that will sue for the same. 12 *Geo.* 2. *cap.* 28. The *game* of passage, and all other *games* with one or more dice, or any thing in that nature, having figures or numbers thereon, (back-gammon and *games* now played with those tables only excepted) shall be deemed *games* or lotteries by dice, within the *stat.* 12 *Geo.* 2. *c.* 28. And such as keep any office or table for the said *game*, &c. or play thereat, are subject to the penalties in that act. *Stat.* 13 *Geo.* 2. *cap.* 19.

Playing at, or keeping any house or place for playing at the *game* of roulet, otherwise roly-poly, or any other *game* with cards or dice already prohibited, incurs the penalties in *stat.* 12 *Geo.* 2. *cap.* 28. Persons losing 10*l.* and paying the same may sue the winner, and recover the same with costs: and on a bill in equity the court may decree the same to be paid. The persons who have jurisdiction to determine informations on the statutes against *gaming*, may summon witnesses, who, on refusing to appear and give evidence, shall forfeit 50*l.* No privilege of parliament shall be allowed on prosecutions for keeping a Gaming-house.

The *stat.* 27 *Geo.* 3. *c.* 1. which takes away the summary jurisdiction of magistrates over offences concerning the lottery, only extends to *state lotteries*, and does not repeal their power over games of chance or lotteries prohibited by 12 *Geo.* 2. *c.* 28. 5 *Term Rep. K. B.* 338. See *stat.* 42 *Geo.* 3. *c.* 119. against private lotteries or *little-goes.*

By *stat.* 18 *Geo.* 2. *c.* 34. persons *losing* or *winning* 10*l.* at one time, or 20*l.* in 24 hours, may be indicted and fined

five times the value to be paid to the poor. But if a defendant be convicted on this act (on indictment as required by the act) the court cannot set the fine, but an action must be brought on the judgment to recover the penalty. *Rex.* v. *Lookup*, 2 *Stra.* 1048. and see *Rex* v. *Hill Darley & al.* 1 *Starkie*, 359. *Rex* v. *Gilham*, 6 *Term Rep. K. B.* 265.

By *stat.* 30 *Geo.* 1. *c.* 24. if any person licensed to sell liquors shall knowingly suffer any *gaming* in their house or grounds, with cards, dice, draughts, shuffle boards, mississippi, or billiard-tables, skittles, or nine-pins, by any *Journeymen*, labourers, servants or apprentices, he shall forfeit 40*s.* for the first, and 10*l.* for every subsequent offence; three-fourths to the poor, and one-fourth to the informer.—Any journeyman, &c. so gaming, shall forfeit from 20*s.* to 5*s.* No *certiorari* to be granted: but appeal given to the next Sessions; and persons punished by this act not to be punished by any other law.

See the *stat.* 25 *Geo.* 2. *c.* 36. against unlicenced houses for music, dancing, &c. the keeper of which shall forfeit 100*l.* and further this Dict. title *Bawdy-house*, *Play-houses*, and 1 *Salk.* 344, 345, 5 *Mod.* 13. *Mod. Ca.* 128.

From the above statutes and the several determinations in the books, it may be observed, that at common law, the playing at cards, dice, &c. when practised innocently, and as a recreation, was not unlawful. 2 *Vent.* 175. But common *gaming-houses* were always considered as nuisances in the eye of the law. 1 *Hawk. P. C. c.* 75. § 6. and as the practice was found to encourage idleness and debauchery, the *stat.* 33 *H.* 8. *c.* 9. was passed to restrain it among the inferior sort of people. And on this statute *Noy* had a writ to remove *bowling-allies* as common nuisances. 3 *Keb.* 465. Gentlemen were however still left free to pursue their pleasure in this way, until the *stat.* 16 *Car.* 2. *c.* 7. the preamble of which states the inconveniences to be remedied as arising from the immoderate use of Gaming. The provisions of this statute however were soon found to be insufficient; and the *stat.* 9 *Ann. c.* 14. was made for the more effectually suppressing this pernicious vice. The subsequent statutes, already enumerated above, superadded further penalties to restrain this fashionable crime: which may shew, says *Blackstone*, that our laws against Gaming are not so deficient, as ourselves and our magistrates in putting those laws in execution. 4 *Comm.* 173.

*Betting* on *horse-races* is within the general words of the *stat.* 9 *Ann. c.* 14. (other Game whatsoever;) 2 *Stra.* 1159. 2 *Wils.* 309. See *Black. Rep.* 706. and this Dict. title *Horse-races.*—So is *Cricket.* 1 *Wils.* part 1. *p.* 220. So is a *foot-race:* and a foot-man running against time is a foot-race; but to bring it within the statute, it must appear that a person was engaged in such Game, and a wager was laid on his side. 2 *Wils.* 36.—But on a wager between two persons on the lives of their two fathers, the winner has been allowed to maintain an action. *Burr.* 2802.

Where two persons played at *all-fours* for two guineas a game, from Monday evening to Tuesday evening, without any interruption, except for an hour or two at dinner, the plaintiff lost fourteen guineas, for which he brought his action on *stat.* 9 *Ann. c.* 14. and this was held to be *one sitting.*—One *time* in the act means one stake or bet; and is distinguished from *one sitting*, which means a course of play where the company never parts, though the party may not be actually gaming the whole time. 2 *Black. Rep.* 1226.

On a conviction for Gaming under *stat.* 9 *Ann. c.* 14. the judgment is only that the defendant is *convicted*; and the Court cannot set a fine of five times the value, but a new action must be brought upon that judgment for the forfeiture. 2 *Stra.* 1048.

The statutes against Gaming have rendered it now less frequently necessary to resort to Courts of Equity, which appear to have often interposed, prior to the *stat.* 16 *Car.* 2. for the purpose of restraining the winner from proceeding at law against the loser upon the security which he had obtained for the money won. See 14 *Vin. Ab.* 8. *pl.* 1. 2 *Eq. Ab.* 184. *Chanc. Rep.* 47.

It is observable that the *stat.* 16 *Car.* 2. declares that the *contract* for money lost at play, *and all securities* given for it shall be utterly void; but the *stat.* 9 *Ann.* confines itself to the *securities* for money won or lent at play.—Upon which it has been determined that though both the security and the contract are void as to money *won* at play, only the security is void as to money *lent* at play: and that the contract remains, and the lender may maintain his action for it. 2 *Burr.* 1077. 2 *Stra.* 1249.

The statutes having declared the security void, a bill of exchange given for money won at play, cannot be recovered upon, even by an indorsee for valuable consideration, and without notice; the original vice of the consideration affecting the security, even in the hands of an innocent and *bonâ fide* holder. 2 *Str.* 1155. *Dougl.* 636. 736. 4 *W. P. Taunton*, 683. And it seems that if money be paid on such security, it may be recovered back: for payment under a void security cannot be supported: nor does the limitation of three months, (within which time the loser of money actually paid at the time it is lost must bring his action to recover it back) extend to payments on account of such void securities. *Ambl.* 269.

Money *fairly* won at play cannot be recovered back in an action of debt, for money had and received, not founded on the statute. 1 *Maul. & Selw. Rep.* 500.

A person who, by the defendant's authority, lays illegal bets in the defendant's name, and losing pays them, without an express order from the defendant so to do, cannot recover from the defendant the amount of the money so paid. 4 *W. P. Taunton*, 165.

For further matter relative to Gaming, see also this Dict. titles *Lottery*, *Nuisance*, *Wager*.

GANG-DAYS, *Dies Lustrationis.*] And *gang weeks* are mentioned in the laws of King Athelstan. See *Rogation Week.*

## GAOL AND GAOLER.

Gaola, Fr. *Geole*, i. e. *Caveola*, a cage for birds; used metaphorically for a prison.] A strong place or house for keeping of debtors, &c. and wherein a man is restrained of his liberty to answer an offence done against the laws: Every County hath two *gaols*, one for Debtors, which may be any house where the Sheriff pleases; the other for the peace and matters of the crown, which is the *County Gaol.*

I. *Of Erecting and Repairing Gaols.*
II. *To what Place, and at whose Charge, Offenders are to be committed; and how they are to be treated and regulated.*
III. *Of the Offence of breaking Gaol; and see title* Rescue.
IV. *Of the Duties of a Gaoler and the Restraints imposed on him.*

I. Gaols are of such universal concern to the Public, that none can be erected by any less authority than an act of parliament. 2 *Inst.* 705. All prisons and *gaols* belong to the King, although the Subject may have the custody or keeping of them. 2 *Inst.* 100. 589. It is said, that none can claim a prison as a franchise unless they have also a gaol-delivery; and that therefore the Dean and Chapter of Westminster, though they have the custody of the Gatehouse prison, yet as they have no gaol-delivery, must send a kalendar of the prisoners to Newgate. 1 *Salk.* 213. 7 *Mod.* 31.

By *stat.* 14 *Ed.* 3. *cap.* 10. it is enacted, that the Sheriff's shall have the custody of the *Gaols* as before, and shall put in under-keepers for whom they will answer. This statute is confirmed by *stat.* 19 *H.* 7. *cap.* 10.

Although divers lords of liberties have the custody of prisons, and some in fee, yet the prison itself is the King's *pro bono publico;* and therefore it is to be repaired at the common charge. 2 *Inst.* 589.

The Lord of a Franchise is not as such bound to repair a gaol within it, but he may be subject to such a charge by immemorial usage. *R.* v. *Exeter* (Earl) 6 *Term Rep. K. B.* 373.

The Justices, or the greater number of them within the limits of their commission, upon presentment of the Grand Jury at the assizes (or sessions; *stat.* 12 *Geo.* 2. *c.* 29. § 13.) of the insufficiency or inconveniency of the County-gaol may contract with any person for the building, finishing or repairing the same. *Stats.* 11 & 12 *W.* 3. *c.* 19. §§ 1, 2. The expence thereof to be paid by the Treasurer out of the general county rates, *stat.* 12 *Geo.* 2. § 29. But this (by said *stat.* 11 & 12 *W.* 3.) not to extend to gaols held by inheritance, nor to charge any persons in any town or liberty, which have common gaols for felons, and commissioners of assize or gaol-delivery, with any assessment to the making the common gaol of the shire.

By *stat.* 24 *Geo.* 3. *st.* 2. *c.* 54. the justices, at their general quarter sessions, or the major part of them, not being less than seven, on presentment made by the Grand Jury of the insufficiency, inconveniency, or want of repair of the gaol, may contract for the building, repairing, or enlarging the same: or for erecting any new gaol upon any scite within two miles from that of the old gaol; and in that case for the selling the old gaol, and the scite thereof, and the materials and land belonging thereto. In certain cases also Justices may build a new gaol in any part of the county; which is always to be divided into separate apartments with divers conveniences for the benefit of the health and morals of the prisoners, which are enforced by *stat.* 31 *Geo.* 3. *c.* 46.

II. Justices of peace may not commit felons, and other criminals to the *counters* in London, or other prisons, but the common *gaols*, for legally they cannot imprison any where but in the common *gaol*. *Co. Lit.* 9, 119. But the house of correction, and the *counters* of the *sheriffs of* London, are the common prisons for offenders for the breach of the peace, &c.

By *stat.* 5 *H.* 4. *cap.* 10. it is enacted, "That none shall be imprisoned by any justice of the peace, but only in the common gaol, saving to lords and others, who have *gaols*, their franchise in this case."—This statute is only declaratory of the common law. 2 *Inst.* 43.

But the court of King's Bench may commit to any prison *in the kingdom* which they shall think most proper, and the offender so committed or condemned to imprisonment cannot be removed or bailed by any other court. *Moor*, 666. *pl.* 913. 1 *Sid.* 145. See *stat.* 31 *C.* 2. *c.* 2. § 12.

All the prisons in the kingdom are the king's prisons. The house of correction for the county of Middlesex, built under *stat.* 26 *Geo.* 3. *c.* 55. and adapted to the solitary and separate confinement of felons, according to the directions of 22 *Geo.* 3. *c.* 64. and other acts, is a legal prison for the safe custody of persons charged with high treason. 8 *Term Rep. K. B.* 172.

As prisoners ought to be committed at first to the proper prison, so ought they not to be removed from thence, except in some special cases. To which purpose, by the said *stat.* 31 *Car.* 2. *c.* 2. *sect.* 9. it is enacted, "That if any Subject of this realm shall be committed to any prison, or in custody of any officer, for any criminal or supposed criminal matter, he shall not be removed into the custody of any other; unless it be by a *habeas corpus*, or other legal writ; or where the prisoner is delivered to the constable, &c. to be carried to some common gaol; or where any person is sent by order of any judge of assise, or justice of the peace, to any common work-house, or house of correction; or where the prisoner is removed from one prison to another within the same county, in order to a trial or discharge by due course of law; or in case of sudden fire or infection, or other necessity; upon pain that he who makes out, signs, or countersigns, or obeys, or executes such warrant, shall forfeit to the party grieved *one hundred pounds* for the *first* offence, *two hundred pounds* for the *second*, &c." See *stat.* 19 *Car.* 2. *cap.* 4. for impowering justices of the peace to remove prisoners in case of infection.

By *stat.* 11 & 12 *Will.* 3. *c.* 10. all murderers and felons shall be imprisoned in the common *gaol*, and the sheriffs shall have the keeping of the *gaol*.

Offenders committed to prison, are to bear the charges of their conveying to *gaol;* or, on refusal, their goods shall be sold for that purpose, by virtue of a justice of peace's warrant; and if they have no goods, a tax is to be made by *constables*, &c. on the inhabitants of the parish where the offenders were apprehended. *Stat.* 3 *Jac.* 1. *cap.* 10. And by *stat.* 27 *Geo.* 2. *c.* 3. The expence of conveying poor offenders to *gaol*, or the house of correction, shall be paid by the treasurer of the county, except in Middlesex.

For the *Relief of Prisoners* in *gaols*, justices of peace in sessions have power to tax every parish in the county, not exceeding 6*s.* 8*d. per* week, leviable by constable, and distributed by collectors, &c. 14 *Eliz. cap.* 5. See also *stat.* 12 *C.* 2. *c.* 29. And by *stat.* 31 *Geo.* 3. *c.* 46. the Justices in sessions may order such sums as they shall think necessary to be paid out of the county-rate towards assisting such prisoners as are not able to work, or being able, cannot procure employment sufficient to maintain themselves in food and raiment, and not otherwise provided for by law.

Various provisions have been, from time to time, made for the relief of poor prisoners, and setting them to work. By *stat.* 22 & 23 *Car.* 2. *c.* 20. it is enacted, "That all, sheriffs, gaolers, &c. shall permit their prisoners to send for necessary food where they please; nor demand any greater fee for their commitment or discharge, than what is allowable." Also it is thereby directed, that an inquiry be made into all charities given for the benefit of poor prisoners.

By *stat.* 29 *Geo.* 3. *c.* 67. Every gaoler is, on forfeiture (of 50*l.* if a county gaoler, and 20*l.* if another,) to deliver in at the Michaelmas sessions yearly, a certificate stating how far the provisions made by various statutes for the benefit of prisoners, are observed in his gaol.—The following are the statutes to be particularized in such Certificate:

"The *stat.* 22 & 23 *Car.* 2. *c.* 20. enacts, That felons and debtors shall be kept separate.—*Stat.* 24 *Geo.* 2. *c.* 40. enacts, That no gaoler shall sell, lend, use, give away, or suffer any spirituous liquors within any gaol; and that a copy of the clauses prohibiting thereof shall be hung up in the gaol.—*Stat.* 32 *Geo.* 2. *c.* 28. enacts, The clerk of the peace shall cause a list of the fees payable by debtors, and the rules and orders for the government of gaols and prisons, to be hung up in the court where the assises or sessions are held; and send another copy to the gaoler, who shall cause the same to be hung up in a conspicuous part of the gaol.—*Stats.* 13 *Geo.* 3. *c.* 58. 22 *Geo.* 3. *c.* 64. & 55 *Geo.* 3. *c.* 48. provide for engaging clergymen to officiate in gaols and houses of correction.—*Stat.* 14 *Geo.* 3. *c.* 59. enacts, That the walls and ceilings of cells in gaols shall be scraped and white-washed, at least once a year: that the cells shall be kept clean and supplied with fresh air by ventilators, &c.—that there shall be two rooms set apart for the sick—that a warm and cold bath or bathing tubs shall be provided—that a Surgeon or Apothecary shall be appointed with a salary—that this act shall be hung up in the gaol."

And by *stat.* 32 *Geo.* 3. *c.* 45. prisoners discharged may, on application, be conveyed to their settlement by a vagrant pass. See title *Vagrant.*

By 52 *Geo.* 3. *c.* 160. for enabling justices of the peace to order parochial relief to prisoners for debt in gaols, not being county gaols, one justice may order parochial relief to poor debtors in such gaols, by the overseers where the gaol in which such pauper is confined shall be situate, which shall be repaid by the parish to which such pauper belongs. If the pauper debtor has no place of settlement in England or Wales, the allowance shall be paid out of the county rate.

With respect to the regulation of gaols in Ireland, see *stat.* 50 *Geo.* 3. *c.* 103. repeating former laws, and re-enacting such provisions thereof as have been found useful, with amendments. —This act is amended by *stats.* 55 *Geo.* 3. *c.* 92. 57 *Geo.* 3. *c.* 71 and 59 *Geo.* 3. *c.* 100.

Thus humane have the Legislature continually shewn themselves, in repeatedly interfering for the health and comfort of those who are considered generally as the mere outcasts of society; to employ them also in useful industry, and thus turn their minds to good from evil, has been another attempt no less praise-worthy than the former.

The Justices in general sessions may provide a convenient stock of materials for setting poor prisoners to work, to be paid for by the treasurer out of the general county-rate: and may pay and provide fit persons to oversee and set such prisoners on work; and make the orders needful as to regulating the accounts, for punishing neglects and abuses, and for bestowing the profits of their labour for the relief of the pisoners. *Stats.* 19 *C.* 2. *c.* 4. § 1. 12 *Geo.* 2. *c.* 29. 31 *Geo.* 3. *c.* 46.

As to other matters relative to the ease, or to prevent the oppression of prisoners, see this Dict. title *Habeas Corpus*, *Transportation*, *Arrest*, and *Burn's J.* tit. *Gaol.*

III. The offence of *Prison-breaking* by the common-law, was no less than felony; and this whether the party were committed in a criminal, or civil case, or whether he were actually within the walls of the prison, or only in the stocks, or in the custody of any person who had lawfully arrested him, or whether he were in the King's prison, or one belonging to a lord, or franchise. 2 *Inst.* 589. *Staundf. P. C.* 31. *Cro. Car.* 210.

But now, by the statute 1 *Ed.* 2. *stat.* 2. *de frangentibus prisonam*, "None from henceforth that breaketh prison shall have judgment of life, or member, for breaking of prison only, except the cause for which he was taken and imprisoned did require such judgment, if he had been convict thereupon according to the law and custom of the realm; albeit in times past it hath been used otherwise." So that to break prison and escape, when one is lawfully committed for any treason or felony, remains still felony, as at the common-law: and to break prison, (whether it be the county gaol, the stocks, or other usual place of security,) when lawfully confined upon any other inferior charge is still punishable as a high *misdemeanour* by fine and imprisonment. 4 *Comm. c.* 10. 2 *Hawk. P. C. c.* 18.

Any place whatsoever, wherein a person under a lawful arrest for a supposed capital offence is restrained from his liberty, whether in the stocks or street, or in the common gaol, or the house of a constable, or private person, or the prison of the Ordinary, is a prison within the statute. 2 *Inst.* 589. *Dyer*, 99. *pl.* 60. *Crom.* 38. *Cro. Car.* 210. *Hale's P. C.* 107.

There must be an actual breaking, for the words *felonicè fregit prisonam*, which are necessary in every indictment for this offence, cannot be satisfied without some actual force or violence; and therefore if the prisoner, without the use of any violent means, go out of the prison doors, which he finds open by the negligence or consent of the gaoler, or if he escape through a breach made by others without his privity, he is guilty of a *misdemeanour* only, and not of felony. 2 *Inst.* 589. *Hale's P. C.* 108. *Staundf. P. C.* 31.

Nor will the breaking of prison, which is necessitated by any accident, happening without any default of the prisoner, as where the prison is fired by lightning, or otherwise, without his privity, and he breaks out to save his life, come within the statute. *Plowd.* 136. 2 *Inst.* 590. *Hale's P. C.* 108. Nor is it felony to break a prison, unless the prisoner escape. *Keilw.* 87. *a.*

If the imprisonment be for any offence made capital by a subsequent statute, the breach of prison is as much within the act of 1 *Ed.* 2. *stat.* 2. as if the offence had always been felony; but if the offence, for which a man is committed, were but a trespass at the time when he breaks the prison, and afterwards become felony by a subsequent matter; as where one committed for having dangerously wounded a man, who afterwards dies, breaks the prison before he dies, the fiction of law, (which to many purposes makes the offence a felony *ab initio*,) shall not be carried so far as to make the prison-breach also a felony, which, at the time when it was committed, was but a misdemeanour. *Hale's P. C.* 108. 2 *Inst.* 591. *Plowd.* 258.

It seems the better opinion, that if the offence, for which the party was committed, be in truth but a trespass, the calling it felony in the *mittimus*, will not make the breaking of the gaol amount to felony; and that, on the other side, if the offence were in truth a capital one, the calling it a trespass in the *mittimus* will not bring it within the statute; for the cause of imprisonment is what the statute regards; and that is the offence, which can neither be lessened, nor increased by a mistake in the *mittimus*. But for this, see 2 *Hawk. P. C. c.* 18.

The offence of breaking prison is but felony, whatsoever the crime were for which the party was committed, unless his intent were to favour the escape of others who were committed for treason, for that will make him a principal in the treason. 2 *Hawk. P. C. c.* 18.

The felony of breach of prison is within clergy, though the offence for which the party was committed be excluded clergy. 1 *Hal. H. P. C.* 612.

He that breaks prison may be proceeded against for such crime before he be convicted of the crime for which he is committed, because the breach of prison is a distinct independent offence; but the sheriff's return of a breach of prison is not a sufficient ground to arraign a man, without an indictment. 2 *Hawk. P. C. c.* 18.

It is not sufficient to indict a man generally, for having feloniously broken prison; but the *case must be set forth specially*, that it may appear he was lawfully in prison, and for a capital offence. *Hale's P. C.* 109. 2 *Inst.* 591.

By several statutes, which relate to particular crimes, the offence of prison-breaking is in certain cases made the subject of special enactment, and in some instances of capital punishment. See the various titles in this Dictionary.—By the *stat.* 31 *Geo.* 3. *c.* 46. (see *ante*, II.) it is enacted, That prisoners ordered to hard labour, instead of being capitally punished, escaping or breaking prison, shall be guilty of capital felony; and, if instead of transportation, they shall be punished by addition of three years' further confinement; and on a second offence shall be guilty of capital felony. See also *stat.* 19 *Geo.* 3. *c.* 74. § 65. 67.

By *stat.* 59 *Geo.* 3. *c.* 136. for the better regulation of the *general Penitentiary* for convicts at Millbank, near Westminster, established by *stat.* 56 *Geo.* 3. *c.* 63. (see title *Transportation*,) prisoners breaking prison or escaping, are in like manner punishable by three years' further confinement as capital Felons, on a second escape; and by six months' confinement for any attempt at escape.

If A. arrest B. for suspicion, and carry him to the common gaol, and *there* deliver him; if he *breaks prison* and be indicted on it, there must be the following averments in the indictment: that there was a felony done, and that A. having probable cause to suspect B. had arrested and committed him, and that he broke the prison; all which must be proved on the trial. But where a felon is taken by *capias* and committed, and breaks prison, there needs no such averment, &c. because all appears by matter of record. 2 *Inst.* 590. *Hal. Hist. P. C.* 10.

For further matter relative to *Gaols* and *Prisoners*, see this Dict. titles *Arrest*, *Commitment*, *Debtor*, *Escape*, *Execution*, *False Imprisonment*, *Insolvent*, *Marshalsea*, *Rescue*.

IV. Gaoler. Is the master of a prison; one that hath the custody of the place where prisoners are kept. Sheriffs must make such *gaolers* for which they will answer. But if there is a default in the *gaoler*, action lies against him for an escape, &c. 2 *Inst.* 592. In common cases, the *sheriff*, or *gaoler*, is chargeable at the discretion of the party; though the *sheriff* is most usually charged. He who hath the custody of the gaol wrongfully, or of right, shall be charged with the escape of prisoners: and if he that hath the actual possession be not sufficient, his superior shall answer. 2 *Hawk. P. C.*

It is said that for his own security a gaoler may *hamper* a felon with irons to prevent his escape. 1 *Hal. H. P. C.* 601. *Dalt. c.* 107. and that a gaoler is no way punishable for keeping even a debtor in irons. 2 *Hawk. P. C.* But it has been observed that this proceeding, even in the case of a felon, (much more in that of a debtor,) can only be intended where the officer has just reason to fear an escape: as where the prisoner is unruly, or makes any attempt to that purpose: but otherwise notwithstanding the too common practice of gaolers, it seems altogether unwarrantable, and contrary to the mildness and humanity of the laws of England, by which gaolers are forbidden to put their prisoners to any pain or torment: and Lord *Coke*, 2 *Inst.* 381. is express that by the common-law it might not be done. 1 *H. H.* 601. And if the gaoler keep the prisoner more strictly than he ought of right, whereof the prisoner dieth, this is felony in the gaoler by the common-law. And this is the cause that if a prisoner die in gaol, the coroner ought to sit upon him: and if the death was owing to cruel and oppressive usage on the part of the gaoler, or any officer of his, it will be deemed wilful murder in the person guilty of such duress. 3 *Inst.* 91. *Fost.* 321, 322. But if a criminal endeavouring to break the gaol, assault his gaoler, he may be lawfully killed by him in the affray. 1 *Hawk. P. C.* 1 *H. H.* 496. See *ante*, III. and this Dict. titles *Escape*, *Murder*.

A person in execution in the King's Bench prison was put in irons by the Marshal; and the Court ordered the Marshal to keep his prisoner *according to law:* and in this case they said the gaoler might justify putting him in irons if he feared an escape; or if the prisoner was unruly. 7 *Mod.* 52. In the second year of Geo. II. Sir William Rich being laid in irons in the Fleet prison, had his irons taken off by order of the House of Commons; who thereupon began an inquiry into the conduct of Gaolers, which produced some of the wholesome laws mentioned hereafter, and under title *Gaol*.

By *stat.* 14 *Ed.* 3. *c.* 10. "If any keeper of a prison, or under-keeper, by too great duress of imprisonment, and by pain, make any prisoner that he hath in his ward to become an appellor against his will, he is guilty of felony." See title *Accessary*.

By *stat.* 4 *Ed.* 3. *c.* 10. it is enacted, That the Sheriffs and *gaolers* shall receive, and safely keep in prison, from henceforth such thieves and felons, by the delivery of the constables and townships, without taking any thing for the receipt; and *the justices to deliver the gaol, shall have power to hear their complaints, that will complain against the Sheriffs and* Gaolers *in such case*, and moreover to *punish* the Sheriffs and *Gaolers*, if they be found guilty.

By *stat.* 3 *H.* 7. *c.* 3. the sheriff and every other person, having authority or power of keeping of *gaol*, or of prisoners for felony, shall certify the names of all prisoners in his custody to the justices of gaol-delivery.

If any person assault a *gaoler*, for keeping a prisoner in safe custody, he may be fined and imprisoned. 1 *Hawk. P. C.* Where a Gaol is broken by thieves, the *Gaoler* is answerable; not if it be broken by enemies. 3 *Inst.* 52.

It seems clearly agreed, that a Gaoler by suffering voluntary escapes, by abusing his prisoners, by extorting unreasonable fees from them, or by detaining them in *gaol*, after they have been legally discharged, and paid their just fees, forfeits his office; for that in the grant of every office it is implied, that the grantee execute it faithfully and diligently. *Co. Lit.* 233. 9 *Co.* 5. 3 *Mod.* 143.

By *stat.* 8 & 9 *W.* 3. *c.* 27. the Marshal of the King's Bench and Warden of the Fleet taking any reward to connive at prisoners' escape, shall forfeit 500*l.* and their office, and be rendered for ever after incapable of executing any such office.

It hath been resolved, that a forfeiture by a Gaoler who hath but a particular interest, as of him who hath custody of a gaol for life, or years, does not affect him in remainder, or reversion, who hath the inheritance, but that upon such forfeiture his title shall accrue, and not go to the King. *Poph.* 119. 2 *Lev.* 71. *Raym.* 216. 3 *Lev.* 288.

By *stat.* 8 & 9 *W.* 3. *c.* 27. it is enacted, That the office of Marshal of the King's Bench, and Warden of the Fleet, shall be executed by those who have the inheritance of the said prisons, or their deputies, &c. and the profits of their office may be sequestered on motion to the Court of B. R. to satisfy a judgment had against them for escape.

By *stat.* 59 *Geo.* 3. *c.* 64. a bill may be filed against the warden of the Fleet *in Vacation*, for any escape; by filing a bill in the office of prothonotaris of C. P. or clerk of the Pleas in Exchequer, and delivering a copy to the warden: to which he must appear and plead within the first four days of the ensuing term, &c.

By *stat.* 3 *Geo.* 1 *cap.* 15. none shall purchase the office of *Gaoler*, or any other office pertaining to the high sheriff, under pain of 500*l.*

By *stat.* 24 *Geo.* 3. *st.* 2. *c.* 54. a Gaoler shall not directly or indirectly sell liquors to the prisoners, or keep, or be concerned in, or benefited by any tap-house, tap-room, tap, or license for that purpose, on pain of 10*l.* for each offence: The Justices in sessions may make allowance to Gaolers in lieu of profits formerly derived to them from the sale of liquors.

By *stat.* 31 *Geo.* 3. *c.* 46. § 8. Gaolers are, on the first day of every assises, to make a return of the size and condition of Gaols, the number of prisoners, &c. therein. See further title *Gaol*.

Fees of Gaolers, &c. By *stat.* 14 *Geo.* 3. *c.* 20. persons acquitted, or discharged by proclamation for defect of prosecution, shall be discharged immediately in open court *without fee*.

By *stat.* 55 *Geo.* 3. *c.* 50. (explained by 56 *Geo.* 3. *c.* 116. and extended expressly to prisoners for debt) all fees and gratuities payable by any prisoners on their entrance, commitment, or discharge to prison, are abolished, and a compensation is given to the gaoler out of the county rates.

Every prisoner charged with felony or misdemeanour, and ordered to be discharged, shall be so without payment of any fee. Clerks of the assize, clerks of the peace, and other officers of the courts of assize or sessions, shall deliver in accounts upon oath of all fees due to him on account of such prisoners, which shall be paid out of the county stock; or poor's rates in certain places. Any Gaoler exacting any

fee from prisoner, or detaining him for non-payment, forfeits his office. These acts do not extend to the prisons of the King's Bench, Fleet, Marshalsea, and Palace Courts.—As to *Ireland*, see 50 *Geo.* 3. *c.* 103. § 73—79. 84, 85.

GAOL-DELIVERY. The administration of justice being originally in the crown, in former times our Kings in person rode through the realm once in seven years, to judge of and determine crimes and offences; afterwards *Justices in eyre* were appointed; and since *Justices of Assise* and *gaol delivery*, &c. A commission of a *gaol delivery* is a patent in nature of a letter from the King to certain persons, appointing them his justices, or two, or three, of them, and authorising them to deliver his *gaol*, at such a place, of the prisoners in it; for which purpose, it commands them to meet at such a place, at the time they themselves shall appoint; and informs them that for the same purpose the king hath commanded his sheriff of the same county to bring all the prisoners of the *gaol*, and their attachments before them, at the day appointed. *Cromp. Jurisd.* 125. 4 *Inst.* 168.

By *stat.* 3. *H.* 7. *c.* 3. those that have the custody of gaols must certify the names of all the prisoners to the justices of gaol-delivery, in order to their trial or discharge, on pain of 5*l.*

Justices of *gaol delivery* are impowered by the Common-law to proceed upon indictments of felony, trespass, &c. and to order execution or reprieve: And they have power to discharge such prisoners, as upon their trials shall be acquitted; also all such against whom, upon proclamation made, no evidence appears to indict them; which Justices of *oyer and terminer*, &c. may not do. 2 *Hawk. P. C.* But these Justices *have nothing to do with any person not in custody of the prison*, except in some special cases; as if some of the accomplices to a felony be in such prison, and some of them out of it, the justices may receive an appeal against those who are out of the prison, as well as those who are in it; which appeal, after the trial of such prisoners, shall be removed into B. R. and process issue from thence against the rest. *Fitz. Coron.* 77. *S. P. C.* 64. Such justices have no more to do with one let to mainprise, than if he were at large; for such person cannot be said to be a prisoner, since it is not in the power of his sureties to detain him in their custody: And where any person is bailed, there he is in the custody of his sureties, and they may detain him where they please. 2 *H. P. C.* 25. Though *per Holt.* C. J. if a person be let to bail, yet he is in law in prison, and his bail are his keepers; and therefore the justices of *gaol-delivery* may take an indictment against him, as well as if he was actually in gaol. And they may take indictments not only of felony, but also of high treason, if the offenders are in prison, and try and give judgment upon them, like unto commissioners of *oyer and terminer*; though it has been formerly held otherwise. 2 *Hale's Hist. P. C.* 35. Justices of *gaol-delivery* may punish those who unduly bail prisoners; as being guilty of a negligent escape. *S. P. C.* 77. 25 *Ed.* 3. 39. They are also to punish sheriffs and gaolers, refusing to take felons into their custody from constables, &c. *Stat.* 4 *Ed.* 3. *c.* 10. and have authority to punish many particular offences by statute.

The granting a new commission of *gaol-delivery*, or of the peace, in a town corporate, shall not avoid the former commission. 2 & 3 *Ph. & Mar. c.* 18. Justices of *gaol-delivery* may act in their counties. 12 *Geo.* 2. *c.* 27.—See titles *Assise*, *Circuits*, *Judges*, *Justices*.

GARB, *Garba*, from the Fr. *Garbe*, alias *Gerbe*, i. e. *fascis*.] A bundle or sheaf of corn. *Chart. Forest. cap.* 7. And in some places it is taken for an handful, *viz.* Garba *aceris sit ex triginta peciis.* *Fleta, lib.* 2. *cap.* 12. *Garba sagittarum* is a sheaf of arrows containing twenty-four. *Skene.*

GARBALES DECIMÆ. Tithes of Corn.

GARBLE. Is to sever the dross and dust from spice, drugs, &c. *Garbling* is the purifying and cleansing the good from the bad; and may come from the Italian *Garbo*, i. e. Finery or neatness; and thence probable we say, when we see a man in a neat habit, that he is in a handsome *Garb. Cowel.*

GARBLER OF SPICES. An officer of antiquity in the city of London, who may enter into any shop, warehouse, &c. to view and search drugs and spices, and *garble* and make clean the same, or see that it be done. And anciently all drugs, &c. were to be cleansed and garbled before sold, on pain of forfeiture, or the value. By *Stat.* 6 *Ann. cap.* 16. this officer is to be appointed by the Court of Lord Mayor, Aldermen and Common Council, to garble spices at the request of the owner, but not otherwise.

GARCIO, Fr. *Garçon.*] A groom or servant. *Pla. Cor.* 21 *Ed.* 1. *Garcio stolæ*, groom of the stole to the King: and in the Irish language, (according to *Toland*) *garson* is an appellative for any menial servant. *Kennet's Gloss.*

GARCIONES. Servants who follow the camp. *Ingulph*, 886. *Walsing*, 242. Boys.

GARD, GARDIAN, &c. See *Guard* and *Guardian.*

GARDEBRACHE, Fr. *Gardebrace.*] An armour or vambrace for the arm. *Chart. K. Hen.* 5.

GARDENS. Robbing of orchards or gardens, of fruit growing therein, is punishable criminally by whipping, small fines, imprisonment, and satisfaction to the party wronged, according to the nature of the offence. See *stat.* 43 *Eliz. c.* 7. and title *Black Act*, *Trees*, *Trespass*, *Felony.*

GARDEROBE, *Garderoba.*] A wardrobe; a closet or small apartment, for hanging up clothes. See 2 *Inst.* 255.

GARDIA. Is a word used by the *feudists* for *custodia*. *Lib. Feud.* 1.

GARE. A coarse wool, full of staring hairs, such as grow about the shanks of sheep. See *stat.* 32 *Ed.* 3. *cap.* 2.

GARLANDA. A chaplet, coronet, or garland. *Mat. Paris.*

GARNESTURA. Victuals, arms, and other implements of war, necessary for the defence of a town or castle. *Matt. Paris, Ann.* 1250.

To GARNISH. To warn; to *garnish* the heir, signifies in law to warn the heir. *Stat.* 27 *Eliz. cap.* 3.

GARNISHMENT, Fr. *Garnement*, from *Garnir*, i. e. *instruere.*] In a legal sense intends a *warning* given to one for his appearance, for the information of the Court and explaining a cause. For example; one is sued for the *detinue* of certain writings delivered; and the defendant alledging that they were delivered to him by the plaintiff, and another person, upon condition, prays that the other person may be warned to plead with the plaintiff, whether the condition be performed or not; in this petition he is said to pray *Garnishment*; which may be interpreted either a warning of that other, or a *furnishing* the court with all parties to the action, whereby it may thoroughly determine the cause: and until he appears and joins, the defendant is as it were out of the court. *Cromp. Juris.* 211. *F. N. B.* 106. A writ of *scire facias* is to go forth against the other person to appear and plead with the plaintiff: and when he comes and thus pleads, it is called *enterpleader*: If the *garnishee* be returned *scire feci*, and make default, judgment will be had to recover the writings, and for their delivery, against the defendant; and if the *Garnishee* appears and pleads, if the plaintiff recovers, he shall have damages. *Rast.* 213. 1 *Brownl.* 147.

*Garnishment* is generally used for a warning; as *garnisher le court* is to warn the court; and *reasonable Garnishment*, is where a person hath reasonable warning. *Kitch.* 6. In the *stat.* 27 *Eliz. cap.* 3. we read, upon a *Garnishment* or two *nihils* returned, &c. And further, some contracts are naked, *sans garnement*, and some furnished, &c.—See title *Interpleader.*

GARNISHEE. Such third person or party in whose hands money is *attached* within the liberties of the city of

London, by process out of the sheriff's court; so called, because he hath had *Garnishment* or warning, not to pay the money to the defendant, but to appear and answer to the plaintiff creditor's suit. Vide *Attachment Foreign.*

GARNISTURE. A furnishing or providing. *Pat.* 17 *Ed.* 3. Vide *Garnestura.*

GARRANTY. See *Warranty.*

GARSUMMUNE. *Gersuma*, or *Gersoma.* A Fine or amerciament. *Domesday, Spelm. Gloss.*

GARTER. *Garterium*, Fr. *Jartier*, i. e. *Periscelis Fascia poplitaria.*] Signifies in divers statutes, and elsewhere a special *garter*, being the ensign of a noble order of knights, instituted by King *Ed.* III. *anno Dom.* 1344, called *Knights of the Garter*: It is also taken for the principal *King at arms*, among our *English heralds*, attending upon the Knights thereof; created by King *Hen.* V.

The first dignity after that of nobility, is that of a Knight of the Order of Saint *George*, or of the Garter. Indeed many Sovereign Princes have been proud of the order, and considered themselves as highly honoured by our Sovereign's conferring it on them. See titles *Knights, Precedency.*

GARTH. A little back-side, or close in the *North of England*; being an ancient *British* word; *gardd* in that language signifying *garden*, and pronounced and writ *garth*; also a *dam* or wear, &c.

GARTHMAN. As there are *fishgarths* or wears for catching of fish, so there are *Garthmen*; for by statute 17 *R.* 2. *c.* 9. it is ordained, that no fisher nor *Garthman* shall use any nets or engines to destroy the fry of fish, &c. This word is supposed to be derived from the Scottish *gart*, which signifieth inforced, or compelled; the fish being forced by the wear to pass in at a loop where they are taken.

GASTALDUS. A governor of the country, whose office was only temporary, and who had jurisdiction over the common people. *Blount.*

GATE. At the end of the names of places, signifies a way or path, from the Sax. *geat*, i. e. *porta*, the custody of the *gates* of the city of London, is granted to the Lord Mayor, &c. by *Chart.* King *Hen.* 4. See London.

GAVEL, Sax. *gafel.*] Tribute, toll, custom or yearly revenue; of which we had in old time several kinds. See title *Gabel.*

GAVELET, *gaveletum.*] An ancient and special kind of *cessavit* used in Kent, where the custom of *gavel-kind* continues, whereby a tenant, if he with-holds his rents and services due to the lord, shall forfeit his land: it was intended where no distress could be found on the premises, so that the lord might seize the land itself in the nature of a distress, and keep it a year and a day; within which time, if the tenant came and paid his rent, he was admitted to his tenement to hold it as before; but if not, the lord might enter and enjoy the same. The lord was to seek by the award of his court, from three weeks to three weeks, to find some distress upon the land or tenement, until the fourth court; and if in that time he could find none, at the fourth court it was awarded that the tenement should be seized as a distress, and kept in the lord's hands a year and a day without manuring; and if the tenant did not in that time redeem it, by paying the rent and making amends to the lord, the lord having pronounced his process by witnesses at the next *county court*, was awarded by his court to enter and manure the tenement as his own: and if the tenant would afterwards have it again, he was to make agreement with the lord. *Fitz. Cess.* 60. *Terms de Ley.*

*Gaveletum* is as much as to say to cease, or to *let* to pay the rent; and *consuetudo de gavelet* was not a rent or service, but a rent or service *with-held*, denied or detained, causing the forfeiture of the tenement. *Dict.*

The word *gavelet* in its original signification imported *rent*; but it means also *a process for the recovery of rent* peculiar to Kent, and London.—The gavelet thus prevailing by the custom of Kent may be used whether there is a sufficient distress on the land or not; but is restricted to gavelkind tenure. *Robins, on Gavelk.* 243. To London this writ was given for rent service generally by *stat.* 10. *E.* 2; which is therefore called the statute of Gavelet. But by the words of the statute this latter gavelet only lies where the lord cannot obtain payment by distress. See *Spelm. voc. Gaveletum, Wright's Ten.* 197.

This remedy of gavelet, as well as that of *cessavit*, is now fallen wholly into disuse; nor, whilst they continued in use, were they applicable, except where the tenure was in fee. *Booth on Real Act.* 133. See 1 *Inst.* 142. *n.* 2. and this Dict. titles *Cessavit, Distress, Tenure.*

GAVELET IN LONDON, *breve de gaveleto in* London, *pro redditu ibidem, quia tenementa fuerunt indistringibilia.*] The writ used in the *hustings* of London; where the parties, tenant and demandant, appear by *scire facias*, to shew cause why the one should not have his tenement again on payment of his rent, or the other recover the lands, on default thereof.

GAVELGELD. Payment of tribute or toll. *Mon. Angl. tom.* 3.

## GAVELKIND.

A Tenure or Custom, annexed and belonging to lands in Kent, whereby the lands of the father are equally divided at his death among all his sons; or the land of the brother among all the brethren, if he have no issue of his own. *Lit.* 210. See title *Tenures*, III. 12.

All the lands in England, it is said, were of the nature of *Gavelkind* before the year 1066, and descended to all the issue equally; but after the Conquest (as it is called) when *knight service* was introduced, the descent was restrained to the eldest son for the preservation of the tenure. *Lamb.* 167. 3 *Salk.* 129. Except in Kent, for the supposed reason of which see *Blount* in v. *Gavelkind*, who relates the story of the *Kentish men* surrounding *Will.* I. with a *moving wood* of boughs, and thus obtaining a confirmation of their ancient rights.

In the reign of *Hen.* VI. there were not above thirty or forty persons in all Kent that held by any other tenure than this of *Gavelkind*; which was afterwards altered upon the petition of divers Kentish gentlemen, in much of the land of that county, so as to be descendible to the eldest son, according to the course of the Common-law, by the *stat.* 31 *H.* 8. *cap.* 3. Though the custom to devise *Gavelkind* land, and the other qualities and customs remain. *Co. Lit.* 140. By the *stat.* 34 & 35 *Hen.* 8. *cap.* 26. all *Gavelkind* lands in Wales were made descendible to the heir, according to the Common-law; whereby it appears, that the tenure of *Gavelkind* was likewise in that Principality.

Blackstone relies on the nature of *tenure in Gavelkind* as a pregnant proof that *tenure in free socage* was a remnant of *Saxon* Liberty. It is universally known what struggles the Kentish men made to preserve their ancient liberties, and the success with which those struggles were attended. And as it is principally here that we meet with the custom of Gavelkind, we may fairly conclude that this was a part of those liberties; agreeable to Mr. *Salden's* opinion that *Gavelkind*, before the *Norman* Conquest, was the general custom of the realm.—The distinguishing properties of this tenure are various. Some of the principal are; that the tenant is of sufficient age to alien his estate, by feoffment, at the age of fifteen.—That the estate does not escheat in case of an attainder and execution for *felony.*—That in most places the tenant had power of devising lands by will before the *statute* for that purpose was made. *Fitz. N. B.* 198; *Cro. Car.* 561.—The descent of the lands, as above-stated; which was indeed anciently the most usual course of descent all over England. *Glanvil. l.* 7. *c.* 3. though in particular cases particular customs prevailed.

GAVELKIND.

These among other properties distinguished this tenure in a more remarkable manner; and yet it is said to be only a species of a socage tenure, modified by the custom of the country; the lands, being holden by suit of court and fealty, which is a service in its nature certain. *Wright* 211. See this Dict. title *Tenure*, III. 12. Wherefore by a charter of King *John*, *Hubert* Arch-bishop of *Canterbury* was authorised to exchange the Gavelkind tenures holden of the See of *Canterbury* into tenures by Knight's service: and by the above mentioned statute of 31 *Hen.* 8. *c.* 3. for disgavelling lands in Kent, they are directed to be descendible, for the future, *like other lands which were never holden by service of socage.* Now the immunities which the tenants in Gavelkind enjoyed were such as cannot be conceived should be conferred on mere plowmen and peasants: from all which the learned Commentator conceives it to be sufficiently clear that tenures in free socage are in general of a nobler original than is assigned by *Littleton*, or after him by the bulk of common lawyers. 2 *Comm.* 84, 85. *c.* 6.

A father having *Gavelkind* lands, had three sons, one of whom died in the life-time of his father, leaving issue a daughter: and it was held that the daughter shall inherit the part of her father *jure representationis*, and yet she is not within the words of the custom of dividing the land between the heirs male, for she is the daughter of a male and heir by representation. 1 *Salk.* 243. The heir at the age of fifteen years, it is said, may give and sell his lands in *Gavelkind*, and shall inherit. *Co. Lit.* 111. The custom of *Gavelkind* is not altered, though a fine be levied of the lands at Common-law; because it is a custom that runs with the land. 6 *E.* 6.

Land in *Gavelkind* was devised to the husband and wife for life, remainder to the next heir male of their bodies, &c. They had three sons, and it was adjudged that the eldest son should not have the whole. *Dyer*, 133. A donee in tail, of *Gavelkind* lands had issue four sons; and it was held, that all should inherit; but if a lease for life is made of *Gavelkind*, remainder to the right heirs of A. B. who hath issue four sons, in this case the eldest son shall inherit the remainder, because, in case of purchase, there can be but one right heir. 1 *Rep.* 102. If *Gavelkind* lands come to the crown, and are regranted to hold in *capite*, &c. the land shall descend to all the heirs male as *Gavelkind*. *Nels. Abr.* 895.

A wife shall be endowed of *Gavelkind* land, of a moiety of the land whereof her husband died seised, during her widowhood. *Co. Lit.* 111. And it has been adjudged, that the widow cannot have election to demand her thirds or dower at Common-law, so as to avoid the custom, by which she shall lose her dower, if she marry a second husband. *Moor.* 260. But see 1 *Leon.* 62. See title *Dower.*

The husband shall be tenant by the curtesy of half the *Gavelkind* lands of the wife, during the time he continues unmarried, without having any issue by his wife; but if he marry, he shall forfeit his tenancy by the curtesy. *Co. Lit.* 111. If the husband had issue by his wife, and she die, he shall be tenant by the curtesy of the whole land; and though he marry, he shall not forfeit his tenancy. *Mich.* 21 *Car. B. R.* 1 *Lill. Abr.* 649.

It was formerly supposed that although a father was attainted of *treason* or felony, the heir of *Gavelkind* land should inherit, for the custom, as said, was, 'the father to the bough and the son to the plough.' *Doct. & Stud. c.* 10. But, it has been held, that, in matters of *treason*, which strike at the foundations of policy and government, even *Gavelkind* lands are forfeitable, and *always were.* See title *Forfeiture.*

A rent in fee granted out of *Gavelkind* lands, shall descend in *Gavelkind* to all the heirs male, as the lands would have done; it being of the same nature with the land itself. 2 *Lev.* 138. 1 *Mod.* 97.

All lands in Kent shall be taken to be *Gavelkind*, except those which are *disgavelled* by particular statutes. 1 *Mod.* 98. If lands are alledged to be in Kent, it shall be intended that they are *Gavelkind*; if the contrary doth not appear. 2 *Sid.* 153. By *Hale*, Ch. J. *Gavelkind law* is the law of Kent, and is never pleaded, but presumed; and it has been held, that the superior courts may take notice of *Gavelkind* generally without pleading: though not of the special custom of devising it, which ought to be pleaded specially. 1 *Mod.* 98, *Cro. Car.* 465. *Lutw.* 236. 754.

The Gavelkind descent of lands in Ireland was an incident to the custom of *Tanistry*: and as such fell to the ground with its Principal, in consequence of a solemn judgment against the latter in a case *Ann.* 5. *Jac.* 1. See *Dav. Rep.* 28. But in the reign of Queen *Ann* the policy of weakening the Roman-Catholic interest in Ireland was the cause of an Irish statute to make the lands of Papists descendible according to the gavelkind custom unless the heir conformed within a limited time. See *Rob. on Gavelk. c.* 17. However now by an Irish *statute* of the present reign (17 & 18 *Geo.* 3. *c.* 49,) the descent of the lands of Papists is again reduced to the course of the Common-law. 1 *Inst.* 176. *n.* 1;

GAVELMAN. A tenant liable to tribute.—*Somner of Gavelkind, pag.* 33. And hence *Gavelkind* has been thought to be land in its nature taxable. *Blount.* See *Tenures* III. 12.

GAVELMED. The duty or work of mowing grass, or cutting of meadow land, required by the lord from his customary tenants; *Consuetudo falcandi quæ vocatur* gavelmed. *Somn.*

GAVELCESTER, Sax. *Sextarius Vectigalis.*] A certain measure of rent-ale; and among the articles to be charged on the stewards and bailiffs of the manors belonging to the *church* of Canterbury in Kent, according to which they were to be accountable, this of old was one; *de* gavelcester *cujuslibet bracini braciati infra libertatem maneriorum, viz. unam lagenam & dimidiam cervisiæ.* This duty elsewhere occurs under the name of *tolcester*; in lieu whereof the *Abbot of Abingdon* was wont of custom to receive the penny mentioned by *Selden* in his Dissertation annexed to *Fleta, cap.* 8. Nor does it differ from what is called *oak gavel* in the Glossary at the end of *Hen.* 1. *Law's Sax. Dict.*

GAVEL-WERK, *Sax.*] Was either *manu opera*, by the hands and person of the tenant, or *carropera*, by his carts or carriages. *Phillips of Purvey.*

GAUGETUM. A *gauge* or *gauging*, done by the gauger; and the true English *gauge* is mentioned, in *Rot. Parl.* 32 *Ed.* 1.

GAUGER, *Gaugeator*, Fr. *gauchir*, i. e. *in gyrum torquere.*] An officer appointed by the King, to examine all tuns, pipes, hogsheads, barrels and terces of wine, oil, honey, &c. and to give them a mark of allowance, as containing lawful measure, before they are sold in any place: and because his mark is a circle made with an iron instrument for that purpose, it seems to have its name from thence. Of this officer and his office, there are many statutes; as by *stat.* 27 *Ed.* 3. *cap.* 8. all wines, &c. imported, are to be gauged by the King's *gaugers*, or their deputies. By *stat.* 31 *Ed.* 3. *c.* 5. Selling wine before gauged, incurs forfeiture of the value. And by *stat.* 23 *Hen.* 6. *cap.* 15. the *gauge-penny* is to be paid *gaugers*, on gauging wines. The *stat.* 31 *Eliz. c.* 8. ordained that beer, &c. imported, shall be gauged by the Master and Wardens of the Coopers' company. See *stat.* 12 *Car.* 2. *c.* 4.

The wardens of the Coopers, shall attend to gauge vessels upon request. 23 *Hen.* 8. *c.* 4. Gaugers may take samples not exceeding half a pint, 32 *Geo.* 2. *c.* 29. See titles *Brewers, Excise.*

GEASPECIA. In a charter of the privileges of Newcastle-upon-Tyne, renewed *anno* 30 *Eliz.* we find *sturgiones, porpecias*, (i. e. *porpoises*) *delphinos*, geaspecia, viz. *grampois, &c.*

GEBURSCIP, *Geburscipa.*] Neighbourhood or adjoining district. *Leg. Ed. Confess. cap.* 1.

GEBURUS. A country inhabitant of the same *gebureship*, or village; from the Sax. *gebure*, a carl ploughman, or farmer. *Cowel.*

GELD, *Geldum. Mulcta; compensatio delicti & pretium rei.*] Hence, in our ancient laws, *wergeld* or *weregild* was used for the value or price of a man slain; and *orfgeld* of a beast: likewise money or tribute; for it is said, *Et sint quieti de* geldis, *danegeldis, horngeldis, blodwita, &c.* Chart. Rich. 2. Priorat. de H. in Devon. Pat. 5. E. 4. *Angeld* is the single value of a thing, *twigeld*, double value, &c.

GELDABLE, *Geldabilis.*] That is liable to pay tax or tribute. *Camden* dividing Suffolk into three parts, calls the first *geldable*, because subject to taxes; from which the other two parts were exempt, as being *ecclesiæ donatæ.* The word is mentioned in the *stat.* 27 *Hen.* 8. *cap.* 26. But if an old *MS.* it is expounded to be that land, or lordship, which is '*sub districtione curiæ vicecom.*' 2 *Inst.* 701.

GEMOTE, Sax. i. e. *conventus.*] An assembly. Leg. Edw. Conf. cap. 35. See *Alderman, Ealdorman, Folcmote, Mote, Wittena-gemote, Parliament.*

GENEATII, *Villanus: Regis Ganeath*, is the King's villain. *LL. Inæ, MS. cap.* 19.

GENERAL ISSUE. Is a plea to the fact of *Not Guilty*, in criminal cases, in order to trial, by the country, or by peers, &c. *H. P. C.* 254. In civil suits, there are various pleas, which are general issues, according to the species of the action, as in *Trespass, Not Guilty*, in Case on *promises, non assumpsit, &c.* See title *Pleading.*

GENERALE. The single commons, or ordinary provision of the religious, were termed *generale*, as their general allowance, distinguished from their *pietantiæ*, or pittances; which on extraordinary occasions were thrown in as over commons. These are described amongst other customs. *Cartular, Glaston. MS. fol.* 10.

GENERALS OF ORDERS. Chiefs of the several orders of *monks, friars*, and other religious societies.

GENERATIO. When an old abbey, or religious house had spread itself into many colonies, or depending cells, that issue or offspring of the mother monastery was called *generatio; quasi proles & soboles matricis domas. Annal. Waverl.* 1232.

GENEVA. A strong water or spirit. Vide *Distillers.*

GENTLEMAN, *Generosus.*] Is compounded of two languages, from the Fr. *gentil*, i. e. *honestus, vel honesto loco natus*, and the Sax. *mon*, a man; thus meaning a man well born. The *Italians* call those *gentil homini* whom we style *gentleman*: the *French* (*heu quantum mutati!*) under their ancient monarchy, distinguished such by the name of *gentilhomme*; and the *Spaniards* keep up to the meaning of the word, calling him *hidalgo* or *hijo d' alga*, who is the son of a man of account; so that gentlemen are such whom their blood or race doth make known.

Under the denomination of Gentlemen, are comprised all above yeoman: whereby noblemen are truly called Gentlemen. *Smith de Rep. Ang. lib.* 1. *cc.* 20, 21. A Gentleman is generally defined to be one, who, without any title, bears a *coat of arms*, or whose ancestors have been freemen: and by the coat that a Gentleman giveth, he is known to be, or not to be, descended from those of his name, that lived many hundred years since.

There is said to be a Gentleman by office, and in reputation, as well as those that are born such. 2 *Inst.* 668. And we read that *J. Kingston* was made a Gentleman by King *Rich.* II. *Pat.* 13 *R.* 2. *par.* 1. *Gentilis homo* for a Gentleman, was adjudged a good *addition. Hil.* 27 *Ed.* 3. But the addition of esquire, or Gentleman, was rare before 1 *Hen.* 5. though that of knight is very ancient. 2 *Inst.* 595. 667. See title *Precedency.*

GENTLEWOMAN, *generosa.*] Is a good addition for the estate and degree of a woman, as *generosus* is for that of a man; and if a Gentlewoman be named *spinster* in any original writ, appeal, &c. it hath been held that she may abate and quash the same. 2 *Inst.* 668. But it seems that *Spinster* is in general, a good addition, for an *unmarried* woman, as *single woman* is, for one who being *unmarried* hath had a *bastard.*

GENTILITY, *gentilitas.*] Is lost by attainder of treason, or felony, by which persons become base and ignoble, &c.

GENU. A generation.—*Successit* Ethelbaldo *Offa quinta* Genu. *Malmsh. lib.* 1. *c.* 4.

GENUS, Lat.] The general stock, extraction, &c. as the word office in law is the *genus*, or general; but the Sheriff, &c. is the *species* of it, or particular. 2 *Lill. Abr.* 528.

*Genus*, among metaphysicians and logicians, denotes a number of beings, which agree in certain general properties, common to them all; so that a *genus* is, in fact, only an *abstract* idea, expressed by some general name or term; or rather a general name or term, to signify what is called an *abstract* idea.

GEORGE NOBLE. A piece of gold, current at six shillings and eight-pence, in the reign of King *Hen.* VII. *Lowndes's Essay upon Coins, p.* 41.

GEORGIA. In *America*, its colony established, by *stat.* 6 *Geo.* 2. *c.* 25. § 7. See title *Plantations.*

GERSUMA. See *Garsummune.*

GESTIO PRO HÆREDE. Behaviour as Heir. That conduct by which the heir renders himself liable to the debts of the ancestor. This may be by taking possession of title deeds, receiving rent, &c. *Scotch Dict.*

GESTU ET FAMA. An antient writ where a person's good behaviour was impeached, now out of use. *Lamb. Eirin. lib.* 4. *cap.* 14. See *Surety for the Peace.*

GEWINEDA, Sax.] The public convention of the people, to decide a cause: *et pax quam aldermanus Regis in quinque bergorum* gewineda *dabit emendatur* 12 *libris.* LL. Æthelred. cap. 1.

GEWITNESSA. The giving of evidence. *Leg. Ethel. cap.* 1. *apud Brompton.*

GIFT, *donum donatio.*] A conveyance which passeth either lands or goods. A Gift is of a larger extent than a Grant, being applied to things moveable and immoveable; yet as to things immoveable, when strictly taken, it is applicable only to lands and tenements given in tail; but gifts and grants are said to be alike in nature and often confounded. *Wood's Inst.* 260.

The conveyance of *lands* by *Gift* is properly applied to the creation of an estate-tail, as Feoffment is to that of an estate in fee, and Lease to that of an estate for life or years. It differs in nothing from a feoffment but in the nature of the estate passing by it; for the operative words of conveyance in this case are *Do*, or *Dedi—I give*, or *Have given*; and gifts in tail are equally imperfect without livery of seisin as feoffment in fee simple. *Lit.* § 59. And this is the only distinction that *Littleton* seems to take when he says, "it is to be understood that there is feoffor and feoffee; donor and donee; lessor and lessee." *Litt.* § 57; *viz.* feoffor is applied to a feoffment in fee-simple; donor to a Gift in tail, and lessor to a lease for life or years or at will. In common acceptation, Gifts are frequently confounded with *Grants.* See title *Grant*, 2 *Comm.* 316. *c.* 20.

*Gifts* or *Grants* for the transferring of *personal property* are thus to be distinguished from each other; that Gifts are always gratuitous; Grants are upon some consideration or equivalent; and they may be divided with regard to their subject matter into Gifts or grants of chattels real, and Gifts or grants of chattels personal. Under the former head may be included all leases for years of land, assignments and surrenders of these leases; and all the other methods of conveying an estate less

than freehold. See this Dict. titles *Deed, Conveyance, Estate.* These however very seldom carry the outward appearance of a Gift, however freely bestowed: being usually expressed to be made in consideration of blood, or natural affection; or of 5*s.* to 10*s.* nominally paid to the Grantor: and in case of leases, always reserving a rent, though it be but a pepper corn; any of which considerations will in the eye of the law convert the gift, if executed into a grant: if not executed, into a contract. 2 *Comm.* 440. *c.* 30.

Grants or Gifts of chattels-personal are the act of transferring the right and the possession of them, whereby one man renounces, and another immediately acquires, all title and interest therein: which may be done either in writing or by word of mouth, attested by sufficient evidence, of which the delivery of possession is the strongest and most essential. But this conveyance, when merely voluntary, is somewhat suspicious; and is usually construed to be fraudulent, if creditors or others become sufferers thereby; and particularly, by *stat.* 3 *H.* 7. *c.* 4. all deeds of gift of goods, made in trust to the use of the donor shall be void, because otherwise persons might be tempted to commit treason or felony without danger of forfeiture: and the creditors of the donor might also be defrauded. And by *stat.* 13 *Eliz. c.* 5. every grant or gift of chattels as well as lands with an intent to defraud creditors or others, shall be void as against such persons to whom such fraud would be prejudicial, but as against the grantor or giver himself shall stand good and effectual; and all persons, partakers in, or privy to, such fraudulent grants, shall forfeit the whole value of the goods, one moiety to the King, and the other to the party grieved: and also on conviction suffer half a year's imprisonment. See 3 *Rep.* 82, and this Dict. title *Fraud.*

A true and proper Gift or Grant is always accompanied with delivery of possession, and takes effect immediately: as if A. gives to B. 100*l.* or a flock of sheep, and puts him in possession of them directly, it is then a gift executed in the donee; and it is not in the donor's power to retract it, though he did it without any consideration or recompence; *Jenk.* 109; unless it be prejudicial to creditors, or the donor were under any legal incapacity, as infancy, coverture, duress, or the like: or if he were drawn in, circumvented, or imposed upon, by false pretences, ebriety or surprise. But if the Gift does not take effect by delivery of immediate possession, it is then not properly a Gift but a contract; and this a man cannot be compelled to perform, but upon good and sufficient consideration. 2 *Comm.* 441. *c.* 30. See this Dict. title *Assumpsit, Consideration, Contract.*

A Gift may be by deed, in word, or in *law*: all goods and chattels personal may be given without deed, except in some special cases; and a free Gift is good without a consideration. *Perk.* 57.

Whenever any Gift shall be made, in satisfaction of a debt, it is proper to make it in a public manner before neighbours, that the goods and chattels be appraised to the full value, and the Gift expressly made in satisfaction of the debt; and that on the Gift, the donee take possession of them, &c. *Hob.* 230. See title *Fraud.*

If a man intending to give a jewel to another, say to him, *Here I give you my ring with the ruby in it, &c.* and with his own hand delivers it to the party, this will be a good gift; notwithstanding the ring bear any other jewel, being delivered by the party himself, to the person to whom given. And if a person give a horse to another, being present, and bid him take the horse, though he call the man by a wrong name, it will be a good Gift; but it would be otherwise if the horse were delivered for the use of another person, being absent; there a mistake of the name would alter the case. *Bac. Max.* 87. A Gift must be certain; therefore to give or grant another his horses or cows, that may be spared, will be void; though if one give to A, B. his horse, or his cow, he may take which he will. *Bro. Done,* 90.

As to *Gifts in law,* when a man is married to a woman, all her goods and chattels by gift in law become the husband's; but then he is liable for her debts: so if a man is made executor, the law gives him all the goods and chattels of the testator, subject to his debts. 1 *Inst.* 351. See titles *Baron and Feme, Executor.*

If a person make a suit of cloaths for another, and put it upon him to use and wear, this will be a gift or grant in law of the apparel made. *Co. Lit.* 351. This must mean if there was not any employment, and if the taylor, therefore, meant to give the cloaths.

A man by deed did *give* and *grant, bargain* and *sell, alien, enfeoff* and *confirm* to his daughter certain lands: but no consideration of money was mentioned, nor was the deed inrolled; there was likewise no consideration of natural affection expressed, (other than what was implied in naming the grantee his daughter,) and there was no livery indorsed, or any found to have been made; nor was the daughter in possession at the time of the deed made: and in B. R. it was adjudged by the court that the deed was good, and carried the estate to the daughter by way of covenant to stand seised, &c. 1 *Mod.* 157.

The words *give* and *grant,* in deeds of Gift, &c. of things which lie in grant, will amount unto a grant, a feoffment, a Gift, release, confirmation or surrender, at the election of the party, and may be pleaded as a Gift, or grant, release, &c. at his election. *Co. Lit.* 301. And words shall be marshalled so in Gifts and Grants, that where they cannot take effect according to the latter, the law will make such construction as that the Gift by possibility may take effect: *benigne sunt interpretationes chartarum propter simplicitatem laicorum. Co. Lit.* 183. If a person gives or grants land, and does not say in what parish or county it lies: yet if there be any other thing to describe it, as lately belonging to such a person, &c. or other circumstantial matter, it may be averred where the land lieth, and so the Gift be good. *Bro. Grant* 53, 9 *Rep.* 47. All corporeal and immoveable things that lie in livery, such as manors, messuages, cottages, lands, woods, and the like, may be given and granted in fee, for life, or years at first; and be assignable over after, from man to man *in infinitum.* 1 *Rol. Abr.* 44. And where a man gives and grants wood to another on his lands, or 20*s.* for it to be received out of the same lands, &c. here the wood passes by the Gift presently, with power to choose to have the money. 1 *Rol. Abr.* 47. A deed of Gift of lands or goods may be made upon condition; and on a Gift or sale of goods, the delivery of 6*d.* or a spoon, &c. is a good *seisin* of the whole. *Wood's Inst.* 234. See titles *Conveyance, Fraud, Deed, Grant, Estate, Limitation, &c.*

GIFTA AQUÆ. The stream of water to a mill.—*Mon. Angl. tom.* 3.

GIGMILLS. A kind of fulling mills for fulling and burling of woollen cloth, prohibited by *stat.* 5 & 6 *Ed.* 6. *c.* 22. See *Woollen manufacturers.*

GILD. A fraternity, or company, &c. See *Guild, Geld.*

GILDA MERCATORIA. A mercantile meeting or assembly. If the King grants to a set of men to have *gildam mercatoriam,* this is alone sufficient to incorporate and establish them for ever. 10 *Rep.* 30, 1 *Rol. Ab.* 513. See titles *Corporation, Guild.*

GILDING METALS. By certain ancient statutes, now obsolete, the gilding any metal but silver, and church ornaments; or silvering any thing except the apparel of peers, &c. and metal for knights' spurs, is liable to forfeiture of ten times the value, and a year's imprisonment. None shall gild rings or other things made of copper or latten, on pain to forfeit 5*l.* to the King, and damages to the party deceived. For gilding silver wares, no person may take above 4*s.* 8*d.* for a

pound of troy weight, under penalties. *Stats. 5. H. 4. c.* 13. 2 *H. 5. c.* 4. 8 *H. 5. c.* 3. See titles *Gold Lace, Goldsmiths.*

GISARMS, OR GUISARMES. An halbert or hand-ax, from the Lat. *bis arma*, because it wounds on both sides. *Skene—Spelm.* It is mentioned in the statute 13 *Ed.* 1. *c.* 6.

GIST OF ACTION. From the Fr. *gist.* is the cause for which the action lieth; the ground and foundation thereof, without which it is not maintainable. 5 *Mod.* 305. See title *Action.*

GLADIOLUM. A little sword or dagger; also a kind of sedge. *Matt. Paris.* 1206.

GLADIUS. *Jus gladii*, is mentioned in our *Latin* authors, and the Norman laws; it signifies a supreme jurisdiction. *Cambd.* And it is said that from hence, at the creation of an earl, he is *gladio succinctus*; to signify that he had a jurisdiction over the county of which he was made earl. See *Pleas of the Sword.*

GLAIRE, *Fr.*] A sword, lance, or horseman's staff. *Gleyre* was one of the weapons allowed the contending parties in a trial by *combat. Orig. Jurisd.* 79.

GLASS. Certain duties granted on all glass ware, &c. by *stat.* 6 & 7 *W.* 3; which duties were continued for ever by a subsequent act; But were afterwards taken off, by *stat.* 10 & 11 *W.* 3. *c.* 18. Various internal duties of excise have from time to time been by many statutes laid on glass and glass manufactures, and all works and manufactures of glass are subjected to strict regulation. Equivalent duties are imposed on all glass imported.

GLASS-MEN. Are reckoned amongst wandering rogues and *vagrants*, by the old statutes, 39 *Eliz. c.* 17. 1 *Jac.* 1. *c.* 7.

GLAVEA. A hand dart. *Blount.*

GLEANING, LEASING, OR LESING, From Fr. *Glainer, quasi graner; colligere grana.—Teuton. Ahrlesen, ex* ahr, *spica.* & lesen, *colligere.—Minshew in v. Glean.*] It hath been said, that by the common-law and custom of England, the poor are allowed to enter and glean upon another's ground, after the harvest, without being guilty of trespass; which humane provision seems borrowed from the *Mosaical* law. 3 *Comm.* 212, 213. *Trials per pais, c.* 15. *p.* 438. 534.

But it is now positively settled by a solemn judgment of the Court of Common Pleas, that a right to glean in the harvest-field cannot be claimed by any person at Common-law. Neither have the poor of a parish, legally settled, such right. *Gould, J.* dissented from this opinion, quoting the passages in the Mosaical law. (*Levit. c.* 19. *vv.* 9, 10. *c.* 23. *v.* 22. and see *Deut. c.* 24. *v.* 19.) and 4 *Burr.* 1927. together with the recognition of the custom or privilege in a private act of parliament for an inclosure in Basingstoke parish. The other Judges, however, were of opinion that it would be dangerous and impolitic to admit Gleaning to be *a right*, and in fact would be prejudicial to the poor themselves, now provided for under various positive statutes. They also remarked that the custom of Gleaning or Leasing was various in various places, and was in many places restricted to particular corn, and could not therefore be set up as an universal Common-law right; that it would be opening a tempting door to fraud and idleness, and had never been specifically recognised by any judicial determination. 1 *H. Black. Rep.* 51—63. By the Irish acts 25 *H.* 8. *c.* 1. and 28 *H.* 8. *c.* 24. Gleaning and leasing is so restricted as in fact to be prohibited in that part of the kingdom.

GLEBE, *gleba.*] Church-land; most commonly taken for the land belonging to a parish church, besides the tithes. If any parson, vicar, &c. hath caused any of his Glebe-land to be manured and sown at his own costs, with any corn or grain, the incumbents may devise all the profits and corn growing upon the said Glebe by will, under *stat.* 28 *H.* 8. *c.* 11. And if a parson sows his Glebe and dies, the executors shall have the corn sown by the testator. But if the Glebe be in the hands of a tenant, and the parson dies after severance of the corn, and before his rent due; it is said, neither the parson's executors, nor the successor, can claim the rent, but the tenant may retain it, and also the crop, unless there be a special covenant for the payment to the parson's executors proportionably, &c. *Wood's Inst.* 163. *Sed qu.* If this case would not come within the equity of *stat.* 11 *Geo.* 2. *c.* 19. § 15. which gives right of action to the representative of *tenant for life*, for any portion of rent in arrear at the time of his death?

Prohibition was moved for to a parson for digging new coal-mines in his Glebe, and also for felling trees; for it is waste, and prohibited by the statute *de non prosternend' arbores*, &c. The court held it lay not for the mines; for then no mines in the Glebe could ever be opened. *Lev.* 107.

By the said *stat.* 28 *H.* 8. *c.* 11. Every successor, on a month's warning, after induction, shall have the mansion-house and the Glebe belonging thereto, not sown at the time of the predecessor's death. He that is instituted may enter into the Glebe-land before induction, and has right to have it against any stranger; *per Coke*, Ch. J. *Roll. R.* 192.

There is a writ grounded on the *Stat. articuli cleri, cap.* 6. where a parson is distrained in his Glebe-lands by sheriffs, or other officers; against whom attachment shall issue. *New. Nat. Br.* 386, 387. See as to exchanging Glebe Lands *stats.* 55 *Geo.* 3. *c.* 147. 56 *Geo.* 3. *c.* 52. and this Dict. tiles *Parson, Vicar, Church, Tithes*, &c.

GLEBARIÆ. Turfs dug out of the ground.—*In Sylvis, Campis, Semitis, Moris*, Glebariis, &c.

GLISCYWA. An old Saxon word for a Fraternity. *Leg. Athelstan, cap.* 12.

GLOMERELLS. Commissaries appointed to determine differences between scholars in a School or University, and the townsmen of the place: in the edict of the bishop of Ely, *anno* 1276, there is mention of the *Master of the Glomerells.*

GLOVE-SILVER. Money customarily given to servants to buy them gloves, as an encouragement for their labours—*Glove money* has been also applied to extraordinary rewards given to officers of courts, &c. It is now given on the circuits by the barristers to the judges' crier.

GLOVES. The *stat.* 6 *Geo.* 3. *c.* 19. restrained the importation and sale of foreign Gloves and mitts: and one section of the *stat.* 25 *Geo.* 3. *c.* 55. also restrained the importation of foreign leather not completely made into Gloves, but cut into shapes or tranks.—By this latter act a stamp duty was imposed on Gloves sold, which was repealed by 34 *Geo.* 3. *c.* 10.

GLYN. A valley; according to the book of *Domesday.*

GO. This word is sometimes used in a judicial signification, as to *go* without day, is to be dismissed the court; so in old phrase to *go* to God. *Broke. Kitch.* 190.

GOATS. No man may common goats within the forest without especial warrant. *Nota, Capriolus non est bestia venationis forestæ. Manwood's Forest Laws, cap.* 25. *numb.* 3. See title *Common.*

GOAT'S HAIR. To what duties liable. 4 *W.* & *M. c.* 5.

GOD-BOTE, *Sax.*] An ecclesiastical or church fine, paid for crimes and offences committed against God.

GOD-GILD. That which is offered to God, or his service. *Sax.*

GOD AND RELIGION, *Offences against.* *Apostacy* is an offence against God and religion. It was formerly the object only of the Ecclesiastical courts, which corrected the offender *pro salute animæ.* But now, by *stat.* 9 & 10 *W.* 3. *c.* 32. If any person educated in, or having made any profession of, the Christian religion, shall by writing, printing, teaching, or *advised* speaking, deny the Christian religion to

be true, or the Holy Scriptures to be of divine authority, he shall upon the first offence be rendered incapable to hold any office or place of trust; and for the second, be rendered incapable of bringing any action, being guardian, executor, legatee, or purchaser of lands, and shall suffer three year's imprisonment without bail. To give room however for repentance, if within four months after the first conviction the delinquent will in open court, publicly renounce his error, he is discharged for that once from all disabilities.

*Heresy* is another offence, for which the offender is subject only to ecclesiastical censure, by *stat.* 29 *Car.* 2. *c.* 9. See 4 *Comm.* 42. 65. as to *Reviling of the ordinances, Non conformity, Blasphemy, Swearing and Cursing, Witchcraft, Religious Impostors, Simony, Sabbath breaking, Drunkenness* and *Lewdness*; and this Dict. under those several titles.

GOLDA. A mine, according to *Blount. Mon. Ang. tom.* 2. *pag.* 610.

GOLD-MINES. See *Mines.*

GOLD AND SILVER. *Gold* and *silver* manufactures are to be assayed by the warden of the *Goldsmith's* Company in London, and marked; and gold is to be of a certain touch. *Stat.* 28 *E.* 1. *c.* 20. By *stat.* 37 *E.* 3. *c.* 7. *Goldsmiths* were to have their own marks on plate, after the surveyors have made their assay: and false metal was to be seized and forfeited to the King. Work of silver made by *Goldsmiths*, &c. is to be as fine as *Sterling*, except the solder necessary; and marking other work incurs a forfeiture of double value. *Stat.* 2 *H.* 6. *c.* 14.

Gold plate made by *Goldsmiths* shall contain 22 carrats of fine gold: and silver plate 11 ounces and two pennyweights of silver, in every pound troy, or they forfeit 10*l.* And no *Goldsmith* shall sell any such plate, until marked with the first letters of the maker's christian and surname, the marks of the city of London being the leopard's head, lion passant, &c. and those made use of by the assayers at York, Exeter, &c. All persons making plate, are to enter their marks, names and places of abode in the assay-office; they are likewise to send with the plate required to be marked, a particular account thereof, in order to be entered, &c. or forfeit 5*l.* The *Assayers* determine what solder is necessary about plate, and judge of the workmanship, and for good cause may refuse to assay it; and if any parcel be discovered of a coarser allay than the standard, it may be broke and defaced; also the fees for assaying and marking are particularly limited, &c. *Stat.* 12 *G.* 2. *c.* 26. and see *stats.* 31 *Geo.* 2. *c.* 32. 13 *Geo.* 3. *c.* 59. 24 *Geo.* 3. *st.* 2. *c.* 53. and 38 *Geo.* 3. *c.* 69.

*Goldsmiths*, shall not take above 1*s.* the ounce of gold beside the fashion, more than the buyer may be allowed for it at the King's exchange: and if the work of any *Goldsmith* be marked and allowed by the master and wardens of the mystery, and afterwards found faulty; the wardens and corporation shall forfeit the value of the thing so sold or exchanged. *Stat.* 18 *Eliz. c.* 15.

Molten silver is not to be transported by *Goldsmiths* before it is marked at Goldsmith's Hall, and a certificate made thereof on oath; and oath made before the Court of Aldermen that no part of it is the clippings of the coin of the realm; and officers of the customs may seize silver shipped otherwise. *Stats.* 6 & 7 *W.* 3. *c.* 17. 7 & 8 *W.* 3. *c.* 19. and 59 *Geo.* 3. *c.* 49.

The cities of York, Exeter, Bristol, Chester, Norwich, and town of Newcastle, are also appointed places for assaying and marking wrought plate of *Goldsmiths*, &c. *Stats.* 12 *W.* 3. *c.* 4. 1 *Ann. c.* 9.

By *stat.* 59 *Geo.* 3. *c.* 49. so much of all the ancient statutes as prohibited the melting or exportation of gold or silver or bullion was repealed. These were *stats.* 9 *E.* 3. *st.* 2. *cc.* 1, 3. 17 *E.* 3. *c.* 1. 27 *E.* 3. *st.* 2. *c.* 14. 38 *E.* 3. *st.* 1. *c.* 2. 5 *Rich.* 2. *st.* 1. *c.* 2. 17 *Rich.* 2. *c.* 1. 2 *Hen.* 4. *c.* 5. 2 *Hen.* 6. *c.* 6. 4 *Hen.* 7. *c.* 23. and the *stat.* 13, 14 *C.* 2. *c.* 31. and by the same act 59 *Geo.* 3. *c.* 49. the free exportation and melting of the gold and silver coin was allowed; and the regulations of the *stats.* 6 & 7 *W.* 3. *c.* 17. 7 & 8 *W.* 3. *c.* 19. are altered accordingly.

Certain duties have been from time to time imposed on gold and silver plate wrought in Great Britain. See *stat.* 6 *G.* 1. *c.* 11. repealed and other provisions made 31 *G.* 2. *c.* 32. 32 *G.* 2. *c.* 24. 24 *G.* 3. *c.* 53. (by which and subsequent acts this duty is placed under the management of the Stamp office)—25 *G.* 3. *c.* 64. 30 *G.* 3. *c.* 31. 38 *G.* 3. *c.* 24. &c. 69.—The duty under the latest Stamp act 55 *Geo.* 3. *c.* 185. is on gold plate, 17*s.* per ounce, and 1*s.* 6*d.* on silver plate.—In Ireland the duty (of excise) on either gold or silver plate wrought is 1*s.* per ounce. See 47 *Geo.* 3. *st.* 1. *c.* 18.

Persons that sell orrice lace, mixed with other metals or materials than *gold, silver*, silk and vellum, shall forfeit 2*s.* 6*d.* for every ounce: and there shall be allowed at least six ounces of *gold* and *silver* prepared and reduced into plate to cover four ounces of silk, except large twist, frize, &c. And laying the same on greater proportions of the silk, or in any other manner than directed, incurs the like forfeiture of 2*s.* 6*d.* the ounce. Copper, and lace inferior to *silver*, is to be spun upon thread, yarn or incle, and not on silk; but this does not extend to *Tinsel* apparel used in theatres. No gold or silver lace, thread, fringe or wire, &c. may be imported on pain of being forfeited and burnt, and 100*l.* penalty. *Stat.* 15 *Geo.* 2. *c.* 20. See 28 *Geo.* 3. *c.* 7. The importation and making up of gold and silver lace, embroidery, brocade, &c. is prohibited by *stat.* 22 *Geo.* 2. *c.* 36. See further titles *Wire-Drawers, Embroidery, Navigation Acts.*

GOLDWIT, or GOLDWICH. Perhaps a golden mulct; in the records of the Tower, there is mention of *consuetudo vocata*, Goldwith *vel* Goldwich.

GOLIARDUS. A jester or buffoon. *Mat. Paris*, 1229.

GOOD ABEARING, *Bonus Gestus.*] Signifies an exact *carriage* or *behaviour* of a subject towards the King and the people: whereunto some persons, upon their misbehaviour are bound; and he that is bound to this, is said to be more strictly bound than to the *peace*; because where the peace is not broken, the surety *de bono gestu* may be forfeited by the number of a man's company, or by their weapons. *Lamb. Eirin. lib.* 2. *c.* 2. See *stat.* 34 *Ed.* 3. *c.* 1.

GOOD BEHAVIOUR. Surety for the *Good behaviour* is surety for the *peace*, and differs very little from *Good abearing*. A Justice of peace may demand it *ex officio*, according to his discretion, when he sees cause; or at the request of any other under the King's protection: his warrant also is to be issued when he is commanded to do it by writ of *supplicavit* out of Chancery, or B. R. See further, titles, *Justices of Peace* and *Surety of the Peace*; at large.

GOOD CONSIDERATION. See *Consideration.*

GOODS AND CHATTELS, *Bona et catalla.* See *Chattels.*

GOOLE, Fr. *Goulet.*] A breach in a sea-bank or wall; or a passage worn by the flux and reflux of the sea. *Stat.* 16 & 17 *Car.* 2. *c.* 11.

GORCE or GORS, From Fr. *Gort.*] A wear: By *stat.* 25 *E.* 3. *st.* 4. *c.* 4. it is ordained, that all *Gorces*, mills, wears, &c. levied and set up, whereby the King's ships and boats are disturbed and cannot pass in any river, shall be utterly pulled down without being renewed. *Sir Edward Coke* derives this word from *Gurges*, a deep pit of water, and calls it a *Gors* or *Gulf*: but this seems to be a mistake, for in *Domesday* it is called *Gourt and Gort*, the French word for a wear. *Co. Lit.* 5. It is used for a pool or pit of water for fish in ancient grants. See *Termes de la Ley.*

GORE. A narrow slip of ground. *Paroch. Antiq.* 393.

GOTE, Sax. *Geotan*, i. e. *Fundere.*] A ditch, sluice or gutter, mentioned in *stat.* 23 *H.* 8. *c.* 5.

## GOVERNMENT.

By this word, in common speech, is understood the Constitution of our country as exercised, according to the principles of *Limited Monarchy*, under the Legislature of *King Lords* and *Commons*. For the principles of this Government and Constitution, and its peculiar excellencies in preference to all others, see this Dict. *passim;* and particularly under titles *King*, *Parliament*, *Treason*, *Tenure*, *Habeas Corpus*, *Liberties*, *Jury*, and other apposite titles.

When Civil Society is once formed, Government at the same time results of course, as necessary to preserve and to keep that society in order. Unless some Superior be constituted, whose commands and decisions all the members are bound to obey, they would still remain as in a state of nature without any judge upon earth to define their rights and redress their wrongs. But as all the members which compose this society were naturally equal, it may be asked in whose hands are the reins of government to be entrusted? To this the general answer is easy; but the application of it to particular cases has occasioned one half of those mischiefs, which are apt to proceed from misguided political zeal. In general, all mankind will agree that Government should be reposed in such persons, in whom those qualities are most likely to be found, the perfection of which is among the attributes of him who is emphatically stiled *The Supreme Being;* the three grand requisites of wisdom, of goodness, and of power: wisdom to discern the real interest of the community goodness to endeavour always to pursue that real interest: and strength or power to carry this knowledge and intention into action. These are the natural foundations of Sovereignty, and these are the requisites that ought to be found in every well constituted frame of Government.

How the several forms of Government we now see in the world at first actually began, is matter of great uncertainty, and has occasioned infinite disputes. However they began, or by what right soever they subsist, there is and must be in all of them a Supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of Sovereignty reside. And this authority is placed in those hands wherein, (according to the opinion of the founders of such respective States, either expressly given or collected, from their tacit approbation,) the qualities requisite for supremacy, wisdom, goodness, and power, are the most likely to be found.

The political writers of antiquity will not allow more than three regular forms of government. The first when the Sovereign Power is lodged in an aggregate assembly consisting of all the free members of a community, which is called a *Democracy;* the second when it is lodged in a council, composed of select members, and then it is stiled an *Aristocracy;* the last when it is entrusted in the hands of a single person, and then it takes the name of a *Monarchy*. All other species of Government, they say, are either corruptions of, or reducible to, these three.

By the Sovereign Power, is meant the power of making laws; for wherever that power resides, all others must conform to, and be directed by it, whatever appearance the outward form and administration of the Government may put on. For it is at any time at the option of the Legislature to alter that form and administration by a new edict or rule, and to put the execution of the laws into whatever hands it pleases; by constituting one or a few, or many executive magistrates: and all the other powers of the State must obey the legislative power in the discharge of their several functions, or else the Constitution is at an end.

In a *Democracy*, where the right of making laws resides in the People at large, public virtue or goodness of intention is more likely to be found, than either of the other qualities of Government. Popular assemblies are frequently foolish in their contrivance, and weak in their execution; but generally mean to do the thing that is right and just, and have always a degree of patriotism or public spirit. In *Aristocracies* there is more wisdom to be found than in the other frames of Government; being composed or intended to be composed, of the most experienced citizens. But there is less honesty than in a Republic, and less strength than in a Monarchy. A *Monarchy* is indeed the most powerful of any; for by the entire conjunction of the legislative and executive powers all the sinews of Government are knit together, and united in the hand of the Prince; but then [in absolute Monarchies] there is imminent danger of his employing that strength to improvident or oppressive purposes.

Thus these three species of Government have, all of them, their several perfections and imperfections. *Democracies* are usually the best calculated to direct the end of a law; *Aristocracies* to invent the means by which that end shall be obtained; and *Monarchies* to carry those means into execution. The ancients, had in general no idea of any other permanent form of Government but these three: for though Cicero declares himself of opinion, "*esse optimè constitutam rempublicam, quæ ex tribus generibus illis, regali, optimo, et populari, sit modicè confusa*," yet Tacitus treats this notion of a mixed Government, formed out of them all, and partaking of the advantages of each, as a visionary whim, and one that, if effected, could never be lasting or secure.

But, happily for us of this Island, THE BRITISH CONSTITUTION has long remained, and it is to be hoped will long continue, a standing exception to the truth of this observation. For, as with us, the Executive power of the laws is lodged in a single person, they have all the advantages of strength and dispatch, that are to be found in the most absolute monarchy: and as the Legislature of this kingdom is intrusted to three distinct powers, entirely independent of each other; first the *King;* secondly the *Lords* spiritual and temporal, which is an Aristocratical assembly of persons selected for their piety, their birth, their wisdom, their valour, or their property; and thirdly, the House of *Commons*, freely chosen by the People from among themselves, which makes it a kind of Democracy; as this aggregate body, actuated by different springs, and attentive to different interests composes the *British Parliament*, and has the supreme disposal of every thing; there can be no inconvenience attempted by either of the three branches, but which will be withstood by one of the other two; each branch being armed with a negative power, sufficient to repel any innovation which it shall think inexpedient or dangerous.

Here then is lodged the *Sovereignty of the British Constitution;* and lodged as beneficially as is possible for Society. For in no other shape could we be so certain of finding the three great qualities of Government so well and so happily united. If the supreme power were lodged in any of the three branches separately, we must be exposed to the inconveniences of either Absolute Monarchy, Aristocracy, or Democracy, and so want two of the three principal ingredients of good policy, either virtue wisdom, or power. If it were lodged in any two of the branches; for instance in the King and house of Lords, our laws might be providentially made and well executed, but they might not have always the good of the people in view. If lodged in the King and Commons, we should want that circumspection and mediatory caution which the wisdom of the Peers is to afford: if the supreme rights of Legislature were lodged in the two houses only, and the King had no negative upon their proceeding, they might be tempted to incroach upon the royal prerogative, or perhaps to abolish the kingly office, and thereby weaken (if not totally destroy) the strength of the Executive Power. But the constitutional Government of this Island is so admi-

rably tempered and compounded, that nothing can endanger or hurt it, but destroying the equilibrium of power between one branch of the Legislature and the rest. For if ever it should happen that the independence of *any one* of the three should be lost, or that it should become subservient to the views of either of the other two, there would soon be an end of our Constitution. 1 *Comm.* 48. 52. *Introd.*

Contempts and misprisions against the King's person and Government, may be by speaking or writing against them; cursing or wishing him ill, giving out scandalous stories concerning him, or doing any thing that may tend to lessen him in the esteem of his subjects, may weaken his government, or may raise jealousies between him and his people. It has also been held an offence of this species to drink to the pious memory of a traitor: or for a clergyman to absolve persons at the gallows, who there persist in the treasons for which they die; these being acts which impliedly encourage rebellion. And for this species of contempt, a man may not be fined and imprisoned, but suffer the pillory, or other infamous corporal punishment. 1 *Hawk. P. C.* 4 *Comm.* 13. *c.* 9.

In cases of conspiracy or meditated treason against the King and Government, it is not unusual to vest a power in the King of apprehending and detaining suspected persons without bail or mainprise: which *as to them* operates as a suspension of the *Habeas Corpus* Act. For this purpose the *stats.* 1 *W. & M. c.* 2, 6 *Anne, c.* 15. 1 *Geo.* 1. *cc.* 8. 39. and divers others have been from time to time passed. The last instances were 57 *Geo.* 3. *cc.* 3. 55. See title *Habeas Corpus.*

GRACE. Acts of parliament for a general and free *pardon*, are called *Acts of Grace.*

GRACE, *Days of.* See title *Bill of Exchange.*

GRADUATES, *Graduati.*] Scholars who have taken *degrees* in an university. Those not having taken any degree are called Under-graduates.

GRAFFER, Fr. *Greffier*, i. e. *Scriba.*] A notary or scrivener, used in the ancient *stat.* 5 *H.* 8. *c.* 1.

GRAFFIO, GRAVIO, A landgrave, or earl—*Nec princeps, nec* Graffio, *hanc lenitatem mutare audeat. Mon. Angl. tom.* 1. *p.* 100.

GRAFFIUM. A writing book, register, or cartulary of deeds and evidences. *Annal. Eccl. Menevensis apud Angl. Sacr. par.* 1. *p.* 653.

GRAIL, *Gradale*, or *Graduale.*] A *gradual* or book, containing some of the offices of the Romish church.—Gradale, *sic dictum, a gradalibus in tali libro contentis. Lyndewood. Provincial. Ang. lib.* 3. It is sometimes taken for a *mass book*, or part of it, instituted by Pope Celestine, *Anno* 430.

GRAIN. The twenty-fourth part of a penny-weight. *Merch. Dict.* Also *grain* signifies any corn sown on ground; and there is what is so called in the top of the ear, less than corn. *Lit. Alleyn's Rep.* 89.

GRAINAGE. An ancient duty in London of the 20th part of salt imported by aliens. *Dy.* 352.

GRAND ASSISE. A writ in a real action to determine the right of property in lands. See titles *Jury, Magna Assisa.*

GRAND CAPE. A writ on plea of land, where the tenant makes default in appearance at the day given, for the King to take the land into his hands, &c. *Reg. Jud.* 1. See *Cape Magnum.*

GRAND DAYS. Those days in the Terms which are solemnly kept in the Inns of Court and Chancery, i. e. Candlemas Day in Hilary term, Ascension Day in Easter term, St. John the Baptist's Day in Trinity term, and All Saint's Day in Michaelmas term; which days are *Dies non Juridici*, or no days in court.

GRAND DISTRESS. Is a writ so called, not for the quantity of it, for it is very short, but for its quality; for the extent thereof is very great, being to all the goods and chattels of the party distrained within the county: it lies in two cases, either when the tenant or defendant is attached, and appears not, but makes default; or where the tenant hath once appeared, and after makes default, then this writ is had by the *Common Law* in lieu of a *Petit Cape, stats. West.* 1. *cap.* 44. 52 *H.* 3. *c.* 9.

GRAND JURY. The Jury which finds bills of indictment before Justices of peace, and gaol-delivery, or of *Oyer* and *Terminer*, &c. They ought only to hear witnesses for the King; and to find a bill on probable evidence; because it is but an accusation, and the party is to be put upon his trial afterwards. But if the bill be against A. for murder, and the *Grand Jury*, on the evidence before them, be satisfied it was *se defendendo*, &c. and so return it specially; the court may remand them to consider better thereof, or hear the evidence at the bar, and accordingly direct the *Grand Jury*. 2 *Hale's Hist. P. C.* 157, 158. Where a *Grand Jury* refuses to present things, within their charge, &c. a new *Grand Inquest* may be impanelled, to inquire of the concealment of the former; on whose defaults presented, they shall be amerced. 2 *Hale's P. C.* 155. A *Grand Juror* disclosing to any one indicted, the evidence that appeared against him, is guilty of a high misprision, and liable to be fined and imprisoned. 4 *Comm.* 126. Several acts have been passed, since the Union between Great Britain and Ireland, to regulate the powers of Grand Juries in Ireland as to presentments for levying money for roads and public works: the latest of these in force is 59 *Geo.* 3. *c.* 84.

See at large titles *Indictment, Jury.*

GRAND SERJEANTY. An ancient tenure, by military service. See titles *Chivalry, Tenure, Serjeanty.*

GRANGE, *Grangia.*] A house or farm where corn is laid up in barns, *granaries*, &c. and provided with stables for horses, stalls for oxen, and other things necessary for husbandry. This definition is agreeable to *Spelman.* According to *Wharton, Grange* is strictly and properly the farm of a monastery, where the religious reposited their corn. *Grangia, Lat.* from *Granum.* But in Lincolnshire, and other Northern counties, they call every lone house, or farm, which stands solitary, a *Grange. Stevens's Shakspeare.*

Dr. Johnson, in his dictionary derives the word from *Grange*, French, and defines it, a farm, generally; a farm with a house, at a distance from neighbours.

GRANGEARIUS. Is the person who has the care of such a place, for corn and husbandry; and there was anciently a *grangcr*, or *grange*-keeper belonging to religious houses, who was to look after their *granges* or farms in their own hands. *Fleta, lib.* 2. *c.* 8. *Cartular. St. Edmund MS.* 323.

## GRANT.

DONATIO; CONCESSIO in the Common-law, a conveyance in writing of incorporeal things, not lying in livery and which cannot pass by word only; as of reversions, advowsons in gross, tithes, rents, services, common in gross, &c. It has also been taken generally, for every gift and *Grant* of any thing whatsoever. *Co. Lit.* 172. 3 *Rep.* 63. *Grants* are made by such persons as cannot give but by deed: he that granteth is termed the Grantor, he to whom the *Grant* is made is the Grantee. *West. Symb.* 234.

*Grant* is the regular method, by the Common-law, of transferring the property of incorporeal hereditaments or such things whereof no livery can be had. *Co. Litt.* 9. For which reason all corporeal hereditaments as lands and houses are said to *lie in livery*, and the others as advowsons, commons, rents, reversions, &c. *to lie in grant. Ib.* 172. And the reason is given by *Bracton*, "*Traditio*, [livery] nihil aliud est quám rei corporalis, de personâ in personam, de manu in manum translatio, aut in possessionem inductio: sed res incorporales quæ sunt ipsum jus rei vel corpori inhærens, tra-

ditionem non patiuntur," *Bract. l.* 2. *c.* 18. Incorporeal hereditaments therefore pass merely by delivery of the deed. And in seignories or reversions of lands, such Grant, together with the attornment of the tenant, (while attornments were requisite) were held to be of equal notoriety with, and therefore equivalent to, a feoffment and livery of lands in immediate possession. It therefore differs but little from a feoffment, except in its subject-matter, for the operative words therein commonly used are *Dedi et concessi; Have given and granted;* 2 *Comm.* 316. *c.* 20. See further this Dict. titles *Conveyance, Deed, Gift.*

I. *What Things and Interests may be granted; by what Description; and how Grants shall be construed.*
II. *Who may make Grants; and who may take by Grant.*

I. To every good *Grant* the following things are requisite: 1. That there be a person able to *grant*. 2. A person capable of the thing *granted*. 3. That there be a thing *grantable*. 4. That it be *granted* in such manner as the law requires. 5. That there be an agreement to, and acceptance of, the thing granted, by him to whom made. And 6. There ought to be an attornment where needful. *Co. Lit.* 73. But *Grants* and conveyances are good without attornment of tenants, notice being given them of the *Grants*, by *stat.* 4 *Ann. c.* 16. § 9. *Grants* are taken most strongly against the *grantor* in favour of the *grantee:* the *grantee* himself is to take by the *Grant* immediately, and not a stranger, or any *in futuro;* and if a *Grant* be made to a man and his heirs, he may assign at his pleasure, though the word *Assigns* be not expressed. *Lit.* 1. *Saund.* 322. The use of any thing being *granted*, all is *granted* necessary to enjoy such use: and in the *Grant* of a thing, what is requisite for the obtaining thereof is included. *Co. Lit.* 56. So that if timber trees are *granted*, the *grantee* may come upon the *grantor's* ground to cut and carry them away. 2 *Inst.* 309. *Plowd.* 15.

A man cannot *grant* that which he hath not, or more than he hath; though he may covenant to purchase an estate, and levy a fine to uses, which will be good. A person may *grant* a reversion, as well as a possession; but the law will not allow *Grants* of titles only, or imperfect interests, or of such interests as are merely future. *Bac. Max.* 58. A bare possibility of an interest, which is uncertain; a right of entry, or thing in action, cause of suit, &c. may not be granted over to a stranger. *Perk. Sect.* 65. 2 *Inst.* 214. 4 *Rep.* 66.

It was formerly held, that by a *Grant* of all a man's goods and chattels, bonds would pass; now it is held the contrary, that the words *Goods and Chattels* do not extend to bonds, deeds, or specialties, being things in action, unless in special cases. 8 *Rep.* 33. *Co. Lit.* 152. The *stat.* 2 *Geo.* 2. *cap.* 25. was found necessary to make the stealing such bonds, &c. felony, as in case of other goods and chattels.

In *Grants* there must be a foundation of interest, or they will not be binding: If a person *grants* a rent charge out of lands, when he hath nothing in the land, the grant will be void. *Perk.* 15. Though it is said, if a man *grant* an annual rent out of land, wherein he hath no kind of interest, yet it may be good to charge the person of the *grantor*. *Owen Rep.* 3. A man may *grant* an annuity for him, and his heirs to commence after his death, and it shall charge the heir. *Bac. Max.* 58. And after the *Grant* of an annuity, &c. is determined, debt lies for the arrears; and the person of the tertenant will be charged. 7 *Rep.* 39. If a common person *grants* a rent, or other thing that lies in *Grant*, without limitation of any estate, by the delivery of the deed, a freehold passes: but if the King make such a *Grant* of a rent, &c. it is void for uncertainty. *Danv. Rep.* 45, *a.*

A *Grant* to a man, with a blank for his christian name is void, except to an officer known by his office, when it must be averred: and it is the same where the *grantee's* christian name is mistaken. *Cro. Eliz.* 328.

*Grants* may be void by incertainty, impossibility, being against law, on a wrong title, to defraud creditors, &c. *Co. Lit.* 183. Such things as lie in *Grant*, may not be granted or held without deed: and if any thing not grantable, is granted with other things, the *Grant* will be void for all. 2 *Shep. Abr.* 269. 271. 273. Trusts and confidences are personal things, and may not be granted over to others in most cases; as offices of trust, and the like: but all kinds of chattels real and personal, are grantable. *Perk.* § 99. *Plowd.* 141. 379.

If one *grant* any thing that lies in livery, or *Grant*, and that is *in esse* at the time of the *Grant*, in fee, or for life, and the estate is to begin at a day to come; this for the most part will be void: but a lease or *Grant* for years, may be good *in futuro;* and may be to one for term of years, or years determinable on lives, and after to another, to begin at the end of that estate. 5 *Rep.* 1. *Dyer*, 58. Where a man hath a reversion after an estate for life of land, and he grants a rent out of it; the *Grant* is good, and will fasten upon the land after the estate of the tenant for life is ended: and if a person *grant* rents, &c. and a stranger take them at that time; in this case the *Grant* will be good, for one may not be out of possession of these things but at his pleasure. *Perk.* 92. 98. If a man *grants* that to one, that he hath granted before to another, for the like term, &c. the second *Grant* will be void. *Dyer*, 23. *Perk.* § 102. *Grants* are usually made by these words, *viz. Have Given, Granted*, and *Confirmed, &c.* And words in *Grants* shall be construed according to a reasonable sense, and not be strained to what is unlikely. *Hob.* 304. Also it hath been adjudged, that *Grants* shall be expounded according to the substance of the deed, not the strict grammatical sense; and agreeable to the intention of the parties. *Co. Lit.* 146. 313.

Where the principal thing is *granted*, the *incident* shall pass; but the *principal* will not pass by the *Grant* of the *incident*. *Co. Lit.* 152. A lord of a manor cannot *grant* the same, and reserve the Court Baron, it being inseperably incident. *Co. Lit.* 313. A *Grant* of a manor, without the words *cum pertinentiis*, will pass all things belonging to the manor; the *Grant* of a farm will also pass all lands belonging to it; but a *Grant* of a messuage passes only the house, out-houses and gardens. *Owen's Rep.* 51. When lands are *granted* by deed, the houses which stand thereon will pass; houses and mills pass by the *Grant* of all lands, because that is the most durable thing on which they are built. 4 *Rep.* 86. 2 *And.* 123. By *Grant* of all lands, the woods will pass: and if a man *grant* all his trees in a certain place, this passeth the soil; though an exception of wood extends to the trees only, not the soil. 1 *Rol. Rep.* 33. *Dyer*, 19. 5 *Rep.* 11.

A. being mortgagee in fee of certain lands, and B. the mortgagor entitled to the equity of redemption, by lease and release, A. conveys and B. releases the lands to C. in fee, who by the same instrument covenants with, and *grants* to B. that it shall be lawful for B. and his assigns at all times to enter upon the lands, to search and dig for coal, and to take and carry away the same to his and their own use: this is only a *licence*, and conveys no interest in the soil, so as to exclude C. and those claiming under him, from getting coal there; nor could it operate as an exception or reservation out of the grant in respect to B. who had not the legal title in him at the time. 4 *East's Rep.* 469.

By a grant of all tithes arising out of or in respect to farms, lands, &c. the tithes arising out of and in respect of rights of common appurtenant to such farms or lands will pass. 7 *Term Rep. K. B.* 641.

Trees in boxes will not pass by the *grant* of the land, &c. as they are separate from the freehold. *Mod. Cases*, 170. A man *grants* all his wood that shall grow in time to come; it

is a void *grant*, not being *in esse*. 3 *Leon.* 37. A *grant de vesturâ terræ* passeth not the freehold; therefore the *grantee* hath no authority to dig in it by virtue of such a *grant*. *Ow.* 37. By the *grant* of lands in the possession of another, it is good if such other be in possession, let the possession be right or wrong, 1 *Rol. Rep.* 23. If a *grant* is general, and the lands *granted* restrained to a certain vill, the *grantee* shall have no lands out of the vill. 2 *Rep.* 33. It has been held, that where a *grant* is made of lands and tenements in D. copyhold lands will not pass; for they cannot pass otherwise than by surrender. *Owen*, 37.

Where lands are certainly described in a grant, with a recital as *granted* to A. B. &c. though they were not thus *granted*, it has been adjudged, that the *grant* was good. 10 *Rep.* 110. If a first description of lands in a *grant* is false, notwithstanding the second be true, nothing will pass by it; though, if the first be true, and the second false, the *grant* may be good. 3 *Rep.* 10.

Where there is a grant of a particular thing once sufficiently ascertained by some circumstance belonging to it, the addition of an allegation, mistaken or false respecting it, will not frustrate the grant: but when a grant is in general terms, then the addition of a particular circumstance will operate by way of restriction and modification of such grant. 5 *East's Rep.* 51.

The word *grant*, where it is placed among other words of demise, &c. shall not enure to pass a property in the thing demised: but the *grantee* shall have it by way of demise. *Dyer*, 56.

Of *grants* some charge the *grantor* with something he was not charged with before; others discharge the *grantee* of something wherewith he was before charged, or chargeable. If a man *grant* to me a rent-charge; and after I *grant* to him, that he shall not be sued for this rent; this is good to bar me of bringing an action, though I may still distrain for the rent; And if one *grants* to his lessee for life or years, that he shall not be impeached for waste; it will be a good discharge, and may be pleaded. 7 *H.* 6. 43. *Bro. Grant*, 175. *Keilw.* 88. See 1 *Rep.* 147. 10 *Rep.* 48. and this Dict. tit. *Condition*.

II. Any Natural Person, or Corporate Body, (not prohibited by law, as infants, feme coverts, monks, &c.) may make a *grant* of lands, and be a *grantor*; and an infant, or woman covert, may be a *grantee*. Though the infant at his full age may disagree to the *grant*, and the husband disagree to the *grant* to his wife. *Perk.* 3, 4. 43. See titles *Infant*, *Baron* and *Feme*, &c.

But herein the law distinguishes between such *grants* as are *void*, and only *voidable*; the first of which are all such gifts, grants or deeds, made by an infant, which do not take effect by delivery of his hand; as if an infant give a horse, and no delivery of the horse with his hand, and the donee take the horse by force of the gift, the infant shall have an action of trespass, for the *grant* was merely void. But if an infant enters into an obligation, makes a feoffment, levies a fine, or suffers a recovery, these are not void, only voidable. *Perk.* §§ 12, 13. 19. See title *Infant*.

A grant by a feme covert is void, for no act of her's can transfer that interest which the inter-marriage has vested in the husband. See 2 *New Abr.* 618. *Perk.* § 6. See title *Baron and Feme*.

*Grants* made by persons *non sanæ memoriæ*, are good against themselves; but they are voidable by their heirs, &c. A man that is born dumb, or dumb and deaf, if he have understanding, by making signs, he may grant his land to another; not one who is born deaf, dumb, and blind also. *Co. Lit.* 2. See title *Ideot*. A person attainted of treason, or felony, may make a deed of gift, or grant, and it shall be good against all persons except the king, and the lord of whom the lands are held, and for relief in prison they may be good against them likewise. *Co. Lit.* 2. *Perk.* § 26. 31.

The grants of persons under duress are *void*; that is, if they were made under an apprehension of some bodily hurt, or if the grantor were imprisoned without cause, and the grantee refused to release or discharge him, unless he made such grant. 2 *Inst.* 483. But menacing to burn houses, or spoil or carry away the party's goods, are not sufficient to avoid the grant: for if he should suffer what he is threatened, he may sue and recover damages in proportion to the injury done him. 4 *Inst.* 485. *Perk.* § 18. See title *Duress*.

If there be father and son of the same name, and the father grants an annuity by his name, without any addition, it shall be intended the grant of the father; and if the son being of the same name with his father grant an annuity without any addition; yet the grant is good, for he cannot deny his deed. *Perk.* § 37.

There are but few (if any) persons excluded from being grantees, therefore a man attainted of felony, murder, or treason, may be a grantee: so the King's villein, an alien, one outlawed in a personal action, or a bastard, may be grantees. *Perk.* § 48. A bastard who is known to be the son of such a one, may purchase, or be a grantee by such reputed name; for all surnames were originally acquired by reputation. *Co. Lit.* 3. 2 *Rol. Abr.* 43, 44.

A feme covert may be a *grantee*, therefore if a rent-charge be granted to a feme covert, and the deed is delivered to her without the privity of her husband, and the husband dies before any disagreement made by him, and before any day of payment, the grant is good, and shall not be avoided, by saying, that the husband did not agree, &c. but the disagreement of the husband ought to be shewn. *Perk.* § 43. See title *Baron* and *Feme*.

Although aggregate Corporations are invisible, and exist only in supposition of law, yet they are capable of taking by grant, for the benefit of the members of the corporation. *Co. Lit.* 9. 1 *Saund.* 344.

GRANTS OF THE KING.—The King's grants are matters of public record: for the King's excellency is so high in the law, that no freehold may be given to, nor derived from, him, but by matter of record. *Doct.* and *Stud. b.* 1. *d.* 8.—To this end a varity of offices are erected, communicating in a regular subordination one with another, through which all the King's grants must pass, and be transcribed and enrolled; that the same may be narrowly inspected by his officers, who will inform him if any thing contained therein is improper, or unlawful to be granted. These grants, whether of lands, honours, liberties, franchises, or aught besides, are contained in charters or letters patent; that is open letters, *literæ patentes*: so called because they are not sealed up, but exposed to open view, with the great seal pendant at the bottom: and are usually directed or addressed by the King to all his subjects at large. And therein they differ from certain other letters of the King, sealed also with his great seal, but directed to particular persons and for particular purposes: which therefore not being designed for public inspection, are closed up and sealed on the outside, and are thereupon called writs-close, *literæ clausæ*; and are recorded in the close-rolls, in the same manner as the others are in the patent rolls. 2 *Comm.* 346. *c.* 21.

Grants or letters-patent must first pass by *bill*; which is prepared by the Attorney and Solicitor General, in consequence of a warrant from the crown: and is there signed, that is subscribed at top, with the King's own *sign-manual*, and sealed with his *privy signet*, which is always in the custody of the principal Secretary of State: and then sometimes it immediately passes under the great seal, in which case the patent is subscribed in these words, *per ipsum regem, by the King himself*. Otherwise the course is to carry an ex-

tract of the bill to the keeper of the *privy-seal*, who makes out a writ or warrant thereupon to the Chancery, so that the sign manual is the warrant to the privy seal, and the privy seal is the warrant to the great seal: and in this last case the patent is subscribed, *per breve de privato sigillo; By writ of privy seal.* But there are some grants which only pass through certain offices, as the Admiralty or Treasury, in consequence of a sign-manual, without the confirmation of either the signet, the great, or the privy seal. 2 *Comm. c.* 21. See 9 *Rep.* 18. 2 *Inst.* 555.

The manner of granting by the King does not more differ from that by a Subject, than the construction of his grants when made. A grant made by the King *at the suit of the grantee*, shall be taken most beneficially for the King, and against the party; whereas the grant of a Subject is construed most strongly against the grantor. Wherefore it is usual to insert in the King's grants, that they are made, not at the suit of the grantee, but *ex speciali gratiâ, certâ scientiâ et mero motu regis; of the King's special favour, certain knowledge, and mere motion*, and then they have a more liberal construction. *Finch. L.* 100. 10 *Rep.* 112.

A subject's grant shall be construed to include many things besides what are expressed, if necessary for the operation of the grant. Therefore, in a private grant of the profits of land for one year, free ingress, egress and regress to cut and carry away those profits are also inclusively granted; and if a feoffment of land was made by a lord to his villein, this operated as a manumission, for he was otherwise unable to hold it. *Co. Lit.* 56. *Litt.* § 206. But the King's grant shall not enure to any other intent, than that which is precisely expressed in the grant. As if he grants land to an alien, it operates nothing; for such grant shall not also enure to make him a denizen, that so he may be capable of taking by grant. *Bro. Ab. Patent*, 62. *Finch. L.* 110.

When it appears from the face of the grant that the King is mistaken, or deceived, either in matter of fact or of law, as in case of false suggestion, misinformation, or misrecital of former grants; or if his own title to the thing granted be different from what he supposes; or if the grant be informal: or if he grants an estate contrary to the rules of law, in any of those cases the grant is absolutely void. *Freem.* 172. For instance, if the King grants lands to one and his heirs-male, this is merely void; for it shall not be an estate-tail, because there want words of procreation, to ascertain the body out of which the heirs shall issue: neither is it a fee simple as in common grants it would be, because it may reasonably be supposed that the King meant to give no more than an estate-tail; the grantee is therefore, if any thing, nothing more than tenant at will. *Finch.* 101, 102. *Bro. Ab. Estates*, 34. *Patents*, 104. *Dy.* 270. *Dav.* 45. 5 *Rep.* 94. *More*, 293.

To prevent deceits of the King with regard to the value of estates granted, it is particularly provided by *stat.* 1 *H.* 4. *c.* 6. that no grant of his shall be good, unless in the grantee's petition for them, express mention be made of the real value of lands. Other statutes have also been passed relative to this subject. The King's grantee shall not forfeit for non-payment of rent, where the rent has been answered before process issued. *Stat.* 21 *Jac.* 1. *c.* 25. Grants of felons' goods how to be inrolled.—*Stat.* 4 & 5 *W. & M. c.* 22. § 1. The Crown restrained from granting lands, except for thirty one years, &c. *Stat.* 1 *Ann. stat.* 1. *c.* 7. 34 *Geo.* 3. *c.* 75, and 48 *Geo.* 3. *c.* 73. See also 39 & 40. *Geo.* 3. *c.* 88. 47 *Geo.* 3. *st.* 2. *c.* 24. 52 *Geo.* 3. *c.* 8. and 59 *Geo.* 3. *c.* 22. as to the disposition of the private property of the King, real and personal; and also as to grants of lands escheated; and which the King may please to restore for the execution of any trusts relating to them; or to reward the discoverers. See also titles *Forfeiture, Trustees.*

Before the statute *de prerogativa Regis*, dowers, advowsons, and other things, have passed by the general *grant of the King;* but by that statute they are to be *granted* in express words. 1 *Rep.* 50. See title *Advowson.*

The King's *grant* is good for himself and successors, though his successors are not named. *Yelv.* 13.

The King may not grant away an estate tail in the Crown, &c. And the law takes care to preserve the inheritance of the King for the benefit of the successor. 2 *And.* 154. *Style*, 263. See *Jenk. Cent.* 307. A *grant* may not be made by the King which tends to a monopoly, against the interest and liberty of the Subject: Nor can the King make a *grant non obstante* any statute made, or to be made; if he doth, any subsequent statute prohibiting what is *granted*, will be a revocation of the *grant.* 11 *Rep.* 87. *Dyer*, 52. Where the King is restrained by the Common-law to make a *grant*, if he makes a *grant non obstante* the Common-law, it will not make the *grant* good: but when he may lawfully make a *grant*, and the law requires he should be fully apprised of what he *grants*, and not be deceived, a *non obstante* supplies it, and makes the *grant* good: If the words are not sufficient to pass the thing granted, a *non obstante* will not help. 4 *Rep.* 35. *Nels. Abr.* 904. If a *grant* is made by the King, and a former *grant* is in being of the same thing, if it be not recited, the *grant* will be void: And reciting a void *grant*, when there is another good, may make the King's *grant* void. *Dyer*, 77. *Cro. Car.* 143. And there may be a *non obstante* to a former *grant.* 5 *Rep.* 94. *Moor*, 293.

The King's *grants* may be void, by reason of uncertainty; as if debts and duties are granted, without saying in particular what duties, &c. 12 *Rep.* 46. But where there is a particular certainty preceding they shall not be destroyed by any uncertainty or mistake which follows: and there is a distinction where a mistake of title is prejudicial to the King, and when it is in some description of the thing which is supplemental only, and not material or issuable. 1 *Mod.* 195. The King *grants* the manor of D. which he has by the attainder of a certain person, &c. and in fact the King hath it not so; this *grant* is void. 10 *Rep.* 109.

If the King *grants* a messuage of the value of 5*l.* a year to A. B. and it be of the yearly value of 10*l.* the value being in the same sentence with the *grant*, will make it void: Though if it be mentioned in another sentence it may be good. *Jenk. Cent.* 261. The *grant* of the King to a Corporation, that they shall not be impleaded for lands, nor for any cause arising there, elsewhere than before themselves, doth not bind the King where he is party; and the King by his *grant* cannot exclude himself from prosecuting pleas of the crown; for it concerns the public government. *Keilw.* 88. *Dyer*, 376. *Jenk. Cent.* 190.

The King cannot grant a thing *intrusted to him in respect of his sovereignty:* as, the lapse of a church, before, or after it becomes void. 2 *Rol.* 187, *l.* 32. 35. Nor purveyance, butlerage, prisage, &c. 2 *Rol.* 187, *l.* 35. Nor, the power to make a dispensation of a statute. 7 *Co.* 36, *b.* So he cannot grant the lands, or goods, of a recusant-convict, before the commission returned. 2 *Rol.* 184, *l.* 20. Nor the lands or goods of one attainted of treason, before his attainder. *Dyer*, 108, *a.*

So the King cannot grant the prosecution, or execution of any penal statute to another; for it is intrusted with him as the head of the public-weal. *R.* 7. *Co.* 37, *a.* Nor, the penalty or benefit of a penal statute, before it be recovered. 7 *Co.* 36, *b.* 37, *a.* Nor any fine or forfeiture of a particular person, before he be convicted.—Declared by *stat.* 1 *W. & M. stat.* 2. *c.* 2. that such grant or promise is illegal and void. See title *Forfeiture;* and further as to the subject of this article, titles *King, Scire facias to repeal patents.*

GRANTS OF OFFICES. The *stats.* 50 *Geo.* 3. *c.* 88. 52 *Geo.* 3. *c.* 40. (temporary acts) provided that no public office, place, or employment, should for certain periods be granted in reversion, or for joint lives, with benefit of survivorship, or for two or more lives in succession.

GRANTZ. Is used for *grandees*, in the *Par. Roll.* 6 *Ed.* 3. *m.* 5, 6.—*Et les ditz Countz, Barons, et autre* Grantz, &c.

GRASS-HEARTH. The *grasing* or turning up the earth with a plough; whence the customary service for the inferior tenants of the manor of Amersden, in Oxfordshire, to bring their ploughs and do one day's work for their lord, was called *grass hurth* or *grass hurt:* and we still say the skin is *grased* or slightly hurt, and a bullet *grases* on any place, when it gently turns up the surface of what it strikes upon. *Paroch. Antiq.* 496, 497.

GRATUITOUS Deeds, &c. such as are made without good and legal consideration. See *Consideration.*

GRAVA. A little wood or grove:—*Mon. Angl. tom.* 2. *p.* 198. *Co. Lit.* 4.

GRAVARE ET GRAVATIO. An accusation or impeachment. *Leg. Etheld. cap.* 19.

GRAVE. The names of places ending with *grave* come from the Sax. *graf*, a wood, thicket, den or cave.

GRAVERS. Of seals and stones shall give to every one their weight of silver and gold, on pain of imprisonment. *Stat.* 7 *Ed.* 3. *cap.* 7. now obsolete.

GRAZIER, *Pecuarius.*] A breeder or keeper of cattle, mentioned in the *stat.* 25 *Hen.* 8. *cc.* 2. 13. See *Cattle.*

GREAT MEN. This expression is sometimes, in ancient statutes, understood of the Temporal Lords in the higher house of Parliament, and sometimes of the members of the House of Commons. See title *Parliament.*

GREAT SEAL OF ENGLAND. See titles *Chancellor, Treason.*

By article 24 of the union between England and Scotland, (see *stat.* 5 *Ann. c.* 8.) it was provided, that there should be one great seal for the United Kingdom of Great Britain, which should be used for sealing writs to summon the parliaments, and for sealing all treaties with foreign states, and all public acts of state which concern the United Kingdom, and in all other matters relating to England, as the great seal of England was then used; and that a seal in Scotland should be kept and made use of in all things relating to private rights, or grants which had usually passed the great seal of Scotland, and which only concern offices, grants, commissions, and private rights within Scotland. On the union between Great Britain and Ireland, no express provision was made by any article of that union, as to the establishing one great seal for the United Kingdom; but various acts (as to the summoning parliament, &c. are required to be done under the great seal of the United Kingdom, and others under the great seal of Ireland; and by § 3. of the Acts of Union, (39, 40 *Geo.* 3. *c.* 67, *British*, and 40 *Geo.* 3. *c.* 38. *Irish*,) it is enacted, That the great seal of Ireland may, if his Majesty shall so think fit, after the union, be used in like manner as before the union, (except where it is otherwise provided by the articles of union,) within that part of the United Kingdom called *Ireland.*

GREE, Fr. *Gre. i. e.* Good liking or allowance.—*Satisfaction;* as to make *gree* to the parties, is to *agree* with and satisfy them for an offence done. And where it is said in our statutes, that judgment shall be put in suspence till *gree* is made to the King of his debt; it is taken for *Satisfaction. Stats.* 1 *R.* 2. *c.* 15. 25 *Ed.* 3. *c.* 19.

GREEN CLOTH. Of the *King's Household*, so termed from the *green* cloth on the table, is a court of justice composed of the Lord Steward, Treasurer of the Household, Comptroller, and other officers; to which is committed the government and oversight of the King's court, and the keeping of the peace within the verge, &c.

GREENHEW OR GREENHUE. The same as *Vert* in forests, &c. *Manwood, par.* 2. *cap.* 6. *num.* 5. See title *Forest.*

GREENLAND COMPANY. A joint stock of 40,000*l.* was, by statute, to be raised by subscribers, who were incorporated: And the Company to use the trade of catching whales, &c. into and from Greenland, and the Greenland seas; they might make Bye-laws for government, and of persons employed in their ships, &c. *Stat.* 4 *& 5 W.* 3. *cap.* 17. But by *stat.* 1 *Ann. c.* 16. any persons who will adventure to Greenland for whale fishing, shall have all privileges granted to the Greenland *Company.* See this Dict. titles *Fish, Fisheries, and Fishing; Navigation Acts.*

GREEN-SILVER. There is an ancient custom within the manor of Writtel, in the county of Essex, that every tenant whose fore-door opens to Greenbury, shall pay a halfpenny yearly to the lord, by the name of *green-silver.* The term *silver*, here, must mean *rent.*

GREEN-WAX. Is where estreats are delivered to the sheriffs out of the Exchequer, under the seal of that court, made in *green-wax*, to be levied in the several counties; this word is mentioned in *stat.* 7 *H.* 4. *c.* 3.

GREENWICH-HOSPITAL. A duty was laid on all foreign-built ships, half of it payable to the Trinity-house, to be applied for the relief of decayed seamen. *Stat.* 1 *Jac.* 2. *cap.* 18. Every Seaman shall allow out of his wages 6*d.* a month for the better support of *the said hospital;* for which duty receivers are appointed, who may depute officers of the customs, &c. to collect the same, and examine on oath masters of ships, &c. *Stat.* 8 *& 9 W.* 3. *c.* 23. *&c.* 10 *Ann. c.* 17. 2 *Geo.* 2. *c.* 7. Provisions for securing the payment of the 6*d. per* month from privateers. 18 *Geo.* 2. *c.* 31. These funds are under the management of the governors of Greenwich Hospital. See 5 *Geo.* 3. *c.* 16. and were further improved by the transfer thither of the Chest from Chatham, 43 *Geo.* 3. *c.* 119. and by proportions of prize money, 46 *Geo.* 3. *cc.* 100, 101.

By *stat.* 54 *Geo.* 3. *c.* 110. provisions were made for preventing the embezzlement of the clothes and property of the hospital.

By *stat.* 55 *Geo.* 3. *cc.* 1. 56. the Chest at Greenwich is dissolved, and the funds carried to and united with the hospital funds; and see *cap.* 133. of the same session, § 6. as to apportioning pensions according to length of service.

*Stat.* 57 *Geo.* 3. *c.* 127. was passed to settle the share of prize money, droits of admiralty, and bounty money payable to Greenwich Hospital, and to secure to the said Hospital all unclaimed shares of vessels found derelict, and of seizures for breach of the laws relating to the Revenue, Colonies, Navigation, or Slave-trade Abolition. See further title *Navy, Seamen.*

GREVE, Sax. *Gerefa.*] or rather *Reve.* A word of power and authority, signifying as much as *Comes* or *vicecomes;* and hence comes our *shreve portreve*, &c. which by the Saxons were written *Sciregerefa, portgerefa.* Lambert in his exposition of Saxon words, *verbo* præfectus, makes it the same with *reve.* See *Hovedon Part. poster. Annal. fol.* 346.

GRILS. A kind of small fish. *Stat.* 22 *Ed.* 4. *c.* 2.

GRITH, *Sax.*] Peace. *Termes de lay.*

GRITHBRECHE, Sax. *Grythbryce*, i. e. *Pacis fractio.*] Breach of the peace.—*In causis Regiis* Grithbreche 100 *Sol. emendabit. Leg. Hen.* 1. *c.* 36.

GRITHSTOLE, Sax, *Sedes Pacis.*] A place of sanctuary See *Fridstol.*

GROATS. The allowance to prisoners kept in execution for debt, is vulgarly so called; it was formerly 4*d.* per day, or 2*s.* 4*d.* per week. It is now 3*s.* 6*d.* See title *Execution.* III. 4.

GROCERS. Were formerly those who ingrossed merchandise. *Stat.* 37 *Ed.* 3. *c.* 5.—It is now a particular and well-known *trade;* and the custom duties for *grocery* wares and drugs, are particularly ascertained, by statutes. See titles *Customs, Navigation Acts.*

GRONNA. A deep pit, or bituminous place, where turfs are dug to burn. *Hoved.* 438. *Mon. Ang. tom.* 1. *p.* 213.

GROOM. The name of a servant in some inferior place; generally applied to servants in stables: But it hath a special signification, extending to *Groom of the Chamber; Groom of the Stole,* &c. which last is a great Officer of the King's household, whose precinct is properly the King's bed-chamber, where the Lord Chamberlain hath nothing to do; *stole* signifies a robe of honour. *Lex Constitutionis, p.* 182. See *Garcio.*

GROOM-PORTER. An officer or superintendant over the royal *gaming-tables;* in Latin, he is stiled *Aulæ Regiæ Janitor Primarius.*

GROSS, *Grossus.*] *In gross,* absolute, intire, not depending on another; as anciently a *villain in gross* was such a servile person as was not appendant or annexed to the Lord, or manor, nor to go along with the tenure as appurtenant to it; but was like the other personal goods and chattels of his lord, at his lord's pleasure and disposal; so also *advowson in gross* differs from *advowson appendant,* being distinct from the manor. *Co. Lit.* 120. See 2 *Comm.* 22.

GROSSE BOIS, Fr. *Gros bois,* i. e. great wood.] Signifies such wood as by the common-law or custom is reputed timber. 2 *Inst.* 642.

GROSS, (Common in, or *Common at large,*) is such as is neither appendant nor appurtenant, to land, but is annexed to a man's person; being granted to him and his heirs by deed: or it may be claimed by prescriptive right, as by parson of a church, or the like corporation sole. This is a separate inheritance, entirely distinct from any landed property. See title *Common.*

GROSS WEIGHT. The whole weight of goods or merchandise, dust and dross mixed with them, and of the chest, bag, &c. out of which *tare* and *tret* are allowed. *Merchant's Dict.*

GROT, Fr.] A den, cave, or hollow place in the ground; also a shady woody place, with springs of water. *L. Fr. Dict.*

GROUNDAGE. A custom or tribute paid for the standing of a ship in a port.

GROUND ANNUAL. A ground rent; payable out of the ground, before the tenement in a burgh is built.—*Scotch Dict.* It is contradistinguished in the Scotch law from *Feu Annual.*—See that title.

GROUSE. The red and black *heath game,* for preserving of which, no heath, furze or fern shall be burnt on any heaths, moors or other wastes, between the 2d of February and 24th of June. *Stat.* 4 *&* 5 *W. & M. c.* 23. See title *Game.*

GROWME. An engine to stretch woollen cloth after it is woven. See the ancient *stat.* 43 *Ed.* 3. *c.* 10.

GROWTH HALFPENNY. A rate so called; and paid in some places for the *tithe* of every fat beast, ox, or other unfruitful cattle. *Clayton's Rep.* 92.

GRUARII, From the Fr. *Gruyer.*] The principal officers of the forest in general.

GUARD, Fr. *Garde.* Lat. *Custodia.*] A custody or care of defence. And sometimes it is used for those that attend upon the safety of the Prince, called the *life-guard, &c.* sometimes such as have the education and *guardianship* of *infants;* sometimes for a *writ* touching *wardship,* as *droit de garde, ejectione de gard,* and *ravishment de gard.* F. N. B. 139. See title *Guardian.*



## GUARDIAN.

Fr. *Gardien,* Lat. *Custos, Guardianus.*] One who hath the charge or custody of any person or thing; but commonly he who hath the custody and education of such persons as are not of sufficient discretion to guide themselves and their own affairs, as children and ideots; (usually the former;) being as largely extended in the common law as *Tutor* and *Curator* among the civilians. *Blount.*

I. *The several kind of Guardians; who may be Guardians; and how Appointed.*

II. *Of the Guardian's Interest in the Body and Lands of the Ward, and what he may lawfully do, so as to bind the Infant.*

III. *Of the Infant's remedy against the Guardian, and of obliging him to Account.*

I. A *Guardian* is either *legitimus, testamentarius, datus,* or *custumarius:* he that is a legitimate or lawful *Guardian* is so *jure communi,* or *jure naturali;* the first as *Guardian* in *chivalry,* in fact, or in right; the other *de jure naturali,* as father or mother. A *testamentary Guardian* was allowed even by the common law; the body of the minor was to remain with him who was appointed, till the age of fourteen; and as for his goods it might be longer, or as long as the testator appointed; *Gardianus datus,* was one appointed by the father in his life-time, or by the Lord Chancellor after the death of the father; and where there is a *Guardianship* by the common-law, the Lord Chancellor can order and intermeddle; but where by statute, he cannot remove either the child, or the *Guardian: Guardianship* by *custom,* is of orphans by the custom of London, and other cities and boroughs; and in copyhold manors, by the custom it may belong to the lord of the manor to be guardian himself, or to appoint one. 3 *Salk. Rep.* 176, 177.

The *Guardianships* by the *common law,* were *Guardians* in *chivalry; Guardians by nature,* such as the father or mother; *Guardians in socage,* who are the next of blood, to whom the inheritance cannot descend, if the father does not order it otherwise; and *Guardian* because of *nurture,* when the father by will appoints one to be *Guardian* of his child. *Co. Lit.* 18. 2 *Inst.* 305. 3 *Rep.* 37.

The several Guardians now in use, may be thus enumerated: 1. By Nature; 2. For Nurture; 3. In Socage; 4. By statute; 5. By Custom in London and other cities and boroughs, &c. (which however, from particular exceptions, do not fall under the general law;) 6. By Election of the Infant; 7. By appointment of the Chancellor; 8. *Ad litem;* 9. By appointment of the Ecclesiastical Court.

1. The Father and (in some cases) the Mother of the child are Guardians by nature. For if an *estate* be left to an infant, the father is by common law the Guardian, and must account to his child for the profits. 1 *Inst.* 88. But an executor may not pay to a father a *legacy* left to an infant; 1 *P. Wms.* 285. See titles *Executor: Legacy.* And with regard to daughters, it seems by construction of *stat.* 4 *&* 5 *P. & M. c.* 8, that the father might by deed or will assign a Guardian to any woman child under the age of 16; and if none be so assigned, the mother shall in this case be *Guardian.* 3 *Rep.* 39.

The said *stat.* 4 *&* 5 *P. & M.* provides, under severe penalties, as fine and imprisonment for years, "That nobody shall take away any maid or woman child unmarried, being within the age of sixteen years, out of or from the possession, custody or governance, and against the will of the father of such maid or woman child, or of such person or persons to whom the father of such maid, or woman child by his last will and testament, or by any other act in his life-

time, hath [appointed] or shall appoint, assign, bequeath, give or grant, the order, keeping, education and governance of such maid or woman child." See this Dict. titles *Marriage, Rape.*

The direct object of the above statute, was to prevent the taking away or marrying maidens under 16, against the consent of their parents. But the statute has prohibited it in terms which imply that the custody and education of such females should belong to the father and mother, or the person appointed by the former. It is observable on this statute, that though the title is confined to maidens being *inheritors*, and the preamble speaks only of such as be heirs apparent, or have real or personal estate, yet the enacting part mentions maidens under 16 generally. See 1 *Inst.* 88, *b. n.* 14. For determinations on this statute see *Ratcliff's Ca.* 3 *Co.* 57. *Poph.* 204. *Cro. Car.* 465. 1 *Sid.* 362. 2 *Mod.* 128. 3 *Mod.* 84. 168.

Many books, especially some of modern date, are very indiscriminate when they mention Guardianship by *nature.* Sometimes the father is styled Guardian by nature, of his *heir apparent*, for the time, in general terms; such as at first appear to intimate that no other ancestor except the father, not even the mother, is entitled to the Guardianship in that right: and accordingly Comyns makes this inference from the language of the books; though perhaps too hastily. See *Com. Dig.* tit. *Guardian*, (C). 3 *Co.* 38, *a.* 6 *Co.* 22, *b.* there cited. In other cases it appears that the father being dead, the mother may have a writ of trespass *quare consanguineum et hæredem cepit;* which imports that *she* may also be Guardian by nature of her heir apparent. The silence in one book as to other ancestors, and the express exclusion of the grandfather in another book, without the necessary explanation, tend to an opinion that all ancestors, except the father and mother, are really excluded. See 1 *Inst.* 84, *b.* 6 *Co.* 22, *b.* However in another place it appears that the grandfather and other ancestors may be Guardians by nature of their heirs apparent, as well as the father and mother; though being liable to be postponed to others, where the father is not, both they and the mother have a title distinguishable from his, in point of inferiority. 3 *Co.* 38, *a.* Further, some modern books do not confine Guardianship by nature to *heirs apparent*, but denominate the father and mother the natural Guardians of *all* their children; and sometimes even the parents of illegitimate issue, seem to have been treated as their natural Guardians. 1 *Ves.* 158. 2 *Atk.* 15. 70. 9 *Mod.* 117. Sometimes also the Guardianship of female children under 16, as impliedly given to the father and mother, by the above mentioned *stat.* 4 & 5 *P. & M. c.* 8. is said to be *jure naturæ.* See the *stat.* & 3 *Co.* 38, *b.*

On the whole it seems, that not only the Father but also the Mother and every other ancestor may be Guardians by nature, though with considerable differences, such as denote the superiority of the father's claim. The father hath the first title to Guardianship by nature, the mother the second: as to other ancestors, if the same infant happens to be heir-apparent to two, perhaps priority of the possession of the person of the infant might probably be allowed to decide the question. While the tenure by Knight's service continued there was another difference, which more strongly marked the superiority of the father's claim; for he was intitled to the custody of the infant's person even against the Lord in chivalry; a preference not allowed to the mother or other relations; and this diversity appears to reconcile the determinations in the old books, which apply only to cases in which the right to the infant's person was in contest with the lord in chivalry. 3 *Co.* 38, *b. Radcliff's Ca.* According to the *strict* language of our law, only an heir apparent can be the subject of Guardianship by nature; which restriction is so true, that it hath even been doubted whether such Guardianship can be of a daughter whose heirship, though denominated *apparent*, yet being liable to be superseded by the birth of a son, is in effect rather of the *presumptive* kind. 3 *Co.* 38, *b.* 1 *Inst.* 84, *a.* Therefore when the term of Guardianship by nature is extended to children in general, or to any besides such as are heirs apparent, it is not conformable to its legal sense, but must be understood to have reference to some rule independent of the common law: as the dictates of nature, and the principles of general reason. Yet we must not however conclude that parents have not a right to the custody of their other children, for the law gives them this custody till the age of 14 by the Guardianship for *nurture*, next mentioned, which, though it differs from that by nature, not only in name, but also in duration, and some other particulars, is founded on a like conformity to the order of nature. 1 *Inst.* 88, *b. n.* 12.

This Guardianship by nature continues till the infant attains the age of 21; it extends no further than the custody of the infant's *person.* *Carth.* 386. 1 *Inst.* 84. It yields, as to the custody of the person, to Guardianship in socage, where the title to both Guardianships concur in the same individuals. 1 *Inst.* 88, *b.* (See *post*, 3.) but Guardianship in socage ending at 14, it seems that after that age the father, or other ancestor having a like title to both Guardianships becomes Guardian by nature till the infant's age of 21. See *Carth.* 384. Lastly the father may disappoint the mother and other ancestors of the Guardianship by nature, by appointing a testamentary Guardian under the *stats.* 4 & 5 *P. & M.* & 12 *Car.* 2. See *post*, 4.

2. *Guardians for nurture* are of course the Father or Mother till the infant attains the age of 14 years. *Moor*, 738. 3 *Rep.* 38. In default of father or mother, the Ordinary usually assigns some discreet person to take care of the infant's personal estate, and to provide for his maintenance and education. 2 *Jones*, 90. 2 *Lev.* 163. See *post*, 9. This Guardianship by nurture, only occurs where the infant is without any other Guardian; and it has been said, that none can have it except the father or mother. 8 *E.* 4. 7, *b. Bro. Gard.* 70. 3 *Co.* 38. It extends no further than the custody and government of the infant's person; and determines at 14 in the case both of males and females. *Ibid. Comyns* refers to *Fleta*, as if according to that ancient book, grandfathers and great grandfathers might be Guardians by nurture. But the statute cited by him doth not point at this species of Guardian, it describing the *patria potestas* in general, and being apparently borrowed from the text of the Roman Law; nor will it bear the least application to Guardianship as our own law regulates it. 1 *Inst.* 88, *b. in n.* 13. *ad. fin.*

3. *Guardians in Socage*, are also called Guardians by the common law. Wardship is incident to tenure in socage, but of a nature very different from that which was formerly incident to knight-service. For if the inheritance descend to an infant under 14, the wardship of him does not, nor ever did, belong to the lord of the fee: because in this tenure no military or other personal service being required, there was no occasion for the lord to take the profits in order to provide a proper substitute for his infant tenant. See this Dict. title *Tenure.*

This kind of Guardianship takes place only when the minor is entitled to some estate in lands; and then by the common law the Guardianship devolves upon his Next-of-kin, to whom the inheritance cannot possibly descend; as where the estate descended from his father, in this case his uncle by the mother's side cannot possibly inherit this estate, and therefore shall be the Guardian. *Litt.* § 123. For the law judges it improper to trust the person of an infant in his hands, who may by possibility become heir to him; that

there may be no temptation, nor even suspicion of temptation, for him to abuse his trust. 1 *Comm. c.* 17. And though this provision has been considered as arising from harsh and barbarous principles, experience shows that it is founded in sound policy and humanity. See 2 *P. Wms.* 262. 1 *Inst.* 88.

Guardianship in socage, like that in chivalry, springs wholly out of tenure. It is for this reason that the title to it cannot arise, unless the infant is seised of lands, or other hereditaments, *lying in tenure*, holden by socage. 1 *Inst.* 87, *b.* Like Guardianship in chivalry, it is deemed to take place on a descent only, though the contrary has been argued. 2 *Mod.* 176. The title to this Guardianship is without any distinction between the whole and the half blood. If there are two or more disinterested relations in equal degree, he who first gains possession of the heir shall have the custody of him; except where they happen to be brothers or sisters, or to be the infant's lineal ancestors, the law preferring the eldest in the former case, and the father or other male ancestor in the latter. But if the infant derives lands both by descent *ex parte paternâ* and *ex parte maternâ*, in which case it may be possible not to find any next of kin incapable of inheriting to the infant, the next of kin on either side first seizing the infant is entitled to the custody of his person; and the custody of the lands coming *ex parte paternâ* goes to the maternal heir, and so *vice versâ*. Should, however, the infant derive lands by descent in such a way, as lets in both the paternal and maternal blood successively to the inheritance, but with a preference of the former, it seems unsettled who shall have the Guardianship. If the person entitled to be Guardian in socage is himself under custody of a Guardian, the latter is entitled to the custody of both, to the former in his own right, and to the latter *pur cause de Ward*, that is, in right of his wardship of the former; A species of Guardianship distinct from all others above enumerated. And it seems that only Guardian in chivalry and in socage could be Guardian *pur cause de Ward*. See 2 *Ro. Ab.* 35. 40. *Vaugh.* 184.

Guardianship in socage, being wholly for the infant's benefit and not in any respect for the Guardian's profit, is not a subject either of alienation, forfeiture or succession, as Wardship in chivalry was; and consequently if the Guardian in socage becomes incapable or dies, the Wardship devolves on the person next in degree of kindred to the infant, not being inheritable to him. Some ancient cases seem to shew that under certain circumstances Guardianship in socage might be assignable. See *F. N. B.* 143. *P. Fitz. Ab. Garde*, 161. But according to the doctrine and practice of later times, the acknowledged qualities of Guardianship in socage being, that it is a personal trust wholly for the infant's benefit, and neither transmissible by succession nor devisable, they are not consistent with its being assignable; and there is Lord Chief Justice *Vaughan's* authority for saying that even in his time common experience proved the contrary. See *Plowd.* 293. *Vaugh.* 181. *Gilb. Rep. Eq.* 177.

This Guardianship extends not only to the person and socage estates of the infant, but also to his hereditaments not lying in tenure; and even to his copyhold estates, unless there is a special custom for the Lord's appointing a Guardian of them. 1 *Inst.* 87, *b.* 1 *Ro. Ab.* 40. *Egleton's Ca. Hutt.* 17. 2 *Lutw.* 1181. But whether the Guardian in socage is entitled to take into his custody the infant's personal estate, is not ascertained by any express authority. It seems however that personalty is included except where by the custom of a particular place it happens to be liable to a different custody: and this opinion is founded on the idea that the custody of an infant's person draws after it the custody of every species of property for which the law hath not otherwise provided: which receives some countenance from the instances of copyholds, and hereditaments not lying in tenure: for including which it will be difficult to account by any other reason than that above given for including personalty. It is also strongly confirmed by the manner in which the *stat.* 12 *Car.* 2. *c.* 24. regulates the power of the Guardian, which it enables a father to appoint: after authorising such Guardian to take the custody of the infant's *personal estate*, as well as of his lands, tenements, and hereditaments, it provides that he may bring such action or actions in relation thereunto, as by law a Guardian in common socage might do; words almost necessarily importing that the personal estate is equally an object of the custody of Guardian in socage with the infant's real property; though a contrary opinion is hinted by *Vaughan*, C. J. See *Vaugh.* 186.

Guardianship in socage is superseded both as to the body and lands, if the father exercises his power of appointing a testamentary or other Guardian according to *stat.* 12 *C.* 2. *c.* 24. (See *post*, 4.) And regularly it ends, when the infant whether male or female, attains 14: though some say that this must be understood only where another Guardian, either by election of the infant or otherwise, is ready to succeed; and that the Guardianship in socage continues in the mean time. *And.* 313. At that age however it seems the heir may oust the Guardian in socage, and call him to account for the rents and profits. *Litt.* § 123. *Co. Lit.* 89. It was in this particular of Wardship as also in that of marriage, and in the certainty of the render or service, that the socage tenures had so much the advantage of the military ones. See title *Tenure*. But as the Wardship ceased at 14, this disadvantage attended it: that young heirs being left at so tender an age to choose their own Guardians till 21, might make an improvident choice. Therefore when almost all the lands in the kingdom were turned into socage tenures, by the *stat.* 12 *Car.* 2. *c.* 24. that statute gave the power of appointing the testamentary Guardian next mentioned. If no such appointment be made, the Court of Chancery will frequently interpose, and name a Guardian, to prevent an infant heir from improvidently exposing himself to ruin. 2 *Comm.* 88. *c.* 6. See *post*, 7. and title *Recto de Custodia*.

4. The *statute* 12 *Car.* 2. *c.* 24. considering the imbecility of judgment in children of the age of 14, and the abolition of Guardianship in chivalry; (which lasted till 21. See *post*, II.) enacts, that any Father, under age or of full age, may by deed or will attested by two witnesses, dispose of the custody of his child, either born or unborn, to any person except a popish recusant, either in possession or reversion till such child attains the age of 21. These are called Guardians by statute; or Testamentary Guardians.

The substance of this Parliamentary regulation is, that the father shall have the power, though under 21.—That he shall have it as to *all* his children under 21, and unmarried at his decease, or born after—That he may appoint any person except popish recusants.—That the appointment may be either in possession or remainder—That he may appoint the Guardianship to last till 21; or any *less* time—That the appointment shall be effectual against all claiming as Guardians in socage or otherwise—That the Guardian so appointed shall have ravishment of ward or trespass, and recover damages for the Ward's benefit—That the Guardian shall have the custody of the infant's estate both real and personal, and have the same actions in relation to them as a Guardian in socage.—Finally that the statute shall not prejudice the custom of London, or any other city or corporate town. For cases on the construction of this statute, see *Vin. Ab.* and *Com. Dig.* title *Guardian*. The nature of this new kind of Guardianship, which the statute professedly models after that in socage, except as to duration, is particularly discussed in the case of *Bedell* v. *Constable*, *Vaugh.* 177. and in Lord *Shaftesbury's Case*, 2 *P. Wms.* 102. *Gilb.* 172.

A reputed or putative father cannot appoint Guardians under this statute to a natural child; but where he has named Guardians by his will to an illegitimate child, the Court of Chancery will appoint the same persons Guardians without any reference to a master for his approbation. 2 *Bro. C. R.* 583. and see this Dict. title *Marriage*.

Though there is no decided case that Guardians can be appointed for a child, by a *Stranger*, during the life of the parent, yet the law will take care that the child shall be educated according to his expectations; in cases where the child is benefited by the will, &c. of such stranger. See *Powell* v. *Clever*, 2 *Bro. C. R.* 500.

A grandfather cannot appoint Guardians to his grandson under this statute: but he may give his estate to him on condition that certain persons be his Guardians; and if the father of the legatee do not submit to the will, the Chancery will make the father's opposition work a forfeiture of his son's estate. *Ambl.* 306.

5. We may here just mention that there is another species of *customary Guardianship* besides that in London and certain cities and boroughs; where, by the special custom of a manor, the Lord names, or is himself, the Guardian of an infant copyholder. See *Com. Dig.* tit. *Copyhold* (K. 5.)—The nature of this Guardianship, depends wholly on the custom of the particular manor; and though it is not expressly saved by the *stat.* 12 *Car.* 2. yet it has been held that the father's appointment of the custody of his child under that statute, will not extend to copyhold estates. 2 *Lutw.* 1181. 3 *Lev.* 395. *Comb.* 253.

6. The right of *electing* a Guardian by an infant, arises only when from a defect in the law, (or rather in the execution of it,) the infant finds himself wholly unprovided with a Guardian. This may happen either *before* 14, when the infant has no such property as attracts a Guardianship by tenure, and the father is dead without having executed his power of appointment, and there is no mother; or *after* 14, when the custody of the Guardian in socage terminates, and there is no appointment by the father under the *stat.* 12 *Car.* 2. *Lord Coke* only takes notice of such election where the infant is under 14; and as to this omits to state how, or before whom, it should be made; see 1 *Inst.* 87, *b.* nor does this defect seem supplied by any prior or contemporary writer. As to a Guardian after 14, it appears from the ending of Guardianship in socage, at that age, as if the common law deemed a Guardian afterwards unnecessary. However since the *stat.* 12 *Car.* 2. *c.* 24. it has been usual in defect of an appointment under the statute, to allow the infant to elect one for himself; and this practice appears to have prevailed even in some degree before the Restoration. Such election is said to be frequently made before a Judge on the circuit. 1 *Ves.* 375. But this form does not seem essential. The late *Lord Baltimore* when he was turned of 18, having no Testamentary Guardian, and being under the necessity of having one for special purposes relative to his proprietary government of Maryland, named a Guardian by deed; a mode adopted by the advice of Counsel.—It seems in fact as if there was no prescribed form of an infant's electing a Guardian after 14, any more than there is before, and therefore election by parol, though unsolemn, might be legally sufficient. The deficiency in precedents on this occasion is easily accounted for; this kind of Guardianship being of very late origin, unnoticed as it seems by any writer before *Coke*, except *Swinburn*; (*Testam. edit.* 1590. 97, *b.*) and there being yet no cases in print to explain the powers incident to it, or whether the infant may change a Guardian so constituted by himself. *Coke*, though professing to enumerate the different sorts of Guardianship, omits this in one place; whence perhaps it may be conjectured that in his time it was in strictness scarcely recognised as legal. 1 *Inst.* 88, *b. in n.*

7. As to Guardian by appointment of the Lord Chancellor; it is not easy to state how this jurisdiction was acquired: It is certainly of no very ancient date, though now indisputable.

The first instance of such a Guardian, appointed on petition without bill, was in the year 1696, in the case of one Hampden. But since that time the Court of Chancery has exercised this power, without its being once called in question; therefore in the case of *Lady Teynham* v. *Leonard*, in *Dom. Proc. An.* 1724. the Counsel for the respondent stated it as a thing fixed, that the Lord Chancellor was entrusted with that part of the Crown's prerogative, which concerned the Guardianship of infants. *Bro. P. C.* Under the same idea, too, the marriage Act, *stat.* 26 *Geo.* 2. *c.* 33. (§ 11.) refers to the Chancellor for the appointment of a Guardian, to consent to marriage, where the infant is without a Guardian and the mother is not living. 1 *Inst.* 88, *b. in n.* See also 1 *Bro. C. R.* 556. The Court never appoints a Guardian to a woman after marriage. 1 *Ves.* 157.

8. All Courts of Justice have a power to assign a *Guardian* to an infant to sue, or defend actions, if the infant comes into court and desires it: or a Judge at his chambers, at the desire of the infant, may assign a person named by him to be his *Guardian*; but this last is no record until entered and filed by the clerk of the rules. *F. N. B.* 27. *L.* 1 *Inst.* 88, *b. n.* (16.) 135 *b, n.* (1.) 1 *Lil.* 656. 2 *Leon.* 238. And this is called a Guardian *ad litem*. See title *Equity*.

9. Guardian by appointment of the *Ecclesiastical Court* seems now perfectly insignificant, and merely on a par with other Guardians *ad litem*. The right of appointment is however *claimed* by that Court, as to personal estate; and, if there is no other Guardian by tenure or otherwise, for the person also; but the following detail will shew with how little effect.

*Swinburne* takes notice of such a Guardian; but confines his observations on the appointment, and his extent of power to the custom within the province of York. *Testam.* 1*st ed.* 99, *b.* In a case in the Court of K. B. *Lord Hale* admitted the right of the Ecclesiastical Court to appoint a Curator of the personal estate; and after that Judge's death the Court inclined to the same opinion. 2 *Lev.* 162. *T. Jo.* 90. In another case, soon after, the same court allowed the right as to the infant's portion, but denied it over the person. 3 *Keb.* 384. In the next case, the question as to the right was largely debated on a plea in prohibition. This alleged that by the common law, used and approved in England, if any person by his will devises any goods to his children, the Ordinary before whom the will is proved hath used to commit the custody of the sons and their portions till 14, and of the daughters and their portions till 12, except where they are in the custody of any other by reason of tenure, or by the father's appointment; and if any person detained such infants, or their portions, the Ordinary hath also used to compel the delivery of them by Ecclesiastical censures. 2 *Lev.* 217. But on a demurrer this plea was over-ruled, and the prohibition ordered to stand, the latter being founded on the libel in the suit in the Ecclesiastical Court which had stated the right in a more extensive way, *viz.* that by the Ecclesiastical Law, every person having the tuition of any infant under age, by the will of the father, or *per judicem competentem*, ought to have the custody of the infant and suit in the Ecclesiastical Court for the detainer. After this case, nothing appears in the books on the subject for a long time, but a cursory notice by *Lee, J.* of the Ecclesiastical Court's appointment without objection, saying the course of that court is, that if the infant is under seven years of age, they choose a *Curator*, but if he is seven he chooses. *Fitzgib.* 164. By a loose note of a later case it appears that *Lord Hardwicke* said, that only Guardians *ad litem* can be appointed by the Ecclesiastical Court. 14 *Vin. Abr.* 176, *pl.* 7. *in n.* In another case how-

ever, reported more at length, the same Judge reprobated it as a presumption in the Ecclesiastical Court to appoint a Guardian of the person and estate, and declared their appointment except when a suit was depending to be an interference with his power as Chancellor; and even recommended to the Attorney General to consider whether a *quo warranto* would not lie in such a case against the Ecclesiastical Court. 3 *Atk.* 631. In a subsequent case in B. R. (Miss Cattley's) the power of appointment in the Ecclesiastical Courts was considered as confined to Guardians *ad litem*, and therefore perfectly insignificant. 3 *Burr.* 1436. See 1 *Inst.* 88, *b. in n.*

The above recapitulation, as to Guardians, is exclusive of any thing relative to the Royal Family. See the arguments in the case on the King's right, in respect to the education and marriage of his grand-children, which was referred to the Judges in the reign of George I. *Fort.* 401. See also the *stat.* 12 *Geo.* 3. *c.* 11. and this Dict. tit. *King*.

The following miscellaneous observations may serve further to illustrate the above propositions:

*Guardianship* is a thing cognisable by the temporal courts, where a devise is made of it, which courts are to judge whether the devise be pursuant to the statute. 1 *Vent.* 207.

The husband of a woman under age cannot disavow a *Guardian* made by the court for his wife. 1 *Vent.* 185. An infant, it is said, cannot revoke the authority of the *Guardian:* but the court may discharge one *Guardian*, and assign another at their discretion; and the justices of *Nisi Prius*, &c. may assign a new *Guardian*. *Palm.* 252. *Style*, 456. *Noy*, 49. 1 *Danv. Abr.* 604.

The eldest son of the half blood shall be Guardian in socage, to a son by a second venter; and when the minor attains the age of 14 years, he may choose his Guardian before a judge at his chambers, or in court, or in the Chancery. *Cro. Jac.* 219. Though a father is Guardian by nature, yet a man may be Guardian to an infant against his father, for prevention of waste; which is a forfeiture of Guardianship. *Hard.* 96.

If a woman hath issue a son by a former husband, and marries a second husband, seised of socage lands, by whom she has issue another son, and the husband and wife die, leaving the second son under fourteen, his brother of the half blood shall be Guardian in socage; as next of kin, to whom the inheritance cannot descend. *Cro. Eliz.* 825. 2 *And.* 171. *Moor*, 635. 2 *Jon.* 17.

An infant, idiot, lunatick, *non compos*, one blind and dumb, deaf and dumb, or leper removed, cannot be Guardian in socage. *Co. Lit.* 88, *b.*

It is clearly agreed, That the King, as *pater patriæ*, is universal Guardian of all *infants*, *ideots*, and *lunaticks*, who cannot take care of themselves; and as this care cannot be exercised otherwise than by appointing them proper curators or committees, it seems also agreed, that the King may, as he has done, *delegate the authority to his Chancellor;* therefore, at this day, the *court of Chancery* is the only proper court which hath jurisdiction in *appointing* and *removing Guardians*, and in *preventing them* and *others* from *abusing* their *persons* or *estates*. 2 *Inst.* 14. 4 *Co.* 126. *Staundf. Præ.* 37. See title *Ideots* and *Lunaticks*, and *ante*, 7.

And as the Court of Chancery is now invested with this authority, hence in every day's practice we find that court determining, as to the right of Guardianship, who is the next of kin, and who the most proper *Guardian;* as also orders are made by that court on petition, or motion, for the provision of infants during any dispute herein; as likewise Guardians removed or compelled to give security; they and others punished for abuses committed on infants, and effectual care taken to prevent any abuses intended them in their persons or estates; all such wrongs and injuries being reckoned a contempt of that court, it having by an established jurisdiction, the protection of all persons under natural disabilities. 2 *Mod.* 177.

II. Though *Guardianship in Chivalry* is now abolished by *stat.* 12 *C.* 2. *c.* 24. already so often mentioned; it may be useful as well as curious to consider the following summary concerning it. See 1 *Inst.* 88, *b. n.* 11.

This guardianship could only be where the estate vested in the infant by *descent*.—All males under 21 at the ancestor's death were liable to it; but not females, unless they were under 14.—It extended not only to the person of the infant, but also to all such of his lands and tenements as were within the Guardian's seignory; and if the King was Guardian in respect of a tenure *in capite*, then to the whole of the infant's estate of whomsoever holden, whatever the tenure; and whether lying in tenure or not.—If the infant heir held lands by knight's service of several lords, each had the wardship of the land within his seignory; and as to the body, the wardship of it belonged to that lord of whom the tenure was most ancient, he being stiled the lord by priority, and the other lords by posteriority: but if any lands of the infant were holden of the King by knight's service *in capite*, he was intitled to the wardship both of the infant's body and all his lands so held of the crown or of others by knight's service.

This guardianship continued over males till 21, over females till 16 or marriage, when it determined; if the tenure were of a Subject, the heir might enter on the lord immediately; but if the King had the wardship, then the heir was not entitled to take possession of the land without suing for livery to the Crown, which was a process both nice and expensive. See 1 *Inst.* 77, *a.*—It had a preference with respect to the custody of the infant's body over every other species of wardship, except only that of the father where the infant was his heir apparent; even the mother being excluded.—It entitled the lord to make sale of the marriage of the infant, subject only to the restriction of not disparaging; and if the infant refused the marriage tendered by the lord, or married after such a tender and against the lord's consent; in the former case the infant was liable to the payment of a sum equal to the value of the marriage, that is, to the profit which the lord might have made by the sale of it; in the latter case, the heir female paid the same sum as for a refusal, but the heir male was charged the double value, which was called a forfeiture of marriage.—The Guardian in chivalry was not accountable for the profits made of the infant's land during the wardship, but received them for his own private emolument, subject only to the bare maintenance of the infant.—Lastly, Guardianship in chivalry being deemed more an interest for the profit of the Guardian, than a trust for the benefit of the Ward, was saleable and transferable like the ordinary subjects of property, to the best bidder; and if not disposed of was transmissable to the lord's personal representatives.

The above general explication of the nature of wardship in chivalry may well excite a strong idea of the evils necessarily incident to it: and it is natural to wonder how this species of Guardianship should be patiently endured for several centuries after the conquest, and even remain unreformed by any effectual checks to soften its rigour till it was wholly taken away at the Restoration; the true period when Britons gained more real liberty, than any other that can be named in history; by no means even excepting the Revolution: and of this proposition the *Habeas-corpus-act* and the statute for abolishing *tenures* are most pregnant proofs; statutes both made in the reign of Car. II. and as far preferable to the vaunted *Bill of Rights*, as practical liberty is to theoretical doctrines.

Perhaps the facility of evading this Guardianship in chivalry, which could only be on a *descent*, may account both for its being so long submitted to, and for its producing consequences less extensively pernicious than seem almost necessarily incident to it. Various modes of preventing the descent were practised. One was enfeoffing the heir in the ancestor's life-time: another, the enfeoffing strangers on condition to pay a sum, far exceeding the value of the land, at a time so fixed as to correspond with the heir's coming of age, who might then enter for breach of the condition. See *Stat. Marlbridge*, 52 *H.* 3. *c.* 6. 2 *Inst.* 109. When these modes were declared to be fraudulent, and therefore checked by the said statute, a third more fit to attain the same end succeeded; for *uses* and *trusts* being invented, and Guardianship in Chivalry being only of *legal* estates, it became the fashion to make feoffments to uses, as well for preventing wardship, as for avoiding reliefs and forfeitures, and indirectly exercising the power of devising; and thus the heir taking only the use of the land on a descent, instead of becoming the legal tenant, he of course escaped being in wardship. This evasion continued in practice till 4 Hen. 7. when the Legislature thought proper once more to interfere in favour of the lord, and made the heir of *cestui que use* liable to wardship in chivalry. See *stat.* 4 *Hen.* 7. *c.* 17. 1 *Inst.* 84, *b.* 2 *Inst.* 110. For some time after this there seems to have been no other means of preventing wardship in chivalry than the ancestor's making a lease for life, with remainder to his heir apparent in fee; but this protection of wardship in chivalry was soon followed by a great diminution of its profits, for in the succeeding reign the statutes of Wills gave the power of devising, so as to deprive the lord of the wardship of two thirds of the land holden by knight's service; in which contracted state this odious species of Guardianship was suffered to languish, till it was entirely abolished, with the other oppressive appendages of military tenures, by the famous statute 12 *Car.* 2. *c.* 24.—See 2 *Inst.* 110, 111. *Smith's Rep. Angl.* (*English Edit.*) *b.* 3. *c.* 5. *Staundf. P. C.* 4 *Inst.* 188. *Cromp. Jurisd.* 112, *a.*—125. *Mad. Exch.* 221. *Ley* on *Words*, and *Liv.* 1 *Inst. lib.* 2. *c.* 4. and the abridgments tit. *Garde* and *Gardien*.

*Guardian* in Socage shall make no waste, nor sale of the inheritance, but keep it safely for the heir: and where there hath been some doubt of the sufficiency of a *Guardian* in socage, the Chancery hath obliged him to give security. 2 *Mod.* 177. Also a Guardian may be ordered to enter into security by recognisance, not to suffer a female infant to marry whilst in his custody; and to permit other relations to visit her, &c. 2 *Lev.* 128. And the court of Chancery will make such *Guardian* give security not to marry the infant without the court is first acquainted with it. 2 *Chan. Rep.* 237.

Before the *stat.* 12 *Car.* 2. *c.* 24. Tenant in socage might have disposed of his land, in trust for the benefit of the heir; but it is said he could not devise or dispose of the Gurdianship or custody of the heir from the next of kin to whom the land could not descend, because the law gave the Guardianship to such next of kin. *Keilw.* 186. But now tenant in socage may nominate whom he pleases to have the custody of the heir, and the land shall follow the Guardianship, as an incident given by law to attend the custody; and such special *Guardian* cannot assign the custody by any act, the trust being personal; nor shall it go to the executor or administrator of the *Guardian*, but determines by his death. *Vaug.* 180. *Dyer*, 189.

As the law hath invested *Guardians* not with a bare *authority* only, but also with an *interest* till the *Guardianship* ceases; so it hath provided several remedies for *Guardians* against those who violate that interest: at Common-law there were remedies both droitural and possessory, to recover the *Guardianship*. 2 *Inst.* 90. 9 *Co.* 72.

A *Guardianship* of a minor is an interest in the body and lands, &c. of one within age. *Guardian* to infants, appointed by the court to sue, may acknowledge satisfaction upon the record, for a debt recovered at law for the infant. *Trin.* 23 *Car.* 2. *B. R.* A *Guardian* in socage may keep courts, in the infant's manors, in his own name, grant copies, &c. He is *dominus pro tempore*, and hath an interest in the lands. *Cro. Jac.* 91. Such *Guardian* may let the land for years, and avow in his own name and right; and his lessee for years may maintain ejectment; but he cannot present to an advowson, for which he may not lawfully account; and the infant must present of whatsoever age. *Cro. Jac.* 98, 99. Though it is said, if the infant be within the age of discretion, his *Guardian* may present. 8 *E.* 2. 10. See 1 *Inst.* 89, *a.* and this Dict. tit. *Advowson*.

In another place *Lord Coke* extends the doctrine so far as to say that the infant shall present whatsoever his age may be. 3 *Inst.* 156. But some suppose the Guardian to have the right of presenting in the name of the infant, in general; others admit the right of the infant: but add that if he be of such tender years as not to have any discretion, then the Guardian should present for him. *Vin. Abr.* tit. *Guardian Q. pl.* 2. But the law seems now settled in the full extent of *Lord Coke's* opinion; by a determination of *Lord Chancellor King*. An advowson was conveyed to trustees on trust to present such person as the grantor his heirs and assigns should by deed appoint: and, on the principle that an infant of any age may present, the Chancellor confirmed an appointment by an infant heir, though it appeared that the child was not a year old, and that the Guardian guided the child's hand in making his mark and putting his seal. 2 *Eq. Ab. Infant B. pl.* 3. *Vin. Abr. Collation A. pl.* 10. and see 3 *Atk.* 710. It still remains however undecided whether the want of discretion might not induce a court of equity to controul the exercise of this right by an infant, in case a presentation should be obtained without the concurrence of his Guardian. 1 *Inst.* 89, *a. in n.* 1.

A *Guardian* for nurture of the minor, appointed by will, hath power to make leases at will only. *Cro. Eliz.* 678. 734. A testamentary Guardian cannot make a lease of the infant's lands; but such lease is absolutely void. 2 *Wils.* 129. 135. *Guardians* are to take the profits of the minor's lands, &c. to the use of the minor, and account for the same: they ought to sell all moveables in a reasonable time, and turn them into land or money, except the minor is near of age, and may want such goods himself; and they shall pay interest for money in their hands, which might have been put out at interest; in which case it shall be presumed the *Guardians* made use of it themselves. 3 *Salk.* 177.

III. The Power and reciprocal duty of a Guardian and Ward are the same *pro tempore* as that of parent and child; but the Guardian when the Ward comes of age is bound to give him an account of all that he has transacted on his behalf, and must answer for all losses by his wilful default or negligence. In order therefore to prevent disagreeable contests with young gentlemen, it has become a practice for many Guardians, of large estates especially, to indemnify themselves by applying to the Court of Chancery, acting under its direction and accounting annually before the officers of that court. And that court in case any Guardian abuses his trust will check and punish him, and sometimes proceed to the removal of him and appoint another in his stead. 1 *Sid.* 424. 1 *P. Wms.* 702. See 1 *Comm.* 463. *c.* 17. and *ante*, I. 7.

At Common-law, both a *prohibition* of waste, and an *action* of *waste*, lay against a guardian in chivalry and a guardian in socage, for *voluntary*, but not for *permissive*, *waste*, or *waste* done by a *stranger*. 2 *Inst.* 305.

By the Common-law, Guardians in socage are accountable

to the infant, either when he comes to the age of fourteen years, or at any time after, as he thinks fit. *Co. Lit.* 87. And so is one who is Guardian by nature after the infant's age of 21. See *ante*, I. 1. and 1 *Inst.* 886. *n.* 9. But the Guardian on his account, shall have allowance of all reasonable expences; and if he is robbed of the rents and profits of the land, *without his default or negligence*, he shall be discharged thereof upon his account; for he is in the nature of a bailiff or servant to the infant, and undertakes no otherwise than for his diligence and fidelity. *Co. Lit.* 89, *a.*

But against a testamentary or other Guardian, whose authority doth not determine till the infant is 21, or being a female attains that age or marries, the infant cannot have action of account before; for the rule of the Common-law is that account shall not lie while the Guardianship continues. But in equity the infant may by *prochein amie* sue his Guardian for an account during the minority. 2 *Vern.* 342. 2 *P. Wms.* 119. 1 *Vez.* 91. 3 *Atk.* 625.

A Guardian cannot be charged in account as a receiver: because then he would lose his costs and expences: these it is said being in general allowed only to Guardians and bailiffs and not to receivers. See 1 *Inst.* 89, *a. n.* 2. 172, *a.*

If a Guardian takes a bond for the arrears of rent, he thereby makes it his own debt, and shall be charged with it. 2 *Chan. Rep.* 97. If a man during a person's infancy receives the profits of an infant's estate, and continues to do so for several years after the infant comes of age, before any entry is made on him; yet he shall account for the profits throughout, and not during the infancy only. 1 *Eq. Abr.* 280. A receiver to the *Guardian* of an infant, who has had his account allowed him by the *Guardian*, shall not be obliged to account over again to the infant when he comes of age. *Preced. Chan.* 535.

A *Guardian* shall answer for what is lost by his *fraud, negligence* or *omission*; but *not* for any *casual events*, as where the thing had been well but for such an accident. *Litt.* 123. By statute *Mag. Cart.* 9 *H.* 3. *c.* 3. *Guardians* were to retain the lands till the heir comes of age, and then restore the same as fully stocked, &c. as received. By *stat.* 6 *An. c.* 18. Persons who are Guardians or trustees for infants holding over, without the consent of the person next intitled, shall be adjudged trespassers, and be accountable for profits, &c. By *stat.* 4 *Ann. c.* 16. § 27. Action of account may be brought against the executors or administrators of a Guardian, &c.

FORM OF ELECTION OF A GUARDIAN BY A MINOR.

KNOW *all men by these presents, That I A. B. son and heir, of, &c. deceased, being now about the age of eighteen years, have elected and chosen, and by these presents do elect and chuse C. D. of, &c. to be Guardian of my person and estate, until I shall attain the age of twenty-one years, and I do hereby promise to be ruled and governed by him in all things touching my welfare; and I do authorise and impower the said C. D. to enter upon and take possession of all and every my messuages, lands, tenements, hereditaments and premises whatsoever, situate, lying and being in, &c. in the county of, &c. or elsewhere, whereunto I have or may have any right or title, and to let and set the same, and receive and take the rents, issues and profits thereof, for my use and benefit, during the term aforesaid; giving and hereby granting unto the said C. D. my full power in the said premises; and whatsoever he shall lawfully do or cause to be done in the premises, by virtue hereof, I do hereby promise to ratify and confirm. In witness, &c.*

As to *Orphans* under the custom of London, see that title.

GUARDIAN DE L'ESTEMARY. The *Guardian* or warden of the *Stannaries*, or mines in the county of Cornwall, &c. See title *Stannaries*.

GUARDIANS DE L'EGLISE. Churchwardens. See that title.

GUARDIANS OF THE PEACE. Those that have the keeping of the peace; *wardens* or *conservators* thereof. *Lamb. Eiren, lib.* 1. *c.* 3. See title *Justices of the Peace.*

GUARDIAN (OR WARDEN) OF THE CINQUE PORTS. A Magistrate that hath the jurisdiction of the ports or havens, which are commonly called the *Cinque Ports*, who has there all the authority and jurisdiction the Admiral of England has in places not exempt: and Camden believes this *Warden of the Cinque Ports* was first erected among us in imitation of the Roman policy, to strengthen the sea coasts against enemies, &c. *Camd. Br.* 238. See title *Cinque Ports.*

GUARDIAN OF THE SPIRITUALTIES. The person to whom the *spiritual jurisdiction* of any diocese is committed, during the *vacancy* of the see, is called by this name. See *stat.* 25 *H.* 8. *cap.* 21. and also *stat.* 3 *E.* 1. *c.* 21. in which the word *Guardian* seems applicable to this officer, The *Archbishop* is *Guardian of the Spiritualties* on the vacancy of any *see* within his province; but when the *archiepiscopal see* is vacant, the dean and chapter of the archbishop's diocese are *Guardians of the Spiritualties, viz.* the Spiritual jurisdiction of his province and diocese is committed to them. 2 *Rol. Abr.* 22. 223. The *Guardian of the Spiritualties*, it is said, may be either *Guardian in law, jure magistratûs*, as the archbishop is of any diocese in his province; or *Guardian by delegation*, being he whom the *archbishop* or *vicar general* doth for the time appoint. The *Guardian of the Spiritualties* hath all manner of Ecclesiastical jurisdiction of the courts, power of granting licenses and dispensations, probate of wills, &c. during the vacancy, and of admitting and instituting clerks presented; but such Guardians cannot, as such, consecrate or ordain, or present to any benefices. See *stat.* 13 *Eliz. c.* 12. *Wood's Inst.* 25. 27.

GUARDIAN OF THE TEMPORALTIES. *Custos Temporalium.*] The person to whose custody a vacant see or abbey was committed by the King.—Who as steward of the goods and profits was to give an account to the escheator, and he into the Exchequer. His trust continued till the vacancy was supplied, and the successor obtained the King's writ *de restitutione temporalium*, which was usually after consecration. See tit. *Temporalties.*

GUERNSEY. See *Jersey.*

GUEST, Sax. *Gest*, Fr. *Gist.* a stage of rest in a journey. A lodger or stranger in an *inn*, &c. See titles *Inns and Innkeepers.*

GUIDAGE, *Guidagium.*] An old legal word, signifying that which is given for safe conduct through a strange land, or unknown country. *Est* guidagium *quod datur alicui, ut tuto conducatur per terram alterius. Consuetud. Burgund. p.* 119. 2 *Inst.* 526.

GUILD, from Sax. *Guildan*, to pay.] A fraternity or company, because every one was *gildare*, i. e. to pay something toward the charge and support of the company. The original of these guilds and fraternities is said to be from the old Saxon law, by which neighbours entered into an association and became bound for each other, to bring forth him who committed any crime, or make satisfaction to the party injured, for which purpose they raised a sum of money among themselves, and put into a common stock, whereout a pecuniary compensation was made according to the quality of the offence committed. From hence came our fraternities and guilds; and they were in use in this kingdom long before any formal licences were granted for them; though at this day they are a company combined together, with orders and laws made by themselves, by the prince's licence. *Camd.*

*Guilda Mercatoria*, or the *Merchants' Guild*, is a liberty or privilege granted to merchants, whereby they are enabled to hold certain pleas of land, &c. within their own precinct,

37 *Ed.* 3. 15 *R.* 2. King Ed. III. in the 14th year of his reign, granted licence to the men of Coventry to erect a *Merchants' Guild*, and also a fraternity of brethren and sisters, with a master or warden, and that they might make chantries, bestow alms, do other works of piety, and constitute ordinances touching the same, &c.

*Guild*, or *Gild*, is also used for a tribute, or tax, an amercement, &c. 27 *Ed.* 3. 11 *H.* 6. 15 *Car.* 2. See *Geld*; and more fully titles *Corporation*, *London*.

GUILD-HALL. The chief hall of the city of London, for the Meeting of the Lord Mayor and Commonalty of the city, making laws and ordinances, holding of courts, &c. Gildarum *nomine continentur non solum minores fraternitatus, sed ipsæ etiam civitatum communitates. Spelm.* It also signifies the chief hall of other cities and corporate towns; the *Sessions-hall* in *King-street, Westminster*, is called the *Guild-hall*.

GUILDHALDA TEUTONICORUM. The fraternity of *Easterling* merchants in London, called the *Still-yard*. See *stat.* 22 *Hen.* 8. *c.* 8.

GUILD-RENTS. Rents payable to the crown, by any guild or fraternity; or such rents as formerly belonged to *religious Guilds*, and came to the crown at the general dissolution of monasteries, being ordered to be sold by the *stat.* 22 *Car.* 2. *cap.* 6.

GUILDER. A Foreign coin: the German guilder is 3*s.* 8*d.* and the golden one in some parts of Germany 4*s.* 9*d.* In Portugal it passes for 5*s.* but the Poland and Holland *gelder* is but 2*s.*

GULE OF AUGUST, *Gula Augusti, Goule d'Aout.*] The day of *St. Peter ad Vincula*, which is celebrated on the 1*st of* August, and called the *Gule of August*, from the Lat. *Gula*, a throat; for this reason, (as pretended) that one Quirinus, a tribune, having a daughter that had a disease in her *throat*, went to Pope Alexander, (the sixth from St. Peter,) and desired of him to see the chains that St. Peter was chained with under *Nero*, which request being granted, she the said daughter kissing the chains, was cured of her disease; whereupon the Pope instituted this feast in honour of St. Peter; and, as before, this day was termed only the *calends of August*, it was on this occasion called indifferently either *St. Peter's day ad Vincula*, from what wrought the miracle, or the *Gule of August*, from that part of the virgin whereon it was wrought. *Durand's Rationale Divinorum, lib.* 7. *cap.* 19. It is mentioned *F. N. B.* 62. *Plowd.* 316. *Stat. West.* 2. *cap.* 30. See *Yule*.

GULTWIT (or rather *Guiltwit*) An amends for trespass. *Terms de la ley.*

GUNS. See titles *Arms*, *Game*.

GUNPOWDER. It is lawful for all persons, as well strangers as natural born subjects, to import any quantities of *Gunpowder* or salt-petre, brimstone, and other materials for the making thereof, and to make and sell *Gunpowder*, &c. *Stat.* 16 *Car.* 1. *cap.* 21.

By *stat.* 12 *Car.* 2. *c.* 4. the exportation of Gunpowder was allowed if the price did not exceed 5*l.* per barrel.—By 59 *Geo.* 3. *c.* 73. this restriction as to price is repealed: but power is reserved to the crown to prohibit the exportation at any time.—And see as to *Ireland*, *stat.* 49 *Geo.* 3. *c.* 76.

To obtain an exclusive patent for the sole making or importation of Gunpowder or arms, or to hinder others from importing them, incurs the penalties of *præmunire* by *stat.* 16 *Car.* 1. *c.* 21. 1 *Jac.* 2. *c.* 8. See *stat.* 46 *Geo.* 3. *c.* 121.

The *stat.* 12 *Geo.* 3. *c.* 61. reduces into one, and repeals all former acts relative to the making, keeping, and carrying of Gunpowder. By this act it is provided, that no person shall make Gunpowder but in the regular manufactories, established at the time of making the statute, or licensed by the Sessions pursuant to the provisions in § 13, &c. on forfeiture of the Gunpowder and 2*s. per* pound, § 1.—*Pestle-mills* not to be used; on the like penalty, § 2.—Only 40 pounds of powder to be made at one time under one pair of stones: except *battle-powder*, a fine fowling powder so called, made at Battle and elsewhere in Sussex, §§ 3. 5.—Not more than 40 hundred weight to be dried at one time in one stove. § 6.—only the quantity absolutely necessary for immediate use to be kept in or near the place of making, except in brick or stone magazines, 50 yards at least from the mill, § 7. All Gunpowder makers to have a brick or stone magazine near the Thames below Blackwall to keep the Gunpowder when made, on penalty of 25*l. per* month; and 5*l.* a day for not removing it when made, with all possible diligence, § 8. Charcoal not to be kept within 20 yards of the mill, § 10.—No dealer to keep more than 200 pounds of powder, nor any person not a dealer more than 50 pounds, in the cities of London and Westminster, or within 3 miles thereof; or within any other city, borough, or market town, or one mile thereof; or within two miles of the King's palaces or magazines, or half a mile of any parish church; on pain of forfeiture and 2*s. per* pound; except in licensed mills; or to the amount of 300 pounds for the use of collieries within 200 yards of them, § 12.—§§ 13, 14, 15, 16, contain provisions respecting the licensing mills, building magazines, &c.—Not more than 25 barrels to be carried in any land carriage, nor more than 200 barrels by water (unless going beyond sea or coast wise;) each barrel to contain not more than 100 pounds.—Various means are directed for the safe conveyance, in both cases, and to prevent all danger and delay, § 18—22. [and see 54 *Geo.* 3. *c.* 152.] Justices of peace may search mills, houses, carriages, &c. § 23.—Outward bound ships to take in, and homeward bound to discharge their Gunpowder at or below Blackwall; and be searched by the officers of the Trinity house, § 24, 25. Penalties to be recovered before two justices; and prosecutions to be within 14 days, § 26, 27.—General exceptions are made as to his majesty's mills, storehouses and magazines; and as to powder sent with the army or militia; and exported or carried coastwise below Blackwall, § 29, 30.

It seems that erecting powder mills, or keeping magazines near a town is a nuisance at Common-law, punishable by indictment or information. *Stra.* 1169. And see § 15. of the above mentioned statute.

By 46 *Geo.* 3. *c.* 121. the importation into Great Britain of gunpowder, arms, &c. manufactured in Ireland, is permitted, notwithstanding the *stat.* 1 *Jac.* 2. *c.* 8.

GURGITES. Wears. *Black Book Hereford, f.* 20. See *Gorce*.

GUTI AND GOTTI. Engl. *Goths*, called sometimes *Jutæ*, and by the Romans *Getæ*, were one of those three nations or people who left Germany, and came to inhabit this island. *Leg. Edw. Confess. cap.* 35.

GUTTERA. A gutter or spout to convey the water from the leads and roofs of houses: *gutter-tiles*, are mentioned in *stat.* 17 *Ed.* 4. *c.* 4. See title *Bricks*.

GWABR MERCHED. A British word which signifies a payment or fine, made to the lords of some manors, upon the marriage of their tenants' daughters; or otherwise on their committing incontinency. See *Mercheta Mulierum*.

GWALSTOW, *Sax.*] A place of execution: *omnia gwalstowa*, i. e. *occidendorum loca, totaliter regis sunt in socâ sud. Leg. H.* 1. *cap.* 11.

GYLPUT. The name of a court held every three weeks in the liberty or hundred of Pathbew in the county of Warwick. *Inquisit.* 13 *Ed.* 3.

GYLTWITE. A compensation or amends for tresspass, &c. *Mulcta pro transgressione. LL. Edgar. Regis, Anno* 964.

GYPSIES. See title *Egyptians*.

GYROVAGI. Wandering *monks*, who pretending great piety left their own cloisters, and visited others. *Matt. Paris, p.* 490.

# H.

## HABEAS CORPUS.

THE SUBJECT'S WRIT OF RIGHT, in cases where he is aggrieved by illegal imprisonment: Founded on the Common law, and secured by various statutes; of which the most powerful, the *stat.* 31 *Car.* 2. *c.* 2. is emphatically stiled THE HABEAS CORPUS ACT; and is at least next in importance, if not indeed as relates to modern times, superior in its beneficial effect, to *Magna Charta*. See 2 *Inst.* 55. 615. 4 *Inst.* 182. *Cro. Jac.* 543. 2 *Ro. Ab.* 69. *Com. Journ. April* 1*st*, 1628.

Next to *Personal Security*, the law of England regards, asserts, and preserves, the *personal Liberty* of individuals against all imprisonment or restraint, unless by due course of law.—This is a right strictly natural, and the laws of England have never abridged it without sufficient cause: nor can it ever be abridged in this kingdom at the mere discretion of the magistrate, without the explicit permission of the laws.—The language of the Great Charter is, that no freeman shall be taken or imprisoned, but by the lawful judgment of his equals, or by the law of the land. *Mag. C. c.* 29. And many subsequent old statutes expressly direct, that no man shall be taken or imprisoned by suggestion or petition to the King or his Council, unless it be by legal indictment, or the process of the Common-law. See *stats.* 5 *E.* 3. *c.* 9. 25 *E.* 3. *st.* 5. *c.* 4. 28 *Ed.* 3. *c.* 3. By the *Petition of Right*, 3 *Car.* 1. it is enacted that no free-man shall be imprisoned or detained without cause shewn, to which he may make answer according to law.—By *stat.* 16 *Car.* 1. *c.* 10. if any person be restrained of his liberty, by order or decree of any illegal court, or by command of the King's Majesty in person, or by warrant of the council board, or of any of the privy council, he shall upon demand of his council have a writ of *Habeas Corpus*, to bring his body before the court of King's Bench or Common Pleas; who shall within three court days determine whether the cause of his commitment be just, and thereupon do as to justice shall appertain. And by the *Habeas Corpus Act*, *stat.* 31 *C.* 2. *c.* 2. the methods of obtaining this writ are so plainly pointed out and enforced, that so long as this statute remains unimpeached, no Subject of England can be long detained in prison, except in those cases in which the law requires and justifies such detainer: And lest this act should be evaded by demanding unreasonable Bail or sureties for the prisoner's appearance, it is declared by *stat.* 1 *W. & M. st.* 2. *c.* 2. that excessive Bail ought not to be required. 1 *Comm.* 135. *c.* 1.

Of great importance to the Public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, Magistrate to imprison arbitrarily, whenever he or his officers thought proper, there would soon be an end of all other rights and immunities. And yet sometimes when the State is in real danger, even this measure may be necessary. But the happiness of our Constitution is, that it is not left to the Executive Power to determine when the danger of the State is so great as to render this measure expedient; for it is the Parliament only, or Legislative Power, consisting of King, Lords, and Commons, that, wherever it seems proper, can authorize one branch of it, the Crown, by suspending the benefit of the *Habeas Corpus Act* for a short and limited time, and in certain specified particulars, to imprison suspected persons without giving any reason for so doing. An experiment which ought only to be tried, and which we believe has never been tried, but in cases of extreme emergency: and in these the nation parts with a portion of its liberty for a while in order to preserve the whole for ever. See 1 *Comm. c.* 1. 136.—and this Dict. title *Government*, *ad fin.*

Having said thus much in general we may pursue our enquiries under the following heads.

I. *The Nature, various Kinds, and Effects of this Writ.*
II. *Further, by whom, and in what cases, it is grantable for the furtherance of justice.*
III. *What shall be a proper return of such Writ.*
IV. *Of Bailing, Discharging or Remanding a Prisoner, or cause brought up on a Habeas Corpus;* and see title Procedendo.

For other matters connected with this subject see this Dict. titles *Bail*, *Commitment*, *Arrest*, *Gaoler*, &c. and as to the *Habeas Corpora Juratorum*, see title *Jury*, 1.

I. THE WRIT of *Habeas Corpus* is the most celebrated writ in the English law. Various kinds of it are made use of by the courts at Westminster for removing prisoners for the more easy administration of justice.

One of those is the *Habeas Corpus ad respondendum*, when a man hath a cause of action against one, who is confined by the process of some inferior court; in order to remove the Prisoner and charge him with this new action in the court above. 2 *Mod.* 198. For inferior courts being tied down to causes arising within their own jurisdiction, the party would be without remedy, unless allowed to sue in another court; but it seems, that regularly a person confined in B. R. cannot be removed to C. B. by this writ, nor *vice versa*; for in these cases there can be no defect of justice, as these courts have conusance as well of local, as transitory actions. *Dyer* 197, *a.* 249. *pl.* 84. 296. 307. 1 *Mod.* 235. *Style Pract. Regist.* 330.

The *Habeas Corpus ad satisfaciendum*, is used when a Prisoner hath had judgment against him in an action, and the plaintiff is desirous to bring him up to some superior court to charge him with process of execution. 2 *Lill. Prac. Reg.* 4.

On this writ the attorney for the plaintiff must endorse the number roll of the judgment on the back of the writ. *Style Regist.* 331.

*Habeas Corpus* upon a *cepi*, where the party is taken in execution in the court below.—So upon an attachment out of Chancery, and a *cepi corpus* returned by the sheriff, the next step is a *Habeas Corpus*; for the sheriff having executed the command of the writ of attachment by taking the body, he cannot carry him out of the county without the King's writ. *Dict.*

Of the same nature are writs of *Habeas Corpus ad prosequendum*, *testificandum*, *deliberandum*, &c. which issue when it is necessary to remove a prisoner, in order to *prosecute*, or *bear testimony* in any court, or to be *tried* in the proper jurisdiction wherein the fact was committed; See *Sty. Reg.* 331. 119. 126. 230. *Comb.* 17. 48. 4 *East's Rep.* 587.

By 44 *Geo.* 3. *c.* 102. any Judge of the superior courts in England or Ireland may award writs of *Habeas Corpus* for bringing prisoners before courts of record to be examined as witnesses. In Wales, Justices of Great Sessions shall have like authority. *Ib.* § 2.

Lastly, as relates to writs of *Habeas Corpus* for these confined purposes, may be mentioned the common writ *ad faciendum et recipiendum*; which issues only in civil cases out of any of the courts in Westminster Hall, when a person is sued in some inferior jurisdiction, and is desirous to remove the action into the superior court; commanding the inferior judges to produce the body of the defendant, together with the day and cause of his caption and detainer; whence this writ is frequently denominated an *Habeas Corpus cum causâ*; to *do and receive* whatsoever the King's court shall consider in that behalf.—In this case the body is to be removed by *Habeas Corpus*; but the proceedings, by *certiorari*. 3 *Bac. Abr.* This is a writ grantable of common right without any motion in court; and instantly supersedes all proceedings in the court below. 2 *Mod.* 306. But in order to prevent the surreptitious discharge of prisoners, it is ordained by *stat.* 1 *& 2 P. & M. c.* 13. that no *Habeas Corpus* shall issue to remove any prisoner out of any gaol, unless signed by some Judge of the Court out of which it is awarded. And to avoid vexatious delays by removal of frivolous causes, it is enacted by *stat.* 21 *Jac.* 1. *c.* 23. that where the Judge of an inferior court of record is a barrister of three years' standing, no cause shall be removed from thence by *Habeas Corpus* or other writ, after issue or demurrer deliberately joined.—That no cause, if once remanded to the inferior court by writ of *procedendo* or otherwise, shall ever afterwards be again removed; and that no cause shall be removed at all, if the debt or damages laid in the declaration do not amount to the sum of 5*l.*—But an expedient having been found out to elude the latter branch of the statute, by procuring a nominal plaintiff to bring another action for 5*l.* or upwards; (when by the course of the Court the *Habeas Corpus* removed both actions together;) it is therefore enacted by *stat.* 12 *Geo.* 1. *c.* 29. that the inferior court may proceed in such actions as are under the value of 5*l.* notwithstanding other actions may be brought against the same defendant to a greater amount. And by *stat.* 19 *Geo.* 3. *c.* 70. no cause under the value of 10*l.* shall be removed by *Habeas Corpus*, or otherwise, into any superior court, unless the defendant so removing the same shall give special bail for payment of the debt and costs. See 3 *Comm. c.* 8.

No writ of *Habeas Corpus*, or other writ to remove a cause out of an inferior court, shall be allowed, except delivered to the Judge of the court, before the jury to try the cause have appeared, and before any of them are sworn. *Stat.* 3 *Eliz. c.* 5.

See further, *Impey's Practice in K. B.* as to the mode of suing out a *Habeas Corpus* for the purpose of removing a Debtor to the King's Bench prison.

By 43 *Geo.* 3. *c.* 140. any Judge of the courts at Westminster may award a writ of *Habeas Corpus* for bringing up prisoners for trial or examination before Courts Martial, Commissioners of Bankrupt, &c.

The application under this act ought to be made to a Judge out of court. 2 *Maul. & Selw. Rep.* 582.

But the *Great and efficacious Writ* in all manner of illegal confinement, is that of HABEAS CORPUS AD SUBJICIENDUM: directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum et recipiendum*; to *do, submit to*, and *receive* whatsoever the Judge or Court awarding such writ shall consider in that behalf. 8 *St. Tr.* 142.

This is a high prerogative writ, and therefore, by the Common-law, issuing out of the court of King's Bench, not only in term time, but also during the vacation, by a *fiat* from the Chief Justice or any other of the Judges; and running into all parts of the King's dominions: for the King is at all times entitled to have an account why the liberty of any of his Subjects is restrained, whenever that restraint may be inflicted. *Cro. Jac.* 543. If it issues in vacation, it is usually returnable before the Judge himself who awarded it, and he proceeds by himself thereon, unless the term should intervene, and then it may be returned in Court. *Burr.* 856. 460. 542. 606.

If the party were privileged in the Courts of Common Pleas and Exchequer, as being, or supposed to be, an officer or suitor of the Court, this *Habeas Corpus ad subjiciendum* might also by Common-law have been awarded from thence. 2 *Inst.* 55. 4 *Inst.* 290. 2 *Hal. P. C.* 144. 2 *Vent.* 22. And if the cause of imprisonment were palpably illegal, they might have discharged him. *Vaugh.* 155. But if he were committed for any criminal matter, they could only have remanded him or taken bail for his appearance in the Court of K. B. which occasioned the Common Pleas for some time to discountenance such applications. *Carter*, 221. 2 *Jon.* 13. But since the *stat.* 16 *Car.* 2. *c.* 10. above recited, expressly mentioned the Courts of K. B. and C. P. as co-ordinate in this jurisdiction, it hath been holden that every subject of the kingdom is equally entitled to the benefit of the Common-law writ in either of those courts at his option. 2 *Mod.* 198. It hath also been said that the like *Habeas Corpus* may issue out of the Court of Chancery in vacation; but upon the famous application to *Lord Nottingham* by *Jenks*, notwithstanding the most diligent searches, no precedent could be found where the chancellor had issued such a writ in vacation, and therefore his Lordship refused it. See 4 *Inst.* 182. 2 *Hal. P. C.* 147. 3 *Comm.* 132. *c.* 8.

In the King's Bench and Common Pleas it is necessary to apply for it by motion to the Court, as in the case of all other prerogative writs; (as *Certiorari*, *Prohibition*, *Mandamus*, &c.) which do not issue as of mere course, without shewing some probable cause why the extraordinary power of the crown is called in to the party's assistance. 2 *Mod.* 306. 1 *Lev.* 1. For, as was argued, by Lord Chief Justice *Vaughan*, "it is granted on motion, because it cannot be had of course; and there is therefore no *necessity* to grant it: for the Court ought to be satisfied that the party hath a probable cause to be delivered." 2 *Jon.* 13. And this seems the more reasonable, because, when once granted, the person to whom it is directed can return no satisfactory excuse for not bringing up the body of the prisoner. *Cro. Jac.* 543. So that if it issued of mere course, without shewing to the Court or Judge some reasonable ground for awarding it, a traitor or felon under sentence of death, a soldier or mariner in the King's service, a wife, a child, a relation, or a domestic confined for insanity, or other prudential reasons might obtain a temporary enlargement by suing out an *Habeas Corpus*, though sure to be remanded as soon as brought up to the Court. And therefore *Coke* when Chief Justice did not scruple to deny a *Habeas Corpus* to one confined by the Court of Admiralty for piracy; there appearing on his own shewing sufficient grounds to confine him. 3 *Bulst.* 27. and see 2 *Ro. Rep.* 138. On the other hand if a probable ground be shewn, that the party is imprisoned without just cause, and therefore hath a right to be delivered; the writ of *Habeas Corpus* is then a *Writ of Right* which "may not be denied, but ought to be granted to every man that is committed, or detained in prison, or otherwise restrained, though it be by command of the King, the privy council, or any other." *Com. Journ. Ap.* 1. 1628. See 2 *Inst.* 615.

The personal liberty of the subject, as has been already observed, is a natural inherent right which cannot be surrendered or forfeited, unless by the commission of some great and atrocious crime; and which ought not to be abridged in any case without the special permission of law. To assert an absolute exemption from imprisonment *in all cases* is inconsistent with every idea of law and political society; and in the end would destroy all civil liberty, by rendering it's pro-

tection impossible: but the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and in what degree, the imprisonment of the subject may be lawful. This it is which induces the absolute necessity of expressing upon every commitment the reason for which it is made; that the Court upon an *Habeas Corpus* may examine into its validity; and according to the circumstances of the case may discharge, admit to bail, or remand the prisoner.—Yet early in the reign of Charles I. the Court of K. B. determined that they could not upon an *Habeas Corpus* either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by the special command of the King, or by the Lords of the privy council. 7 *St. Tr.* 136. This drew on a parliamentary enquiry, and produced the *Petition of right*, 3 *Car.* 1. already mentioned; which recites this illegal judgment, and enacts that no freeman hereafter shall be so imprisoned or detained. Some evasions however of this statute, in favour of the Crown, gave rise to the *stat.* 16 *Car.* 1. *c.* 10. already stated; and even after this some shifts and devices, not very creditable to the Judges of that time, were made use of to the same unpopular end. See 3 *Comm.* 134, 135. § 8.

Other abuses had also crept into daily practice, which had in some measure defeated the benefit of this great constitutional remedy. The party imprisoning was at liberty to delay his obedience to the first writ, and might wait till a second and a third, called an *alias* and a *pluries*, were issued, before he produced the party; and many other vexatious shifts were practised to detain state prisoners in custody. But whoever will attentively consider the English History may observe, that the flagrant abuse of any power, by the Crown or its ministers, has always been productive of a struggle which either discovers the exercise of that power to be contrary to law, or (if legal) restrains it for the future. This was the case in the present instance. The oppression of an obscure individual gave birth to the famous HABEAS CORPUS ACT, 31 *Car.* 2. *c.* 2. which is frequently considered as another *Magna Charta* of the kingdom; and by consequence and analogy has also in subsequent times reduced the general method of proceeding on these writs, (though not within the reach of that statute, but issuing merely at the common law,) to the true standard of Law and Liberty. The provisions of this act are extended to Ireland by the Irish act 21, 22 *Geo.* 3. *c.* 11.

The *statute* itself enacts, 1. That on complaint and request in writing by or on behalf of any person committed and charged with any crime; (unless committed for Treason or Felony expressed in the warrant; or as accessary, or on suspicion of being accessary before the fact, to any *petit* treason or felony, plainly expressed in the warrant; or unless he is convicted or charged in execution by legal process;) the Lord Chancellor or any of the twelve Judges in vacation, upon viewing a copy of the warrant, or affidavit that a copy is denied, shall (unless the party has neglected for two terms to apply to any court for his enlargement,) award a *Habeas Corpus* for such prisoner, returnable immediately before himself, or any of the Judges; and upon the return made, shall, within two days, discharge the party, if bailable, upon giving security to appear and answer to the accusation in the proper court of Judicature.—2. That such writs shall be indorsed, as granted in pursuance of this act, and signed by the person awarding them.—3. That the writ shall be returned, and the prisoner brought up within a limited time, according to the distance, not exceeding in any case twenty days; upon tender of the charges not exceeding 1*s.* per mile, and security by his own bond to pay the charges of his return, if remanded, and not to escape.—4. That any officer or keeper neglecting to make due returns, or not delivering to the prisoner or his agent, within six hours after demand, a copy of the warrant of commitment, or shifting the custody of a prisoner from one to another, without sufficient reason or authority, (specified in the act) shall for the first offence, forfeit 100*l.* and for the second offence 200*l.* to the party grieved, and be disabled to hold his office.—5. That no person once delivered by *Habeas Corpus*, shall be recommitted for the same offence, on penalty of 500*l.*—6. That every person committed for Treason or Felony shall, if he requires it, the first week of the next term, or the first day of the next session of *Oyer* and *Terminer*, be indicted in that term or session, or else admitted to bail; unless the King's witnesses cannot be produced at that time: and if acquitted, or if not indicted and tried in the second term or session, he shall be discharged from his imprisonment for such imputed offence: but that no person after the assizes shall be opened for the county in which he is detained, shall be removed by *Habeas Corpus*, till after the assizes are ended; but shall be left to the justice of the Judges of assize.—7. That any such prisoner may move for and obtain his *Habeas Corpus* as well out of the Chancery, or Exchequer, as out of the King's Bench or Common Pleas; and the Lord Chancellor or Judges denying the same, on sight of the warrant, or oath that the same is refused, shall forfeit severally to the party grieved the sum of 500*l.*—8. That this writ of *Habeas Corpus* shall run into the counties Palatine, Cinque-ports, and other privileged places, and the islands of Jersey and Guernsey.—9. That no inhabitant of England (except persons contracting, or convicts praying, to be transported; or persons having committed some capital offence in the place to which they are sent to be tried) shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey, or any places beyond the seas, within or without the King's dominions: on pain that the party commiting, his advisers, aiders, and assistants, shall forfeit to the party grieved, a sum not less than 500*l.* to be recovered with treble costs; shall be disabled to bear any office of trust or profit; shall incur the penalties of *præmunire*; and shall be incapable of the King's pardon.

This is the substance of that great and important statute, which extends only to the case of commitments for such criminal charge, as can produce no inconvenience to the public justice by a temporary enlargement of the prisoner; all other cases of unjust imprisonment being left to the *Habeas Corpus* at common law. But even upon writs at the common law it was expected by the Court, agreeable to ancient precedents, and the spirit of the act of Parliament, that this writ should be immediately obeyed, without waiting for any *alias* or *pluries*, 4 *Burr.* 856.

Now by *stat.* 56 *Geo.* 3. *c.* 100. "for more effectually securing the liberty of the subject," reciting that the extending the remedy of the writ of *Habeas Corpus* and enforcing obedience thereto will be advantageous to the public, and that the provisions of the existing acts extend only to cases of detainer on criminal charges; it is enacted, that when any person shall be confined or restrained of his liberty (except for crime or debt) any Baron of the Exchequer, as well as any Judge of either Bench (in England or Ireland) shall on complaint on behalf of the party confined or restained, if reasonable cause appear to them, award in vacation time, a writ of *Habeas corpus ad subjiciendum*, returnable immediately before the judge awarding the same, or any other judge of the same court; the party to whom the writ is directed refusing to make a return or pay obedience thereto is declared guilty of a contempt of the court, and may be apprehended on the judge's warrant and held to bail or committed to answer such contempt. Such writs issued in vacation may be made returnable in the ensuing term, and writs issued by the court of K. B. C. P. or Exchequer in term time may be made returnable in the vacation, before one Judge or Baron. The Judge before whom the writ is returnable, may examine the truth

of the fact in the return, and do therein as to justice shall appertain; or, if he has any doubt, may bail the party detained, to appear before the court who shall finally determine on the discharging, bailing, or remanding such party: and the like proceedings may be had by the court on such writs awarded by the court.—These writs shall run in Counties Palatine, the Cinque Ports and all privileged places, and into ports, harbours, creeks and bays, though not within the body of any county; and lastly the provisions of this act are extended to writs of *Habeas Corpus* awarded in pursuance of the former existing acts, 31 *Car.* 2. *c.* 2. 21; 22 *Geo.* 3. (I.) *c.* 11.

By all these admirable regulations, judicial as well as parliamentary, the remedy seems now complete for *removing* the injury of unjust and illegal confinement. A remedy the more necessary, because the oppression does not always arise from the ill nature, but sometimes from the mere inattention, of Government. For it frequently happens in foreign countries, (and has happened in England during temporary suspensions of the statute) that persons apprehended upon suspicion have suffered a long imprisonment, merely because they were forgotten. 3 *Comm.* 135. 138. *c.* 8.

II. It is clear, that both by the Common law, as also by the statute, the Courts of Chancery and King's Bench have jurisdiction of awarding this writ of *Habeas Corpus*, and that without any privilege in the person for whom it is awarded; but it seems that by the common law the court of King's Bench could only have awarded it in term time, but that the Chancery might have done it as well out of, as in, term, because that court is always open. 2 *Inst.* 55. 4 *Inst.* 290. 2 *And.* 297. 2 *Jon.* 13, 14. 17. Any of the courts at Westminster may award it. See *Vaugh.* 155. and the *Habeas Corpus Act*, *ante*, I.

If the *Habeas Corpus* issues out of Chancery, and on the return thereof the Lord Chancellor finds that the party was illegally restrained of his liberty, he may discharge him, or if he finds it doubtful, he may bail him; but then it must be to appear in the court of King's Bench, for the Chancellor hath no power in criminal causes; or the Chancellor may commit the party to the Fleet, and in term time may, *propriis manibus*, deliver the record into the King's Bench, together with the body; and thereupon the court of King's Bench may proceed to bail, discharge, or commit the prisoner. 2 *Hal. Hist. P. C.* 247. 2 *Hawk. P. C.* 114, 115.

No *Habeas Corpus* lies for an enemy, prisoner of war, however ill used or deceived. 2 *Black. Rep.* 1324. Nor for a prisoner of war, the subject of a Neutral Power, taken in the enemy's service, into which he was forced, when taken prisoner by them in an English ship. 2 *Burr.* 765.

If sailors on board a ship are to be produced as witnesses, and have been served with a subpœna, and say they will not attend; a *Habeas Corpus ad testificandum* may be applied for to the Chief Justice, on affidavit of that fact, and that they are material witnesses; but without which no *Habeas Corpus* can issue. *Cowp.* 672.

The Court thought there could be no *Habeas Corpus* to bring up a prisoner at war to be a witness. *Lord Mansfield* said the presence of witnesses who are prisoners of war, was generally obtained by an order from the Secretary of State: and an application was made for a *Habeas Corpus* to bring up such a prisoner, but without success. Afterwards a rule was granted to shew cause why the defendant should not consent either to admit of the fact of the capture, or that the prisoner should be examined upon interrogatories. *Dougl.* 420. (403) *Furley* v. *Newnham*.

The Court of Common Pleas refused to grant a *Habeas Corpus* to bring up a prisoner in custody upon a criminal matter, in order to his being charged with a declaration in a civil action. 2 *New Rep. C. P.* 245.

The court on affidavit suggesting probable cause to believe that a helpless and ignorant female foreigner was exhibited for money against her will, granted a rule on her keeper to shew cause why a writ of *Hab. Corp.* should not issue to bring her before the court, and directed an examination before the coroner and attorney of the court in the presence of the parties applying and applied against. 13 *East's Rep.* 195.

Besides the efficacy of the writ of *Habeas Corpus* in liberating the Subject from illegal confinement in a public prison, it also extends its influence to remove every unjust restraint of personal freedom in private life, though imposed by a husband or a father; but when women or infants are brought before the Court by a *Habeas Corpus*, the court will only set them free from an unmerited or unreasonable confinement, and will not determine the validity of a marriage, or the right to the guardianship, but will leave them at liberty to chuse where they will go; and if there be any reason to apprehend they will be seized in returning from the court, they will be sent home under the protection of an officer. But if a child is too young to have any discretion of its own, then the court will deliver it into the custody of its parent, or the person who appears to be its legal guardian. See 2 *Burr.* 1434. where all the prior cases are considered by *Lord Mansfield*. See also 1 *Black. Rep.* 386. *Stra.* 982. 2 *Lord Raym.* 1354. 4 *Burr.* 1991.

The mother, and not the father, of an infant *illegitimate* child, is entitled to the custody of the child in preference to the father, though from his circumstances he may be better able to educate it. 1 *New Rep. C. P.* 148. See also 5 *Term Rep. K. B.* 278. 5 *East's Rep.* 221, *n.* It is otherwise with respect to a *legitimate* child, even where the father is an alien enemy domiciled in this kingdom. 5 *East's Rep.* 221.

If a party be imprisoned against law, though he is intitled to a *Habeas Corpus*, yet he may have an action of false imprisonment, in which he shall recover damages in proportion to the injury done him. *Fitz. Corpus cum Causâ.* 2. 9 *H.* 6. 44, *a.* 2 *Inst.* 55. 10 *H.* 7. 17. 5 *Co.* 64. 11 *Co.* 98, 99.

If a person be in custody, and also indicted for some offence in the inferior court, there must, besides the *Habeas Corpus* to remove the body, be a *certiorari* to remove the record; for as the *certiorari* alone removes not the body, so the *Habeas Corpus* alone removes not the record itself, but only the prisoner with the cause of his commitment; therefore, although upon the *Habeas Corpus*, and the return thereof, the court can judge of the sufficiency or insufficiency of the return and commitment; and bail or discharge, or remand the prisoner, as the case appears upon the return; yet they cannot upon the bare return of the *Habeas Corpus* give any judgment, without the record itself be removed by *certiorari*: but the same stands in the same force it did, though the return should be adjudged insufficient, and the party discharged thereupon of his imprisonment; and the court below may issue new process upon the indictment. 2 *Hal. Hist. P. C.* 210, 211. 1 *Salk.* 352. *Comb.* 2.

If the Chief Justice of the King's Bench, commit one to the Marshall by his warrant, he ought not to be brought to the bar by rule, but by *Habeas Corpus*. 1 *Salk.* 349.

If an apprentice of above the age of eighteen, having been impressed, afterwards voluntarily enter into the King's service, his master is not entitled to sue out an *Habeas Corpus* to bring him up to be discharged. 6 *Term Rep. K. B.* 497.—So when the apprentice is protected from being impressed, but is willing to enter into the King's service. 5 *East's Rep.* 38.—So where the apprentice has entered into the King's service, and is willing to return to his master. 7 *Term Rep.* 745. And, without reference to the desire of the apprentice to stay or to return, the court will not grant the *Habeas Corpus* on the application of the master; for the object of that writ is the personal liberty of the party.

The Court discharged an impressed seaman after the expiration of the two years of his protection, the *application* for his discharge having been made within that time. 8 *East's Rep.* 27.

III. In extrajudicial commitments, the warrant of commitment ought to be returned *in hæc verba* on a *Habeas Corpus:* but when a man is committed by a court of record, it is in the nature of an execution for a contempt, and in such case the warrant is never returned. 5 *Mod.* 156. The cause of imprisonment must be particularly set forth in the return of the *Habeas Corpus*, or it will not be good, for by this the court may judge of it; and with a *paratum habeo*, that they may either discharge, bail, or remand the prisoner. 2 *Nels. Abr.* 915. *Cro. Jac.* 543. If a commitment is without cause, or no cause is shewn, a prisoner may be delivered by *Habeas Corpus*. 1 *Salk.* 348.

It has been adjudged, that on a commitment by the House of Commons, of persons for contempt and breach of privilege, no court can deliver on a *Habeas Corpus*: but *Holt*, Ch. J. was of a contrary opinion. 2 *Salk.* 404. 503. See as to commitments in like cases by the House of Lords, 8 *Term Rep.* K. B. 314; in which case one committed in execution by the House of Lords for a breach of privilege, was refused to be discharged by the Court of K. B. upon a *Habeas* brought.—See also this Dict. title *Bail*, II. *Commitment*.

A writ of error may be allowed by the King in such a case, &c. and it is not to be denied *ex debito justitiæ;* though it has been a doubt, whether any writ of error lay upon a judgment given on a *Habeas Corpus*. 2 *Salk.* 404. 503. A man may not be delivered from the commitment of a court of *Oyer* and *Terminer*, by *Habeas Corpus*, without writ of error: and where there appears to be good cause, and a defect only in the form of the commitment, he ought not to be discharged. 1 *Salk.* 348.

It seems a sufficient return to a writ of *Habeas Corpus* that the party is in custody under the sentence of a court of competent jurisdiction to inquire of the offence, and to pass such a sentence, without setting forth the particular circumstances necessary to warrant the sentence. 1 *East's Rep.* 306.

Return, "I had not at the time of receiving this writ, nor have I since had, the body of A. B. *detained* in my custody so that *I could not* have her, &c." was held a bad return, and an attachment granted against the party who made it. 5 *Term Rep. K. B.* 89.

For a false return there is regularly no other remedy against the officer than an action on the case at the suit of the party grieved, and an information or indictment at the suit of the King. 6 *Mod.* 90. 1 *Salk.* 349. But no action lies until the return be filed. 1 *Salk.* 352.

As upon the return of the writ the court is to judge, whether the cause of the commitment and detainer be according to law, or against it; so the officer or party in whose custody the prisoner is, must, according to the command of the writ, certify on the return thereof, the day, cause of caption, and detainer. *Vaugh.* 137.

Where a man is committed for any crime either at common law or by act of Parliament, for which he is punishable by indictment, a return that he was committed, *till discharged by due course of law*, is good. But if the commitment be in pursuance of a special authority, the terms of the commitment must be special, and exactly pursue that authority; and therefore if it do not appear on the return to have been according to that authority, the return will be bad. 2 *Black. Rep.* 806, 807.

It seems to be agreed, that no one can in any case controvert the truth of the return to a *Habeas Corpus*, or plead or suggest any matter repugnant to it; yet it hath been holden, that a man may confess and avoid such a return by admitting the truth of the matters contained in it, and suggesting others not repugnant, which take off the effect of them. *Cro. Eliz.* 821. 5 *Co.* 71, *b.* 2 *Hawk. P. C. c.* 15. § 78.

It seems, that, before the return filed, any defect in form, or the want of an averment of a matter of fact, may be amended; but this must be at the peril of the officer, in the same manner as if the return were originally what it is after the amendment. 1 *Mod.* 102, 103.

But after the return is filed, it becomes a record of the court, and cannot be amended. 1 *Mod.* 102, 103.

A return to a *Habeas Corpus* for the discharge of an apprentice above the age of twenty-one, stating the custom of London that every citizen and freeman of the city may take as an apprentice any person *above the age of* fourteen, and under twenty-one, to serve for seven years or more, must show that the apprentice was within those ages when he bound himself apprentice; for the Court will not intend that from matter *dehors* the return. 2 *Maul. & Selw. Rep.* 226.

IV. Upon the return of the *Habeas Corpus*, the prisoner is regularly to be discharged, bailed or remanded; but if it be doubtful which the Court ought to do, it is said that the prisoner may be bailed to appear *de die in diem*, till the matter is determined. 5 *Mod.* 22. *Style*, 16.

By the Petition of Right, 16 *Car.* 1. *cap* 10. already mentioned, the court must within three days after the return of the *Habeas Corpus*, either discharge, bail or remand the prisoner. But it seems that a commitment by the court of King's Bench to the Marshalsea, is a remanding, being an imprisonment within the statute. 5 *Mod.* 22.

Also it hath been ruled, that the court of King's Bench, may, after the return of the *Habeas Corpus* is filed, remand the prisoner to the same gaol from whence he came, and order him to be brought up from time to time, till they shall have determined whether it is proper to bail, discharge, or remand him absolutely. 1 *Vent.* 330.

And though in doubtful cases the court is to bail, or discharge the party on the return of the *Habeas Corpus*, yet if a person be convicted, and the conviction on the return of the *Habeas Corpus* appears only defective in point of form, it is at the election of the court either to discharge the party, or oblige him to bring his writ of error. 1 *Salk.* 348. 5 *Mod.* 19, 20.

If a person be committed by the Admiralty in execution, he is not removable by *Habeas Corpus* into B. R. to answer an action brought against him there; but it might be otherwise if an action had been before depending. 1 *Salk.* 351. Where there is an action in B. R. precedent to the King's suit, on which the party is out on bail, *Habeas Corpus* may be brought by the bail, &c. and the prisoner turned over; though this was greatly opposed in favour of the King's execution. *Ib.* 353.

If the Steward of an inferior court proceeds, after an *Habeas Corpus* delivered and allowed, the proceedings are void; and the court of B. R. will award a *supersedeas;* and grant an attachment against the steward for the contempt. *Cro. Car.* 79. 296. An *Habeas Corpus* suspends the power of the court below, so that if they proceed, it is void, and *coram non judice*. And on a *Habeas Corpus*, if the record be filed, no *procedendo* can go to the court below; but where a record below is not filed, or not returned, it may be granted. 1 *Salk.* 352.

A *Habeas Corpus cum causâ* removes the body of the party for whom granted, and all the causes depending against him; (but see *stat.* 12 *Geo.* 1. *c.* 29. *ante*, I.) and if upon the return thereof the officer doth not return all the causes, &c. it is an escape in him. 2 *Lil. Abr.* 2. A judge will not grant a *Habeas Corpus* in the vacation for a prisoner to follow his suits; but the court may grant a special *Habeas Corpus* for a prisoner to be at his trial in the vacation time. *Ibid.* 3. And

the court may grant a *Habeas Corpus* to bring a prisoner, not in prison on execution, out of prison, to be a witness at a trial; though it is at the peril of the party suing out the writ, that the prisoner do not escape. *Style*, 119. And where there is no collusion, even a prisoner in execution may be brought up as a witness. 3 *Burr.* 1440. But no person ought to take out a *Habeas Corpus* for any one in prison, without his consent; except it be to turn him over to B. R. or charge him with an action in court. 2 *Lil.* A man brought into B. R. by *Habeas Corpus*, shall not be removed thence till he has answered there; he shall be detained until then, and after he may be removed. 1 *Salk.* 350.

A person is in custody upon a criminal, and also on a civil, matter; if he would move himself by *Habeas Corpus*, there ought to be but one *Habeas Corpus* on the crown side or plea side, and both causes are to be returned. *Mod. Cas.* 133. If there be judgment against a defendant in the court of B. R. and another in C. B. on which he is in execution in the Fleet, he may have an *Habeas Corpus* to remove himself into B. R. where he shall be in custody of the Marshal for both debts. *Dyer*, 132.

Where an action is founded on the custom of London, for a thing actionable there, and not elsewhere; if it be removed by *Habeas Corpus*, a *procedendo* shall be granted: but the declaration itself ought to be returned upon the *Habeas Corpus*, and then the court will see what was the cause, &c. For the special matter and all the proceedings are to be in the return in this case; as well as in an action on a bye-law, to take notice thereof. *Carth.* 75, 76. Before a *Habeas Corpus* is returned and filed, it may be amended; but not afterwards. 2 *Lil. Abr.* 2.

A *feme covert* was arrested in London, as a *sole-trader*, and discharged, by a judge of B. R. on *Habeas Corpus*, bail being put in to appear in B. R. The next term, on motion, the court granted a *procedendo*, affidavit of plaintiff's cause of action, &c. being made; for plaintiff could only proceed in London. See *Lavie* v. *Phillips*, 3 *Bur.* 1776; wherein the reason of the *procedendo* being granted, is fully discussed and determined. See title *Procedendo*.

HABEAS CORPORA JURATORUM. A writ which lies to compel the attendance of a Jury, or any of them, upon the *venire facias* for the trial of a cause brought to issue.

HABENDUM. See title *Deed*, II. 4.

HABENTIA. Riches: In some ancient charters, *habentes homines* is taken for rich men; and we read, *Nec Rex suum postum requirat, vel* habentes homines *quos nos dicimus* feasting-men. *Mon. Angl. tom.* 1. *p.* 100.

HABERDASHER. A dealer in miscellaneous goods and merchandizes: apparently derived from *avoirdupois* corruptly written *Habber-de-pois*, the weight with which goods of all sorts were weighed which were not weighed by Troy weight: these being very numerous, Haber-de-poisery, or Haberdashery was gradually applied to any mixture of various articles of merchandize. See *stat.* 9 *Ed.* 3. *stat.* 1. *c.* 1: 25 *Ed.* 3. *stat.* 3. (*vulgo stat.* 4.) *c.* 2.

HABERE FACIAS POSSESSIONEM. A judicial writ that lies where one hath recovered a term for years in action of *ejectione firmæ*, to put him into *possession*. *F. N. B.* 167. And one may have a new writ, if a former be not well executed. *Mich.* 21 *Car.* 1. *B. R.* A sheriff delivered possession in the morning, by virtue of an *habere facias possessionem*, and some time in the same day, after he was gone, the defendant turned the plaintiff out of possession; it was held, that if he had been turned out immediately, or whilst the sheriff or his officers were there, an attachment might be granted against the defendant; for this had been a disturbance in contempt of the execution; but it being several hours after the plaintiff was in possession, the court doubted, but agreed to grant a new *habere facias*, &c. 1 *Salk.* 321.

If the sheriff deliver possession of more than is contained in the writ of *habere facias possessionem*, an action on the case will lie against him, or an assize for the lands. *Style*, 238. The sheriff cannot return upon this writ that another is tenant of the land by right, but must execute the writ, for that will not come in issue between the demandant and him. 6 *Rep.* 52. See this Dict. titles *Ejectment*, *Execution*.

HABERE FACIAS SEISINAM. A writ directed to the sheriff, to give *seisin* of a freehold estate recovered in the King's courts, by *ejectione firmæ*, or other action. *Old Nat. Br.* 154. The sheriff may raise the *posse comitatus* in his assistance, to execute these writs: and where a house is recovered in a real action, or by ejectment, the sheriff may break open the doors to deliver possession and seisin thereof; but he ought to signify the cause of his coming, and request that the doors may be opened. 5 *Rep.* 91. This writ also issues sometimes out of the records of a fine, to give the cognisee seisin of the land whereof the fine is levied. *West. Symb. par.* 2. And there is a writ called *Habere facias Seisinam, ubi Rex habuit annum, diem et vastum*; for the delivery of lands to the Lord of the fee, after the King hath had the year, day, and waste in the lands of a person convict of felony. *Reg. Orig.* 156. See title *Execution*.

HABERE FACIAS VISUM. A writ that lies in divers cases in real actions, as in *formedon*, &c. where a *view* is required to be taken of the lands in controversy. *Red. Jud.* 26. 2 8, &c. *F. N. B.* See title *Jury*.

HABERGEON. From Germ. *Hals, collum*, and *Bergen, tegere*.] An helmet which covered the head and shoulders. *Blount*.

HABERJECTS, *Haubergetæ*.] A sort of cloths of a mixed colour, mentioned in *Magna Charta*, *cap.* 26.

HABILIMENTS OF WAR. Armour, utensils, or provisions for the maintaining of war. 3 *Eliz. cap.* 4.

HABIT AND REPUTE. Held and reputed. *Scotch Dict.*

HABLE, Fr.] A sea-port town; this word is used in *Stat.* 27 *H.* 6. *cap.* 3.

HACHIA. A hack, pick, or instrument for digging, *Placit.* 2 *Ed.* 3.

HACKNEY COACHES AND CHAIRS. See *Coach*.

HADBOTE, Sax.] A recompence or amends for violence offered to persons in holy orders. *Sax. Dict.*

HADE OF LAND, *Hada terræ*.] Is a small quantity of land, thus expressed:—*Sursum reddidit in manus domini duas acras terræ continentes decem feliones et duas* Hadas, *Anglicè* ten *ridges*, *and* two *hades*, &c. *Rot. Cur. Maner. de Orleton*, *Anno* 16 *Jac.*

HADERUNGA. Respect or distinction of persons; from the Sax. *Had, persona*, and *Arung*, honoured and admired. *Leg. Ethelred.*

HADGONEL, *Sax.*] Seems to be a tax or mulct.—*Mon. Ang. par.* 1. *fol.* 302.

HÆREDE ABDUCTO. A writ that anciently lay for the lord, who having by right the wardship of his tenant under age, could not come by his body, the same being carried away by another person. *Old Nat. Br.* 93.

HÆREDE DELIBERANDO ALTERI, QUI HABET CUSTODIAM TERRÆ. A writ directed to the sheriff to require one that had the body of an heir being in ward; to deliver him to the person whose ward he was, by reason of his land. *Reg. Orig.* 161.

HÆREDE RAPTO. See *Ravishment of Guard*. *Reg. Orig.* 163.

HÆREDIPETA. The next heir to lands. *Leg. H.* 1. *c.* 70.

HÆREDITAS JACENS. An estate to which the title has not been completed in the person of the heir. *Bell's Scotch Law Dict.*

HÆRETICO COMBURENDO. A writ that lay against an *Heretick*, who having been convicted of *heresy*, by the

bishop, and abjured it, afterwards fell into the same again, or some other, and was thereupon delivered over to the secular power. *F. N. B.* 69. By this writ, grantable out of Chancery, upon a certificate of such conviction, *Hereticks* were burnt; and so were likewise witches, sorcerers, &c. But the writ *de heretico comburendo* lies not at this day. 12 *Rep.* 93. *Stat.* 29 *Car.* 2. *c.* 9. See title *Heresy.*

HAFNE, *Danish*, A haven or port.] *Hafne Courts* are granted, *inter alia*, by letters patent of *Rich.* duke of *Glouc.* Admiral of England. 14 *Aug. Anno.* 5 *Edw.* 4.

HAGA, Sax. *Mansio.*] A house in a city or borough. *Domesday.* An ancient *anonymous* author expounds *haga* to be a house and shop, *domus cum shopa;* and in a book which belonged to the Abby of St. Austin in Canterbury, mention is made of *hagan monachis*, &c. See *Co. Lit.* 56.

HAGIA, Sax. *Hæg*, melted into *hay*, whence *haia.*] A hedge, *Mon. Angl. tom.* 2. *p.* 273.

HAIA. A hedge: sometimes taken for a park, &c. enclosed. *Bract. lib.* 2. *c.* 40. And *haiement* is used for a hedge-fence. *Rot. inq.* 36 *Ed.* 3. And *Haiebote* for the permission to take thorns, &c. to make or repair hedges.

HAIL-SHOT. The *stat.* 3 *Ed.* 6. against shooting of *Hail-Shot*, or more pellets than one, by any person under the degree of a Lord, &c. is repealed. *Stat.* 6 & 7 *W.* 3. *c.* 13.

HAIMSUCKEN. See *Homesoken.*

HAIR POWDER. Not to be mixed with lime, alabaster, &c. *Stat.* 4 *Geo.* 2. *c.* 14. Vide *Starch powder.* Persons wearing hair powder, are subjected to certain annual duties. See 48 *G.* 3. *c.* 55.

HAKE. A sort of fish dried and salted; hence the proverb obtains in *Kent*, *As dry as a Hake. Paroch. Antiq.* 875. *Spelm.*

HAKETON. A military coat of defence. *Wals. in Ed.* 3.

HALF-BLOOD. Is no impediment to *descents* of *fee-simple* lands of the *crown*, or to *dignities*, or in descent of *estates tail:* but in other cases it is an impediment. Administration is grantable to the *Half Blood* of the deceased, as well as to the whole blood; and *Half Blood* shall come in for a share of an intestate's personal estate, equally with the whole blood, they being next of kin, in equal degree. *Style*, 74. 1 *Vent.* 307. *Stat.* 22 *Car.* 2. *c.* 10. See titles *Descent, Executor.*

HALFENDEAL. The moiety, or one half of a thing; as *fardingdeal* is a quarter, or fourth part of an acre of land, &c.

HALF MARK, *Dimidia Markæ.*] A noble, or six shillings and eight-pence in money. If a *writ of right* is brought, and the seisin of the plaintiff, or his ancestor, be alledged, the seisin is not traversable by the defendant, but he must render the *Half-Mark* for the enquiry of the seisin; which is as much as to say, that though the defendant shall not be admitted to deny, that the plaintiff or his ancestors were seised of the land in question, and to prove his denial; yet he may be allowed to tender *half a mark* in money, to have an inquiry made, whether the plaintiff, &c. were so seised or not. *F. N. B.* 5. *Old Nat. Br.* 26. But in a writ of advowson brought by the King, the defendant may be permitted to traverse the seisin, by license obtained from the King's serjeant; so that the defendant shall not be obliged to proffer the *Half-Mark*, &c. *F. N. B.* 31.

HALF-SEAL. Is what is used in the *Chancery*, for sealing of commissions to *delegates*, upon any appeal to the court of delegates, either in ecclesiastical or marine causes. *Stat.* 8 *Eliz. c.* 5.

HALF-TONGUE. *Stat.* 11 *H.* 7. *c.* 21. See *Medietas Linguæ*, as to pleas and trials of *foreigners*, and titles *Jury, Trial.*

HALKE. From Sax. *Heall*, i. e. *Angulus.*] An hole; seeking in every *Halke*, &c.

HALL, Lat. *Halla*, Sax. *Heall.*] Was anciently taken for a mansion-house or habitation, being mentioned as such in *Domesday*, and other records; and this word is retained in many counties of England, especially in the county palatine of Chester, where almost every gentleman of quality's seat is called a *Hall.* Public meetings of corporations are called *Common Halls.*

HALLAGE. Toll paid for goods or merchandize vended in a *hall;* and particularly applied to a fee or toll due for cloth, brought for sale to Blackwell-Hall in London: Lords of fairs or markets, are entitled to this fee. 6 *Rep.* 62.

HALLAMAS. The day of *All Hallows* or *All Saints*, viz. *November* 1. and one of the cross quarters of the year was computed in ancient writings from *Hallamas* to *Candlemas. Cowel.*

HALLAMSHIRE. A part of the county of York, anciently so called in which the town of Sheffield stands. See *stat.* 21 *Jac.* 1. *c.* 23.

HALLMOTE OR HALLIMOTE, Sax. *Heall*, i. e. Aula, and *Gemote*, Conventus.] That court among the Saxons, which we now call a court baron: and the etymology is from the meeting of the tenants of one *hall* or manor. The name is still kept up in several places in Herefordshire; and in the records of Hereford, this court is entered as follows, *viz.* Hereford Palatium, *ad* Halimot *ibidem tent'* 11 *Die. Octob. Anno Regni Regis Hen.* 6, &c. It hath been sometimes taken for a convention of citizens in their public *hall*, where they held their courts, which was also called *Folkmote* and *Halmote:* But the word *Halimote* is rather the lord's court held within the manor, in which the differences between the tenants were determined. See *Leg. H.* 1. *c.* 10.

HALYMOTE, is properly an *holy* or ecclesiastical court: but there is a court in London, formerly held on the *Sunday* next before St. Thomas's day, called the *halymote* or *holy court, Curia Sanctimotûs*, for regulating the *bakers* of the city, &c. *Blount.* See title *London.*

HALYWERCFOLK. *Holyworkfolk*, or people who enjoyed lands by the service of repairing or defending a church or sepulchre; for which pious labours they were exempt from all feodal and military services. It did signify such of the province of Durham in particular, as held their lands to defend the corpse of St. Cuthbert; and who claimed the privilege not to be forced to go out of the bishoprick, either by the King or Bishop. *Hist. Dunelm. apud Wartoni Angl. Sax. par.* 1. *p.* 749. *Mon. Angl.* 1. 512. *Blount.*

HAM. A Saxon word, used for a place of dwelling; a village or town; hence the termination of some of our towns, as Nottingham, Buckingham, &c. Also a home close, or little narrow meadow is called *ham. Blount.*

HAMBLING OR HAMELING OF DOGS. The ancient term used by foresters for *expeditating. Manwood.*

HAMBURGH COMPANY. This, the oldest of our Trading Companies, being first chartered by Hen. IV. in 1406, and heretofore more usually called *Merchants Adventurers*, took warning from the repeated complaints made of their monopoly (the last of which was in 1661), and facilitated the admission by private regulations made by themselves. Add to this, it was, like the Hudson's Bay Company, without any parliamentary sanction; and had not been able even during the reigns of Charles II. and James II. to protect its exclusive privileges against the separate adventurers. See *Reeves's Law of Shipping and Navigation.*

HAMESECKEN. See *Homesoken.*

HAMFARE. Breach of the peace in a house. *Brompton in Legibus H.* 1. *c.* 80. See *Homesoken.*

HAMLET; HEMEL; HAMPSEL. From the Sax. *Ham*, i. e. Domus, and *Germ. Lat.* Membrum.] A little village, or part of a village or parish; of which three words,

*hamlet* is now only used; though *Kitchen* mentions the other two, *Hamel* and *Hampsel*. By *Spelman* there is a difference between *villam integram*, *villam dimidiam*, and *hamletam*; a *hamlet* being *quæ medietatem friborgi non obtinuit, hoc est, ubi 5 capitales plegii non deprehensi sint*. *Stowe* expounds it to be the seat of a freeholder. Several country towns have *hamlets*, as there may be several *hamlets* in a parish; and some particular places may be out of a town or *hamlet*, though not out of the county. *Wood*, 3.

HAMSOCA OR HAMSOKEN. See *Homesoken*.

HANAPER OFFICE. One of the offices so called, belonging to the Court of Chancery. Writs relating to the business of the Subject and their returns, were, according to the simplicity of ancient times, originally kept in an hamper, *in hanaperio;* and the others, relating to such matters wherein the Crown is immediately or mediately concerned, were preserved in a little sack or bag, *in parvâ bagâ;* and thence hath arisen the distinction, of the *Hanaper Office*, and *petty-bag* office, which both belong to the Common-law Court in Chancery. 3 *Comm.* 49. See title *Chancery*.

HANDBOROW. A surety or manual pledge, *i. e.* an inferior undertaker; for *headborow* is the superior or chief. *Spelm.*

HAND IN AND OUT. Is the name of an unlawful *Game* now disused, and prohibited by statute 17 *Ed.* 4. *c.* 2.

HANDFUL OR HAND-HIGH. In measuring horses is four inches by the standard. *Stat.* 33 *H.* 8. *c.* 5.

HANDGRITH, from Sax. *Hond*, manus, and *Grith*, pax.] Peace or protection given by the King, with his own hand.—*Leg. Hen.* 1.

HAND-GUN. An engine to destroy game. *Stat.* 33 *H.* 8. See title *Game*.

HAND-HABEND. A thief caught in the very fact, having the goods stolen in his hand. *Leg. Hen.* 1. *cap.* 59. *Bract. lib.* 3. *tract.* 2. *cap.* 8. 32 & 35. *Fleta lib.* 1. *c.* 38. See *Backberinde*.

HAND-WRITING. See *Evidence*.

HANDY-WARP. A kind of cloth. *Stat.* 4 & 5 *P.* & *M. c.* 5.

HANGWITE OR HANGWIT. From Sax. *Hangen*, i. e. suspendere, and *wite*, mulcta.] A liberty granted to a person, whereby he is quit of a felon or thief hanged without judgment; or escaped out of custody. *Rastal.* We read it interpreted to be quit *de laron pendu sans serjeans le Roy*, i. e. without legal trial: and elsewhere *mulcta pro latrone præter juris exigentiam suspenso vel elapso*. And it may signify a liberty, whereby a lord challenges the forfeiture for him who hangs himself within the lord's fee. *Domesday*.

HANIG. A term for customary labour to be done and performed. *Mon. Ang. tom.* 2. *p.* 264.

HANPER OR HANAPER, *Haniperium*.] The *Hanaper* of the *Chancery*; it seems to be the same as *fiscus* originally in the *Latin*. 10 *R.* 2. *c.* 1. See *Hanaper*.

HANSE. An old *Gothick* word, or from the German *Hansa*.] A Society of *Merchants*, for the good usage and safe passage of merchandize from one kingdom to another. The *Hanse* or *mercatorum societas*, was and in part yet is endowed with many large privileges by Princes within their territories; and had four principal seats or *Staples*, where the *Almain*, or *German* and *Dutch* merchants, being the founders of this society, had an especial house: one of which was here in London, called the *Steel Yard*. They had many privileges under ancient statutes.

Towards the middle of the thirteenth century, the nations around the *Baltick* were extremely barbarous, and infested that sea with their piracies: this obliged the cities of *Lubeck* and *Hamburgh*, soon after they began to open some trade with these people, to enter into a league of mutual defence. They derived such advantages from this union, that other towns, hence called HANS-TOWNS, acceded to their confederacy, and in a short time *eighty* of the most considerable cities scattered through those vast countries which stretch from the bottom of the *Baltick* to *Cologne* on the *Rhine*, joined in the famous *Hanseatic league*, which became so formidable, that its alliance was courted, and its enmity dreaded by the greatest monarchs. The members of this powerful association formed the first systematic plan of commerce, known in the middle ages, and conducted it by common laws enacted in their general assemblies. *Robertson's Hist. Emp. Char. V.* 2. 79, 80. 336.

HANTELODE. An arrest, from the Germ. *Hant*, an hand, and *load*, i. e. laid; *manûs immissio*: As arrests are made by laying hold on the debtor, &c.

HAP, Fr. *Happer*, i. e. *Rapere*, to catch.] Is of the same signification with us as in the *French*; as to *hap* the rent, is where partition being made between two parceners, and more land allowed to one than the other, she that has most of the land charges it to the other, and she *haps* the rent, whereon assise is brought, &c. This word is used by *Littleton*, where a person *happeth* the possession of a deed poll. *Lit.* § 8.

HAQUE. A little hand-gun, prohibited to be used by *stats.* 33 *H.* 8. *c.* 6. 2 & 3 *Ed.* 6. *cap.* 14. There is the *half haque*, or *demy haque*, within those acts. See titles *Arms*, *Game*.

HAQUEBUT. A bigger sort of hand-gun than the *haque*, from the Teuton, *haeck buyse*; it is otherwise called an *harquebuss*, vulgarly a *hagbut*. See *stats.* 2 & 3 *Ed.* 6. *c.* 14. 4 & 5 *P.* & *M. c.* 2. and titles *Arms*, *Game*.

HARATIUM From the Fr. *Haras*.] A race of horses and mares, kept for breed; in some parts of England termed a *stud of mares*, &c. *Spelm. Gloss.*

HARBINGER. An officer of the King's house, &c.

HARBOURS AND HAVENS. Upon the principles of our constitution, which places the Executive Power in the hands of the Monarch, the King has the prerogative of appointing *Ports* and *Havens*, or such places only, for persons and merchandise to pass into and out of the realm, as he in his wisdom seems proper. By the feodal law all navigable rivers and havens were computed among the *regalia*, and were subject to the Sovereign of the State. And in England it hath always been holden, that the King is lord of the whole shore, and particularly is the guardian of the ports and havens, which are the inlets and gates of the realm. *F. N. B.* 113. *Dav.* 9. 56. Therefore, as early as the reign of King John, we find ships seized by the King's officers, for putting in at a place that was not a legal port. *Madox, Hist. Exch.* 530. These legal ports were undoubtedly at first assigned by the crown; since to each of them a court of Portmote is incident, the jurisdiction of which must flow from the royal authority. 4 *Inst.* 148. The *great ports* of the sea are also referred to, as well known and established by *stat.* 4 *Hen.* 4. *c.* 26. which prohibits the landing elsewhere under pain of confiscation. See title *Ports*. The *stat.* 1 *Eliz. c.* 11. recites that the franchise of lading and discharging had been frequently granted by the crown.

But though the King had a power of granting the franchise of havens and ports, yet he had not the power of resumption, or of narrowing and confining their limits when once established; but any person had a right to lade or discharge his merchandize in any part of the haven: whereby the revenue of the customs was much impaired and diminished, by fraudulent landings in obscure and private corners. This occasioned the *stats.* 1 *Eliz. c.* 11. 13 & 14 *Car.* 2. *c.* 11. § 14. which enabled the Crown by commission to ascertain the limits of all Ports, and to assign proper Wharfs and Quays in each port, for the exclusive landing and lading of merchandize. 1 *Comm.* 264, *c.* 7. See further this Dict. title *Navigation Acts*.

By the *stat.* 19 *Geo.* 2. *c.* 22. if any master of a ship shall cast out of any ship, riding in any haven, &c. any ballast, &c. but only on land, where the tide never flows or runs, he may be fined by the justices, not more than 5*l.* nor less than 50*s.* As soon as any ship shall be sunk, stranded, or run on shore in any *harbour*, &c. or be brought or drove in, or be there in a ruinous condition, and there be suffered to remain, and the owner shall begin to carry away the rigging; on summons of the owner, or commander, a justice may seize the ship, &c. and by sale thereof raise money to clear the *harbour.* See *Bur.* 656.

Many local acts of parliament have been made for repairing and improving the port of London and particular *harbours* and *havens* of this kingdom. By 46 *Geo.* 3. *c.* 153. no pier, quay, wharf, jetty, breast, or embankment in, or adjoining to, any public harbour in the united kingdom, or any river immediately communicating therewith, so far as the tide flows up the same, shall be made or constructed by any person, without giving one month's notice to the Board of Admiralty, on penalty of 200*l.* The act contains a saving for the privileges of the Corporation of London.

By *stat.* 54 *Geo.* 3. *c.* 159. several provisions were made for the better regulation of the several ports, harbours, roadsteads, sounds, channels, bays, and navigable rivers in the kingdom; and of his majesty's docks, dock-yards, arsenals, wharfs, moorings, and stores therein; under the direction of the Board of Admiralty.

HARDWIC. Mentioned in *Domesday*, and by *Spelman.* See *Herdiwick.*

HARES. See title *Game.*

HARIOT. See *Heriot.*

HARNESS, *Fr. Harnisch.*] Signifies all warlike instruments. *Hoved. p.* 725. *Matt. Paris.* The tackle or furniture of a ship, was also called *harness* or *harnesium. Pl. Parl.* 22 *Ed.* 1.

HARO, HARRON. An *outcry* after felons and malefactors; and the original of this *clamour de haro* comes from the Normans. *Custom. de Norman.* 1. *p.* 104.

HARPING-IRONS. Are iron instruments for the striking and taking of Whales: and those that strike the fish with them are called *Harpiniers* or *Harpooners. Merch. Dict.* See titles *Fish, Fisheries, and Fishing.*

HARRIERS, *Harecti canes.*] Small hounds for hunting the *hare:* anciently several persons held lands of the King, by the tenure and service of keeping a pack of *beagles* and *harriers. Cart.* 12 *Ed.* 1.

HART. A stag, or male deer of the forest five years old complete; and if the King or Queen do hunt any such, and he escape alive, then he is called an *Hart Royal:* And where by the hunting he is chaced out of the forest, proclamation is usually made in the adjacent places, that in regard of the diversion the beast hath afforded the King or Queen, none shall hurt or hinder him from returning to the forest; and then he is called a *Hart Royal proclaimed. Manwood's Forest Laws, par.* 2. *cap.* 4.

HARVEST WORKMEN. May be licensed by justices of peace to go into other counties to work, &c. *Stat.* 13 & 14 *Car.* 2. *c.* 12. See title *Labourers, Poor, Vagrants.*

HASP AND STAPLE. The form of the entry of an heir into premises situate in a Royal Borough in Scotland. The baillie, the town-clerk, and the claimant, appear on the premises, when the claimant alleges his title, and proves it by witnesses, on which the baillie declares him to be heir, and makes him take hold of the hasp and staple of the door as a symbol of possession, and then enters the house and bolts himself in. On his coming out, the transaction is noted and registered, &c. See *Scotch Acts*, 1681, *c.* 11. and this Dict. title *Feoffment*, III. *Symbols.*

HASTA PORCI. A shield of brawn. *Paroch. Antiq.* 450.

HATCHES. Certain dams made of clay and earth, to prevent the water issuing from the works and tin washes in Cornwall, from running into the fresh rivers: And the tenants of several manors there, are bound to do certain days works *ad le hatches*, or *hacches. Stat.* 27 *Hen.* 8. *c.* 23. And from a *hatch*, gate, or door, some houses, situate on the highway, near a common gate, are called *Hatches.*

HATS. See *stat.* 1 *Jac.* 1. *c.* 7. regulating the making of Hats under survey of the Haberdashers' Company in London.—17 *G.* 3. *c.* 55. as to journeymen and apprentices in that trade.—27 *G.* 3. *c.* 13. as to the importation and exportation of Hats.—45 *G.* 3. *c.* 103. as to Straw Hats. Stamp Duties were at one time imposed on hats (and gloves,) sold by retail: but being found vexatious and trifling in their produce were repealed.

HAVENS. See *Harbours.*

HAUR. From the Fr. *Hair.*] Hatred. *Leg. W.* 1. *c.* 16.

HAUTHONER, *Homo Loricatus.*] A man armed with a coat of mail. *Charta Galfridi de Dutton, temp. H.* 3.

HAW. A small parcel of land so called in Kent; as a *Hemphaw* or *Beanhaw*, lying near the house, and inclosed for those uses. *Sax. Dict.* But *Sir Edward Coke*, in an ancient plea concerning Feversham in Kent, says *Hawes*, are houses. *Co. Lit.* 5. See *Haga Haia.*

HAWARD. See *Hayward.*

HAWGH or HOWGH. A green plot in a valley; a word used in the North of England. *Camd.*

HAWBERK alias HAWBERT, Fr. i. e. *Lorica.* He who held lands in France by finding a coat or shirt of mail, and to be ready with it when he shall be called, was said to have hauberticum *feudum*, *Fief de* Haubert: and *Hawberk*, with our ancestors, had the same signification, and so it seems to be used in the *stat.* 13 *Ed.* 1. *cap.* 6.

HAWKS. The stealing of an *hawk*, or concealing it, after proclamation made by the sheriff, is felony with clergy: But this extends only to long-winged *Hawks*, of the kind of *falcons:* and not to *goss hawks* or *sparrow hawks. Stats.* 34 *Ed.* 3. *c.* 22. 37 *Ed.* 3. *c.* 19. 3 *Inst.* 97. None shall kill, or scare away, any *hawks* from the coverts where they use to breed, on pain of 10*l.* to be recovered before justices of the peace, and divided between the King and prosecutor. *Stat.* 11 *Hen.* 7. *cap.* 17. A *Hawk* taken up, must be delivered to the sheriff, if taken up by a mean person to be proclaimed in the towns of the county, &c. An action of trover and conversion lies for an *Hawk reclaimed*, and which may be known by her vervels, bells, &c. See further, title *Game.*

HAWKERS. Those deceitful fellows who went from place to place, buying and selling brass, pewter, and other good and merchandize, which ought to be uttered in open market, were of old so called; and the appellation seems to grow from their uncertain wandering, like persons that with *Hawks* seek their game where they can find it. They are mentioned in *stat.* 33 *Hen.* 8. *cap.* 4.

HAWKERS, PEDLARS AND PETTY CHAPMEN. Persons travelling from town to town with goods and merchandize. These were under the control of Commissioners for licensing them for that purpose under *stats.* 8 & 9 *W.* 3. *c.* 25. 9 & 10 *W.* 3. *c.* 25. 29 *Geo.* 3. *c.* 26, &c.

These, and all other acts for regulating Hawkers and Pedlars, are repealed by *stat.* 50 *Geo.* 3. *c.* 41. by which the duties on such licences, and the regulation of the parties licensed, are placed under the management of the Commissioners of Hackney Coaches in London.—The act does not extend to hinder any person from selling any goods in any public *Mart*, *Market*, or *Fair.*—And by 52 *Geo.* 3. *c.* 108. it is enacted, that no wholesale trader in lace, or in woollen, linen, silk, cotton, or mixed goods, or in any British manufactures, and selling the same by wholesale, shall be deemed a Hawker, &c. and all such traders and their servants, or agents selling by

wholesale only, may go from house to house, and shop to shop, to any of their customers, who sell by wholesale or retail. And, by the said last act, the former act shall not extend to persons carrying about coals by carts, horses, &c. and so retailing them. By § 23. of the act 50 *Geo.* 3. it is not to extend to persons selling printed papers, licensed by authority, or fish, fruit, or victuals, or any goods, wares, or manufactures of their own making in any mart, market, fair, city, borough, town corporate, or market town, nor to travelling tinkers, &c. By § 16. Hawkers dealing in smuggled goods shall forfeit their licences. See *stat.* 55 *Geo.* 3. *c.* 71. for regulating Hawkers in Scotland.

A licensed Hawker opening a house in a place where he is not an householder, and that not being the usual place of his abode, and selling there by retail, does not commit an offence against § 7 of the said act 50 *Geo.* 3. *c.* 41. forbidding sales by auction by such Hawkers; to constitute such offence, the selling must be by outcry, &c. or by some mode of sale at auction. *Allen* v. *Sparkall*, *Term Rep. K. B. Mic.* 58 *Geo.* 3. *c.* 100.

HAY, *Haya*, Fr. *Haye.*] A hedge or inclosure; also a net to take game. See *Haia.*

HAY-BOTE. A liberty to take thorns and other wood, to make and repair hedges, gates, fences, &c. either by tenant for life or years: it is also said to be wood, for the making of rakes and forks, with which men make *hay.* See *Co. Lit.* 41., and title *Bote.*

HAY AND STRAW, AND HAY-MARKET. *Hay* sold in London, &c. between the first of June, and the last of August, being new *Hay*, is to weigh 60 pounds a truss; and old *Hay* the rest of the year 56 pounds, under the penalty of 1*s.* 6*d.* for every truss offered to sale, &c. See *stats.* 2 *W. & M. st.* 2. *c.* 8. §§ 16, 17. 8 & 9 *W.* 3. *c.* 17. § 1. 31 *Geo.* 2. *c.* 40. and 11 *Geo.* 3. *c.* 15.

HAYWARD. From the Fr. *Haye*, *sepes*, and *Garde*, *custodia.*] One who keeps a common herd of cattle of a town; and the reason of his being called *Hayward* may be, because one part of his office is to see that they neither break nor crop the hedges of inclosed grounds, or for that he keeps the grass from hurt and destruction. He is an officer appointed in the *Lord's Court*; and is to look to the fields, and impound cattle that do trespass therein; to inspect that no pound breaches be made, and if any be to present them at the leet, &c. *Kitch.* 46. There may be a custom in a manor, to have a surveyor of the fields or *Hayward*, and for him to distrain cattle damage feasant. See *Agillarius.*

HAZARD. An unlawful game at dice. See title *Gaming.*

HEADBOROW, OR HEADBOROUGH. From Sax. *Head*, caput, and *Borge*, fidejussor.] Signifies him who is *head* of the *frank pledge* in *boroughs*; and who had a principal government within his own pledge: as he was called *Headborough*, so he was also stiled *borowhead*, *borsholder*, *thirdborough*, *tithingman*, &c. according to the usage and diversity of speech in several places. *Lamb.* These *Headboroughs* were the chief of the ten pledges; the other nine being denominated *handborows*, or inferior pledges. *Headborows* are now a kind of *constables.* See titles *Constable*, *Tithing.*

In Scotland each shire has a head or principal borough, where the sheriff's court is held, and jurisdiction exercised. *Bell's Scotch Law Dict.*

HEAD COURTS in Scotland, abolished by the act 20 *Geo.* 2. *c.* 50.

HEADLAND. The upper part of ground left for the turning of the plough; whence the *headway*. *Paroch. Antiq.* 587.

HEAD-PENCE. Was an exaction of a certain sum heretofore collected by the sheriff of Northumberland of the inhabitants of that county, without any account therefore to be made to the King; which was abolished by *stat.* 23 *H.* 6. *c.* 7.

HEAD-SILVER. Paid to Lords of leets. See *Common Fine.*

HEALFANG OR HALSFANG. From Sax. *Hals*, *collum*, and *Fang*, *capere.*] That punishment, *quâ allicui collum stringatur. Collistrigium.* The Pillory. Sometimes it is taken for a pecuniary mulct, to commute for standing in the *pillory*; payable to the King or Chief Lord. *Leg. H.* 1. *c.* 11.

HEALTH, *Injuries to.*] Injuries affecting a man's *health*, are whereby any unwholesome practices of another, a man sustains any apparent damage in his vigor or constitution. As by selling him bad provisions or wine; 1 *Rol. Abr.* 90. by the exercise of a noisome trade, which infects the air in his neighbourhood. 9 *Rep.* 57. *Hut.* 135. or by the neglect, or unskilful management of his physician, surgeon, or apothecary. For it hath been solemnly resolved, that *mala praxis* is a great misdemeanor and offence at Common-law, whether it be for curiosity and experiment, or by neglect; because it breaks the trust which the party had placed in his physician, and tends to his destruction. *Ld. Raym.* 214. These are wrongs or injuries unaccompanied by force, for which there is a remedy in damages, by special action of *trespass on the case.* 3 *Comm.* 122.

As to offences against the public *health* of the nation, with respect to the *plague*, see titles *Plague*, *Quarantine.* As to *unwholesome provisions*, see titles *Butchers*, *Bakers*, *Wines*, *Cattle*, &c.

HEARTH MONEY. A tax formerly levied, now abolished in England, but still in force in Ireland. See *Chimney-Money*, *Taxes.*

HEBBER-MEN. Fishermen, or poachers below London Bridge, who fish for whitings, smelts, &c. commonly at *ebbing* water; mentioned in one of the articles of the Thames Jury, at the court of Conservancy of the river Thames, printed *anno* 1632. And those persons are punishable by *stat.* 4 *H.* 7. *c.* 15. See title *London.*

HEBBING WEARS. Are wears or engines made or laid at *ebbing water.* *Stat.* 23 *Hen.* 8. *c.* 5. See title *Sewers.*

HEBDOMAS, Lat.] A week. See *Week.*

HEBDOMADIUS. The week's man, canon, or prebendary in the cathedral church, who hath the care of the choir, and the officers belonging to it, for his own week. *Reg. Episc. Hereford. MS.* See *Ebdomadarius.*

HECK. An engine to take fish in the river *Owse.* *Stat.* 23 *H.* 8. *c.* 18.

HECCAGIUM. Is supposed to be rent paid to the lord of the fee for liberty to use the engines called *Hecks.*

HEDA. A small haven, wharf, or landing place. *Domesd.* See *Hith.*

HEDAGIUM. Toll, or customary duties paid at the *hith* or wharf, for the landing goods, &c. from which exemption was granted by the King to some particular persons and societies. *Cartular. Abbat. de Radings. MS. f.* 7.

HEDGE-BOTE. Is necessary stuff to make *hedges*, which the lessee for years, &c. may of common right take in his ground leased. See *Hay-bote*, *Bote.*

HEDGE-BREAKERS. By the *stat.* 43 *Eliz. cap.* 7. *Hedge-breakers*, &c. shall pay such damages as a justice of peace shall think fit; and if not able to pay the damages, shall be committed to the constable to be whipped. And by *stat.* 15 *Car.* 2. *c.* 2. constables and others may apprehend persons suspected of *Hedge stealing*, and carry them before a justice; where not giving a good account how they came by wood, &c. they are not only to make such recompence as the justice of peace shall adjudge, but pay a sum not exceed- 10*s.* for the use of the poor, or be sent to the house of correction for a month; persons convicted of buying stolen *wood*, shall forfeit treble value to him from whom taken. See title *Woods*, *Trees*, *Malicious Mischief.*

HEGIRA. The Mahometan *Æra*, or computation of time; beginning from the flight of Mahomet from Mecca, 16 July, *anno* 622. As the years of the *Hegira* consist of only 354 days, they are reduced to the Julian calendar by multiplying the year of the *Hegira* by 354, dividing the product by 365, subtracting the intercalary days, or as many times as there are four years in the quotient, and adding 622 to the remainder.

## HEIR.

HÆRES; AB HÆREDITATE.] Is one *ex justis nuptiis procreatus*, who succeeds by descent to lands, tenements, and hereditaments, being an estate of inheritance. The estate must be *Fee*, because nothing passeth *jure hæreditatis* but *Fee;* and by the *Common-law* a man cannot be *Heir* to goods and chattels: Though the *civilians* call him *hæredem, qui ex testamento succedit in universum jus testatoris.*

*Heirs* are included in the word assigns in grants, &c. If a woman keeps lands from the *Heir*, on pretence of being big with child by the *Heir's* ancestor, her deceased husband, the writ *de ventre inspiciendo* is to be granted to search her, &c. that the *heir* be not defrauded. *F. N. B.* 227.

*Heirs* may have divers writs, as writ of *Mortdancester*, *Entre ad communem legem*, *In casu proviso*, and *consimili casu*, *quod permittat*, *&c.* The *Heir* may bring an ejectment of copyhold lands *before* admittance. 2 *Wils.* 14.

In the Scotch law, the term Heir does not mean merely the Heir at law; it means also the Heir by destination or limitation: neither is it confined to lands only, as it is applied to the successors to personal property; who in the English law are distinguished as *Next of Kin.*

I. *The several Kinds of Heirs; and of relieving them against imprudent Contracts.*

II. *Who may be Heirs, what Persons are excluded from being Heirs; and of the Effect of the Word* Heirs *in Limitations.* And see titles *Purchase*, *Remainder.*

III. 1. *Where the heir shall take Advantage of Conditions, Covenants, &c. entered into to his Ancestor.*—2. *Where he shall be liable to his Ancestor's Debts and Contracts.*—3. *What shall go to the Heir.*—4. *Of Suits by and against an Heir, and herein of the Regulations by Statute.*—5. *As to Assets in the Hands of an Heir.*

See further as connected with this subject, this Dict. titles *Agreements*, *Assets*, *Condition*, *Covenant*, *Executor*, *Fraud*, *Limitation*, &c.

I. SOME Writers have made a distinction of Hæres *sanguinis et hæreditatis;* a man may be *hæres sanguinis* to a father or ancestor, and yet upon displeasure, be defeated of his inheritance. And there is an *ultimus hæres*, being he to whom lands come by *escheat*, for want of lawful *heir*, &c. *i. e.* the Lord of whom the lands are held, or the King. *Bract. lib.* 7. *cap.* 17. See titles *Escheat*, *Tenure.* But the most usual division is, that of *Heir Apparent*, *Heir Presumptive*, (as to both which see title *Descent*, Canon I.) *Heir general*, *Heir special*, *Heir by custom*, and *Heir by devise*, called *Hæres factus.*

Bonds and bargains with an *Heir apparent*, &c. to have double or treble the money lent, after his father's death, &c. are set aside in equity; but it is by paying what was lent *bona fide*, with interest, if the obligor applies for relief: though in case the obligee sues, he shall not recover what was really lent; for that would be to assist fraud. 1 *Vern.* 141. 359. Where *young Heirs* enter into any bond, *Chancery* relieves against it, without evidence of actual imposition; because there is a supposed distress and presumption of a liableness to be imposed on. *Barnardist.* 481. See *Treat. Eq.*

A devisee under a will defectively executed, represented the will as duly executed, and for a small sum gained a release from the Heir; the release was set aside. 1 *P. Wms.* 239. —So where a son, who on his father's death was remainder man in tail, sold his remainder at an under rate, the Court of Chancery set aside the conveyance. *Id.* 310.

The rule upon which Courts of Equity in these cases proceed, is not merely in respect of the *age* of the Heir contracting. 3 *P. Wms.* 131. In *Wiseman* v. *Beake*, Mr. Wiseman was nearly 40 years of age, and a Proctor in the Commons. In *Curwyn* v. *Milner*, the Heir was about 27 years of age; and in *Gwynne* v. *Heaton*, the plaintiff was 23 years old; which though not an advanced age, is beyond that which the law recognises as the age of discretion. But the real object which the rule proposes is, to restrain the anticipation of expectancies, which must from its very nature furnish to designing men an opportunity to practise upon the inexperience or passions of a dissipated man. And this being the object of the rule, its operation is not confined to Heirs, but extends to all persons, the pressure of whose wants may be considered as obstructing the exercise of that judgment which might otherwise regulate their dealings. 2 *Vern.* 346. *Forest*, 111. 2 *Atk.* 34. and see 2 *Vez.* 281. 516. 1 *Wils.* 229. and this Dict. titles *Fraud*, *Agreement.*

It has been said, that if the Heir has no maintenance from the father; but is turned out upon unreasonable displeasure, there, perhaps, the bargain, if not excessively beyond the proportion of such assurances, shall stand; because it is not to supply the luxury and prodigality of the Heir, but to keep him from starving. *Treat. Eq. c.* 2. § 12. But in *Gwynne* v. *Heaton*, *Thurlow*, C. was of opinion, that this circumstance was intitled to no weight whatever: nor does there appear to be any case in which such difference has been proceeded upon by the Court of Chancery; and there are several cases where it has been entirely disregarded. See 2 *Ch. Ca.* 120. 1 *P. Wms.* 310. 1 *Wils.* 320.

*Heir at Law*, or Heir-general by the Common Law, is he who, after his father or ancestor's death, hath a right to, and is introduced into, all his lands, tenements, and hereditaments. But he must be of the whole blood, not a bastard, alien, &c.

None but the Heir-general, according to the course of the Common-law, can be Heir to a warranty, or sue an appeal of the death of his ancestor. *Co. Lit.* 14 *a. Cro. Jac.* 217, 218.

If a condition be annexed to Borough-English or Gavelkind lands, and the condition is broken, the Heir at common-law shall enter; for the condition is a thing of new creation, and collateral to the land: But when the eldest son enters, the Heir or Heirs by custom shall enjoy the land; for by breach of the condition they are restored to their ancient estates. *Cro. Eliz.* 204. *Plow.* 28. *Co. Lit.* 11, 12. Heirs at law are in the Scotch law termed *Heirs whatsomever.*

*Special Heir*, is the issue in tail claiming, *per formam doni;* and as the statute *de donis* preserves the estate to him, his ancestor cannot grant or alien, nor make any rightful estate of freehold to another, but for term of his own life. *Lit.* § 613. See *Limitation of Estate.*

*Heir by custom.* A custom in particular places varying the rules of descent at Common-law is good; such as the custom of Gavelkind, by which all the sons shall inherit and make but one heir to their ancestor; but the general custom of Gavelkind lands extends to sons only; but a special custom, that if one brother dies without issue, all his brothers may inherit, is good. *Co. Lit.* 140.

*Heir by devise*, or *Hæres factus*, is only a devisee of lands, being made so by the *will* of the testator, and has no other right or interest than the *will* gives him. 3 *Co.* 42, *a.*

It has been held in Chancery, that such an Heir shall have

the aid of the personal estate in discharging the debts of the testator. 1 *Vern.* 36, 37. But this must be understood of an *hæres factus* of the whole estate, who shall have the benefit of the personal estate, but a devisee of particular lands shall not. *Preced. Chanc.* See title *Executor*, V. 6. *Assets.*

*Heir Active.* He who is served Heir, and has the right of action. *Scotch Dict.*

*Heir by conquest.* Is he who succeeds to the deceased in lands and other heritable rights; to which the deceased did not himself succeed, as heir to his predecessors; as when a father leaves an estate purchased to his second son. *Scotch Dict.*

*Heir of line.* He who succeeds lineally, by right of blood. *Scotch Dict.*

*Heir Male.* The nearest male heir who can succeed. *Scotch Dict.*

*Heir Passive.* He whom the law makes liable to be heir. *Scotch Dict.*

*Heirs Portioners.* Is when women succeed: in that case they have all equal portions. *Scotch Dict.* See title *Parceners.*

*Heirs of provision*, or Heirs by Destination, are those who succeed by virtue of a particular provision in a deed or instrument. *Scotch Dict.*

*Heir of Tailzie.* Is he to whom an estate is entailed. *Scotch Dict.* See title *Tail.*

II. The Eldest Son, after the death of his father, is at Common-law his *heir*, &c. And if there be grandfather, father, and son, and the father die before the grandfather, and after the grandfather die seised; the land shall go to the son or daughter of the father, and not to any other children of the grandfather. *Bro.* 303. And this *heir* is called *hæres jure repræsentationis*, because he doth represent his father's person: but if, in this case, the father die without any child; his next eldest brother shall have the land as *heir*, or for want of a brother, it descends to the sisters of the father. *Ibid.* A man having issue only a daughter, dies, leaving his wife with child of a son, which is afterwards born; here the son after his birth is *heir* to the land, but till then the daughter is to have it. 9 *H.* 6. 23. *Perk.* 521. See at large title *Descent.*

There are some persons who cannot be heir; as a bastard born out of lawful wedlock; an alien born out of the King's allegiance, though in wedlock; (see 4 *Term Rep. K. B.* 300.) a man attainted of treason or felony, whose blood is corrupted; these last cannot be *heirs propter delictum;* and an alien cannot be *heir, propter defectum subjectionis;* nor may one made *denizen* by letters patent; though it is *otherwise* of a person *naturalized* by act of parliament. *Co. Lit.* 8. 2 *Danv. Abr.* 552. A bastard by continuance, may be *heir* against a stranger; and an hermaphrodite may be *heir*, and take according to that sex which is most prevalent; but a monster, who hath not human shape, cannot be *heir*, although a person deformed may. *Co. Lit.* 7. *Ideots* and *Lunatics*, *persons excommunicate*, *attainted* in *premunire*, *outlaws* in *debt*, &c. may be *heirs.* 2 *Danv.* 553.

The word *heir* is not a good description of a person in the life-time of the ancestor; and an eldest son shall not take by the name of *heir* in the life-time of his father. 2 *Leon.* 70. A man cannot raise a fee-simple estate to his right *heirs*, by the name of *heirs*, as a word of *purchase* by conveyance or otherwise; but in such case the *heir* shall be in by descent: *Fortior et potentior est dispositio legis quam hominis. Hob.* 30. 2 *Lill. Abr.* 11.

By the law of England, no person can take to himself an inheritance in fee-simple by *deed*, without the word *heirs; but he may by devise;* though, in cases where the word *heir* is wanting, it has been adjudged that if there were *other words equivalent*, and the interest in the thing granted passeth by the consideration only, without any further ceremony in the law, an estate in fee may pass. 2 *Nels. Abr.* 928. In a *devise* by *will* or *exchange*, &c. the word *heirs* is *not* necessary: but estates of inheritance which are otherwise conveyed, require it. *Jenk. Cent.* 196. See this Dict. titles *Deed*, *Devise*, *Limitation.*

The word *heir* is *nomen collectivum*, and extends unto all Heirs; and under *heirs* the *heirs* of *heirs* are comprehended *in infinitum;* if lands are given to a man and his *heirs*, all his *heirs* are so totally in him, that he may give his lands to whom he will. *Trin.* 23 *Jac.* 1. *Noy*, 56.

The *Heir* is favoured by the *Common-law;* and the ancestor could not give away his lands by will from his *heir* at law, without the consent of the *heir*, till the statute 32 *H.* 8. *c.* 1. 2 *Lill.* 11. Dubious words in a will shall be construed for the benefit of the Heir, and not to disinherit him: and the Heir at law is preferred in Chancery in a doubtful case. *Noy*, 185. *Chanc. Rep.* 7. Where lands were devised to the *heirs* of J. S. then living; it was held, that his eldest son should have them, though in strictness he was not *heir* during his father's life, but *heir apparent:* But this was by reason of the words *then living*, which make it a description of the person. *Preced. Chanc.* 57.

As a limitation to the Heirs of the body of A. then living, shall be good as a *designatio personæ*, notwithstanding the rule *non est hæres viventis;* so a limitation to the Heirs of the body of A. then begotten shall prevail. See 1 *P. Wms.* 229. 1 *Bro. P. C.* 489. 2 *Black. Rep.* 1010.

Devise to the Heir at law in fee, with an executory devise over in case he does not attain the age of 21 years: this does not alter the quality of the estate which he would otherwise have taken as Heir; and he therefore takes by descent, and not by purchase. *Doe* v. *Timins*, *Term Rep. K. B. East.* 58 *Geo.* 3. 530.

The cases in which it has been held that the person described as an Heir special need not answer both parts of the description, by being actually Heir, as well as that species of Heir denoted by the description, seem to have materially broken in upon the doctrine of *Lord Coke* on the subject. See 1 *Inst.* 24, *b.* and which doctrine of *Lord Coke* has been pursued in many cases exclusive of those on which he relied: particularly in *Counden* v. *Clerke*, *Hob.* 29. *Southcot* v. *Stowell*, 1 *Freem.* 216. *Lord Ossulston's case*, 3 *Salk.* 336. and *Dawes* v. *Ferrers*, 2 *P. Wms.* 1. *Starling* v. *Ettrick*, *Pre. Ch.* 54. *Mr. Hargrave* has very ably attempted to vindicate the propriety of *Lord Coke's* doctrine, observing that it may be doubted whether there is a passage in all his works more capable of standing the severest test of modern criticism; and having examined the circumstances of the cases supposed to have weakened its authority, concludes his note, (*p.* 32, *a.*) with remarking, that *Lord Cowper's* judgment in *Newcomen* v. *Barkham*, or *Brown* v. *Barkham*, 1 *Eq. Ab.* 215. *c.* 14. *Rep. Eq.* 116. 131. *Pre. Ch.* 442. 461. 2 *Vern.* 729. 1 *Stra.* 35. which was materially shaken in its principle by what fell from *Lord Hardwicke*, in decreeing upon the bill of review, is the only direct authority against *Lord Coke.*—In a following note, however, (*p.* 164, *a.*) *Mr. Hargrave* candidly admits, that since his writing his former note, a case has been published in which the court of King's Bench, after three arguments, decided against applying the above rule to a *Will; Wills* v. *Palmer*, 5 *Burr.* 2615. and that in another, which was also three times argued, the Court of Exchequer had refused to apply the rule to a Marriage-settlement. *Evans d. Burtenshaw* v. *Weston*, *M.* 1774. or *H.* 1775.—This concurrence of authority, the result of so much deliberation, for both Courts appear to have weighed the subject with the most anxious attention, seems to have given a weight to the decree in *Newcomen* v. *Barkham*, beyond that to which *Lord Hardwicke* thought the principle entitled. It is however well worth the

Student's while to consult *Mr. Hargrave's* observations in support of *Lord Coke's* doctrine, that to take as a purchaser by description of a special heir, *every part of the description* must unite in the claimant. See also *Fearne on Cont. Rem.* 4th. edit. *p.* 319; and 2 *Wils. p.* 20.

III. 1. Conditions and Covenants-*real*, or such as are annexed to estates, shall descend to the Heir, and he alone shall take advantage of them. 43 *Ed.* 3. *c.* 4. 1 *And.* 55.

And this is not only where there are express words, but also where there are none: for the law by implication reserves the condition to the Heir of the feoffor, &c. for being prejudiced by the disposition, it is but reasonable that he should take the same advantage that his ancestor whom he represents might. 1 *Rol. Abr.* 407. 472.

If a man seised of lands in right of his wife, makes a feoffment in fee upon condition, and dies, and after the condition is broken, the Heir of the husband shall enter; for though no right descended to him, yet the title of entry by force of the condition which was created upon the feoffment, and reserved to the feoffor and his Heirs, descended. 8 *Co.* 43. *Co. Lit.* 202, *a.* 336, *b.*

The Heir shall take advantage of a *nomine pœnæ;* for being incident to the rent, it shall descend to the Heir, being a security or penalty to engage the payment of the rent; therefore whoever has a right to the rent, ought in reason to have the penalty, which is to oblige the tenant to pay it. *Co. Lit.* 162, *b.*

If a man leases for years, and the lessee covenants with the lessor, his executors and administrators, to repair and leave it in good repair at the end of the term, and the lessor dies, &c. his Heir may have an action upon this covenant; for this is a covenant which runs with the land, and shall go to the Heir, though he is not named: and it appears, that it was intended to continue after the death of the lessor, inasmuch as his executors, &c. are named. 3 *Lev.* 92. *Skin.* 305.

If A. enfeoff B. upon condition that if the *Heir* of A. pay to B. &c. 20*s.* then he and his *Heirs* may re-enter; this is a good condition, of which the *Heir* of A. may take advantage, and yet A. himself never can. *Co. Lit.* 214, *b.*

Upon a covenant with A. and his Heirs to do all lawful and reasonable acts, for further assurance upon request, and a request made by the purchaser in his life to levy a fine, and neglect so to do, the ancestor not being evicted in his life, but the Heir being evicted afterwards, the Heir may maintain an action upon the request of his ancestor, and refusal made by the vendor. 5 *W. P. Taunton*, 418.

The heir of the conusor was heard to oppose a fine being amended to his disherison. 5 *W. P. Taunton*, 207.

III. 2. As the Heir-at-law is the proper and only person who can take advantage of conditions, &c. annexed to the real estate; so he shall be bound by all such conditions, &c. which run with the land, whether such conditions were annexed to the estate by the original feoffer, grantor, or immediate ancestor. 1 *Rol. Abr.* 421.

If a gift be made in tail on condition that the donee should not discontinue, and the donee hath issue two daughters, and one of them discontinues, the donor shall enter and evict them both; because it was the original condition annexed to the whole estate, that no part of it should be discontinued. *Co. Lit.* 165.

But note, that neither tenant in tail, nor his issue can be restrained from aliening by *fine* and *recovery;* though they may be restrained from aliening by feoffment, or other *tortious act*, which amounts to a *discontinuance.*

So where one devised lands to A. and the Heirs male of his body, provided, that if he does attempt to alien, that then immediately his estate shall cease, and B. shall enter, and A. makes a feoffment in fee, and thereupon B. enters; and it was adjudged against B. and that the condition was void, because *non constat* what shall be adjudged an attempt, and how it shall be tried. 1 *Vent.* 321. 3 *Keb.* 787. *Piers and Winn.*

Also where a *condition* is annexed to the estate given to the Heir, and which goes in abridgment and restraint thereof, the same shall in some cases be construed a *limitation;* for if it were a *condition*, nobody could take advantage of it but the *Heir. Dyer*, 316. 10 *Co.* 41. 1 *Vent.* 199. As if a copyholder in *Borough English* surrender to the use of his will, and after devises to his wife for life, remainder to his eldest son, paying 40*s.* to each of his brothers and sisters within two years after the death of his wife, &c. this is a *limitation*, and not a *condition;* for if it should be a *condition*, it would *extinguish in the Heir*, and there would be no remedy for the money. *Cro. Eliz.* 204. 3 *Co.* 20, *b.* 2 *Leon.* 114. *S. C. Vide* farther as to the doctrine of the *Heir* being bound, &c. *Vaughan*, 271. 2 *Mod.* 26. *S. C. Cro. Eliz.* 833. 919. *Moor*, 644. *pl.* 891. *Noy*, 51.

But wherever the ancestor makes a conveyance or disposition on condition, which goes in restraint and abridgment of the estate of the heir, he must have notice of it; for having a good title by descent, he is not obliged to take notice of such condition at his peril, as others must do. 8 *Co. Francia's* case.

If the person of the ancestor be bound in respect of his land, which descends to the Heir, he shall be charged: as, if by a subsidy to be assessed upon every one having 20*s. per annum*, A. be charged and die; his Heir shall pay it, for it runs with the land. *R. Mo.* 17.

*Heir* is *nomen collectivum;* and therefore, if a condition be, *that if his heir does not pay such a rent-charge, the estate shall go to B.* if the *Heir* of the *Heir* does not pay, the condition is broken. *R. Cro. Jac.* 145.

It has been held, that the *Heir* is never chargeable without an express *lien* and assets; and even then, no longer than he hath assets, for he is not obliged to keep them till he is charged: But if he has assets, he ought to plead truly, and confess them; otherwise judgment shall be given against him *de terris propriis*, for it is then his debt. *Jones*, 88. 3 *Salk.* 179. When a man recovers against an *Heir*, by default or verdict, on *pleading riens per descent*, a special judgment *de terris descensis*, may be entered against the *Heir*, and the plaintiff (praying it) shall have all the lands by descent in execution: though, if the judgment be general against the *Heir*, without praying such special judgment, he can only have a moiety of the lands by *elegit. Plowd.* 439. 2 *Leon*, 16. Here the plaintiff may surmise, that the *Heir* hath such land by descent, and pray to have execution of all his land. *Dyer*, 149. *Rol.* 72. The judgment and execution shall be general, unless the Heir acknowledge the action, and shews that he hath so much by descent; but if he will not shew what he hath by descent, he loses the benefit of the law. *Cro. Eliz.* 692.

If the *Heir*, in case where the ancestor hath bound himself and his *Heirs*, have never so much land come to him by gift in tail, or conveyance of the father, and *not by descent*, he is *not* chargeable at all: and so it is for any estate but what is in *fee-simple;* as where lands are granted to J. S. and his *Heirs* during the life of another, &c. the *Heir* shall not be charged for this, no more than for the land entailed. 10 *Rep.* 98. See *post*, 4. *No lands can be charged but fee-simple;* therefore, in a suit against the *heir*, the judgment is only for the land *descended*, and not for other lands, &c. but where it is by his own fault, as by a false plea, or the like. *Co. Lit.* 102. 376.

A man binds himself and his *heirs* in an obligation, and hath lands and *heirs* on the part of the father, and the part

of the mother: the *heirs* and lands of both, and not of one alone, must be charged in debt; and the plaintiff shall have several actions; and the execution shall stay, till it may be had against both of them. 2 *Rep.* 25. *Hob.* 25. Also if one bind himself and his *heirs*, and leave land at *Common-law*, and lands in *gavelkind*; the obligee must sue all the *heirs*. *Hob.* 25. An *heir* sued on a specialty, shall have his age; and if one of the *heirs* be within age, the parol shall be stayed for all. *Moor. cap.* 203.

A collateral *heir* is chargeable for the debt of his ancestor: but the declaration must be special, and he is to be charged as collateral *heir*, not as immediate *heir*; and if a son happens between, who dies, he must be said uncle and *heir* of the son, who was heir of the debtor, &c. *Cro. Car.* 151. And a child born, though he lives but an hour, has the fee of lands vested in him as *heir*. *Hetl.* 134. In a writ a man need not shew how he is *heir*; but he must in a declaration, &c. though it is only for form to set forth *how* a person is *heir*, because it is not traversable; and *heir*, or no *heir*, is issuable. *Moor.* 885. If an *heir* ought to confess the debt on action brought against him, and the debt be not denied, it must be admitted. 1 *Lutw.* 442.

Debt against the *heir*, upon the bond of his ancestor, is to be brought in the *debet* and *detinet*, because the *heir* himself is bound; and not in the *detinet* only, though that is cured by verdict. *Sid.* 342. 1 *Lev.* 224. An *heir* is not bound by the bond of the ancestor, unless he is expressly bound: and if in a bond a man bind his *heirs*, but not himself, the bond is void. 2 *Saund.* 156. *Cro. Jac.* 570. Also a man shall never bind his *heir* to warranty, where he himself was not bound: if he make a feoffment in fee, and bind his *heirs* only to warranty, the feoffment is void, for the *heir* shall be bound to warranty in such cases only, where the ancestor was bound, without which it cannot descend upon him. *Co. Lit.* 386. And warranties and estoppels shall descend upon the *heir* general, and not upon any special *heir*, &c. So that if a man convey land with warranty against him and his *heirs*, his *heir* on the mother's part shall not be vouched by this, so long as there is an *heir* on the father's part, &c. *Hob.* 24.

A grant of an annuity, must be for a man and his *heirs*, to bind the *heir*, although there be assets; and when he is named, the *heir* shall not be bound except there be assets. *Co. Litt.* 144. Where a person covenants with another to perform any act, if his *heir* be not named, he is not bound by it; but in covenants of others, that concern the inheritance, the *heir* shall have the benefit of them, though not named. 5 *Rep.* 8. 1 *Rol. Abr.* 520. An *heir* may enter for a condition broken, when the condition is annexed to lands, and take advantage of it; because, if there had been no condition, the land would have descended to him. And an *heir* may perform a condition, to save the land. 2 *Nels. Abr.* 929.

The Heir must be expressly named, otherwise he is not chargeable, and the reason why the Heir is not chargeable in this case, as the executor in case of a bond entered into by the testator, without being named, is this; by the Common-law only the goods and chattels of the debtor, and the annual profits of the land as they arose, and not the land itself, were liable to execution for debt or damages, because these being the security the creditor depended upon, they were liable in the hands of his representative or executor, as well as in the hands of the debtor himself; hence it was, that the executor was bound by the debt of the testator, so far as he had chattels or assets, though he was not named in the contract; but the land was not liable to execution, because it was preserved from the personal contracts and engagements of the tenant, that he might be the better able to answer the feudal duties to the lord, which were the life and support of government; therefore the land not being originally liable to the demand in the hands of the obligor, must be much less liable in the hands of the *heir*, who was not comprehended in the contract. 2 *Inst.* 19. *Plow.* 440. *Hob.* 60.

But if A. had granted, for him and his *heirs*, to B. and his *heirs*, such a rent out of his lands; in this case, the *heirs* being comprehended in the contract, are bound to make good the grant, so far as they have assets by descent from the grantor; and this was allowed at Common-law, because the grantee of the rent had the land originally in view for his security; and by the grant itself having it in his power to distrain the land for the rent, it was equal to the *heir*, whether the land answer the rent by distress, or by an execution upon a judgment in a writ of annuity. 1 *Rol. Abr.* 226. *Popham*, 87. *Hob.* 58. *Dyer*, 344, *b.* *Co. Lit.* 144, *b.*

If the ancestor bind himself in a statute, recognizance, &c. the *heir* is liable, not only as tertenant, but also as *heir*, otherwise he could not have his age; and cannot oblige a purchaser, whether for valuable consideration, or without, to contribute, but one *heir* may oblige another to contribute; as if a man seised of two acres, the one descendible, according to the course of the Common-law, the other in Borough English, acknowledge a statute, &c. the *heir* at Common-law shall oblige the Borough English heir to contribute: so one coparcener shall oblige the other to contribute; or if the conuzor had lands, some descendible to the *heirs* of the father, and some descendible on the *heirs* of the mother, the *heir* on the part of the father shall compel the *heir* on the part of the mother to contribute; *& sic vice versa*. 3 *Co.* 12. Sir *William Herbert's* case. See *post*, 4.

III. 3. Not only land, but rent not due at the death of the ancestor lessor, shall go to the *heir*; so corn sown by a tenant for years, where his term expires before the corn is ripe; every thing fastened to the freehold, timber-trees, deeds belonging to the inheritance; deer, conies, pigeons, fish, &c. 2 *Nels. Abr.* 927. An *heir* shall enforce the administrator to pay debts with personal estate, to preserve the inheritance. *Chan. Rep.* 280. 293. If an executor hath assets, he is compellable in equity to redeem a mortgage, for the benefit of the *heir*; and it is the same where the *heir* is charged in debt. *Hard.* 511. For the personal estate received the benefit. When the *heir* is sued for the debt of his ancestor, and pays it, he shall be reimbursed by the executor of the obligor, who hath personal assets. 1 *Chanc. Rep.* 74. But in action of debt brought upon a bond against an *heir*, it is no good plea for the *heir* to say, that the executors have assets in their hands. *Dyer*, 204. For a creditor may sue either *heir* or executor, and *heirs* and executors are both chargeable upon specialties. If an *heir* hath assets, and the executor also, it is at the election of the obligee to have action of debt against the one, or the other; but he shall not charge them doubly. 2 *Plowd.* 433. See title *Executor*. Whether the *heir* hath land by descent shall be tried and enquired of, with the value, by a jury, to make the *heir* answerable. 5 *Mod.* 122. See *post*, III. 4.

The *heir* shall not have money due on mortgages in fee, if he be not particularly named, but the executor; and if the day be past, although the *heir* be named, the executor shall have it. *Co. Lit.* 210. 1 *Ventr.* 348. See titles *Executor*, V. 6. *Mortgage*.

Where money is covenanted to be laid out in a purchase of land to be settled on A. in fee; on A.'s dying before the money is laid out, his Heir, and not his executor, shall have it. 1 *P. Wms.* 483. So where, though by a voluntary contract, money is agreed to be laid out in land, the Court will execute such agreement in favour of the Heir. 2 *P. Wms.* 171. On the same principle, where one articled to buy land and died; his executor shall pay the money, but his heir shall have the lands. *Id.* 632. And in all cases where it is a measuring cast between an executor and an Heir, the latter shall in equity have the preference. *Id.* 176.

A younger brother beyond sea having contracted to buy a real estate of his elder brother, made his will charging his estate with great legacies, but his will was attested by only two witnesses. Afterwards the testator died without issue, leaving his elder brother his executor and Heir: the Heir may retain out of the assets the whole purchase money, though entitled to the land again as Heir. 2 *P. Wms.* 291.

If an estate *pur autre vie* be limited in trust for one, his Heirs, executors, administrators and assigns, and be not devised, it descends to the Heir as a special occupant, chargeable according to the statute of Frauds. (29 *Car.* 2. *c.* 3.) 4 *Term Rep. K. B.* 229.

*The following is a* specification *of what* goods *and* chattels *go to* the Heir in England: As to Scotland, see title *Heirship Moveables.*

Goods and chattels annexed to the freehold go to the Heir, and not to the executor, or administrator: as the glass in a window; the doors and locks of an house. *Off. Ex.* 86. 21 *H.* 7. 26, *b.* 4. *Co.* 63, *b.* So the pales, posts, and rails for an inclosure. 12 *H.* 7. 26, *b.* So furnaces, coppers, &c. fixed to the freehold. *R.* 21 *H.* 7. 26, *b.* *R.* 20 *H.* 7. 13, *b.* unless they are severed in the life-time of the testator. *Semb*, 1 *Sal.* 368. *Vide Com. Dig.* tit. *Execution*, (C. 4.) tit. *Wast.* (D. 2.) Salt-pans necessary to the use of salt-works, and without which they would be of no value. 1 *H. Blackst.* 259, *n.*—So wainscot fixed to an house. 4 *Co. a.* So pictures, glasses, &c. fixed instead of wainscot. 2 *Vern.* 508. So millstones, &c. fixed to a mill. So a term for years to attend the inheritance does not go to the executor, but to the heir. *R.* 2 *Ch. Ca.* 156. 160. So deer in a park, conies in a warren, and doves in a dove-house, go with the inheritance to the Heir. So fish in a pond, or piscary. *Co. Lit.* 8 *a.* *R. Owen.* 20. 1 *Rol.* 916. *l.* 45, 50. So apples and other fruits growing at the death of the ancestor. *Off. Ex.* 84. So roots, &c. within the soil. *Ibid.* 89. So a coat-armour, pennons, tombstone, and monuments in a church, in honor of the ancestor. *Co. Lit.* 18 *b.* So charters, deeds, and evidences of lands, with the chests in which they are preserved. See *Com. Dig.* tit. *Biens.* (B;) *Charters.* 1 *Inst.* 18 *b.*—An ancient horn where the tenure is by cornage. 1 *Vern.* 273.

If a nobleman, knight, esquire, &c. be buried in a church, and have his coat of arms, and pennons with his arms, and such other ensigns of honour as belong to his degree, set up in the church, or if a grave-stone or tomb be laid or made, &c. for a monument of him; in this case, albeit the freehold of the church be in the parson, and that these be annexed to the freehold, yet cannot the parson, or any, take them, or deface them, but he is liable to an action from the Heir, and his Heirs, in the honour and memory of whose ancestor they were set up. *Co. Lit.* 18, *b.* And see 1 *Rol. Abr.* 625. *Noy*, 101. *Godbolt*, 200. *Cro. Jac.* 367. 2 *Bulst.* 151. See 2 *Comm. c.* 28. *p.* 428, 429.

In Scotland, the Heir is entitled to all the heritage, and the executor to all the moveables of the deceased, with the exception of *heirship moveables.* (See that title.)—But where the heir and executor stand in an equal degree of relationship to the ancestor, it is competent to the Heir to insist that the whole estate, heritable and moveable, shall be thrown together, and that he shall be entitled to his share of the whole equally with the executor. This is a privilege which it is obvious will be used only, where the moveables greatly exceed the heritage in value.

In the division of the rents of land betwixt an Heir and executor, the latter has right to the rent of the lands due at the death of the ancestor, the Heir to what was not at that time due, and a rule has been adopted for regulating what part of the rents shall be considered as due or not.—The terms of Whitsunday and Martinmas are received as the legal terms by which those interests are regulated, whatever the conventional terms of payment may be. If, therefore, the landlord has survived Whitsunday, his executor has right to half of that year's rent: and if he survived Martinmas, the executor has a right to the whole of that year's rent. But where the lands have been in possession of the proprietor, whatever has been sown by the proprietor must be reaped by the executor. See *Bell's Scotch Law Dict.*

III. 4. It is clear, that the *heir* may bring any real action *droitural*, in right of his ancestor, but cannot regularly bring any personal action, because he has nothing to do with the assets, or personal contracts of his ancestor. *Co. Lit.* 164. If an erroneous judgment be given against the ancestor, by which he loseth the lands, the heir may bring a writ of error. 1 *Rol. Abr.* 747. *Dyer*, 90. *Godb.* 337. And if one hath lands on the part of his mother, and loseth by erroneous judgment, and dies, the heir of the part of the mother shall have the writ of error. 1 *Leon.* 261. 2 *Sid.* 56. So the younger son, when entitled to the land by the custom of Borough English, shall bring the writ of error, and not the Heir at Common-law, for this remedy descends with the land. *Owen*, 68. 1 *Leon.* 261. 4 *Leon.* 5. and see *Bridgm.* 71. So if there be an erroneous judgment against tenant in tail female, the issue female, and not the son, shall bring a writ of error. *Dyer*, 90. 1 *Leon.* 261. 1 *Rol. Abr.* 747. See further *Dyer*, 89. *Cro. Eliz.* 469. 3 *Lev.* 36. and title *Error*, I. 1.

If J. S. binds himself and his Heirs, in a bond, and thereupon judgment is obtained against J. S., and J. S. makes his will, and his heir at law executor, and dies, leaving lands which descended to his Heir, yet he shall not have a writ of error as Heir, for he is not privy to the judgment; and when an extent is made upon him, it is as tertenant: but after the lands are taken in execution, he may have a writ of error. Because he is prejudiced by the judgment, and by the reversal will receive benefit. *Sty.* 38, 39.

The heir at law may, in right of his ancestor, maintain an action of debt for rent reserved on a lease, made by his ancestor, (accrued after the death of the ancestor,) for the rent is part of the lands, and incident to the reversion; but for arrears of rent incurred in the life-time of the ancestor, neither the heir, nor the executor, could by the Common-law maintain an action; for as to the heir, they were considered as part of the personal estate, and as to the executor, he could not represent his testator as to any contracts relating to the freehold and inheritance. 11 *H.* 6. 15. 19 *H.* 6. 41. *Co. Lit.* 162, *a.* But now, by *stat.* 32 *H.* 8. *cap.* 37. an executor may maintain an action of debt for such arrears: for which see tit. *Debt.*

Where the ancestor binds himself, and his heirs, in an obligation, the obligee may sue the Heir, or executor, or the administrator of the executor, at his election, and may have execution of the land descended to the Heir; for the Common-law having allowed the action of debt against the Heir, he could have no benefit by the action, unless he were permitted to have execution of the lands which descended to the Heir. *Plowd.* 441. 3 *Co.* 12, *a.* *Cro. Jac.* 450. 1 *And.* 7.

But the body of the *heir* is protected, for it would be most unreasonable to subject the *heir* to the payment of his ancestor's debts, any farther than to the value of the assets descended. *Dyer*, 81. *pl.* 62. 207. *pl.* 15. *Moor, pl.* 203. *Co. Lit.* 103. 290.

By the common-law, if the *heir* before an action brought against him had aliened the assets, the obligee was without any remedy; but if he only aliened, pending the writ, the lands, which he had by descent at the time of the original purchased, had been liable. *Co. Lit.* 102.

In consequence of this doctrine, that the lien shall have relation to the time of the original purchased, it hath been adjudged, that if there had been two creditors to J. S. whose

Heir is bound, *viz.* A. and B. and A. files an original in C. B. and hath judgment thereon. *Trin. Term*, 2 *Jac.* 2. by default, and thereupon a *general elegit* issues against all the lands of the heir, and a moiety thereof is delivered to A.—B. on a bill filed in *B. R.* 1 & 2 *Jac.* 2. has a *special judgment* against the assets confessed by the heir, *Trin. Term*, 3 *Jac.* 2. though B.'s judgment be subsequent to A.'s yet it appearing that his bill or original was filed before A.'s the judgment shall have relation thereto: therefore he must be first satisfied. *Carth.* 245.

So it seems in the above case, that though A.'s judgment had been on an original actually filed before B.'s that B. must have been preferred, because his judgment was general *against the heir*, and the execution a *general* and *common execution* by *elegit*, and *not* against the *assets only* by way of extent; therefore such a *general judgment* will not operate by way of relation to the original, but binds only, as in common cases, from the time of the judgment given. *Carth.* 246. *Per. Cur.*

But now, in relief of creditors against the alienation of lands descended, &c. it is enacted by *stat.* 3 & 4 *W. & M. c.* 14. § 5, "That in all cases, where any heir at law shall be liable to pay the debt of his ancestor, in regard to any lands, tenements or hereditaments descending to him; and shall sell, alien, or make over the same, before any action brought or process sued out against him; that such heir at law shall be answerable for such debt or debts, in an action or actions of debt to the value of the said land so by him sold, aliened, or made over; in which cases all creditors shall be preferred, as in actions against executors and administrators; and such execution shall be taken out upon any judgment or judgments so obtained against such heir to the value of the said land, as if the same were his own proper debt or debts; saving that the lands, tenements and hereditaments *bona fide* aliened before the action brought, shall not be liable to such execution."

And by § 6. of that act it is provided, "That where any action of debt upon any specialty is brought against any heir, he may plead *riens per discent* at the time of the original writ brought, or the bill filed against him. And the plaintiff in such action may reply, that he had lands, tenements or hereditaments from his ancestor *before the original writ brought*, or *the bill filed:* and if, upon issue joined thereupon, it be found for the plaintiff, the jury shall enquire of the value of the lands, tenements or hereditaments so descended, and thereupon judgment shall be awarded as aforesaid: but if judgment be given against such *heir* by confession of the action without confessing the assets descended, or upon demurrer, or *nihil dicit*, it shall be for the debt and damages, without any writ to enquire of the lands, tenements or hereditaments so descended."

Before this act, if the ancestor had devised away the lands, a creditor by specialty had no remedy either against the heir or devisee. *Abr. Eq.* 149.—To provide against which mischief, it is by § 1, 2. of the same statute enacted, "That all wills and testaments, limitations, dispositions, or appointments, of or concerning any manors, messuages, lands, tenements, or hereditaments, or of any rent, profit, term, or charge out of the same, whereof any person or persons at the time of his, her, or their decease shall be seised in fee-simple, possession, reversion, or remainder, or have power to dispose of the same by his, her, or their last wills or testaments, shall be deemed and taken (only as against such creditor or creditors as aforesaid, his, her, and their *heirs*, successors, executors, administrators and assigns, and every of them,) to be fraudulent, and clearly, absolutely, and utterly void, frustrate, and of none effect; (any pretence, colour, feigned or presumed consideration, or any other matter or thing to the contrary notwithstanding)."

And that such creditors may be enabled to recover their debts, it is further enacted, § 3. "that in the cases before mentioned, every such creditor may maintain an action of debt upon such bonds and specialties, against the *heirs* at law of such obligors, and such devisees *jointly*, by virtue of this act; and such devisees shall be liable and chargeable for a false plea, in the same manner as any *heirs* should have been for false plea, or for not confessing the lands or tenements to him descended."

It is, however, by § 4. further provided, "that where there is any limitation or appointment, devise or disposition of any lands, &c. for the raising or payment of any real or just debt, or any portion or sum of money, for any child, other than the Heir at law, according to or in pursuance of any *marriage contract*, or *agreement* in *writing bona fide* made, before such marriage, the same shall be in full force, and the lands, &c. shall be holden and enjoyed by such persons, and their Heirs, executors, administrators and assigns, for whom the said limitation, &c. was made, and by their trustees and their Heirs, executors, administrators and assigns, for such estate or interest, as shall be so limited, &c. until such debt or debts, portion or portions shall be raised, paid and satisfied."

And it is further enacted, § 7. "that all and every devisee and devisees, made liable by that act, shall be liable and chargeable in the same manner as the Heir at law, by force of the act, notwithstanding the lands, tenements, and hereditaments to him or them devised, shall be aliened before the action brought."

In the construction of this statute it hath been holden, that though a man is prevented thereby from defeating his creditors by will, that yet any settlement or disposition he shall make in his life-time of his lands, whether voluntary or not, will be good against bond creditors; for that was not provided against by the statute, which only took care to secure such creditors from any imposition, which might be supposed in a man's last sickness; but if he gave away his estate in his life-time, this prevented the descent of so much to the Heir, consequently took away their remedy against him, who was only liable in respect of the lands descended; and as a bond is no lien whatsoever on lands in the hands of the obliger, much less can it be so, when they are given away to a stranger. *Eq. Ab.* 149. See title *Fraud*, II.

As to the manner of *pleading* and *replying* under this statute; see *Carth.* 35. 5 *Mod.* 122.

It seems that neither before, nor since, this statute, the *executor* or *administrator* of the *heir* are liable; for the *person* of the *heir* is not chargeable but with respect to the land: and if, before the statute, the *heir* had aliened before action brought, he should not be charged for the profits he received; which is evident from the plea of *riens per discent* the day of the writ purchased; much less could his executor, nor can he yet, unless some statute make him so; for an executor is but in nature of a trustee for the personalty, and not at all privy to the inheritance. *Trin.* 32 *Car.* 2. in *C. B.* 3 *New Abr.* 28.

If the heir pay his ancestor's debts to the value of the land descended, he may hold the land, discharged from all debts of his ancestor. 1 *Stra.* 665. But he cannot plead that he claims to retain a certain sum of money laid out in repairing the estate descended. 1 *Term Rep. K. B.* 454

By 47 *Geo.* 3. *st.* 2. *c.* 47, reciting, that it is expedient that the payment of the debts of persons in trade should be more effectually secured; it is enacted that when any person being at the time of his death a trader, within the meaning of the bankrupt laws, shall die, seised of or entitled to any estate or interests in lands, &c. or other real estate, which he shall not by will charge with payment of debts, and which would have been assets for payment of

debts due on any speciality in which heirs were bound, the same shall be assets, to be administered in equity, for payment of all the debts of such persons as well debts due on simple contract as on specialty: and that the heir or devisee of such debtor shall be liable to all the same suits in equity at the suit of any creditor, whether by simple contract or specialty, as they were heretofore liable to, at the suit of creditors by specialty, in which the heirs were bound: provided that in administration of assets, by courts of equity, under this act, all creditors by specialty in which heirs are bound, shall be paid their full debts before creditors by simple contract or by specialty, in which heirs are not bound.

This act does not affect the Irish acts, 33 *Geo.* 2. *c.* 14. respecting bankers.

If there be judgment in debt against two, and one dies, a *scire facias* lies against the other alone, reciting the death, and he cannot plead that the *heir* of him who is dead has assets by descent, and demand judgment if he ought to be charged alone: for, at *common-law*, the charge upon a judgment, being *personal*, survived, and the statute of *Westm.* 2, that gives the *elegit*, does not take away the remedy of the plaintiff at *common-law*, therefore the party may take out his execution which way he pleases; for the words of the statute are *sit in electione:* but if he should, after the allowance of the writ, and revival of the judgment, take out an *elegit* to charge the land, the party may have remedy by suggestion, or else by *audita querela.* 1 *Lev.* 30. *Raym.* 26. 1 *Keb.* 92.

As to a *sequestration*, and to show that a *decree* shall have the same authority to bind the personal assets, as a judgment at law, and therefore shall go *pari passu* to be paid off and discharged, *vide* 1 *Vern.* 143. 3 *Lev.* 355. 2 *Vern.* 37, 88, 89. and this Dict. title *Executor*, V. 6.

III. 5. Where the ancestor binds himself and his heirs, all his lands of freehold, and which descend in *fee-simple*, are assets by descent, and shall be liable, as far as they extend, to answer the ancestor's obligations. See *Bro.* tit. *Assets. Fit.* tit. *Assets.* 1 *Rol. Abr.* 296. tit. *Assets.* A reversion after a lease for years made by the ancestor is present assets, so that the Heir cannot plead *riens per discent* in delay of execution of the rent and reversion, though the plaintiff cannot have benefit of the reversion till the lease be determined. 1 *Salk.* 354, 355; 7 *Mod.* 42. 2 *Mod* 50, 51. *Hern's Plead.* 320.

So a *reversion expectant* upon the determination of an *estate* for *life* is *quasi assets;* and ought to be pleaded especially by the Heir, and the plaintiff in such case may take judgment of it *cum acciderit. Carth.* 129. But a *reversion in fee* expectant upon *an estate tail* is *not* assets, because it lies in the will of the tenant in tail to dock and bar it at his pleasure. 6 *Co.* 58. 1 *Rol. Abr.* 269.

If A. hath issue B. and C. and conveys lands to the use of himself for life, the remainder to B. in tail male, the remainder to his own right Heirs, and A. dies, and the reversion descends to his son, who dies without issue, so that the tail is spent, and C. enters, these lands shall be assets to answer the debt of his father. *Carth.* 127. 3 *Lev.* 286. 3 *Mod.* 223. *S. C.*

The lands (as hath been observed) must descend to the Heir: and therefore it was formerly held, that if he took by *purchase*, as if the testator devised them to him, paying so much, or if he devised lands to one of the two, and his Heirs at law jointly, that those lands were not assets; but if he devised one part to A. another to B. and another to his Heir at law, this third part was assets. *Cro. Eliz.* 431. 2 *Mod.* 286.

By the statute of frauds and perjuries (29 *Car.* 2. *c.* 3. § 12.) it is enacted, that if land come to the Heir by reason of a special occupancy, they shall be chargeable in his hands as assets by descent, as in cases of lands in fee-simple, and in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands. Also by the said statute, §§ 10, 11, where lands are settled in trust, and descend in fee to the Heir of *cestuy que trust;* the same shall be assets in his hands, in the same manner as lands in possession, but he shall not, by reason of any plea or other matter, be chargeable to pay the condemnation out of his own estate.—See title *Fraud.*

An equity of redemption of an inheritance is assets, for the Heir having a right in equity, that ought in equity to satisfy a bond debt. 4 *Chanc. Cas.* 148. Tenant in tail suffers a recovery to let in a mortgage of 500 years, then limits the land to the old uses, and makes his will, and devises all his lands for the payment of his debts; the redemption was limited to him, his Heirs and assigns; and the court thought that the equity of redemption of this mortgage should be assets to satisfy creditors, or a subsequent grantee of an annuity. *Preced. Chanc.* 32. A *right* without any estate in possession, reversion or remainder, is not assets till it be recovered and reduced into possession. 6 *Co.* 58.

*For more learning on this subject, see* 14 *Vin. Abr.* and 2 *New Abr.* title *Heir;* and this Dict. title *Assets.*

HEIRESS. The *female heir* to a man, having an estate of inheritance in lands; and where there are several joint *heirs*, they are called *Co-heirs* or *Co-heiresses.* See title *Parceners.* As to stealing an *heiress*, and marrying her against her will, see *Forcible Marriage.*

HEIR LOOME. From the Sax. *Heir*, i. e. *Hæres*, and *Leome, Membrum.*] Comprehends divers implements of household, such as the first best bed and other things, which by the custom of some countries have belonged to a house for certain descents, and are never inventoried after the decease of the owner as chattels, nor do they go to the executor, but accrue to the *heir* with the house itself by *custom*, and not by the common-law; these are *not devisable by testament;* for the law prefers the *custom* before a *devise*, which takes not effect till after the death of the testator, and then they are vested in the *heir* by the *custom. Co. Lit.* 18, 185. But sale in a man's life-time might make it otherwise. The ancient jewels of the *Crown* are *heir-looms* and shall descend to the next successor; and are not devisable by will. 1 *Inst.* 185. And *heir-looms* in general are said to extend to all large household implements not easily moved. See *Spelman.*

It is said, that the word by time hath attained a more general signification than at first it did bear, comprehending all implements of household, as tables, presses, cupboards, bedsteads, wainscot, and such like: which, by the custom of some countries, have belonged to a house during certain descents, as before mentioned.

*Per Holt*, Ch. J. *goods in cross* cannot be an Heir loom, but they must be things fixed to the freehold, as old benches, tables, &c. 12 *Mod.* 519, 520. Also on this subject, *vide* 12 *Co.* 104, 105. *Corven's* case, and *ante*, title *Heir*, III, 3.

HEIRSHIP MOVEABLES. In the law of Scotland are defined to be the moveables which the law withholds from the executors, or next of kin, and gives to the Heir that he may not succeed to a house and land, completely dismantled. They consist of the best of every thing, as the Scotch act 1474, *c.* 54, expresses it; meaning furniture, horses, cows, oxen, farming utensils, &c. but not including *Fungibles.* (See that title.)—Where articles go in pairs or dozens, it is the best pair or dozen, &c. Under this are comprehended the family seal of arms, and the ornament of the seat in the church

Heirship moveables are due only to the Heir of a baron, or of a burgess. In this sense a person *infeft* in lands, or even in an annual rent out of lands, is held a baron: the burgess must be an actual trading burgess in a royal borough.

The Heir of line is the only Heir who has a right to claim Heirship moveables, and of this right he cannot be deprived by will, or death-bed deed.—Where there are Heirs portioners the eldest Heir portioner alone is entitled. *Bell's Scotch Law Dict.*

HELSING. A brass coin among the Saxons, equivalent to our half-penny.

HELM. Thatch or straw. *Cowell.* Sometimes called *Halm.—Helm*, is also a Saxon word, signifying a *covering* for the *head* in *war.* Also, that part of a *coat* of *arms*, which bears the *crest.*—The *steerage*, or *rudder* in a ship or other vessel.

HELOWE-WALL, the *hell-wall* or end wall, that covers and defends the rest of the building. From Saxon *helan*, to cover or heal; whence a thatcher, slater or tiler, who covers the roof of a house is in the Western parts called a *hellier.*—*Paroch. Antiq. p.* 573. See *Kennet's Glossary.*

HEMP AND FLAX. By *stat.* 33 *H.* 8. *c.* 17, none may water *hemp* or *flax* in any river, running water, stream, brook, or common pond, where beasts are used to be watered, but only in their several ponds, &c. for that purpose, on pain of 20*s.* By *stat.* 1 *Car.* 2. *c.* 15, any persons may in any place or corporate town privileged, or unprivileged, set up manufactures of Hemp or Flax; and persons coming from abroad, using the trade of *Hemp* or *Flax* dressing, and of making thread, weaving cloth made of *Hemp* or *Flax*, or making tapestry hangings, twine or nets for fishery, cordage, &c. after three years, shall have the privileges of natural-born subjects.

See 4 *G.* 3. *c.* 26. (a temporary act, continued by subsequent acts,) for granting a bounty on the importation of Hemp and rough and undressed Flax from the British colonies in America.—See also 23 *G.* 3. *c.* 77. (a like temporary and continued act,) for the encouragement of the manufacture of flax and cotton in Great Britain.—See also the Irish act, 3 *G.* 3. *c.* 12. for encouraging the Flaxen and Hempen manufacture in Ireland.

The tithe of hemp and flax is by *stat.* 11 & 12 *W.* 3. *c.* 16. ascertained at 5*s.* an acre in England; and so in Ireland, as to Hemp by Irish act, 28 *G.* 3. *c.* 29. For penalties on workmen embezzling it, see *stats.* 1 *Ann. st.* 2. *c.* 18. § 1. Against frauds in manufactures of hemp, flax, &c. *Stat.* 22 *Geo.* 2. *c.* 27.

HENCHMAN, *Hensman, Qui equo innititur bellicoso,* from the German *hengst*, a war horse.] One who runs on foot, attending upon a person of honour or worship.—A sort of Herald. See *stats.* 3 *Ed.* 4. *c.* 5. 6 *Hen.* 8. *c.* 1. 24 *Hen.* 8. *c.* 14.

HENEDPENNY. A customary payment of money instead of hens at Christmas: from the Saxons *hen, gallina* and *penning, denarius. Monast.* 2 *tom.* 327, 827. *Du Fresne* thinks it may be *henpenny, gallinagium*, or a composition for eggs. But possibly it is misprinted *henedpenny* for *heved peny*, or *head-peny. Cowell, edit.* 1727.

HENGHEN, Saxon *hongen.*] A prison, gaol, or house of correction. *LL. Hen.* 1. *c.* 65.

HENGWITE. See *Hangwite.*

HEORDFESTE. The same with *husfastne* or *hasfestane*, *i. e.* the Master of a family: From the Saxon *hearthfæst*, *i. e.* fixed to the house or hearth: *Leges Canuti, cap.* 40. See *Hurdereferst.*

HEORDPENNY, *Olim* Romescot *& postea* Peterpence from the Saxon *hearth, focus*, and *pening, denarius.* See *Peterpence, Romescot.—Leges Edgari Regis, cap.* 5. *apud Bromptonum.*

HEPTARCHY. The Kingdom of England was formerly, under the Saxons, divided into an Heptarchy, consisting of *seven* independent kingdoms, peopled and governed by different clans and colonies; these were all reduced into one kingdom by Egbert, King of the West Saxons in the year 827 or 828.—Egbert is therefore styled the first King of England. See 4 *Comm. c.* 33.

HERALD, HERALT, OR HEROLD, Ital. *heraldo*, Fr. *herault*, quasi *herus* altus.] An officer at arms. *Verstegan* thinks it may be derived from two Dutch words, *viz.* Here, *exercitus et* Healt, *pugil magnanimus;* as if he should be called the *Champion of the Army:* and the Romans called *Heralds, feciales. Polydore, lib.* 19, Describes them thus; *Habent insuper apparitores ministros, quos* Heraldos *dicunt quorum præfectus* Armorum Rex *vocitatur; hi belli et pacis* Nuncii; *Ducibus Comitibusque a Rege factis insignia aptant, ac eorum funera curant.* The functions of these officers, as now exercised with us, is to denounce war, proclaim peace, and to be employed by the King in martial messages: they are examiners and judges of gentlemen's *coat of arms*, and conservators of *genealogies;* and they marshal the solemnities at the coronations, and funerals of princes, and other great men.

The three chief *Heralds* are called *Kings at Arms:* of which *Garter* is the principal, instituted by King Henry V. whose office is to attend the *Knights of the Garter* at their solemnities, and to marshal the funerals of the nobility: and King Edward IV. granted the office of *King of Heralds* to one *Garter, cum feudis et proficuis ab antiquo, &c.* The next is *Clarencieux* or *Clarentius*, ordained by Edward IV. who, attaining the dukedom of Clarence by the death of George his brother (whom he beheaded for aspiring to the crown,) made the *Herald* who belonged to that dukedom a King at arms, and called him *Clarencieux;* his proper office is to marshal and dispose the funerals of all the lesser nobility, knights, and esquires, through the realm, on the South side of the Trent. The third is *Norroy*, quasi *North Roy*, whose office and business is the same on the North side of Trent, as *Clarentius* on the South, which is intimated by his name, signifying the *Northern King*, or *King at Arms* of the North parts. These three officers are distinguished as follows, *viz.* Garter *Rex Armorum Anglicorum; indefinitè;* Clarencieux, *Rex Armorum partium Australium;* Norroy *Rex Armorum partium Borealium.*

Besides the *Kings at Arms*, there are six *inferior Heralds*, according to their original, as they were created to attend Dukes and great Lords in martial expeditions, i. e. *York, Lancaster, Chester, Windsor, Richmond* and *Somerset;* the four former instituted by King Edward III. and the two latter by Edward IV. and Henry VIII. And lastly, to the superior and inferior *Heralds*, are added four others, called *Marshals*, or *Pursuivants at Arms*, who commonly succeed in the places of such *Heralds* as die, or are preferred; and they are *Blue-mantle, Rouge-cross, Rouge-dragon*, and *Portcullis:* all equipped with proper ensigns and distinctions.

These ancient *Kings at Arms, Heralds* and *Pursuivants* were made a Corporation or College under the *Earl Marshall* of England, with certain privileges by the Kings of this realm: *Concesserunt*, &c. Heraldi Armorum, *et omnes alii* Heraldi *prosecutores sive* Pursuivandi *armorum, qui pro tempore fuerint, in perpetuum sint unum corpus corporatum in re, facto, et nomine; habeantque successionem perpetuam, nec non quoddam sigillum commune, &c. Dat. &c. Spelm. Gloss. Herald's Court of Honour.* See titles *Honour, Courts, Court of Chivalry.*

Since the establishment of this Corporation or College of Arms, some Heralds and Pursuivants extraordinary have been made, but these are considered as merely honorary, and not part of the establishment.

On the accession of King George, Elector of Hanover, to the crown of Great Britain, a *Hanover Herald* was then appointed; and afterwards, in 1815, on the erection of Hanover into a Kingdom, *Blanc Coursier*, King of Arms in Hanover, was appointed, and his duties are confined to that Kingdom.—*Gloucester Herald*, first appointed 11 *Geo.* 1. is an officer of the Order of the *Bath*, and the office of Bath King at Arms is vested in him, but has nothing to do with the College of Arms.

In Scotland the Chief Herald of the *Court of Arms* there is called *Lyon, King of Arms*, from the armorial bearing of the King, as King of Scotland, the lion rampant: and he has serving under him heralds, pursuivants, and messengers. By Scotch acts 1592, *c.* 127. 1672, *c.* 21. he is authorised to inspect the arms and ensigns armorial of the noblemen and gentlemen of Scotland, to distinguish the arms of the younger members of families; and to give grants of arms; to matriculate such arms, and to fine those who wore arms not matriculated, in 100*l. Scots.* [8*l.* 6*s.* 8*d.*] with the forfeiture of the goods and furniture on which the arms are represented.

In Ireland there is also a *Court of Arms*, of which *Ulster* King of Arms is the principal; there are also *Dublin* and *Cork Heralds* at Arms, *Athlone Pursuivant*, and inferior officers.

For the ceremony of creating a King at Arms, *see Dethick's Case*, Ley's Reports, 248.

HERBAGE, *Herbagium.*] The green pasture and fruit of the earth, provided by nature for the bite or food of cattle: it is also used for a liberty that a person hath to feed his cattle in the ground of another person; or in the forest, &c. *Cromp. Jurisd.* 197.

He that hath Herbage of a forest by patent may have trespass for the grass but not for trees or the fruit of them; and he may take beasts damage-feasant, and have *quare clausum fregit*, and by such grant may inclose the forest. Yet grantee of Herbage may inclose, and may have action of trespass *quare clausum fregit*. But though he that hath Herbage may inclose, yet he that hath reasonable Herbage cannot. *Dy.* 285. and see 2 *Ro. Rep.* 356.

Grantee of Herbage of a park cannot dispark it. *Godb.* 419. A lease was made of a manor with all gardens, orchards, yards, &c. and with all the profits of a wood, excepting to lessor forty acres, to take at his pleasure; *per Dyer.* The wood is not comprised within the lease, but the lessee shall only have the profits, as pannage, herbage, &c. 4 *Leon.* 8. See titles *Trespass*, *Lease*, &c.

HERBAGIUM ANTERIUS. The first crop of grass or hay in opposition to after-math and second cutting. *Paroch. Antiq. pag.* 459.

HERBERY OR HERBURY. An inn. *Cowell.*

HERBENGER OR HARBINGER, from the French *herberger*, that is *hospitio accipere.*] An officer in the King's house, who goes before and allots the noblemen, and those of the household, their lodgings. *Kitchin. fol.* 176. It is also used for an innkeeper.

HERBERGAGIUM. Lodgings to receive guests in the way of hospitality. *Cowell.*

HERBERGATUS. Spent in an inn. *Cowell.*

HERBERGARE. To harbour, to entertain, from *heribergum, heriberga*, Saxon *hœre berg* a house of entertainment. *Somner's Antiq. p.* 248. Hence our *herbinger* or *harbinger*, who provides harbour, or house room, &c.

HERCE, HERCIA. An harrow. *Fleta, lib.* 2. *c.* 77. It signifies also a candlestick set up in churches, made in the form of an harrow, in which many candles were placed at the head of a *cenotaph.*

HERCIARE, from the French *hercer*, to harrow. See 4 *Inst. fol.* 270.

HERDEWICH, OR HERDEWIC, *Herdewycha.*] A grange or place for cattle and husbandry. *Mon. Angl.* 3. part.

HERDWERCH, HEORDWERCH. Herdsman's work, or customary labours done by the shepherds, herdsmen, and other inferior tenants, at the will of their lord. *Cowell, edit.* 1727. *Regist. Eccles. Christi. Cant. MS.*

HEREBANNUM, Sax. *Here. exercitus, et* Ban, *edictum, mulcta.*] A mulct, for not going armed into the field, when called forth. *Spelm.* Under the feudal policy, every *free* man, was under an obligation to serve the State. If, upon being summoned into the field, any freeman refused to obey, a full *herebannum*, i. e. a fine of sixty crowns, was to be exacted from him, according to the law of the Franks. This fine was levied with such rigour, that if any person was insolvent, he was reduced to servitude, and continued in that state until such time as his labour should amount to the value of the *herebannum.* The Emperor Lotharius rendered the penalty more severe, by confiscating the goods of the persons refusing, and banishing him. *Robertson's Char.* V. vol. i. 216, 217.

HEREBOTE, From the Sax. *Here*, and *Bote*, a messenger.] The King's edict commanding his subjects into the field; from the Saxon *hœre*, *exercitus*, and *bode*, a messenger. *Cowell.*

HEREDITAMENTS, *Hæreditamenta.*] All such immoveable things, whether corporeal or incorporeal, which a man may have to him and his heirs by way of inheritance; and which, if they are not otherwise devised, descend to him that is next heir, and fall not to the executor as chattels do. See *stat.* 32 *Hen.* 8. *cap.* 2. It is a word of very great extent, comprehending whatever may be inherited or come to the *Heir;* be it real, personal, or mixed, and though it is not holden, or lieth not in tenure. *Co. Lit.* 6. 16. And by the grant of *hereditaments* in conveyances, manors, houses, and lands of all sorts, rent, sevices, advowsons, &c. pass. *Co. Lit.* 16. *Hæreditamentum est omne quod jure hæreditario ad hæredem transeat.*

*Hereditaments* are of two kinds, *corporeal* and *incorporeal.* Corporeal consist of such as affect the senses; such as may be seen and handled by the body: Incorporeal are not the object of sensation, can neither be seen nor handled, are creatures of the mind, and exist only in contemplation.

*Corporeal Hereditaments* consist wholly of substantial and permanent objects, all which may be comprehended under the general denomination of land only. For *land*, says *Coke*, comprehendeth in its legal signification any ground, soil, or earth whatsoever, as arable, meadows, pastures, woods, moors, waters, marshes, furzes, and heath. 1 *Inst.* 4. It legally includes also all castles, houses, and other buildings; for they consist, saith he, of two things; *land*, which is the foundation, and the *structure* thereupon; so that if I convey the land or ground, the structure or building passeth therewith. It is observable that *water* is here mentioned as a species of land, which may seem a kind of solecism; but such is the language of the law: and therefore one cannot bring an action to recover possession of a pool, or other piece of water, by the name of *water* only; either by calculating its capacity, as for so many cubical yards; or by superficial measure, for twenty acres of water, or by general description, as for a pond, a water-course, or rivulet; but he must bring his action for the land that lies at the bottom, and must call it twenty acres of *land covered with water*, *Brownl.* 142. For water is a moveable wandering thing, and must of necessity continue common by the law of nature: so that there can only be a temporary, transient, usufructuary property therein: wherefore, if a body of water runs out of A.'s pond into B.'s, A. has no right to reclaim it. But the land, which that water covers, is permanent, fixed, and immoveable; and there-

fore in this there may be a certain substantial property, of which the law will take notice, and not of the other.

Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. *Cujus est solum, ejus est usque ad cœlum* is the maxim of the law; upwards, therefore, no man may erect any building, or the like, to overhang another's land: and downwards, whatever is in a direct line, between the surface of any land and the centre of the earth belongs to the owner of the surface; as is every day's experience in the mining countries. So that the word *land* includes not only the face of the earth, but every thing under or over it. And therefore if a man grants all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows. Not but the particular names of the things are equally sufficient to pass them, except in the instance of water; by a grant of which nothing passes but a right of fishing. *Co. Lit.* 4. But the capital distinction is this; that by the name of a castle, messuages, toft, croft, or the like, nothing else will pass, except what falls with the utmost propriety under the term made use of; but by the nature of Land, which is *nomen generalissimum*, every thing terrestrial will pass. 1 *Inst.* 4, 5, 6. By the name of a castle, one or more manors may be conveyed; and *è converso* by the name of a manor, a castle may pass. 1 *Inst.* 5. 2 *Inst.* 31. See 2 *Comm.* 17, 19.

An *Incorporeal Hereditament* is a right issuing out of a thing corporate, (whether real or personal) or concerning, or annexed to, or exerciseable within the same. *Co. Lit.* 19, 20. It is not the thing corporate itself, but something collateral thereto; as a rent issuing out of lands, &c. or an office belonging to jewels, &c. Or, according to logicians, Corporeal Hereditaments are the substance which may be always seen, always handled; Incorporeal Hereditaments are but a sort of accidents, which inhere in, and are supported by that substance; and may belong or not belong to it, without any visible alteration therein. Their existence is merely in idea, and abstract contemplation, though their effects and profits, which are totally distinct, may be frequently objects of our bodily senses. 2 *Comm.* 20. These Incorporeal Hereditaments are stated in the Commentaries to be principally of *ten sorts*; *Advowsons*, *Tithes*, *Commons*, *Ways*, *Offices*, *Dignities*, *Franchises*, *Corodies*, or *Pensions*, *Annuities*, and *Rents*. As to all which see those several titles in this Dict.

HEREDITARY RIGHT TO THE CROWN. See title *King*.

HEREDITARY REVENUE OF THE KING. See title *King*.

HEREFARE, *Saxon.*] *Profectio militaris et expeditio.*—See *Subsidy*. A military expedition, a going to warfare.

HEREGELD, Saxon.] *Pecunia seu tributum alendo exercitui collatum.*] A tribute or tax levied for the maintenance of an army.—*Heregeld*, or *Herezeld* is also sometimes synonymous with *Heriot*.

HERELLUS. A sort of little fish, perhaps minows, or rather gudgeons. *Cowell, edit.* 1727.

HEREMITORIUM. A solitary place of retirement for *hermits*. *Mon Angl. tom.* 3. *p.* 18.

HERENACH. An archdeacon. *Cowell, edit.* 1727.

HEREMONES, OR HERETEAMS. Followers of an army. *Lamb Leges Inæ, cap.* 15. *In exercitu prædatorum*, &c. from *here, exercitus*, and *team, sequela*.

HERESLITA, OR HERESSA, OR HERESSIZ. A hired soldier, that departs without licence; derived from the Saxon *here, exercitus*, and *sliten*, to depart, according to *Co.* 4 *Inst. f.* 128.

HERESY, *Hæresis.*] Among Protestants, is said to be a false opinion repugnant to some point of doctrine clearly revealed in scripture, and either absolutely essential to the Christian faith or at least of most high importance. 1 *Hawk. P. C. c.* 2. § 1.

Anciently, under the general name of Heresy, there have been comprehended three sorts of crimes; 1. *Apostacy*, when a Christian apostatizes to Paganism. 2. *Witchcraft*. 3. *Formal Heresy*, which seems to be an apostacy from the established religion; for which, and the several ways of determining, punishing, and the difference between the Civil and Imperial laws, Popish canons, and the Laws of England concerning heresy, see a large account in 1 *Hal. Hist. P. C.* 383—410.

It seems difficult precisely to determine what error shall amount to Heresy, and what not; but the statute 1 *Eliz. cap.* 1. which erected the High Commission court, having restrained it to such as are either determined by scripture, or by one of the four first general councils, or by some other council, by express words of scripture, or by parliament, with the assent of the convocation; these rules are at present generally thought the best directions concerning this matter. 2 *Hawk. P. C. c.* 2. § 2.

By the Common Law one convicted of Heresy, and refusing to abjure it, or falling into it again after he abjured it, might be burnt, by force of the writ *de hæretico comburendo*, which issued out of Chancery upon a certificate of such conviction: but he forfeited neither lands nor goods, because the proceedings against him were only *pro salute animæ*. *F. N. B.* 269. 3 *Inst.* 43. *Doctor and Student, lib.* 2. *cap.* 29. 1 *Hawk. P. C. c.* 2. § 10.

This writ *de Hæretico comburendo* is thought by some to be as ancient as the Common Law itself. However, it appears from thence, that the conviction of Heresy by the Common Law was not in any petty ecclesiastical court, but before the Archbishop himself in a Provincial Synod; and that the delinquent was delivered over to the King to do as he should please with him; so that the Crown had a controul over the Spiritual Power, and might pardon the convict by issuing no process against him; the writ *de hæretico comburendo* being not a writ of course, but issuing only by the special direction of the King in council. *F. N. B.* 269. 1 *Hal. P. C.* 395.

But in the reign of Henry IV. when the eyes of the christian world began to be open, and the seeds of the protestant religion (though under the opprobrious name of Lollardy) took root in this kingdom, the Clergy, taking advantage from the King's dubious title to demand an increase of their own power, obtained an act of parliament, (*stat.* 2 *H.* 4. *c.* 15.) which sharpened the edge of persecution to its utmost keenness. For by that statute the Diocesan alone, without the intervention of a Synod, might convict of heretical tenets; and unless the convict abjured his opinions, or if after abjuration he relapsed, the sheriff was bound *ex officio*, if required by the bishop, to commit the unhappy victim to the flames without waiting for the consent of the Crown. By *stat.* 2 *H.* 5. *c.* 7. Lollardy was also made a temporal offence and indictable in the King's courts; which did not thereby gain an exclusive, but only a concurrent jurisdiction, with the bishop's consistory.

Afterwards, when the final reformation of religion began to advance, the power of the ecclesiastics was somewhat moderated; for though what Heresy is was not then precisely defined, yet we are told in some points what it is *not*. The *stat.* 25 *H.* 8. *c.* 14. declaring, that offences against the see of Rome are not Heresy; and the Ordinary being thereby restrained from proceeding in any case upon mere suspicion; that is, unless the party be accused by two credible witnesses, or an indictment for Heresy be first previously found in the King's courts of Common Law. And yet the spirit of persecution was not then abated, but only diverted into a lay channel. For in six years afterwards, by *stat.* 31 *Hen.* 8. *c.* 14. the bloody law of the *Six Articles* was made, which established

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the six most contested points of popery; transubstantiation, communion in one kind, the celibacy of the clergy, monastic vows, the sacrifice of the mass, and auricular confession; which points were "determined and resolved by the most godly study, pain, and travail of his majesty: for which his most humble and obedient subjects, the Lords Spiritual and Temporal, and the Commons, in parliament assembled, did not only render and give unto his highness their most high and hearty thanks," but did also enact and declare all oppugners of the first to be Hereticks, and to be burnt with fire; and of the five last to be felons and to suffer death. The same statute established a new and mixed jurisdiction of Clergy and Laity, for the trial and conviction of Hereticks; the reigning prince being then equally intent on destroying the supremacy of the Bishop of Rome, and establishing all other Romish corruptions of the Christian religion.

It would be unnecessary to perplex this detail with the various repeals and revivals of the sanguinary laws in the two succeeding reigns; we may therefore proceed directly to the reign of Queen Elizabeth when the Reformation was finally established. By *stat.* 1 *Eliz. c.* 1. all former statutes relating to Heresy are repealed, which leaves the jurisdiction of Heresy as it stood at Common Law; *viz.* as to the infliction of common censures in the Ecclesiastical Courts and in case of burning the Heretic, in the Provincial Synod only. 5 *Rep.* 23. 12 *Rep.* 56. 92. Sir Matthew Hale indeed is of a different opinion, and holds that such power resides in the Diocesan also, though he agrees that in either case the writ *de hæretico comburendo* was not demandable of common right, but grantable or otherwise at the King's discretion. 1 *Hal. P. C.* 405. But the principal point now gained was, that by this statute a boundary is for the first time set to what shall be accounted Heresy; nothing for the future being so to be determined, but only such tenets which have been heretofore so declared: 1. By the words of the canonical scriptures. 2. By the first four General Councils, or such others as have only used the words of the Holy Scriptures; or 3. which shall be hereafter so declared by the parliament, with the assent of the Clergy in Convocation. Thus was Heresy reduced to a greater certainty than before; though it might not have been the worse to have defined it in terms still more precise and particular; as a man continued still liable to be burnt for what perhaps he did not understand to be Heresy, till the ecclesiastical judge so interpreted the words of the canonical scriptures.

For the writ *de hæretico comburendo* remained still in force, and there are instances of its being put in execution upon two Anabaptists in the seventeenth of Elizabeth, and two Arians in the ninth of James I. But it was totally abolished, and Heresy again subjected only to ecclesiastical correction *pro salute animæ* by virtue of *stat.* 29 *Car.* 2. *c.* 9. for in one and the same reign our lands were delivered from the slavery of military tenures; our bodies from arbitrary imprisonment by the *Habeas Corpus Act;* and our minds from the tyranny of superstitious bigotry, by demolishing this last badge of persecution in the English law. 4 *Comm.* 46—49.

The following determinations will further explain the history and progress of proceedings in Heresy; and those relative to the temporal courts seem to be yet undisputed law, as far as they are now applicable.

By the Common Law with us, the Covocation of the Clergy, or Provincial Synod, might, and frequently did, proceed to the sentencing of Hereticks, and, when convicted, left them to the secular power, whereupon the writ of *hæretico comburendo* might issue. *Bro.* tit. *Heresy.* 2 *Rol. Abr.* 226.

It is also agreed, that every Bishop may convict persons of *Heresy* within his own diocese, and proceed by church censures against those who shall be convicted; but it is said that no spiritual judge who is not a bishop hath this power; and it hath been questioned, whether a conviction before the Ordinary were a sufficient foundation whereon to ground the writ *de hæretico comburendo*, as it is agreed that a conviction before the Convocation was. *F. N. B.* 269. 12 *Co.* 56, 57. 3 *Inst.* 40. *Gibs. Codex*, 401. 1 *Hawk. P. C. c.* 2. § 4. *State Trials, vol.* 2. 275.

It seems agreed that, regularly, the Temporal Courts have no conusance of Heresy, either to determine what it is, or to punish the Heretick as such, but only as a disturber of the public peace; that therefore, if a man be proceeded against as an Heretick in the spiritual court, *pro salute animæ*, and think himself aggrieved, his proper remedy is to bring his appeal to a higher ecclesiastical court, and not to move for a prohibition from a temporal one. 27 *H.* 8. 14 *b.* 5 *Co.* 58. *Hob.* 236.

Yet a Temporal Judge may incidentally take knowledge whether a tenet be heretical or not; as where one was committed by force of *stat.* 2 *H.* 4. *c.* 15. for saying, that he was not bound by the law of God to pay tithes to the curate; another for saying, that though he was excommunicated before men he was not so before God: the temporal courts, on an *habeas corpus* in the first case, and in an action of false imprisonment in the other, adjudged neither of the points to be *Heresy* within that statute, for the King's courts will examine all things which are ordained by statute. 3 *Inst.* 42. 1 *Rol. Rep.* 110. 2 *Bulst.* 300.

In *quare impedit*, if the bishop plead that he refused the clerk for Heresy, it seems that he must set forth the particular point, that it may appear to be heretical to the court wherein the action is brought. 5 *Co.* 58. 1 *And.* 191. 3 *Leon.* 199. 3 *Lev.* 314. See title *Quare Impedit.*

HERETABLE. See *Heritable.*

HERETICK, *Hæreticus.* One that adheres to and is convicted of heresy. See title *Heresy.*

HERETICO COMBURENDO. See *Heresy.*

HERETOCHE. From Sax. *here*, *exercitus*, and *togen*, *ducere.*] The general of an army; a leader or commander of military forces. *LL. Ed. Conf. c.* 35. *Ducange* says the *Heretochii* were the barons of the realm. *Leg. H.* 1. *Du Fresne.* See title *Peer.*

HERETOCHIAS. A leader or commander of military forces. See at large the name and office in the laws of *Edward the Confessor, cap.* 35. *De Heretochiis.*

HERETUM. A court or yard; perhaps an orchard. *Hist. Dunelm.*

HEREZELD. See *Hergeld, Heriot.*

HERGRIPA. Pulling by the hair; from the Sax. *hær*, *capillus*, and *grypan*, *capere. Leg. H.* 1. *cap.* 94.

HERIGALDS. A sort of garment. *Cowell.*

## HERIOT.

HERIOTUM, *Sax. heregeat; bellicus apparatus*, from *here*, *exercitus*, an army, and *geat*, *fusus*, *effusus.*] Signified originally a tribute given to the lord of a manor, for his better preparation for war. By the laws of Canutus, at the death of the great men of this realm, so many horses and arms were to be paid as they were in their respective life-times obliged to keep for the King's service. *Spelm. Sir Edward Coke* makes *Heriot*, or *heregat* (from *herus* lord,) the lord's beast: And it is now taken for the best beast, whether it be horse, ox, or cow, that the tenant dies possessed of, due and payable to the lord of the manor: and in some manors, the best goods, piece of plate, &c. *Kitch.* 133.

There is this difference between *Heriot* and *Relief; Heriot* has been generally a *personal*, and *Relief* always a predial service.

It appears not only from *Spelman's* conjectures, but likewise from the laws themselves of King Canutus, that the Danes were the first inventors of Heriots, and that it was a

political institution of theirs, whereby the Danish tenants were to hold by military service, and their arms and horses, at their deaths, to revert to the Public; by that means putting the whole strength and defence of the kingdom into their hands; committing only the affairs of agriculture, and the improvement of the nation, to the English, though they thereby enjoyed greater freedom and immunities in their tenures than the Danish tenants. *Spelm.* 287.

As to the several kinds of Heriots, some are due by *custom*, some by *tenure*, and some by *reservation* on deeds executed within time of memory; those due by *custom* are the most frequent, and arose by the contract or agreement of the lord and tenant, in consideration of some benefit or advantage accruing to the tenant: and for which an Heriot, as the best beast, best piece of household furniture, &c. became due and belonged to the lord, either on the death or alienation of the tenant, and which the lord may seize either within the manor or without, at his election. *Dyer*, 199 *b.* *Bro.* title *Heriot* 2, 3.

Heriots are therefore now to be considered as usually divided into two sorts; *Heriot service* and *Heriot-custom*. The former, being such as are due upon a special reservation in a grant or lease of lands, therefore amount to little more than a mere rent. 2 *Saund.* 166. The latter arise upon no special reservation whatsoever, but depend merely upon immemorial usage and custom. *Co. Cop.* § 24. The latter, of which we are here principally to speak, are defined to be "a customary tribute of goods and chattels, payable to the lord of the fee on the decease of the owner of the land." 2 *Comm. c.* 28.

Upon the plan of the Danish establishment, already noticed, did William the Conqueror fashion his law of reliefs, when he ascertained the precise relief to be taken of every tenant in chivalry; and, contrary to the feodal custom, and the usage of his own duchy of Normandy, required arms and implements of war to be paid instead of money. *LL. Guil. Conq. c.* 22, 23, 24. See this Dict. titles *Relief*, *Tenure*, II. 5.

The Danish compulsive Heriots, being thus transmuted into reliefs, underwent the same several vicissitudes as the feodal tenures, and in socage estates do frequently remain to this day, in the shape of a *Double Rent* payable at the death of the tenant: the Heriots which now continue among us, and preserve that name, seeming rather to be of Saxon parentage, and at first to have been merely discretionary. *Lambard, Peramb. of Kent*, 492.

These are now for the most part confined to Copyhold Tenures, and are due by custom only, which is the life of all estates by copy, and perhaps are the only instance where custom has favoured the lord. For this payment was originally a voluntary donation or gratuitous legacy of the tenant; perhaps in acknowlegement of his having been raised a degree above villeinage, when all his goods and chattels were quite at the mercy of the lord: and custom, which has on the one hand confirmed the tenant's interest, in exclusion of the lord's will, has, on the other hand, established this discretional piece of gratitude into a permanent duty. An Heriot may also appertain to free land that is held by service and suit of court; in which case it is most commonly a copyhold enfranchised, whereupon the Heriot is still due by custom. *Bracton* speaks of Heriots as frequently due on the death of both species of tenants, which he observes, *magis fit de gratiâ quam de jure;* in which *Fleta* and *Britton* agree: thereby plainly intimating the original of this custom to have been merely voluntary, as a legacy from the tenant, though now the immemorial usage has established it as of right in the lord. *Bract. l.* 2. *c.* 36. § 9. *Fleta, l.* 3. *c.* 18. *Britton, c.* 69.

This Heriot is, as has been said, sometimes the best live beast, or *averium*, which the tenant dies possessed of, which is particularly denominated the villein's relief, in the 29th law of King William the Conqueror; sometimes the best inanimate good, under which a jewel or piece of plate may be included: but it is always a *personal* chattel, which immediately, on the death of the tenant, who was the owner of it, being ascertained by the option of the Lord, becomes vested in him as his property; and is no charge upon the lands, but merely on the goods and chattels. *Hob.* 60. The tenant must be the owner of it, or else it cannot be due; and therefore, on the death of a feme-covert, no Heriot can be taken; for she can have no ownership in things personal. *Keilw.* 84. 4 *Leon.* 239. In some places there is a customary composition in money, as 10*s.* or 20*s.* in lieu of a Heriot, by which the lord and tenant are both bound, if it be an indisputable antient custom; but a new composition of this sort, will not bind the representatives of either party; for that amounts to the creation of a new custom, which is now impossible. *Co. Cop.* § 31. See 2 *Comm.* 422—4. *c.* 28. *Watkins on Copyholds*, ii. *c.* 6. and this Dict. tit. *Copyhold*.

The statute 13 *Eliz. c.* 5. against fraudulent deeds, gifts, alienations, &c. extends to gifts intended to defraud lords, &c. of their heriots, mortuaries, or reliefs, and which are declared void against the parties injured by the gifts.

The following extracts will further elucidate this subject. —*Heriot-service* is payable on the death of *Tenant in fee-simple;* and *Heriot-custom* upon the death of *Tenant for life*. *Co. Lit.* 185.

As, however, a Heriot-Service is due by reservation, it may be reserved on the grant of a less estate than fee-simple. 2 *Saund.* 165. It has been suggested that a distinction may be made thus; if the Heriot be claimed after the death of a tenant for life or years, who was in *by the grant of the lord*, the lord might shew the deed by which it was reserved or otherwise prove the express reservation; but if the grant of the lands was so distant that the deed of creation cannot be shewn, nor the precise term of reservation be otherwise proved, the lord might prescribe; for it is not, by the terms, due by custom, as it is only claimed on the death of the tenant of particular lands and not on the death generally of the tenants of the manor. And as the grant must of necessity have been in fee, the heriot shall be considered as due only on the death of such tenant in fee. *Watk. Cop.* ii. *c.* 6.

If an Heriot is reserved upon a lease, it is Heriot-service, and incident to the reversion. *Lutw.* 1366, 7. For a Heriot goes with the reversion, as well as rent; and the grantee of the reversion shall have it. 2 *Saund.* 166.

Where a copyhold is once divided, so as to require several admissions, and to entitle the lord to several Heriots, &c. these several Heriots will remain payable although the land should afterwards be reunited in one person. 6 *East's Rep.* 476.

Although an Heriot reserved upon a lease is called an Heriot-service; yet it is not like the case where a man holds land by the *service of paying an Heriot*, &c. because where a Heriot is reserved on lease, the proper remedy is either a *distress*, or *action of covenant* grounded on the contract, for *the lessor cannot seize*, as the lord of a manor may do, the beast of his tenant who holds of him by Heriot-service. *Keilw.* 82. 84. See *Post*.

There may be a covenant in leases for lives, &c. to render the best beast, or so much money for an *Heriot*, at the election of the lessor; in which case the lessor must give notice which he will accept, before action may be brought for it, or a distress taken, &c. 2 *Lill. Abr.* 19.

For *Heriot-service*, the lord may *distrain* any beast belonging to the tenant *on the land:* Also it has been held, that the lord may distrain any man's beasts which are upon the land, and retain them until an Heriot is satisfied. *Co. Lit.* 185. *Lit. Rep.* 33. *Cro. Car.* 260.

When a Heriot is to be paid by a certain life-holder of his own goods, an assignee is not liable to pay the *Heriot;* his goods not being the goods of such life. *Cro. Car.* 313.

2 *Nels.* 932. If the lord purchase part of the tenancy, Heriot-service is extinguished; but it is not so of Heriot-custom. 8 *Rep.* 105.

It hath been solemnly adjudged, that for an *Heriot-service*, or for a *Heriot* reserved by way of *tenure*, the lord may either seize or distrain; for when the tenant agrees that the lord shall on his death have the best beast, &c. the lord hath his election which beast he will take, and by seizing thereof reduces that to his possession, wherein he had a property at the death of the tenant, without the concurring act of any other person; and it is not like the case where the lessor reserves 20*s.* or a robe; for there the lessee has his election which he will pay, and being to do the first act the lord cannot seize, but must distrain. *Plow.* 96. adjudged. *Cro. Eliz.* 589.

So it hath been ruled, that for a *Heriot-custom* or *service* the lord may *seize* as well *in* the manor as *out*; but if he *distrain*, it must be *in* the manor. See 1 *Salk.* 356. 1 *Show.* 81. *S. P.* 3 *Mod.* 231. But it is now stated as positive law, that for *Heriot-custom*, which *Coke* says, *Co. Cop.* § 25. lies only in *prender*, and not in *render*, the lord may seize the identical thing itself, but cannot distrain any other chattel for it. *Cro. Eliz.* 590. *Cro. Car.* 260. 3 *Comm.* 15. *c.* 1. And this is confirmed by the following authorities.

For *Heriot-custom*, the lord is to *seize*, not distrain: and he may seize the best beast, &c. though out of the manor, or in the King's highway, because he claims it as *his proper goods*, by the death of the tenant, which he may *seize* in *any place* where he finds it. *Kitch.* 267. 2 *Inst.* 132. 2 *Nels. Abr.* 931. *Plowd.* 96. *Keilw.* 82, 84. 1 *Salk.* 356. *Bro.* tit. *Heriot*, 2, 3.

And it is said, that this liberty must be understood to be annexed to ancient tenures, on which the lords had many privileges, and not to be extended to those which are created within time of memory, upon particular reservations. See 1 *Show.* 81. 3 *Mod.* 231.

It seems that a custom for the Homage Jury to assess a compensation in lieu of Heriot, to be paid by an *incoming* copyholder on surrender or alienation, is not good. 1 *Bos. & Pull.* 282.

HERISCHILD. Military service, or knight's fee: from the Sax. *Here*, an army, and *scyld*, *scutum*. *Cowell.*

HERISCINDIUM. A division of household goods; *non totics fieri placet* herescindia *mecum*, *i. e.* I am not pleased so often to divide my goods. *Blount.*

HERISLIT. Laying down of arms: from the Sax. *here*, *exercitus*, and *slitan*, *scissura*. *Blount.* See *Spelm.*

HERISTALL. A castle: from the Sax. *here*, an army, and *stall*, *statio*. *Blount*, *Spelm.*

HERITABLE (and Moveable) RIGHTS. The natural division of things is into corporeal and incorporeal, moveable and immoveable: the first including things corporeal and the objects of touch, the latter things incorporeal, as rights of property, succession, &c. In the Scotch Law these distinctions are lost in those of heritable and moveable, drawn more from the rights of the heir and executor, than from the nature of the things themselves; In this view all rights to land or whatever is connected with land, as mills, fishings, tythes, &c. are heritable. And whatever moves itself or can be moved, and is not united to land, is moveable. These general rules are subject to exception and modification. The distinction, in the Law of England, is between *real* and *personal* property; real property answering nearly to the heritable rights in Scotland, and personal property to the moveable rights.

HERITABLE BOND. A Bond in Scotland for money, joined with a conveyance of land or heritage, to be held by the creditor in security for the debt. See *Mortgage.*

HERITABLE JURISDICTIONS. Grants of criminal jurisdiction heretofore bestowed on great families in Scotland, with a view to the more easy administration of justice. These, with other powers possessed by landed proprietors, were abolished by the effect of *stat.* 20 *Geo.* 2. *c.* 50. and see 20 *Geo.* 2. *c.* 43. and *Dalrymple on Feuds*, 292.

HERMAPHRODITE, *Hermaphroditus.*] A person that is both man and woman. *Lit. Dict.* It is said that as *Hermaphrodites* partake of both sexes, they may give or grant lands, or inherit as heirs to any, and shall take according to the prevailing sex. *Co. Lit.* 2. 7. See titles *Heir*, *Descent*, *Grant*, *&c.*

HERMER. Among the Saxons was a great lord; from the Sax. *hera*, i. e. *major*, and *mære*, *dominus.*

HERMINUS, *mus ponticus.*] A mouse, of whose skins we have *Ermine.* See *Furr.*

HERMITAGE, *Hermitagium.*] The habitation of a hermit, a solitary place. *Mon. Angl.* 2 *par. fol.* 339, *b.*

HERMITORIUM. The chapel or place of prayer, belonging to an *hermitage.* *Cowell.*

HERNESCUS. A heron. *Cowell.*

HERNESSUM. Tackle or furniture of a ship. *Pl. Parl.* 22 *Ed.* 1. It is also called *hernasium*, from the Teuton, *harnas*, English *harness*, and signified any sort of furniture of a house, implements of trade, or rigging of a ship. *Cowell.*

HEROUDES, Heralds. *Knighton*, *p.* 2571.

HERRINGS. None shall buy and sell *Herrings* at sea, before the fishermen come into the haven, and the cable of the ship be drawn to the land, *stat.* 31 *Ed.* 3. *stat.* 2. No *herrings* shall be sold in any vessel, but where the barrel contains 32 gallons, and half barrel and firkin accordingly; and they must be well packed, of one time's packing and salting, and be as good in the middle as at the ends, on pain of forfeiting 3*s.* 4*d.* a barrel, &c. *Stat.* 22 *Ed.* 4. *cap.* 2. The vessels for *Herrings* are to be marked with the quantity, and place where packed: and packets are to be appointed and sworn in all fishing ports, &c. under the penalty of 100*l.* *Stat.* 15 *Car.* 2. *cap.* 16.—See titles *Fish*, *Navigation Act.*

HERRING SILVER. Seems to be a composition in money, for the custom of paying such a number of *herrings*, for the provision of a religious house. *Plac. Trin. T.* 18 *E.* 1.

HERSHIP. The illegally driving off cattle from the grounds of the proprietor. *Scotch Dict.*

HESIA, an easement.—*Chart. Antiq.*

HESTA or HESTHA. A corruption of the Latin *hecta.*] A little loaf of bread. *Domesday*, *Cowell*, *edit.* 1727. See *Rusca. Query? a Capon.*

HESTCORN. Perhaps vowed or devoted corn. See *Mon. Ang. tom.* 2. *p.* 367.

HEUVELBORGH, from the Sax. *healf*, i. e. *dimidium*, & borgh, *debitor vel fidejussor.*] A surety for debt, *quia qui fidejubet*, *debitorem se quodammodo constituit. Du Fresne.*

HEXAM or HEXHAM; and HEXAMSHIRE. Anciently *Hagustald*; was a county of itself, and likewise a bishoprick, endowed with great privileges; but by the *stat.* 14 *Eliz. c.* 13. it is enacted, that the franchise of Hexham and Hexhamshire, shall be within and accounted part of the county of Northumberland, saving to the bailiff's return of writs, &c.

HEYBOTE. See *Haybote.*

HEYLOED. Seems to signify a customary load or burden laid upon the inferior tenants for mending or repairing the *heys* or hedges. *Cowell.*

HEYMECTUS. A net for catching conies; a *hay-net*, *Placit. temp. Ed.* 3. *Cowell.*

HIBERNAGIUM. See *Ibernagium.*

HIDAGE, *hidagium.*] An extraordinary tax formerly payable to the King for every *hide* of land. *Bract. lib.* 2. *cap.* 6. This taxation was levied, not only in money, but provision of armour, &c. And when the Danes landed at Sandwich, in the year 994, King Ethelred taxed all his lands by *hides*, so that every 310 hides found one ship furnished:

and every 8 hides found one jack and one saddle, to arm for the defence of the Kingdom, &c. Sometimes the word *hidage* was used for the being quit of that tax; which was also called *hidegild*, and interpreted from the Saxon, a price or ransom paid to save one's skin or hide from beating. *Sax. Dict.* . See title *Taxes*.

HIDEGILD. Vide *Hidgild*.

HIDES. See *Leather* and *Skins*.

HIDE AND GAIN. Did anciently signify arable land, *Coke Lit.* 85, *b*. For of old, to *gain* the land was as much as to till it. See *Gainage*.

HIDELANDS, Sax. *Hydelandes*.] *Terræ ad hydam seu tectum pertinentes*.

HIDE OF LAND, Sax. *hyde lands*, from *hyden, tegere*.] A ploughland (see *Plow-land*). In an old manuscript it is said to be 120 acres. *Bede* calls it *Familiam*, and says it is as much as will maintain a family; others call it *Mansum, Manentem, Casatam, Carucatam, Sullingham, &c. Crompton*, in his *Jurisdict. fo.* 222. says, a *Hide of land* contains one hundred acres, and eight hides make a knight's fee. *Henry Hunting. Hist. lib.* 6. *fol.* 206, *b*. But Sir *Edward Coke* holds, that a knight's fee, a *Hide* or plough land, a yard-land, or an oxgang of land, do not contain any certain number of acres. *Co. Lit. fol.* 69. The distribution of England by *Hides of land* is very ancient; for there is mention of them in the laws of King *Ina, cap.* 14. *Spelm.* And see *Camd. Brit.*

HIDEL. A place of protection or sanctuary. See *stat.* 1 *Hen.* 7. *c.* 6. *Cowell, edit.* 1727.

HIDGILD, HIDEGILD, *in LL. Canuti R.* Sometimes written *Hinegild* and *Hudegeld*. From the Sax. *Hide, i. e.* the skin; and *geld, pretium*.] The price by which a villein or servant redeemed his skin from being whipped in such trespasses as anciently incurred that corporal punishment. *Cowell*. See *Fleta, lib.* 1. *c.* 47. § 20.

HIERLOOM. See *Heirloome*.

HIGH TREASON. See *Treason*.

## HIGHWAY.

VIA REGIA.] A public passage for the King's people: for which reason it is called the *King's Highway*.

Under this title are comprehended Bridges repaired by the parish or township. As to County-Bridges, see this Dict. title *Bridges*.

The law relating to *Turnpike-roads*, as well as that concerning *High-ways*, being in a great measure regulated by statutes, the provisions of which are in some degree implicated with, and frequently refer to, each other, the whole is here digested and abridged according to the following divisions.

I. *Of the various Sorts of Highways, &c. And the Right to, the claiming, and changing and enlarging of Highways.*
II. *Of Repairs, at Common-Law.*
III. *Of Nusances, at Common Law, in Highways.*
IV. *Of Proceedings relative to repairing Highways, Nusances in them, &c.*
V. *Regulations of* { (A) HIGHWAYS / (B) TURNPIKE ROADS } *by Statute.*

I. It seems, that anciently there were but four High-ways in England, which were free and common to all the King's subjects, and through which they might pass without any toll, unless there was a particular consideration for it; all others, which we have at this day, are supposed to have been made through the grounds of private persons, on writs of *ad quod damnum*, &c. which being an injury to the owner of the soil, it is said that they may prescribe for toll without any special consideration. 3 *New Abr.* 54. 1 *Mod.* 231. 2 *Mod.* 143.





There are (says *Lord Coke*) three kinds of ways: 1. A foot-way, called in Latin *iter*. 2. A pack and prime way, which is both a horse and foot-way, called in Latin *actus*. 3. A cart-way, called in Latin *via* or *aditus*, which contains the other two, and also a cart-way: and is called *via regia*, if it be common to all men; and *communis strata*, if it belong only to some town, or private person. *Co. Lit.* 56, *a*.

But, notwithstanding these distinctions, it seems, that any of the said ways which is common to all the King's subjects, whether it lead directly to a market town, or only from town to town, may properly be called a Highway; that any such cart-way may be called the King's Highway; that a river common to all men may also be called a Highway; and that nusances in any of the said ways are punishable by indictment; otherwise they would not be punished at all; for they are not actionable unless they cause a *special damage* to some *particular person*; because, if such action would lie, a multiplicity of suits would ensue. But it seems, that a way to a parish church, or to the common fields of a town, or to a village, which terminate there, may be called a private way, because it belongs, not to all the King's subjects, but only to the particular inhabitants of such parish, house, or village, each of which, as it seems, may have an action for a nuisance therein. *Palm.* 389. *Cro. Eliz.* 63. 664. 1 *Vent.* 189. 208. 3 *Keb.* 28. *Co. Lit.* 56. 6 *Mod.* 255. 1 *Hawk. P. C. c.* 76. § 1.

A street built upon a person's own ground is a dedication of the Highway, so far only as the public has occasion for it, *viz.* for a right of passage, not as to the absolute possession of the soil. *Stra.* 1004.

If passengers have used time out of mind, when the roads are bad, to go by outlets on the land adjoining to a Highway in an open field, such outlets are parcel of the Highway; and, therefore, if they are sown with corn, and the tract founderous, the King's subjects may go upon the corn. 1 *Rol. Abr.* 390. *Cro. Car.* 366. 1 *Hawk. P. C. c.* 76. § 2. But it is not a good justification in *trespass* that the defendant has a specific right of way over the plaintiff's land, and that he had gone upon the adjoining land, because the way was impassable by being overflowed by a river. *Taylor* v. *Whitehead*, *Doug.* 745-9.

Though every Highway is said to be the King's, yet this must be understood so as that in every Highway the King and his Subjects may pass and repass at their pleasure. But the freehold, and all the profits, as trees, &c. belong to the lord of the soil, or to the owner of the lands on both sides of the way. Also the lord or owner of the soil shall have an action of trespass for digging the ground. But the lord of a rape, within which there are ten hundreds, may prescribe to have all the trees growing within an Highway within this rape, though the manor or soil adjoining belongs to another; for usage to take the trees is a good mark of ownership. 1 *Rol. Abr.* 392. 1 *Brownl.* 42. *Keilw.* 141.

A way may become a public Highway by a dedication of it by the owner of the soil to the public use, and this dedication may be presumed in certain cases of long continued usage, and other facts sufficient to show that the owner actually meant to give the public a right of way over his soil. But the erection of a bar to prevent the passage of carriages will rebut the presumption of such dedication, although the bar may be broken down for a length of time, or though it do not impede the passing of persons on foot, for there can be no partial dedication or abandonment to the public. See 11 *East's Rep.* 375. 1 *Campb.* 260. 4 *Campb.* 16. and particularly *Woodyer* v. *Hadden*, 5 *Taunt.* 125.

Where a railway was made under the authority of an Act of Parliament by which the proprietors were incorporated, and by which it was provided that the public should have the beneficial enjoyment of the way; the company having afterwards taken up the railway, the Court of K. B. granted a

mandamus to compel the company to reinstate and again lay down the railway. *R.* v. *Severn and Wye Railway Company. Term. Rep. K. B. Tr.* 59 *Geo.* 3. 646.

A way must not be claimed as appendant or appurtenant to a house, because it is only an easement, and no interest. *Yelv.* 159. But it may be *quasi* appendant thereto, and as such pass by grant thereof. *Cro. Jac.* 190.

A man may prescribe for a way from his house through a certain close, &c. to church, though he himself has lands next adjoining to his said house, through which of necessity he must first pass; for the general prescription shall be applied only to the lands of others. *Palm*, 387, 388. 2 *Rol. Rep.* 397.

An ancient Highway cannot be changed without an inquisition found on a writ of *ad quod damnum*, that such change will be no prejudice to the public; and it is said, that if one change a Highway without such authority, he may stop the new whenever he pleases: neither can the King's subjects, in an action brought against them for going over such new way, justify generally as in a common Highway, but *ought to show specially, by way of excuse, how the old way was obstructed, and a new one set out*; neither are the inhabitants bound to keep watch in such new way, or repair it, or to make amends for a robbery committed in it. *Cro. Car.* 266. *Vaugh.* 341. *Yelv.* 141. 1 *Burr.* 465. 1 *Hawk. P. C. c.* 76. § 3.

But it hath been holden, that if a water, which hath been an ancient Highway, by degrees changes its course, and goes over different ground from that whereon it used to run, yet the Highway continues in the new channel in the same manner as in the old. 22 *Ass.* 93. 1 *Rol. Abr.* 390.

An owner of land, over which there is an open road may inclose it by his own authority, but he is bound to leave sufficient space and room for the road, and he is obliged to repair it till he throws up the inclosure. But if he alter or change the road by the legal course of a writ of *ad quod damnum*, he is not obliged to repair the new road, unless the jury impose such a condition on him; for otherwise it stands just as it did before, even though it was at first open and should be directed by the jury to be inclosed. And a private act of parliament for inclosing lands which vests power in commissioners to set out new roads by their award, is equally strong as to these consequences as a writ of *ad quod damnum*. See 1 *Burr.* 456.

As to the Regulations by statute, see *post*, V. (A) 9.

II. Of *Common Right*, the general charge of repairing Highways lies on the occupiers of lands in the parish wherein they lie; but it is said that the tenants of the lands adjoining are bound to scour their ditches. 1 *Rol. Abr.* 39. *March* 26. 1 *Vent.* 90. 183. 8 *Hen.* 7. 5.

If a parish is part in one county, and part in another, and the Highways in one county are out of repair, the whole parish shall contribute to the repair: but there may be an agreement between the inhabitants, that the one shall repair one part, and the other the other; and such agreement is good between themselves, and for breach, the one may have an action upon the case against the other; but in indictment they shall take no advantage of these agreements, for as to the King they are equally liable. 1 *Mod.* 112. 1 *Vent.* 256. 3 *Keb.* 301.

A Highway lying within a parish, the whole parish is of common right bound to repair it: except it appears that it ought to be repaired by some particular person either *ratione tenuræ*, or by prescription. 1 *Vent.* 183. *Style*, 163.

If a parish lie in two distinct counties, an indictment may be brought against that part of the parish in which the ruinous road lies, 4 *Burr.* 2511. But it must appear upon the face of the indictment by what right the charge is laid upon the particular division of any parish, which is in one county only. 5 *Burr.* 2700. 2. As that they have repaired time out of mind. *Andr.* 276. *Hardw.* 259. and see 2 *Term Rep.* 513.

But though the parish be obliged of common right to repair the Highways in it, yet it is certain, that particular persons may be found to repair the Highway, by reason of inclosure or prescription; as where the owner of lands not inclosed, next adjoining to the Highway, incloses his lands on both sides of it; in which case he is bound to make a perfect good way, and shall not be excused by making it good as it was before the inclosure, if it were then any way defective, because by the inclosure he takes from the people the liberty of going over the lands adjoining to the common track. 1 *Rol. Abr.* 390. *Cro. Car.* 366. 1 *Sid.* 464.

Also it is said, that if one inclose land on one side, which hath anciently been enclosed on the other side, he ought to repair all the way; but that if there be no such ancient inclosure on the other side, he ought to repair but half the way. 1 *Sid.* 464.

Therefore if there be an old hedge time out of mind belonging to A. on the one side of the way, and B. having land lying on the other side, makes a new hedge, there B. shall be charged with the whole repair. 1 *Sid.* 461. 2 *Keb.* 665. 2 *Saund.* 157. But if A. makes a hedge on the one side of the way, and B. on the other, they shall be chargeable by moieties. 1 *Sid.* 461. 2 *Keb.* 665. But it seems clear, that wherever a person makes himself liable to repair a Highway by reason of inclosure, that by throwing of it open again, he thereby frees himself from the burthen of any future reparation. 2 *Saund.* 160. See *ante*, II.

In a writ of *ad quod damnum*, and inquisition found thereupon, after the person hath once made the road: (and N. B. it is not necessary the whole new road should go through his own soil;) the parishioners ought to keep it in repair; because being discharged from repairing the old road, no new burthen is laid upon them; their labour is only transferred from one place to another. But if the new road lies in another parish, the person who sued out the writ, and his heirs, ought to keep it in repair, because the inhabitants of the other parish gaining no benefit from the old road being taken away, it would be imposing a new charge upon them for which they enjoyed no compensation. 3 *Atk.* 772.

Particular persons may be bound to repair a Highway, by prescription, or in respect of inclosure of the land wherein the road lies; and it is said, that a corporation aggregate may be charged by a general prescription, that it ought and hath used to do it, without shewing any consideration in respect whereof they had used to do it, because such a corporation never dies, neither is it any plea, that they have done it out of charity: but it is said, that such a general prescription is not sufficient to charge a private person, because no man is bound to do a thing which his ancestors have done, unless it be for some special reason; as having lands descended to him holden by such service, &c. but it seems, that an indictment charging a tenant of lands in fee with having used of right to repair such a way *ratione tenuræ terræ suæ*, without adding that his ancestors, or those whose estates he hath, have so done, is sufficient, for it is implied. 27 *Ass.* 8. 27 *Ed.* 4. 38. *Bro. Prescription*, 49. 70. *Keilw.* 52, *a. Latch.* 206. 1 *Hawk. B. C. c.* 76. § 5—8.

And it seems certain in all those cases, whether a private person be bound to repair a Highway by inclosure or prescription, that the parish cannot take advantage of it on the general issue, but *must plead it specially*; that therefore, if to an indictment against the parish, for not repairing a Highway, they plead Not guilty, this shall be intended only that the ways *are in repair*, but does not go to the *right* of reparation. 1 *Mod.* 112. 3 *Keb.* 301. 1 *Vent.* 256.

At Common law it is said, that all the county ought to make good the reparations of a Highway, where no particular persons are bound to do it; by reason the whole county have their ease and passage by the said way. *Co. Rep.* 13.

By the ancient Common law, villages are to repair their Highways, and may be punished for their decay; and if any do injure or straighten the Highway, he is punishable in the King's Bench, or before justices of the peace, in the Court-Leet, &c. 27 *Ass.* 63. *Cromp. Jurisd.* 76. See *post*, V.

As to *Private Ways*.—If one grants a way, and afterwards digs trenches in it to my hindrance, I may fill them up again. But if a way which a man has, becomes not passable, or becomes very bad, by the owner of the land tearing it up with his carts, so that the same be filled with water, yet he who has the why cannot dig the ground to let out the water, for he has no interest in the soil. *Godb.* 52, 53. But in such case he may bring his action against the owner of the land for spoiling the way, or *perhaps* he may go out of the way, upon the land of the wrong-doer, as near to the bad way as he can. But where a private way is spoiled by those who have a right to pass thereon, and not through the default of the owner of the land, it seems that they who have the use and benefit of the way ought to repair it, and not the owner of the soil, unless he is bound thereto by custom or special agreement. 2 *Burr.* 382.

In an action on the case for not repairing a private road leading through the defendant's close, it is sufficient to allege that the defendant *as occupier* of the close is bound to repair. 3 *Term Rep.* 766.

For further matter as to repairs of Highways, see *post*, V. (A) 2, 3. 6.

III. It is clearly agreed to be a nusance to dig a ditch, or make a hedge across the Highway, or to erect a new gate, or to lay logs of timber in it, or generally to do any other act which will render it less commodious. *Kitchin.* 34. 1 *Hawk. P. C. c.* 76. § 48. Also it is a nusance for an heir, (and for which he may be indicted) to continue an incroachment, or other nusance to a Highway begun by his ancestor, because such continuance thereof amounts in the judgment of law, to a new nusance. 1 *Hawk. P. C. c.* 76. § 61. Also it is agreed, that it is no excuse for him who lays logs in the Highway, that he laid them only here and there so that the people might have a passage through them by windings and turnings. 2 *Rol. Abr.* 137. 1 *Hawk. P. C. c.* 76. § 49.

It is a nusance to suffer the Highway to be incommoded by reason of the foulness, &c. of the adjoining ditches, or by boughs of trees hanging over it, &c. And it is said, that the owner of land next adjoining to the Highway, ought of common right to scour his ditches; but that the owner of land next adjoining to such land, is not bound by the Common-law so to do without a special prescription; also it is said, that the owner of trees hanging over an Highway to the annoyance of travellers, is bound by the Common-law to lop them; and it is clear that any other person may lop them, so far as to avoid the nusance. 8 *H.* 7. 5, *a. Kitch.* 34. *Dalt. cap.* 26. 1 *Hawk. P. C. c.* 76. § 52.

But it is no nusance for an inhabitant of a town to unlade billets, &c. in the street before his house, by reason of the necessity of the case, unless he suffer them to continue there an unreasonable time. 2 *Rol. Abr.* 137. 265.

Any one may justify pulling down, or otherwise destroying a common nusance, as a new gate or house erected in a Highway; and it hath been holden, that there is no need, in pleading such justification, to shew that as little damage was done as might be. 2 *Rol. Abr.* 141. *Cro. Car.* 184. 1 *Jon.* 221. 2 *Salk.* 458.

Though all nusances are punishable by indictment with fine and imprisonment, it is said that one convicted of a nusance to the Highway, may be commanded by the judgment to remove it at his own costs, &c. 2 *Rol. Abr.* 84. 1 *Hawk. P. C. c.* 75. § 14. See 2 *Stra.* 686.

A gate erected in a Highway is a common nusance, because it interrupts the people in that free and open passage, which they before enjoyed and were lawfully entitled to; but where such a gate has continued *time out of mind*, it shall be intended that it was set up at first by consent, on a composition with the owner of the land on the laying out the road, in which case the people had never any right to a freer passage than what they still enjoy. 1 *Hawk. P. C. c.* 75. § 9. If one has a *private way* without a gate, and a gate is hung up, an action on the case lies, for the party hath not his way as he had before. *Litt. Rep.* 267.

See further, as to nusances in Highways, *post*, V. and of their punishment by statute, *post*, V. (A.) 4.

IV. *As to the general doctrine with respect to* Indictments, &c. *upon this subject* Mr. Serjeant Hawkins *has laid down the following rules:*—

First, That it is safe in every such indictment to shew both the *place from which*, and also the *place to which*, the way supposed to be out of repair doth *lead*; yet exceptions for want of such certainty, have sometimes been disallowed: (See 4 *Burr.* 2091. *Lucas*, 383.) However it seems certain, that there is no necessity to shew that a Highway leads to a market-town, because every Highway leads from town to town. 1 *Hawk. P. C. c.* 76. § 86.

An indictment against the parish of B. for not repairing a road leading *from* A. *to* B. is exclusive of B. and therefore bad: and it is not aided by a subsequent allegation that a *certain part of the same Highway situate in B.* is in decay, &c. 3 *Term Rep.* 513. See 1 *H. Black. Rep.* 351. that in *pleading* a public Highway it is not necessary to state any *termini*. So in an indictment for a nusance in a Highway, it is not necessary to mention the *termini*. *Stra.* 44.

2dly. That it is necessary in every such indictment expressly to shew *in what place* the nusance complained of was done, for which cause an indictment for stopping a way at D. leading from D. to C. is not good; for it is impossible that a way leading from D. should be in D. and no other place is alleged. 1 *Hawk. P. C. c.* 76. § 87.

So also in a presentment the Highway must be alleged to lie in the parish, otherwise the parish is not bound to repair. *Cowp.* 111. *Stra.* 181.—But if there be two vills in a parish, it is not necessary, in an indictment for a nusance to shew in which vill the nusance lies. *Say.* 119.

3dly. That every such indictment ought also certainly to shew *to what part* of the Highway the nusance *did extend*, as by shewing how many feet in length, and how many feet in breadth it contained; or otherwise the defendant will neither know of the certainty of the charge against which he is to make his defence, neither will the court be able, from the record, to judge of the greatness of the offence, in order to assess a fine answerable thereunto; and upon this ground it hath been adjudged, that an indictment for stopping a certain part of the King's Highway at K. is bad, for the uncertainty thereof. Also it hath been resolved, that the place wherein such a nusance is alleged, is not sufficiently ascertained in such an indictment, by shewing that it contained so many feet in length, and so many in breadth, *by estimation*. 1 *Hawk. P. C. c.* 76. § 88.

An indictment for a nusance in laying soil in a Highway is not bad for want of the length and breadth of the nusance being set out. *Say.* 98.—Nor for a nusance in digging two grips or ditches in a common footway. *Say.* 197.—Nor for a nusance that a certain Highway and bridge are in a ruinous condition. *Say.* 201.

4thly. That every such indictment must shew, that *the way* wherein a nusance is alleged, *is a common Highway*; for which cause it hath been resolved, That an indictment for a nusance to a horseway, without adding that it was a Highway, is bad; and upon the same ground it seemeth also,

That an indictment for a nusance to a common footway to the church of D. for all the parishioners of D. is not good; yet it seems, that if those last words, *viz. for all the parishioners of* D. had been omitted, such an indictment might be maintained. See 1 *Hawk. P. C.* 76. § 89.

5thly. That it is not safe in an indictment against a common person for not repairing a Highway, which he ought to have done in respect of the tenure of certain lands, barely to say that he was bound to repair it *ratione tenuræ terræ*, without adding *suæ*. Also it is said, that in an indictment against a bishop, &c. for not repairing a Highway, in respect to certain lands, it ought to be shown in what capacity he ought to repair it, because otherwise it cannot be known in what capacity the process is to be awarded against him. 1 *Hawk. P. C. c.* 76. § 90.

If a man be charged to repair *ratione tenuræ*, he may throw it upon the parish by the general issue. *Stra.* 184. And it hath been held upon consideration, that *ratione tenuræ* is sufficient without *suæ*. *Stra.* 187. *Hawkins* positively states that the defendant ought not to plead *quod non debuit reparare*, without shewing who ought. 1 *Hawk. P. C. c.* 76. § 94. cites 1 *Sid.* 140. *Carth.* 213. 11 *Mod.* 273. 12 *Mod.* 13.

6thly. That in every such indictment the *fact* alleged against the defendant must be expressed in such *proper terms*, that it may clearly appear to the court to have been a nusance; and for this cause it hath been resolved, That a presentment for diverting a Highway is not good, because a Highway cannot be diverted, but must always continue in the same place where it was, howsoever it be obstructed, and a new way made in another place. See 1 *Hawk. P. C. c.* 76. § 91.

It hath been resolved, That an indictment against a man for stopping a Highway in his own land is good, without laying the offence done *vi et armis*. Also it is said, That a presentment that a Highway in such a place is decayed by the default of the inhabitants of such a town, is good, without naming any person in certainty. But it hath been adjudged, that an indictment against particular persons must specially charge them every one; for which cause it hath been resolved, that an indictment against several for nor repairing their streets, that they, *et eorum uterque*, did not repair them, is not good. See 1 *Hawk. P. C. c.* 76. § 92.

Upon an indictment for not repairing a Highway, if the defendant produce a certificate before trial, that the way is repaired, he shall be admitted to a fine: but after verdict, the certificate is too late, for then he must have a *constat* to the sheriff, who ought to return that the way is repaired, because the verdict, which is a record, must be answered by a record. *Raym.* 215. And where the defendants, indicted for not repairing a common foot-way, confessed the indictment, and submitted to a fine; it was held that the matter was not ended by their being fined; but that writs of *distringas* shall be awarded *in infinitum*, till the court of B. R. is certified that the way is repaired, as it was when it was at best; but the defendants are not bound to put it in better repair than it has been time out of mind. 1 *Salk.* 358. 6 *Mod.* 163. If a defendant hath made a Highway as good as it is capable of being made, it was said, in an extraordinary case, this shall not discharge him on an information against him, though it may be a mitigation of his fine. 3 *Salk.* 183. Also it is no excuse for the inhabitants of a parish indicted at Common Law; for not repairing the Highways, that they have done the work required by statute; for the statutes are made in aid of the Common Law; and when the statute work is not sufficient, rates and assessments are to be made. *Dalt. c.* 26.

It is said that if the right or title to repair such ways come in question, upon suggestion and affidavit made thereof, a *certiorari* may be had to remove the indictment into B. R.

A person may be indicted for not repairing a house standing upon a Highway, which is ruinous, and like to fall down, to the danger of travellers, whatever be his tenure, which in such case is not material. 1 *Salk.* 357.

If there be a common foot-way through a close by prescription, and the owner of the close ploughs up the way, and sows it, and lays thorns at the side of it, passengers may go over another foot-way in the same close, without being trespassers. *Yelv.* 142. And if a Highway is not sufficient, any passenger may break down the inclosure of it, and go over the land, and justify it till a sufficient way is made. 3 *Salk.* 182.

Erecting a gate across a Highway, though not locked, but opening and shutting at pleasure, is esteemed a nusance; for it is not so free and easy a passage, as if there had been no gate: and the usual way of redressing nusances of this kind is by indictment; but every person may remove the nusance by cutting or throwing it down, if there be occasion so to do; and it hath been held, that though there are many gates across Highways, they must be *anciently* set up, and it shall be intended by licence from the King upon the writ of *ad quod damnum*. *Cro. Car.* 184. See *ante*, III.

V. In Scotland, by the acts 1669, *c.* 16. 1670, *c.* 9. 1686, *c.* 8. Justices of Peace are empowered to regulate highways, bridges, and ferries: they may call out tenants, cotters, and servants, six days in the year to work on the highways, and they may assess the county, not exceeding 10*s.* for every 100*l.* of valued rent. By the last of these acts, the Commissioners of Supply were joined with the Justices: and by *stat.* 11 *Geo.* 3. *c.* 53. two general meetings shall be held annually of the justices and commissioners on the business of the Highways; the first on the day when the commissioners are directed to meet for assessing the land tax, and the second on the day when the freeholders assemble at their Michaelmas Head Court.

The System of statute law in England shall be considered under the following divisions:

### (A) Of Highways.

1. *The Statute Duty.*
2. *Assessment of Rates and other Funds for the Repair of Highways.*
3. *Of the Appointment of the Surveyor, and his Duty.*
4. *Of Nusances by Statute.*
5. *The Number of Horses in Carriages.*
6. *Of presenting Highways.*
7. *Of levying Assessments, Penalties, and Forfeitures; and other general Provisions to enforce the Execution of the Act.*
8. *Of Defendants in Actions on the Statutes.*
9. *Of changing and enlarging Highways.*

1. The statute 13 *Geo.* 3. *c.* 78. repeals and consolidates the provisions of all former statutes on this subject.

By § 34 of this act (as amended by *stat.* 34 *G.* 3. *c.* 74.) occupiers of 50*l.* a year, keeping a team of three horses, shall send the same and *two* men to do statute-duty for six days in the year.—And so for another, six days in every year for every further 50*l.* a year.—So also every person who shall occupy 50*l.* in any other parish than where he resides.—Every person occupying 50*l.* a year, but not keeping a team, shall send a team; a person keeping a team, but occupying under 50*l.* a year, either where he does or does not reside, to pay the surveyor, in lieu of duty, for every 20*s.* a year, 1*d.* for every day's duty.—A person keeping a team and not occupying 30*l.* a year, shall only send one man with the team.

Lands suffered to lie fresh, neither occupied or let, are liable to the performance of the duty; to be satisfied by their *Owners*. *Palm.* 389.

The livings of the clergy are liable as other estates. *Wats.* 40. 2 *Inst.* 784.

Whoever shall keep a cart and horse, and not a team, shall send the same and one labourer, or pay the composition, at the option of the surveyor. A person keeping a coach or carriage, and no team, and not occupying 50*l.* a year, shall pay 1*s.* a day for each horse, or the composition beforementioned, at the option of the surveyor.—If the carriages required are not necessary, the owners shall send three men, or pay 4*s.* 6*d.*—The labourers shall furnish *themselves* with proper instruments for the statute labour; and shall, with the teams, &c. work eight hours a day.—If persons do not send a sufficient labourer besides the driver, or if the labourers disobey the surveyor, he may discharge them, and recover the forfeiture against the master, as he might in case none had been sent at all. § 35. (and 34 *G.* 3. *c.* 74. § 2.)

A stand-cart and one horse to be reckoned half a team; a cart and two horses as two thirds.—And if the duty require it, the surveyor may order it to be performed with a waggon. § 36.

The surveyor shall give four days' notice to the occupiers, &c. of the statute-duty required, and the days when. (See *Ld. Raym.* 858.) Persons making default in sending the team and men to forfeit 10*s.*—in sending, cart, horse, and man, 3*s.*—in sending cart, horse, and two men, 5*s.*—in sending a labourer, 1*s.* 6*d.*—The forfeitures to be applied to the Highways; the surveyor to be impartial. § 37.

The statute-duty may be compounded for, as the Justices shall direct. § 38.—And see 34 *Geo.* 3. *c.* 74. § 2, 3, 4. and 44 *Geo.* 3. *c.* 52. § 2. as to the assessment and amount of such composition.

By 54 *Geo.* 3. *c.* 109. § 4—7. the option of calling for composition, instead of statute-duty, is given to the surveyors.

Justices may exempt poor persons from payment of the rates, and may direct team-duty to be performed in kind,—and order labourers to perform six days' statute-duty, on payment of the usual wages. 34 *Geo.* 3. *c.* 74. § 5, 6.

Justices of cities, corporations, &c. are to execute this act within their jurisdictions. 13 *Geo.* 3. *c.* 78. § 54.

If a necessity should arise in any particular place, the Justices may supersede the liberty of compounding, and order the statute-duty to be performed in kind; and lots shall be drawn which of the inhabitants shall so perform it. § 39. (and see 34 *Geo.* 3. *c.* 74.)

The Justices may mitigate the composition, where part of the land occupied lies in another parish. § 40.

Sect. 41. settles the manner in which the surveyors shall give notice of the time and place for compounding, and how such compositions shall be paid.

Where a draught or plough is kept, and no carriage, 1*s.* shall be paid for every horse or pair of oxen. § 42.

The Inhabitants may appoint three separate months in the year for seed-time, hay, and corn-harvest, in which no statute-duty shall be performed. § 43.

The *stat.* 13 *Geo.* 3. *c.* 84. § 58. empowers the Justices in special sessions, in certain cases, to apply the funds of *Turnpike Roads* in aid of the statute-duty on Highways.

By *stat.* 30 *Geo.* 2. *c.* 25. § 23. persons serving in the militia are exempted from statute-duty during their service.

The performance of this statute-duty is no answer to an indictment for not repairing. *Dalt. c.* 26.

The inhabitants of a parish into which a road is turned by Turnpike-trustees are not bound to do statute-work thereon. 1 *Black.* 603.

2. The Sessions may order a rate not exceeding 6*d.* in the pound to defray the expences of procuring materials, &c. for the repairs. *Stat.* 13 *Geo.* 3. *c.* 78. § 30. See *post*, 5. (B.)

If the funds are exhausted, and they and the labour appointed by the act, are insufficient to keep the Highways in sufficient repair, the Sessions may cause an equal assessment for that purpose; provided the said rate of 6*d.* and this assessment do not exceed 9*d. per* pound. §§ 45, 46. See as to additional assessments, *stat.* 54 *Geo.* 3. *c.* 109. § 1—3.

Feoffees or trustees of lands granted for the repair of Highways shall let them to the best advantage, and the Sessions may enquire into the management thereof. § 52.

As it frequently happens that the boundaries of parishes pass through the middle of a Highway, *stat.* 34 *Geo.* *c.* 64. provides that two Justices, on application of the Surveyor, may divide the whole of such common Highway by a transverse line, crossing it in equal parts, or in such parts and proportions as with relation to the soil, floods, &c. they may think proper; and ascertain the liability of their respective parishes to repair their several portions.

3. Of the *Appointment* of the *Surveyor*. By the said *stat.* 13 *Geo.* 3. *c.* 78. § 1. the officers and Parishioners shall assemble yearly on 22d of September at 11 in the morning, when the majority shall make a list of ten parishioners, each possessing a real estate of 10*l.* a year or renting 30*l.* or worth 100*l.* personally.—If a sufficient number of this description cannot be found, the deficiency shall be supplied by the most able inhabitants.—Within three days after the constable shall send a copy of the list to the Justice of the division, and the original list to the special sessions after Michaelmas session; and give notice to the persons named, to appear at the Sessions and accept the office of surveyor (if appointed) or shew cause to the contrary.—The Justices at such special Sessions shall appoint one, two or more surveyors from the said list, preferring such as are qualified; which shall be notified to the persons chosen who shall be surveyors for the next year.—If any named in the list refuse to serve, they shall forfeit 5*l.*—And the Justices may appoint inhabitants of the county living within three miles of the parish, who on refusal shall forfeit 50*s.*—A surveyor serving one year shall be exempt for the three following.—If no list is returned, or the person appointed refuses to serve; two Justices at special Session may appoint a surveyor with a salary to be paid from the forfeitures, but not to exceed $\frac{1}{3}$ of the 6*d.* rate—The Justices may order the collector to return an account of the said assessment—Officers neglecting their duty to forfeit 40*s.*

It seems that the presence of the parish officers is not absolutely essential to the legality of the meeting, provided it is in other respects fair and regular. 4 *Burr.* 2454.

If the Justices make no appointment at the session directed by the act, they may do it afterwards: and may be compelled thereto by mandamus. *R.* v. *Denbighshire, J.* 4 *East Rep.* 142.

More Surveyors than one are comprehended under, and understood by the word *surveyor* in this act. See *sect.* 5, of the act.—If the list has been improperly procured, the Justices may reject it. 4 *Burr.* 2454.

The Magistrates are not bound to appoint surveyors out of the lists returned, if in their opinion the persons named are not qualified: but they may appoint other persons of the parish who are qualified. 7 *Term Rep. K. B.* 169.—If they omit to appoint at the first special Sessions, they are bound to appoint at a subsequent special Sessions. 4 *East's Rep.* 142.

Where a surveyor with a salary is appointed; the Justices shall also appoint an assistant, who shall forfeit 50*s.* on refusal to serve; and another be appointed, liable also to 50*s.* for refusing; and they may then appoint one with a salary.—An assistant serving one year shall not be appointed again for three years, without his own consent. 13 *Geo.* 3. *c.* 78. § 2.

The Surveyor shall give security by bond, if required. § 3.

By § 5, it is provided that two parts in three of the parishioners assembled may recommend a Surveyor with a salary to the Justices.—And if the Surveyor dies or becomes incapable, during the interval of the Sessions, two Justices may appoint a person to officiate until the Session.

The salaries of Surveyors in cities, &c. must be approved by two thirds of the parishioners. § 54.

As to the *Surveyor's duty*.—By § 4, of the same act, the assistant shall obey the Surveyor, and account to him for money received, under forfeiture of double the amount.—And for any neglect he shall forfeit, not more than 5*l*. nor less than 40*s*. at the discretion of the Justices.—The Surveyor is to draw on the assistant for sums of 40*s*. or upwards.

Surveyors shall view the Highways, and give notice to remove obstructions or encroachments by hedges, &c. and if not remedied within twenty days, the Surveyor may do it at the charge of the party offending, who shall also forfeit 1*d*. *per* foot. § 12. and see *post*, 4.

The Surveyor shall upon oath inform two Justices of all Highways, bridges, &c. repairable by tenure which are out of repair.—And if they are not repaired on notice to the persons chargeable they shall be presented at the Sessions. § 23. See 1 *Black*. 602. and *post*, 6.

Justices at special Sessions may order which of the Highways shall be first repaired. § 25.

Sect. 26, directs how, where, and in what manner, the Surveyor shall erect direction posts in cross roads, &c.

Sect. 27 and 28, state where and in what manner the Surveyor may get materials for the repairs; and § 29, how materials shall be obtained in inclosed land where there are not sufficient waste lands within the parish.—As to this latter, see 1 *Burr*. 382.—The Surveyor enabled to contract. § 50.

The Surveyor is to fence off all pits and holes made in digging materials, on forfeiture of 10*s*. and on neglect after notice from 40*s*. to 10*l*. § 31.—Materials dug for the use of a different parish than that in which they lie, shall be removed only between the 1st of April and the 1st of November, or in a hard frost. § 32.

The penalty for damaging bridges, mills, &c. between 20*s*. and 5*l*. at the discretion of the Justices. § 33.

Sect. 48, directs in what manner the Surveyor or his executors, &c. shall keep his accounts; which are to be examined at a vestry, afterwards by a Justice, and further if necessary at a special Sessions. See 2 *Burr*. 746.

Surveyors neglecting their duty, shall forfeit between 10*s*. and 5*l*. at the discretion of the Justices. § 50.

If the Surveyor receives money due to the turnpike roads, he shall pay it to the treasurer, and how it is to be applied. § 44.

By *stat*. 55 *G*. 3. *c*. 47. Surveyors of Highways, are under the direction of the Justices, to make returns of the several matters contained in the schedule to that act, relating to the annual expence of Highways throughout the kingdom.

4. By the said *stat*. 13 *Geo*. 3. *c*. 78. § 7. the Surveyor shall give ten days' notice to the landholders next adjoining the road to cut and prune their hedges; and upon default the Justices may order the same to be done: and if such order is not complied with, in ten days, the Surveyor shall cut and prune at the expence of the owner of the land, who shall pay over and above 2*s*. for every 24 feet of hedge, and 2*s*. for every tree; and see § 12 of this act mentioned under the last head.

The landholder shall make proper ditches and drains, and keep them properly scowered and in repair on pain of 10*s*. § 8.—And where the old ditches are not sufficient, the Surveyor shall order new ones to be made. § 14.

No *small tree*, or bush whereby a man may lurk, shall stand within 200 feet of a Highway.—See *stat*. *Winchester* (13 *Ed*. 1. *st*. 2.) *c*. 5. which was repealed by 7 *Geo*. 3. *c*. 42. but revived by 8 *Geo*. 3. *c*. 5. § 3.

Sect. 13, of the said act. 13 *Geo*. 3. *c*. 78. directs the season in which hedges shall be pruned and trees felled.

No tree, bush or shrub shall grow within 15 feet from the centre of any Highway, unless for ornament, &c. § 6.

Whoever shall lay any stone, timber, &c. in a Highway for five days so as to obstruct or injure the same, shall forfeit 10*s*. § 9.—And if not removed within five days after notice by the Surveyor, it shall be sold. § 10.—Obstructions by carriages, unless for a reasonable time to unload, forfeit 10*s*. § 11.

Penalty for incroaching upon Highways 40*s*. and the incroachment may be taken down by the surveyor. § 64.

No ale-houses suffered on bridges where tolls are kept, on penalty of 5*l*. § 63.

Penalty for damaging banks, causeways, *mile-stones*, &c. from 10*s*. to 5*l*. or commitment to the house of correction. § 53. [The same provisions are made as to turnpike roads by 13 *Geo*. 3. *c*. 84.]

5. The number of horses in the several carts and waggons with wheels of various breadths is settled by § 56, of the said *stat*. 13 *Geo*. 3. *c*. 78. and the time of prosecution for penalties is so limited by § 57, as to render it necessary for an informer to be pretty diligent.

Justices at sessions may licence an additional number, and stop proceedings for the forfeiture. §§ 58, 59. See 4 *Burr*. 2260.

The owner's name, &c. to be painted on all carriages on forfeiture of from 20*s*. to 5*l*. § 59.

Penalty for negligent or impertinent behaviour of drivers not more than 20*s*. if owners of carriages, or 10*s*. if not; who may be apprehended *with or without warrant* by a person seeing the offence committed. § 60.

The forms to be observed in proceedings are settled in the schedule annexed to the act.—Abstracts of the act are to be given to the surveyor. §§ 70, 71.

6. Under the said *stat*. 13 *Geo*. 3. *c*. 78. § 24. (and see § 80.) Justices of assise upon view, and justices of peace upon view, or on information on oath by the surveyor, may present at the assises, great sessions of Wales, or quarter sessions, any Highway, causeway, or bridge out of repair, within the jurisdiction and county where they lie.—And no such presentment nor any indictment shall be removed by *certiorari* on the part of the defendant, until traverse and judgment. But if the right to repair is in question, the defendant *may* remove the proceedings.—And every such presentment shall have equal force as if it had been found by a jury.—Saving the right of traverse as to the fact of non-repair, as well as to the right of repairing. The justice may order the prosecution to be at the expence of the limit, and on conviction may fine the offender.

The Justices are compellable by *mandamus* to receive a general traverse. *Burr*. 1532. 1 *Black*. 468.

On the part of the *prosecution* a presentment may be removed before traverse and judgment; for the restriction was to prevent delay by *defendants*. *Cowp*. 78. And if the Quarter Sessions exceed their authority; as to order a Surveyor to make out his account before a special sessions, such proceedings may be removed by a *certiorari* and quashed; for their power in such case is not original but appellate. *Leache's Hawkins*, i. *c*. 76. § 80. and the authorities there cited: and see 2 *Stra*. 1209.

7. Assessments may be levied by distress, and the surveyor shall be a competent witness. *Stat*. 13 *Geo*. 3. *c*. 78. §§ 68, 69.

Forfeitures, &c. to be levied by distress. §§ 73, 74. See also 54 *Geo*. 3. *c*. 109. § 7.

Convictions shall be made on confession, the oath of one witness, or view of the justice.—Inhabitants competent witnesses. 13 *Geo*. 3. *c*. 78. § 77.

The prosecutor may proceed for a forfeiture above 40*s*. either as directed by the act, or by action of *debt* in a court of record, and recovering shall have double costs. § 75.

Ten days' notice before action commenced and none to be brought after a month [see *post*, § 82.] has expired. § 76.

No distress *unlawful*, or the party to be deemed a trespasser for want of form. § 79.

The court may award costs to either party, according to the circumstances. § 65.

A defendant indicted for not repairing *ratione tenuræ* shall on submission pay costs. 1 *Black.* 602.

All forfeitures shall be paid into the hands of such persons as the court inflicting them shall direct for the benefit of the Highways; on penalty for the misapplication, of double the sum received.—And if any forfeiture is levied upon a particular inhabitant for the default, or on account of the parish, the sessions may cause a rate to be levied within one month by the surveyor for reimbursing him. § 47.

The court will also grant a *mandamus* for a rate to reimburse a particular *district* for a fine paid on the conviction of another district in the same parish, both bound to repair; but such mandamus must be special. *Doug.* 422. *Stra.* 211.

The parishioners may agree to bear the charges of any prosecution or defence. § 66.—But public notice shall be given of every meeting of the parish. § 67.

Forfeiture for opposing the execution of the act, and on officers neglecting to execute warrants; from 40*s.* to 10*l.* or imprisonment till paid. § 72.

Justices are empowered to administer oaths for the purposes of the act. § 78.—And on giving fit notice, they may hold a special sessions. § 62.

8. Persons aggrieved may appeal to the Quarter-sessions, giving notice thereof within 6 days after the cause arose, and entering into a recognisance with one surety within 4 days after notice; and on notice of such appeal all proceedings to be returned to the sessions on pain of 5*l.*—The sessions shall hear the appeal in a summary way, and decide *finally*, and award costs as the decisions shall be. *Stat.* 13 *Geo.* 3. *c.* 78. § 81.

Limitation of actions 3 months, and treble costs to defendant. § 82.

If surveyors of the Highways in the execution of their office, undermine a wall adjoining to the Highway, which does not fall till more than three months afterwards, yet they are subject to an action on the case, for the consequential injury within three mouths after the falling of the wall. 16 *East's Rep.* 215.

9. By the said *stat.* 13 *Geo.* 3. *c.* 78. § 15. every publick cart-way shall be 20 feet wide, and every horse-way, 8 feet wide.

Two justices, upon view, may order Highways to be widened or diverted; so as not to exceed 30 feet in breadth, and so as not to pull down any building, or incroach on any garden, court, or yard.—The surveyor shall make satisfaction to the owners for the ground which shall be necessary for such purposes.—If the owners refuse to treat, or cannot be found, or will not accept the satisfaction offered by the surveyor, the sessions upon certificate shall impannel a jury, who shall assess the value, not exceeding 40 years' purchase; and upon tender thereof, or leaving the same with the clerk of the peace, the ground shall be for ever divested and become a publick Highway.—But all subterranean property of value which can be acquired without injuring the surface of the Highway is saved to the owners of the land.—And all timber and wood thereon shall be felled within a month, and laid upon the adjoining land for the benefit of the owner; and the sessions may order a rate, not exceeding 6*d.* in the pound yearly, to pay for such purchase. § 16.

The directions of the act must be followed as far as may be, otherwise the proceeding is void, and the invalidity thereof may be taken advantage of in any collateral proceeding: therefore, where an order omitted to specify the breadth of the new road, the old road was held to subsist. *Davidson* v. *Gill*, 1 *East. Rep.* 64.

This section of the act extends to Highways repaired *ratione tenuræ*, and the surveyor is indictable for disobedience of an order to widen such a Highway. *R.* v. *Balme*, *Cowp.* 648.

The old Highway to be sold, in which a preference is to be given to the occupiers of the adjoining lands; and if it lead to any land, house or place, the sale shall be subject to such right of passage.—And upon tender or payment of the money, the land shall vest in the purchaser, saving the right of all subterranean property to those who would otherwise have been entitled. § 17.

If the jury shall assess a greater sum than what the surveyor offered, the costs shall be paid from the surveyor's fund; if a less sum, by the owners of the land. § 18.

New Highways which have been acquiesced in for 12 months shall become incontrovertible, § 19. See *Doug.* 749. 2 *Show.* 28. *Lev.* 1234. *W. Jon.* 296. *Ld. Raym.* 725. 3 *Comm.* 36. 3 *Atk.* 766. 8 *Term Rep. K. B.* 133.

That part of this section which related to diverting ways passing through private grounds is repealed by *stat.* 55 *Geo.* 3. *c.* 68. which directs, that two justices upon view, with the consent of the owners of the lands, by order at a special session may divert any Highway, bridle-way, or footway; and order unnecessary ways to be stopped up: that a notice thereof must be affixed at the place of alteration, and be inserted in a newspaper, and fixed to the door of the church, and the order returned to the clerk of the peace at the quarter session there to be confirmed and enrolled. By § 3, 4. appeal is given to the parties grieved by an order under this act, or by an inclosure on a writ of *ad quod damnum.*

*Stat.* 13 *Geo.* 3. *c.* 78. § 62. is applicable to proceedings by order of two justices under 55 *Geo.* 3. *c.* 68. *s.* 2. (for diverting a footway). Held therefore, that it is necessary to give reasonable notice of the special sessions at which any such order is to be made, to the several justices acting and residing within the division; and that unless such notices be given, the sessions ought not to confirm and enrol such order, even though there be no appeal against it. *R.* v. *Worcestershire*, *Just. Term Rep. K. B. Mich.* 59 *Geo.* 3.

If two justices make an order for diverting and turning a public footway, and afterwards an order for stopping up the old footway, the party grieved may appeal to the quarter sessions against the last order, though he be too late to appeal against the first. 3 *Maul. & Selw. Rep.* 459.

It is not necessary for stopping up a road under an order of justices that they should by their order substitute a new road reaching the whole distance from the *terminus à quo* to the *terminus ad quem.* It suffices if they set out a new road leading from the *terminus à quo* into a public highway, along which and other highways connected with it, the subject may pass to the *terminus ad quem.* 5 *W. P. Taunton*, 634.

No common land lying between the fences of any old Highway shall be inclosed.—And land between the fences not being common, exceeding 30 and not extending to 50 feet in breadth shall not be stopped till satisfaction is made to the owners for all the land exceeding 30 feet.—And if the old road shall have passed through common land, or if the space between the fences, the land not being common, shall exceed 50 feet in breadth, the respective owners of such land shall hold and enjoy the old Highway, making satisfaction for the same. § 20.

Where a footway is diverted through a different part of the same lands, no satisfaction shall be made, except the new road shall be longer, or that part of the land of greater value.—If the footway shall not go through the same person's lands, satisfaction shall be made to the owner of the new land by the award of two persons and an umpire. § 21.

Two justices, upon view, may stop up and sell, or may divert all Highways which are useless and burdensome to the parish. § 22.—But this is not a general power; but tied up to a particular case; and is given only where there is a new road to be set out. *Page* v. *Howard*, *Cald. Ca.* 228.

## (B.) *Of Turnpike Roads.*

The Turnpike Roads of England are placed under the management and direction of certain trustees, who are usually appointed by the respective acts of parliament occasionally passed for the making and repairing particular roads. But the powers of these acts being confined to separate and distinct objects, it was thought expedient to pass some general laws which should apply in common to all trustees and turnpike roads in general throughout the kingdom.—*Leach's Hawk, P. C.* i. *c.* 76. *App.*

The last general turnpike act, and that now in force, is the *stat.* 13 *Geo.* 3. *c.* 84. and this act by 21 *Geo.* 3. *c.* 20. is extended to all acts of parliament made since it, or to be made hereafter for the purpose of regulating particular turnpikes.

In analyzing and abbreviating this act therefore we shall follow nearly the plan of the last ingenious editor of *Hawkins*, referring to his book for fuller information. Considering,

1. *The Trustees; their Qualification, Power and Duty.*
2. *Weighing Engines.*
3. *Carriages; and their Tolls.*
4. *Exemptions from Toll.*
5. *Statute Duty and Repairs.*
6. *Nusances.*
7. *Subscribers and Mortgagees.*
8. *Officers, their Duty and Responsibility.*
9. *Of adopting the Powers of the Highway Act; and enforcing this Act.*
10. *Of destroying Turnpike-Gates, &c.*

1. A *Trustee* must possess *realty* of 40*l.* a year, or 800*l.* personalty, or be heir apparent to *realty* of 80*l.* a year.—And take an oath of such qualification before two Justices: on penalty of 50*l.* and in an action it is incumbent on the trustee to prove his qualification. *Stat.* 13 *Geo.* 3. *c.* 84. § 44.

No Publican shall be a Trustee, or act under them as *Collector* of tolls, &c. but he may *farm* the tolls, if he employs a person to collect them. § 46.

Acting as a Trustee is evidence of being one, § 64.

Where the first or any other day of meeting has elapsed, any 5 Trustees may appoint a meeting of the whole body, on giving 20 days' notice. § 49. [explained and amended by *stat.* 18 *Geo.* 3. *c.* 63. § 1.]

No meeting shall be adjourned longer than 3 months; and all business is to be done between 10 *A. M.* and 2 *P. M.* § 50.

If Trustees exceed their power in erecting gates, the justices may order them to be removed. § 51.

Trustees may administer oaths necessary under the act. § 84.

Seven Trustees may farm out the tolls by auction upon one month's notice, describing the particular tolls to be let, and specifying their produce the preceding year, § 31.—The same section directs the method in which the bidding at such auction shall be conducted, and that farmers of the tolls shall not take more than the regular rates on penalty of 5*l.* on them, or 40*s.* on the gate-keepers. § 31.

Seven Trustees on a month's notice may reduce or advance the tolls as they see convenient: but if the toll is mortgaged, they must have the consent of four fifths of the creditors. § 29.

Five Trustees may direct prosecution for nusances at the expence of the trust: provided they can prove the fact by one witness. § 47.

Two Trustees may supply the vacancy of toll-keeper, till a general meeting. § 54.

The Trustees may agree for proportion of repairs with those who are bound to repair by reason of tenure, inclosure, &c. § 62.

They shall hang up at the toll-gates tables of the rates of toll and of the different weights and number of horses allowed to carriages. § 66.

They shall erect mile-stones, direction posts, flood-posts, &c. § 41. [And see *Highways*, VI. (A) 4.]

2. Five trustees may order Weighing engines to be erected at such gates, within their jurisdiction, as they see proper. *Stat.* 13 *Geo.* 3. *c.* 84. § 1. [See 1 *Burr.* 377.]

No side gate to be erected, unless on order of *nine* trustees (being a majority present) on 21 days notice; and no toll to be paid for passing only 100 yards through the same, unless over some expensive bridge. § 34.

The different burthens which carriages are allowed are settled at large by § 1. and the additional toll to be paid for extra weight, is determined by *stat.* 14 *Geo.* 3. *c.* 82. § 2.—And by § 6. of the said act 13 *Geo.* 3. *c.* 84. (explained by *stats.* 52 *Geo.* 3. *c.* 145. 53 *Geo.* 3. *c.* 82. and 57 *Geo.* 3. *c.* 37.) carriages employed in husbandry or in carrying manure are exempted from being weighed.

Any trustee, officer or creditor may cause carriages not passed above 300 yards through any gate to return and be weighed, on tendering the driver 1*s.* which shall be refunded if the weight is found excessive. § 3.

If the toll-keeper neglects to weigh *suspected* carriages, or to receive the additional toll, he shall forfeit 5*l.* § 2.

The trustees shall make places within 300 yards of every gate, for carriages to turn.—A list of the trustees and officers, shall be hung in the house of every gate where there is a Weighing-engine.—A driver refusing to return shall forfeit 40*s.* and any peace officer may drive the carriage back to be weighed. § 4.

The quarter sessions upon complaint may order Weighing-engines to be erected, § 7. and where two roads meet, the trustees may erect one Weighing-engine for both. § 8.

No composition to be made for tolls, unless the carriages have fellies 6 inches broad. § 9.

The penalty for endeavouring to evade the tolls by unloading goods, &c. before the carriage arrives at the Weighing-engine, 5*l.*—and the driver may be committed to the house of correction for a month. § 10.—Penalty on endeavouring to avoid the Weighing-engine; on the owner of a carriage from 20*s.* to 5*l.*—the driver from 10*s.* to 50*s.* § 11.

Toll-gates ought not to be erected in the middle of great towns, so as to obstruct the necessary intercourse. 1 *Burr.* 377.

3. Sect. 13. of the *stat.* 13 *Geo.* 3. *c.* 84. explains at large the number of horses allowed to carriages according to the breadth of their fellies, and the penalties on transgression, 5*l.* on owners, and 20*s.* on drivers.

Two oxen equal to one horse. § 67.

Carriages to have names and descriptions. § 68. [Vide *Burr.* 2258.]

Carriages going on 16 inch rollers may be drawn with any number of horses. § 14. [and by *stat.* 14 *Geo.* 3. *c.* 82. § 5. shall only pay one half-tolls].

On prosecution for penalties, information to be made of the offence within 3 days, and action commenced within one month. § 15.

Penalty for taking off horses and altering the distance of the wheels to avoid the toll, 5*l.* § 17.

Penalty on persons passing through gates without paying tolls, or assaulting collectors, rescuing cattle, &c. between 40*s.* and 10*l.* § 75.

Trustees may allow a sufficient number of horses up hills, rising more than 4 inches in a yard. And one justice may stop prosecution for penalties in drawing with a greater number of horses than allowed; if it appear necessary from deep snows, &c. § 18. [See Highway act, § 59.]

No carriages with less than 9 inch fellies, shall be drawn by horses in pairs, except such as having 6 inch fellies shall be permitted by 7 trustees, and except carriages drawn by two horses only. § 20.

Justices in Wales may licence an increased number of horses. § 59.

Any person may apprehend the driver of a carriage not marked, or drawn by too many horses, &c. § 21.

Extraordinary high tolls for particular roads may be reduced by 5 trustees. § 22.

4. As to certain exemptions from toll,—see under the head immediately preceding, as to carriages moving on rollers; and under *Div.* 2. as to carriages employed in husbandry; and as to the former see also § 26. of the act, (and 53 *Geo.* 3. *c.* 119).

No exemption from tolls shall be taken by carriages carrying any *particular* kind of goods, unless they have 6 inch fellies, (except by carriages employed in husbandry). *Stat.* 13 *Geo.* 3. *c.* 84. § 24.

And no exemption shall be taken by carriages with 6 inch fellies, unless the tire of such fellies lie flat, or do not deviate more than one inch from a flat surface. § 25.

No chaise-marine, coach, landau, berlin, chaise, chair, calash, or hearse, nor any royal artillery or ammunition carriage; nor any cart drawn by one horse and two oxen; nor any carriage of 9 inch fellies, carrying one block of stone and piece of timber, &c.—shall be subject to the tolls of this act. § 27.

No toll shall be taken for carriages working on the repair of highways or turnpike roads. § 60.

No toll shall be taken for any horses of soldiers or officers on their march or on duty, nor for any baggage waggons; nor shall such carriage be weighed at any engine. 18 *Geo.* 3. *c.* 63.

The mail coaches are exempted from toll by *stat.* 25 *Geo.* 3. *c.* 57.

Persons taking fraudulent advantage of any exemptions, shall forfeit between 40*s.* and 5*l.* 13 *Geo.* 3. *c.* 84. § 28.

Section 34 of this act, exempts from toll carriages passing on a turnpike road for a less distance than 100 yards, whether they quit the road on the same side on which they entered it or on the opposite side. 5 *W. P. Taunton*, 340.

5. The Surveyors shall see that the duty required by the several particular Turnpike acts is done, and that the compositions arising therefrom are applied to the repair of the respective roads; on penalty of 40*s.*—And when two trust-roads lie in the same parish, and the duty shall exceed three days, the justices shall apportion the duty between each road. *Stat.* 13 *Geo.* 3. *c.* 84. § 32.

No Surveyor shall gather stones without the consent of the owners of the land, or licence from a justice, after the owner shall have been summoned and refuse to appear. § 61.

Satisfaction shall be made for materials, § 71. in the same manner as directed by the Highway act, § 29. And by § 36. materials may be contracted for (but no surveyor shall have any share therein, under forfeiture of 10*l.* and being incapacitated). See Highway act, § 50.

The inhabitants or persons who were liable to repair any old road, shall continue liable to repair any new road which may be made in lieu of the old one.—And if the parties cannot agree in what proportion they are liable to repair it, it shall be settled by two justices: for which proportion, a gross or annual sum may be fixed to be paid, with the consent of the parties at a Vestry for that purpose. § 63.

But this does not extend to the repair of walls or fences on the side of such new roads, only to the surface of the roads. 2 *Term Rep.* 232.

Where Turnpike roads are indicted, the Court may proportion the fine and costs between the inhabitants and the Trustee; but so as not to endanger the security of the creditors. § 33.

Under this section the court of B. R. may apportion the fine, though the indictment were originally preferred at the assizes, and removed into K. B. by *certiorari*. 2 *East's Rep.* 413.

Where a local turnpike act, after empowering the trustees under it to take tolls, directed that the roads should from time to time be repaired by the trustees out of the money arising by virtue of the act: held that this only made the tolls an auxiliary fund in the hands of the trustees, and that the inhabitants of the township where the road was situate, who by prescription were bound to repair all roads within it, continued liable to be indicted for non repair of the road.—Held also that such inhabitants may, after conviction, apply by motion for relief against the trustees under 13 *Geo.* 3. *c.* 84. § 33. and also that 13 *Geo.* 3. *c.* 84. § 63. refers to diversions under writs of *ad quod damnum*, and under 13 *Geo.* 3. *c.* 78. § 19. *R.* v. *Natherthong par. Term Rep. K. B. Mich.* 59 *Geo.* 3.

6. If the Overseer of any Turnpike road shall suffer any nusance, (such as heaps of stones, rubbish, &c.) to remain for four days, within ten feet on either side the middle of such road, he shall forfeit 40*s.* *Stat.* 13 *Geo.* 3. *c.* 84. § 37.

As to nusances by encroachments of other persons within 30 feet of the road, &c. a penalty of 40*s.* is imposed, in the same manner, as by § 64. of the Highway act. § 38.

7. Subscribers who shall sign any writing to advance money, shall be bound by their subscription, and on 21 days' default, the Treasurer may sue for the same. *Stat.* 13 *G.* 3. *c.* 84. § 35.

Mortgagees of tolls, having possession of them, shall account on oath for all the monies which shall so come to their hands, after 14 days' notice from five Trustees, or forfeit 10*l.* § 52.

Penalty for a mortgagee holding over after his money is paid—Double the money received, and treble costs. § 53.

8. If a discharged gate-keeper refuses to deliver up the toll-house, &c. within four days after notice of a new appointment, any justice may order him to be removed, and put the new toll-keeper in possession. *Stat.* 13 *Geo.* 3. *c.* 84. § 54.

Gate-keepers and toll-gatherers, on notice from five Trustees, shall account for money received by them, on penalty of 5*l.* § 55.

No person residing in a toll-house shall be removable as a pauper, unless chargeable; nor shall he thereby gain a settlement, or be assessed to any public or parochial levy. § 56.

This section does not extend to the tolls of a bridge, which bridge does not appear to be part of the turnpike road. 1 *Maul. and Sel. Rep.* 514.

Gate-keepers permitting horses or carriages, not allowed by the act, to pass the gates, shall forfeit 40*s.* § 57.

All officers, their executors and administrators, shall within ten days, after notice by five trustees, deliver up all books, &c. on penalty of 20*l.* § 45.

Treasurers and Surveyors shall give bond for the discharge of their duty. § 65. [which bond, by *stat.* 23 *Geo.* 3. *c.* 18. § 15. must be on stamps.]

Officers of parishes and of the trust neglecting to put the act into execution, shall forfeit 10*l.* § 73.

Justices may act notwithstanding they are creditors. § 74.

9. When the powers for providing materials, enlarging and turning Turnpike-roads, &c. and calling forth the statute-duty, are ineffectual, and when more ample powers are given by the Highway act; the Surveyor of the Turnpike-roads, with the approbation of the Trustees, may execute and enforce these powers for the benefit of the Turnpike-roads, under the restrictions in the Highway act. *Stat.* 13 *Geo.* 3, *c.* 84. § 70.

Where roads are so far out of order that they cannot be sufficiently repaired under the provisions of 13 *Geo.* 3. *c.* 84. the Justices in sessions may order an additional assessment to be made for that purpose. 54 *Geo.* 3. *c.* 109. § 1, 2. But it shall not exceed 1*s.* 9*d.* in the pound. § 3.

The Highway and Turnpike acts are similar in the following particulars, *viz.* § 72 of the Turnpike act answers to § 70. of the Highway act.—§ 74. to 77, and 78.—§ 7. to 73.—§ 77. to 74.—§ 78, and 79. to 75, and 76. [except the former, giving *full*, the latter *double* costs.]—§ 80. to 79.—§ 81. to 80.—§ 82, and 83. to 81.—§ 85. to 82. For all which sections of the Highway act, see before, VI. (A.)

10. By *stat.* 1 *Geo.* 2. *st.* 2. *c.* 19. to destroy any public Turnpike-gate, or the rails or fences thereto belonging, subjects the offender to hard labour for three months, and to be publicly whipped.

By *stat.* 5 *Geo.* 2. *c.* 33. on conviction at the assizes, the offender may be transported for seven years—and on a second offence, or on demolishing any Turnpike-house, he shall be guilty of felony, and transported for seven years.

In both these cases the prosecution must be within six months; and on the convict's returning from transportation he shall suffer death.

By *stat.* 8 *Geo.* 2. *c.* 20. persons guilty of the above offences, or destroying any chain, &c. placed to prevent persons from passing without paying toll, or rescuing any offender, shall suffer death without benefit of clergy.

The two last-mentioned acts are made perpetual by *stat.* 27 *Geo.* 2. *c.* 16.

By *stat.* 13 *Geo.* 3. *c.* 84. if any person shall commit any of the offences aforesaid, or shall destroy any crane or machine for weighing carriages, &c. he shall be transported for seven years, or committed to prison, not exceeding three years, at the discretion of the Court.

By the last-mentioned act it is provided, that unless the offender is convicted within twelve months, the hundred shall make satisfaction for the damages.

HIGHWAYMEN. A reward of 40*l.* was given for the apprehending and taking of a *Highwayman*; to be paid within a month after conviction by the sheriff of the county, &c. by *stat.* 4 *& 5 W. & M. c.* 8. repealed by *stat.* 58 *Geo.* 3. *c.* 70. See titles *Robbery*, *Rewards*.

HIGLER. A name frequently mentioned in our statutes, for a person who carries from door to door, and sells by retail, small articles of provisions, &c. They are laid under various restraints by the statute laws. See titles *Game*, *Holidays*, *Hawkers*.

HIIS TESTIBUS. [*These being Witnesses.*] Words anciently added in deeds, after *In cujus rei testimonium*: which *witnesses* were first called, then the deed read, and their names entered down: but this clause of *hiis testibus* in the deeds of Subjects has been disused since the reign of King Henry VIII. *Co. Lit.* 6. See title *Deed*.

HINDENI HOMINES. From the Sax. *Hindene*, i. e. *Societas.*] A society of men: in the time of the Saxons, all men were ranked into three *classes*, and valued, as to satisfaction for injuries, &c. according to the class they were in; the *highest* class were valued at twelve hundred shillings, and were called *Twelfhindmen*: the *middle* class valued at six hundred shillings, and called *Sexhindmen*; and the *lowest* at ten pounds, or two hundred shillings, called *Twyhindmen*: their wives were termed *Hindas*. *Brompt. Leg. Alfred*, *cap.* 12. 30, 31.

HINE, *Sax.*] Rather perhaps *Hind*. A servant, or one of the family; but is properly a term for a servant in husbandry, and he that oversees the rest is called the *Masterhine*. *Stat.* 12 *R.* 2. *c.* 4.

HINEFARE, Sax. *Hine*, a servant, and *fare*, a going or passage.] Signifies the loss or departure of a servant from his master. *Domesday*.

HINEGELD. See *Hidgild*.

HIRCISCUNDA. The division of an inheritance among *heirs*. *Sax.*

HIREMAN. A Subject; from the Sax. *Hiran*, i. e. *Obedire*, to obey; or it may be one who serves in the King's hall, to guard him; from *hird*, *aula*, and *man*, *homo*. *Du Fresne*, *Cowell*.

HIRING. A contract by which a qualified property may be transferred to the *hirer*. Hiring is always for a price, stipend, or recompence. By this contract the possession and a transient property is transferred for a particular time or use, on condition and agreement to restore the goods, &c. so hired, as soon as the time is expired or use performed; together with the price or stipend, either expressly agreed on by the parties, or left to be implied by law, according to the value of the service. 2 *Comm.* 454. See titles *Bailment*, *Poor*, (*Settlement of*).

HIRST OR HURST. A little wood. *Domesday*.

HITH. See *Hythe*.

HLAFORDSOCNA. The Lord's protection: from the Sax. *hlaford*, *dominus*, and *socn*, *libertas*. *Nec dominus homini libero* hlafordsocnam *prohibeat*. *Leg. Adelstan. cap.* 5.

HLASOCNER. The benefit of the law; from the Sax. *lega*, *lex*, and *socn*, *libertas*.

HLOTH. An unlawful company, from seven to thirty-five. *Qui de* hloth *fuerit accusatus*, *abneget per centum viginti hidas*, *vel se emendet*; that is, he who is accused for being at an unlawful rout, let him purge himself *tot sacramentalibus quot is qui* 120 *hidas æstimatur*; or, let him clear himself by a mulct, which is called *hlothbota*. *Cowell*.

HLOTHBOTE. A mulct set on him who is in a riot. From the Sax. *hloth*, *turma*, and *bote*, *compensatio*. See the preceding article.

HOBLERS OR HOBILERS, *Hobellarii.*] Were light horse-men; or certain tenants bound by their tenure to maintain a little light horse, for giving notice of any invasion made by enemies, or such like peril towards the sea-side: of which mention is made in *stats.* 18 *Ed.* 3. *c.* 7. 25 *Ed.* 3. *st.* 5. *c.* 8. See *Camd. Britan.* They were to be *Ad omnem motum agiles*, &c. And we read, *Duravit vocabulum usque ad ætatem H.* 8. *Gentzdarmes* and *Hobelours*. *Spelm. Pryn's Animad. on* 4 *Inst. f.* 307. *Hobeleris*, *Rot. Parl.* 21 *Ed.* 3. Sometimes the word signifies those who used bows and arrows. See *Thorn Anno* 1364. *Cowell*.

HOCCUS SALTIS. Seems to be a *hoke*, hole, or lesser pit of salt. See *Domesday*, (*Worcestershire*).

HOCKETTOR, OR HOCQUETEUR. An old French word for a knight of the post, a decayed man, a basket-carrier. *Stat. Ragman. Cowell*.

HOCK-TUESDAY-MONDAY. Was a duty given to the landlord, that his tenants and bond-men might solemnize that *day* on which the English mastered the Danes, being the second Tuesday after Easter week. *Cowell*. See *Hokeday*.

HOGA, HOGIUM, HOCH. A mountain or hill, from the Germ. *Hough*, *altus*; or from the Sax. *Hou.—Du Cange*.

HOGASTER, *Hogastrum.*] A little hog; it also signifies a young sheep. *Fleta*, *lib.* 2. *c.* 79. See *Hoggacius*.

HOGENHINE, Sax.] See *Third-night-Awn-hind*.

HOGGACIUS, HOGGASTER. A sheep of the second year. *Regula computi domûs de Farendon: MS. Cartular. Abbat. Glaston. MS.* In many, especially the Northern parts of England, sheep, after they lose the name of lambs, are called *hogs*; as in Kent, *tags*. *Cowell*.

HOGSHEAD. A vessel of wine or oil, &c. containing in measure 63 gallons; *i. e.* half a pipe, and the fourth part of a tun. See *stat.* 1 *R.* 3. *c.* 13.

HOGGUS, HOGIETUS. A *hog* or swine, beyond the growth of a pig. *Chart. Antiq.*

HOGS. The keeping of hogs in any city or market town is indictable as a public nuisance. *Salk.* 460. It seems the keeping hogs in any neighbourhood (if they stink much, so as to be troublesome) is indictable. See title *Nuisance*, *London*, and the *stat.* 2 *W. & M. st.* 2. *c.* 8. § 20.—See, as to hogs and hogs-flesh, tit. *Cattle.*

HOKEDAY, Called otherwise *Hock Tuesday*, *dies Martis*, *quam quindenam* Paschæ *vocant.*] Was a day so remarkable in ancient times, that rents were reserved payable thereon: and in the accounts of Magdalene College in Oxford, there is a yearly allowance *pro mulieribus* hockantibus, in some manors of theirs in Hampshire, where the men *hock* the women on Monday, *and contra* on Tuesday; the meaning of it is, that on that day the women, in merriment, stop the way with ropes, and pull passengers to them, desiring something to be laid out in pious uses. See *Hock-Tuesday*, *Money.*

HOLDES. Bailiffs of a town or city, from the Sax. *hold*, *i. e. summus præpositus.* Others are of opinion that it signifies a general; for *hold* in Saxon doth also signify *summus imperator. Leges Alured. de Weregildis.*

HOLDINS. The Scotch term for *Tenures.* See that title.

HOLDING OVER A TERM, &c. Where a term is expired, and premises are held by the tenant or person in possession, afterwards, against the will of the landlord, or person claiming the estate and possession. By *stat.* 4 *Geo.* 2. *c.* 28. In case any tenant for years, &c. or other person claiming under or by collusion with such tenant, shall *wilfully hold over* after the determination of such term, and *demand made in writing* for recovering possession of the premises, he shall pay, for the time he continues, at the rate of double the yearly value. See titles *Ejectment*, *Distress*, *Rent*, and also *Term*, *Limitation*, *Estate.*

HOLM. Sax. *hulmus*, *insula amnica.*] An isle or fenny ground, according to *Bede*; or a river island. And where any place is called by that name, or this syllable is joined with any other in the names of places, it signifies a place surrounded with water; as the Flatholmes and Stepholmes in the Severn near Bristol: but if the situation of the place is not near the water, it may then signify a hilly place; *Holm* in Saxon being also a hill or cliff.——*Cum Duobus* Holmis *in campis de* Wedone.—*Mon. Angl. tom.* 2. *p.* 262.

HOLOGRAPH DEED. A deed written entirely by the grantor's own hand; which, on account of the difficulty with which the forgery of such a document can be accomplished, is held by the Scotch law valid without witnesses.—*Bell's Scotch Law Dict.* see also title *Wills.*

HOLT, *Sax.*] A wood: wherefore the names of towns beginning or ending with *holt*, as *Buckholt*, &c. denote that formerly there was great plenty of wood at those places.

HOLY-DAYS AND FASTING-DAYS. See *stat. West.* 1. 3 *Ed.* 1. *c.* 51. as to holding assises in Lent, and this Dict. title *Justices of Assise.*—*Stats.* 2 & 3 *Ed.* 6. *c.* 19. 5 *Eliz. c.* 5. as to eating fish on Fish-days; now obsolete—and *stat.* 5 & 6 *Ed.* 6. *c.* 3. appointing those now called *Red Letter Days.*

Fairs and markets not to be kept on Sundays and principal festivals, except four Sundays in Autumn, 27 *H.* 6. *c.* 5. Shoe-makers in London not to sell or fit on their goods on Sundays, &c. 4 *Ed.* 4. *c.* 7. 1 *Jac.* 1. *c.* 22. § 29. (obsolete.) —Penalty for not resorting to church on Sundays and holydays, 1 *Eliz. c.* 2. § 14. See title *Nonconformists.* The 5th of November to be kept as a day of thanksgiving, 3 *Jac.* 1. *c.* 1.—The 29th of May to be an anniversary thanksgiving, 12 *Car.* 2. *c.* 14.—The 30th of Jan. to be kept as an anniversary day of humiliation, 12 *Car.* 2. *c.* 30. § 1.—The 2d of September to be annually kept as a fast in London, 19 *Car.* 2. *c.* 3. § 28.

By 39 & 40 *Geo.* 3. *c.* 42. for the better observance of Good Friday, where bills of exchange, &c. become due on that day, they shall be payable on the day before; and may be protested for non-payment, as in case of bills become due on a Sunday or on Christmas Day.—By 46 *Geo.* 3. *c.* 82. for the Port of London; 47 *Geo.* 3. *stat.* 1. *c.* 51. for the other Ports in Great Britain; and 48 *Geo.* 3. *c.* 56. for the Ports in Ireland, all Holidays are abolished at the *Custom-Houses* except Sundays, Christmas Day, Good Friday, public Fasts and Thanksgivings, King Charles II.'s Restoration, the King's Coronation, and Birth-days of the King, Queen, and Prince of Wales. And see 49 *Geo.* 3. *c.* 116. as to *Excise Offices in Ireland.*

The 29th of May (King Charles II.'s restoration) is not a Holiday in any of the law offices: and no officer can take an extraordinary fee for business done on that day. The only allowed holidays are Candlemas, or the Purification; the Ascension, or Holy Thursday; and St. John Baptist. 7 *Term Rep. K. B.* 336.

Lord Mayor's day is not such a holiday as entitles the sealer of writs to an extraordinary fee, for sealing a writ on that day. 5 *W. P. Taunton*, 160.

See further title *Sunday.*

HOMAGE, *Homagium.*] Is a French word derived from *home*, because, when the tenant does his service to the Lord, he says, *I become your man. Co. Lit.* 64.

The *stat.* 12 *C.* 2. *c.* 24. which was made to free the Subject from the burthen of Knight's service, and the oppressive consequences of tenures *in capite*, amongst other provisions, wholly discharges all tenures from the incident of Homage; not because Homage itself was any grievance, but because, though not wholly, yet it was more properly an incident to Knight's service, which that statute abolished. But, while Homage continued, it was far from being a mere ceremony; for the performance of it, where due, materially concerned both lord and tenant in point of interest and advantage. See 1 *Inst.* 67, *b.* in *n.* at length, as also 65, *a.* 67, *a.* 68, *a.* in the notes, and this Dict. title *Tenures.*

Notwithstanding the law on this subject is thus become obsolete, the curious reader may not be displeased with the following short extracts relative thereto.

In the original grants of lands and tenements by way of *fee*, the Lord did not only oblige his tenants to certain services, but also took a submission with promise and oath, to be true to him as their lord and benefactor; and this submission, which is the most honourable, being from a freehold tenant, is called *Homage. Stat.* 17. *E.* 2. *st.* 2. The Lord of the fee, for which *Homage* is due, takes *Homage* of every tenant, as he comes to the land or fee: but women perform not *Homage* but by their husbands, as *Homage* especially relates to service in war; and a corporation cannot do *Homage*, which is personal, and they cannot appear but by attorney: also a bishop or religious man may not do Homage, only fealty; but the archbishop of Canterbury does *Homage* on his knees to our Kings at their coronation; and it is said the bishop of the Isle of Man did *Homage* to the Earl of Derby; though *Fulbeo* reconciles this, when he says that a religious man may do *Homage*, but may not say to his Lord, *Ego devenio homo vester*, I become your man, because he has professed himself to be *God's man*, but he may say, *I do unto you Homage, and to you shall be faithful and loyal. Britton, cap.* 68.

*Homage*, say the ancient authors, is either, by ligeance; by reason of tenure; or Homage ancestrel.

*Homage* by *ligeance* is inherent and inseparable to every Subject; see titles *Allegiance*; *Oaths.*—*Homage* by *tenure* is a service made by tenants to their Lords according to their estate; and *Homage ancestrel*, is where a man and his an-

cestors have time out of mind held their land of the lord by *Homage;* and such service draws to it warranty from the Lord, and acquittal of all other services to other Lords, &c. *Bract. lib.* 3. *F. N. B.* 269. *Lit. sect.* 85. But, according to *Sir Edw. Coke*, there must be a double prescription for *Homage ancestrel*, both in the blood of the Lord and of the tenant; so that the same tenant and his ancestors, whose heir he is, is to hold the same land of the same Lord and his ancestors, whose heir the Lord is, time out of memory, by *Homage*, &c. and therefore there was but little land holden by *Homage ancestrel. Co. Lit.* 100, *b.* Though in the manor of Witney in Herefordshire, there was one *West* who held lands by this tenure. *Dict.*

*Homage* tenure is incident to a freehold, and none shall do or receive *Homage*, but such as have estates in fee-simple, or fee-tail, in their own right, or right of another. *Kitch.* 131. Seisin of *Homage* is seisin of fealty, and inferior services, &c. And the Lord only shall take *Homage*, and not the steward, whose power extends but to fealty. 4 *Rep.* 8.

When a tenant made his *Homage* to the Lord, he was to be ungirt, and his head uncovered, and his Lord was to sit, and he should kneel, and hold his hands together between his Lord's hands, and say; *I become your man from this day forward, for life, for member, and for worldly honour, and unto you shall be true and faithful, and bear you faith for the lands that I hold of you, saving the faith that I owe to our Sovereign Lord the King:* And the Lord, so sitting, should kiss the tenant, &c. 17 *Ed.* 3. *Lit.* § 85. See 2 *Comm.* 53. *c.* 4.

When Sovereign Princes did Homage to each other for lands held under their respective sovereignties, a distinction was always made between *simple* Homage, which was only an acknowledgment of tenure, (7 *Rep.* 7.) and liege Homage, which included fealty, and the services consequent upon it.—Thus when Edward III. in 1329, did Homage to Philip VI. of France, for his ducal dominions on that Continent, it was warmly disputed of what species the Homage was to be, whether *liege* or *simple* homage. 1 *Comm.* 367. *c.* 10.

Homage Jury. A Jury in a *Court Baron*, consisting of tenants that do *Homage* to the Lord of the fee; and these by the *Feudists* are called *pares curiæ:* they enquire and make presentment of defaults and deaths of tenants, admittances, and surrenders, in the Lord's court, &c. *Kitch.* See title *Court Baron.*

HOMAGER. One that does or is bound to do *Homage* to another.

HOMAGIO RESPECTUANDO, *Respecting of Homage.* Was a writ to the escheator, commanding him to deliver seisin of lands to the heir of the King's tenant, notwithstanding his *Homage* not done. *F. N. B.* 269. And the heir at full age was to do *Homage to the King*, or agree with him for respiting the same. *New Nat. Br.* 563.

HOMAGIUM REDDERE, To renounce *Homage*, when the vassal made a solemn declaration of disowning and defying his lord. For which, there was a set form and method prescribed by the feudal laws. *Bracton, lib.* 2. *cap.* 35. *sect.* 35. This is the meaning of a passage in *Richardus Hostoldnesis de Bello Standard, p.* 321. And of *Mat. Paris. sub anno* 1188. *Cowel, edit.* 1727.

HOMESOKEN, HOMSOKEN, or HAMSOKEN, and HAMSOCA, From the Sax. *ham*, i. e. *domus habitatio;* and *socne, libertas, immunitas.*] The privilege or freedom which every man hath in his house; and he who invades that freedom is properly said *facere Homesoken.* This we take to be what we now call *Burglary*, a crime of a very heinous nature, because it is not only a breach of the King's peace, but a breach of that liberty which a man hath in his house, which should be his castle, and therefore ought not to be invaded. See *Bracton, lib.* 3. *tract.* 2. *c.* 23. *Du Cange. Ll. Canuti. cap.* 39. *Rastal;* and this Dict. title *Burglary.*

It is also taken for an impunity to those who commit this crime. *W. Thorn, p.* 2030.

In the Scotch law *Haimsucken* is defined to be the crime of beating or assaulting a person in his own house, and was anciently punishable by death. *Bell's Scotch Law Dict.* See 4 *Comm.* 223.

HOMESTALL. A mansion-house. See *Frumstol.*

## HOMICIDE.

Homicidium.] The killing of any Human Creature: This is of three kinds; *justifiable, excusable*, and *felonious.* The first has no share of guilt at all; the second very little; but the third is the highest crime against the law of nature that a man is capable of committing; 4 *Comm. c.* 14; from whence the plan of this title, and much of the subsequent matter is extracted.

Offences against the life of a man come under the general name of Homicide, which in our law signifies the killing of a man by a man. 1 *Hawk. P. C. c.* 26. § 2. *Bracton, lib.* 3. *c.* 4.

I. *Of Justifiable Homicide.*
  1. *By unavoidable Necessity; under Command of the Law.*
  2. *By Permission of Law; for Advancement of Public Justice.*
  3. ——— *For Prevention of Crimes, in themselves Capital.*

II. *Of Excusable Homicide.*
  *Per infortunium; or Misadventure Se Defendendo.*
  1. *Wherein these are distinct.*
  2. *Wherein they agree.*

III. *Of Felonious Homicide.*
  1. *Self-Murder; or where the Offender is Felo de se.*
  2. *Manslaughter* } Which two should be carefully
  3. *Murder* } compared with each other.
  4. *Petit Treason.*
  5. *Of Attempts and Conspiracies to Murder.*

I. 1. Justifiable Homicide may be owing to some unavoidable *necessity*, without any will, intention, or desire, and without any inadvertance, or negligence in the party killing, and therefore without any shadow of blame; it is either of a publick or private nature.

That of a *publick* nature is such as is occasioned by the due execution or advancement of publick justice. That of a *private* nature is such as happens in the just defence of a man's person, house, or goods. 1 *Hawk. P. C. c.* 28. § 3. —The first of these may happen by virtue of such an office as obliges one, in the execution of public justice, to put a malefactor to death, who has forfeited his life by the laws and verdict of his country. This is an act of necessity, and even of civil duty; and therefore not only justifiable, but commendable, where the law requires it. But the law must *require* it, otherwise it is not justifiable: therefore, wantonly, to kill the greatest of malefactors, a felon, or a traitor, attainted or outlawed, deliberately, uncompelled, and extrajudicially, is murder. 1 *Hal. P. C.* 497. *Bract. fol.* 120.

There must be no malice coloured under pretence of necessity; for wherever a person, who kills another, acts in truth upon malice, and takes occasion, from the appearance of necessity, to execute his revenge, he is guilty of murder. 1 *Hawk. P. C. c.* 28. § 2. 2 *Rol. Rep.* 120, 121. *Kelynge* 28. *Bract. lib.* 3. *cap.* 4.

Farther, if judgment of death be given by a judge not authorised by lawful commission, and execution is done accordingly, the judge is guilty of murder. 1 *Hawk. P. C. c.* 28. § 4. 1 *Hal. P. C.* 497. And upon this account, *Sir Matthew Hale* himself, though he accepted the place of a Judge of the Common Pleas under Cromwell's government, (since it is necessary to decide the disputes of civil property in the worst of times,) yet declined to sit on the crown side at the Assises, and try prisoners; having very strong objections to the legality of the Usurper's commission; a distinction perhaps rather too refined, since the punishment of crimes is at least as necessary to society, as maintaining the boundaries of property.

The judgment, by virtue whereof any person is put to death, must be given by one who has jurisdiction in the cause; for otherwise *both Judge and officer* may be guilty of felony. 1 *Hawk. P. C. c.* 28. *Dalt. cap.* 98. 10 *Co.* 76. 22 *Ed.* 4. 33, *a. H. P. C.* 35.—And therefore, if the Court of Common Pleas gave a judgment on an appeal of death, (while that proceeding was in force,) or Justices of Peace on an indictment for treason, and award execution, which is executed, both the judge who gives, and the officers who execute the sentence, are guilty of felony; because the courts having no more jurisdiction over these crimes than mere private persons, their proceedings thereon are merely void, and without foundation.—But if the Justices of Peace, on an indictment for trespass, arraign a man of felony, and condemn him, and he be executed, the justices only are guilty of felony, and not the officers who execute their sentence: for the Justices had a jurisdiction over the offence, and their proceedings were irregular and erroneous only, but not void. 1 *Hawk. P. C. c.* 28. §§ 5, 6, and the authorities there cited.—Also such judgment, when legal, must be executed by the proper officer, or his appointed deputy; for no one else is required by law to do it; which requisition it is that justifies the Homicide. If another person does it of his own head, it is held to be murder; even though it be the judge himself. 1 *Hal. P. C.* 501. 1 *Hawk. P. C. c.* 28 . *Dalt. Jus. c.* 150. It was formerly held, that any one might as lawfully kill a person attainted of treason or felony, as a wolf or other wild beast; and anciently a person condemned in appeal of death, was delivered to the relations of the deceased, in order to be executed by them. 1 *Inst.* 128, *b.* 2 *Ass. pl.* 3. *S. P. C.* 13, *a.* 11 *H.* 4. 12, *a. Plowd. Com.* 306, *b.* 3 *Inst.* 131. But at this day, it seems agreed, if the judge, who gives the sentence of death, and *à fortiori* if any private person execute the same, or if the proper officer himself do it without lawful command, they are guilty of felony. 27 *Ass.* 41. *Bro. Appeal*, 69. 1 *Hawk. P. C. c.* 28. §§ 8, 9. This judgment must also be executed, *survato juris ordine;* it must pursue the sentence of the court. If an officer beheads one who is adjudged to be hanged, or *vice versa*, it is murder; for he is merely ministerial, and therefore only justified when he acts under the authority and compulsion of the law; but if a sheriff changes one kind of death to another, he then acts by his own authority, which extends not to the commission of Homicide; and besides, this licence might occasion a very gross abuse of his power. *Finch L.* 31. 3 *Inst.* 52. 1 *Hal. P. C.* 501. The King, indeed, may remit part of a sentence; as in the case of treason, all but the beheading; but this is no change, no introduction of a new punishment; and in the case of felony, where the judgment is *to be hanged*, the King (it hath been said) cannot legally order even a peer to be beheaded. 3 *Inst.* 52, 212. See *Fost.* 267; where it is said that if the officer varieth from the judgment, *of his own head*, and without warrant, or the colour of authority, he is guilty of felony at least, if not of murder; but not if he is authorised by custom or warrant from the crown. For although the King cannot by his prerogative vary the execution, so as to aggravate the punishment beyond the intention of the law, yet it doth not follow, that he who may remit part of the judgment, or wholly pardon the offender, cannot mitigate his punishment with regard to the pain or infamy of it. But this doctrine is more fully considered in another place. See titles *Pardon*, *Execution* (*Criminal*), *Judgment* (*Criminal.*)

2. Homicides committed for the advancement of public *justice*, are;—Where an *officer*, in the execution of his office, either in a civil or criminal case, kills a person that *assaults* and resists him. 1 *Hal. P. C.* 494. 1 *Hawk. P. C.* 1 *East's P. C.*—If an *officer*, or any private person, attempts to take a man charged with felony, and is *resisted;* and in the endeavour to take him, kills him. 1 *Hal. P. C.* 494. 1 *East's P. C. c.* 5. § 74.—In case of a *riot*, or rebellious assembly, the officers endeavouring to disperse the mob, are justifiable in killing them, both at Common Law, and by the Riot Act, *Stat.* 1 *Geo.* 1. *c.* 5. 1 *Hal. P. C.* 495. 1 *Hawk. P. C.* 161. And in case a stranger interposes to part the combatants in an affray, giving notice to them of that intention, and they assault him; if in the struggle he should chance to kill, this would be justifiable Homicide; for it is every man's duty to interpose for the preservation of the public peace, and for the prevention of mischief. *Fost.* 272.—Where the *prisoners* in a gaol, or going to gaol, *assault the gaoler* or officer, and he in his defence kills any of them, it is justifiable, for the sake of preventing an escape. 1 *Hal. P. C.* 496.—If *trespassers* in forests, parks, chases, or warrens, will not surrender themselves to the keepers, they may be slain, by virtue of the *stat.* 21 *E.* 1. *st.* 2. *de malefactoribus in parcis;* and 3 & 4 *W. & M. c.* 10. § 5. and 4, 5 *W. & M. c.* 23. § 4.—If a person having actually committed felony will not suffer himself to be arrested, but stand on his own defence, or fly, so that he cannot possibly be apprehended alive by those who pursue, whether private persons or public officers, with or without a warrant from a magistrate, he may be lawfully slain by them. So, if even an *innocent* person be *indicted* of a felony, where no felony was committed, yet if he will not suffer himself to be arrested by an officer who has a warrant, he may be lawfully killed, for there is a charge against him on record, to which he is bound at his peril to answer. 1 *Hawk. P. C. c.* 28. §§ 11, 12. 22 *Ass.* 55. *Bro. Cor.* 87. 89. *S. P. C.* 13. 3 *Inst.* 221. *Dalt. cap.* 98. *H. P. C.* 36. *Crom.* 30.—Where a sheriff, &c. attempting to make a lawful arrest in a *civil* action, or to retake one who has been arrested and made his escape, is resisted by the party, and unavoidably kills him in the affray. 1 *Hawk. P. C. c.* 28. § 17. 1 *Rol. Rep.* 189. *H. P. C.* 37. 3 *Inst.* 56. *Crom.* 24, *a. Dalt. cap.* 98. And in such case, the officer is not bound to give back, but may stand his ground, and attack the party. 1 *Hawk. P. C. c.* 28. § 18. *H. P. C.* 31. 1 *East's P. C. c.* 5. § 74. But no private person of his own authority, can arrest a man for a *civil* matter, as he may for felony, &c. 1 *Hawk. c.* 28. § 19. *Crom.* 30, *b.* Neither can the sheriff himself lawfully kill those who *barely fly from* the execution of any civil process. 1 *Hawk. c.* 28. § 20. *H. P. C.* 37. and see 1 *East's P. C. c.* 5.

And in all these cases there must be an apparent necessity on the officer's side, *viz.* that the party could not be arrested or apprehended, the riot could not be suppressed, the prisoners could not be kept in hold, the deer stealers could not but escape, unless such Homicide were committed: otherwise without such absolute necessity it is not justifiable.

If the champions in a trial by battle, killed either of them the other, such Homicide was justifiable, and was imputed to the just judgment of God, who was thereby presumed to have decided in favour of the truth. 1 *Hawk. P. C.* 71. See title *Battle; Wager of Battel;* now abolished by *stat.* 59 *G.* 3. *c.* 41.

By *stat.* 9 *Geo.* 3. *c.* 35. § 35. it is expressly provided with respect to resistance to officers of customs or excise, that if any persons publicly passing with prohibited or uncustomed goods, and being armed, shall resist such officers in seizing such goods, the officers and their assistants may oppose force to force; and if the smugglers be wounded or killed, the officers may plead the general issue, and give the statute and the special matter in evidence.—And justices of peace are directed to admit the officer to bail.

3. Such Homicide as is committed for the *prevention* of any forcible and atrocious *crime*, is justifiable by the law of nature; and also by the law of England, as it stood so early as the time of *Bracton*, and as it is since expressly declared by *stat.* 24 *Hen.* 8. *c.* 5. See *Bract. fol.* 155. If any person attempts a robbery or murder of another, or attempts to break open a house *in the night time*, (which extends also to an attempt to burn it,) and shall be killed in such attempt, the slayer shall be acquitted and discharged. 1 *Hal. P. C.* 488. And not only the master of a house, but a lodger or a sojourner, who kills an assailant intending to commit murder or robbery, is within the protection of the law. *Cro. Car.* 541. This reaches not to any crime unaccompanied with force, as picking of pockets, or to the breaking open of any house *in the day time*, unless it carries with it an attempt of robbery also. 4 *Comm. c.* 14.

*Justifiable Homicide* of a *private* nature, in the just defence of a man's person, house, or goods, may happen either by the killing of a *wrong-doer*, or an *innocent* person. And first, the killing of a wrong-doer in the making of such defence, may be justified in many cases; as where a man kills one who assaults him in the highway, to rob or murder him; or the owner of a house, or any of his servants or lodgers, &c. kill one who attempts to burn it, or to commit therein murder, robbery, or other felony; or a woman kills one who attempts to ravish her; or a servant coming suddenly, and finding his master robbed and slain, falls upon the murderer immediately, and kills him; for he does it in the height of his surprise, and under just apprehensions of the like attempt upon himself; but in other circumstances he could not have justified the killing of such an one, but ought to have apprehended him, &c. 1 *Hawk. P. C. c.* 28. § 21. 24 *H.* 8. *cap.* 5. *Dalt. cap.* 98.

Neither shall a man in any case justify the killing another by a pretence of necessity, unless he were himself wholly without fault in bringing that necessity upon himself; for if a man, *in defence of an injury done by himself*, kill any person whatsoever, he is guilty of manslaughter at least; as where divers rioters wrongfully withhold a house by force, and kill those who attack it from without, and endeavour to burn it. 1 *Hawk. P. C. c.* 28. § 22. *Crom.* 27, *b.* *H. P. C.* 56.

Neither can a man justify the killing another in defence of his house or goods, or even of his person, from *a bare private trespass;* and therefore he that kills another, who, claiming a title to his house, attempts to enter it by force, and shoots at it, or that breaks open his windows in order to arrest him, or that persists in breaking his hedges after he is forbidden, is guilty of manslaughter; and he who in his own defence, kills another that assaults him in his house in the day-time, and plainly appears to intend to beat him only, is guilty of Homicide *se defendendo*, for which he forfeits his goods, but is pardoned of course: yet it seems that a private person, and *à fortiori*, an officer of justice, who happens unavoidably to kill another endeavouring to defend himself from or suppress dangerous rioters, may justify the fact, inasmuch as he only does his duty in aid of public justice. 1 *Hawk. P. C. c.* 28. § 23. *H. P. C.* 40. 57. *Cro. Car.* 538.

According to the opinion of *Mr. Serjeant Hawkins*, a person who, without provocation, is assaulted by another, in any place whatsoever, in such a manner as plainly shews an intent to murder him, as by discharging a pistol, or pushing at him with a drawn sword, &c. may justify killing such an assailant, as much as if he had attempted to rob him. 1 *Hawk. P. C. c.* 28. § 24. &c. *N. Bendlo*, 47. 1 *And.* 41. *Crom.* 27, *b.* 28, *b.* *Dalt. cap.* 98. *S. P. C.* 15, *a.* 3 *Inst.* 57. *Bacon*, 33. For other cases, vide *Cro. Car.* 338. *March* 5.

In the case of the *Marquis de Guiscard*, who stabbed Mr. Harley, while sitting in council, and was wounded dangerously on the spot, and afterwards died of such wounds, the parties who were supposed to have given the Marquis the mortal wound were discharged from all prosecution on that account, and the killing was declared to be a lawful and necessary action. See *stat.* 9 *Ann. c.* 16. § 2.

The Roman Law also justifies *Homicide*, when committed in defence of the chastity either of one's self or relations: The English Law also justifies a woman killing one who attempts to ravish her. *Bac. Elem.* 34. 1 *Hawk. P. C. c.* 38. § 21. and so too, the husband or father may justify killing a man who attempts a rape upon his wife or daughter; but not if he takes them in adultery by consent, for the one is forcible and felonious but not the other. 1 *Hal. P. C.* 485, 486. And there seems no doubt but the forcibly attempting a crime of a still more detestable nature, may be equally resisted by the death of the unnatural aggressor. For the one uniform principle that runs through our own, and all other laws, seems to be this; that where a crime *in itself capital*, is endeavoured to be committed by force, it is lawful to repel that force by the death of the party attempting. 4 *Comm. c.* 14.

In these instances of *justifiable* Homicide, it may be observed, that the slayer is in no kind of fault whatsoever, not even in the minutest degree; and is, therefore, to be totally acquitted and discharged, with commendation rather than blame. 1 *Hawk. P. C. c.* 28. § 3. 1 *East. P. C. c.* 5.

But that is not quite the case in *excusable Homicide*, the very name whereof imports some fault, some error, or omission; so trivial however, that the law excuses it from the guilt of felony, though, in strictness, it judges it deserving of some little degree of punishment. See the next Division.

II. 1. Homicide *per infortunium*, or Misadventure, is where a man doing a lawful act, without any intention of hurt, and using proper precaution to prevent danger, unfortunately kills another: as where a man is at work with a hatchet, and the head thereof flies off, and kills a stander-by; or where a person, *qualified to keep a gun*, is shooting at a mark, and undesignedly kills a man; for the act is lawful, and the effect is merely accidental. 1 *Hawk. P. C. c.* 29. 1 *East. P. C. c.* 5.

So where a person is moderately correcting his child, a master his apprentice or scholar, or an officer punishing a criminal, (as by whipping,) and happens to occasion his death, it is only misadventure; for the act of correction was lawful: but if he exceeds the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, and death ensues, it is *Manslaughter* at least; and in some cases (according to circumstances) murder; for the act of immoderate correction is unlawful. 1 *Hal. P. C.* 473, 474.

A tilt or a tournament, the martial diversion of our ancestors, was however an unlawful act; and so are boxing and sword-playing, the succeeding amusements of their posterity: and therefore, if a knight in the former case, or a gladiator in the latter, be killed, such killing is felony of manslaughter. But if the King command or permit such diversion, it is said only to be misadventure: for then the act is lawful. 1 *Hal. P. C.* 473. 1 *Hawk. P. C. c.* 29. § 8. Likewise to whip another's horse, whereby he runs over a child and kills him, is held to be accidental death in the rider, for he has done nothing unlawful: but it is manslaughter in the person who whipped him; for the act was a trespass, and at best a piece of idleness of inevitable dangerous consequence. 1 *Hawk. P. C. c.* 29. § 3.

Where one lawfully using an innocent diversion, as shooting at butts, or at a bird, &c. by the glancing of an arrow, or such like accident, kills another, this is only Homicide by misadventure. *Keilw.* 108. *Bro. Cor.* 148. See *Kelynge*, 41. —So where a person happens to kill another in playing a match of foot-ball, wrestling, or such like sports, which are attended with no apparent danger of life, and intended only for the trial, exercise, and improvement of the strength, courage, and activity of the parties. *Keilw.* 108. 136. *Crom.* 29, *a.* 11 *H.* 7. 23, *a.* 1 *Hawk. P. C. c.* 29. §§ 6, 7, 8.

In general, if death ensues in consequence of an idle, dangerous, and unlawful sport, the slayer is guilty of manslaughter, and not misadventure only, for these are unlawful acts. 1 *Hawk. P. C. c.* 29. § 9. 1 *Hal. P. C.* 472. *Fost.* 261. Thus, if a man kills another by shooting at a deer, &c. in a third person's park, in the doing whereof he is a trespasser; or by shooting of a gun, or throwing stones in a city or highway, or other place where men usually resort, by throwing stones at another wantonly, in play, which is a dangerous sport, and has not the least appearance of any good intent; or by doing any other such idle action as cannot but endanger the bodily hurt of some one or other; or by tilting or playing at hand-sword without the King's command; or by parrying with naked swords, covered with buttons at the points, or with swords in the scabbards, or such like rash sports, which cannot be used without the manifest hazard of life, he is guilty of manslaughter. 1 *Hawk. P. C.* 29. § 9. *H. P. C.* 31, 32. 58. *Hob.* 134. But see *post*, III.

Where the defendant came to town in a chaise, and before he got out of it, fired his pistols, which by accident killed a woman, *King*, Ch. J. ruled it to be manslaughter. *Str.* 481.

Homicide, in *self-defence*, or *Se defendendo*, upon a sudden affray, is also excusable, rather than justifiable by the English law. This species of self-defence must be distinguished from that already mentioned, *ante*, I. 3. as calculated to hinder the perpetration of a capital crime; which is not only a matter of excuse, but of justification. But the self-defence, which we are now speaking of, is that whereby a man may protect himself from an assault or the like, in the course of a sudden brawl or quarrel, by killing him who assaults him. And this is what the law expresses by the words *chance-medley*, (or, as some rather choose to write it) *chaud-medley*; the former of which, in its etymology, signifies a *casual* affray, the latter an affray in the *heat* of blood or passion, both of them of pretty much the same import; but the former is in common speech too often erroneously applied to any manner of Homicide by misadventure; whereas it appears by the *stat.* 24 *Hen.* 8. *c.* 5. and our ancient books, (*Staun. P. C.* 16.) that it is properly applied to such killing as happens in self-defence, upon a sudden rencounter. 3 *Inst.* 55. 57. *Fost.* 275, 276. This right of natural defence does not imply a right of attacking: for instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice: they cannot therefore legally exercise this right of preventive defence, except in sudden and violent cases, when certain and immediate suffering would be the consequence of waiting for the assistance of the law. Wherefore to excuse Homicide, by the plea of self-defence, it must appear that the slayer had no other possible (or, at least probable) means of escaping from his assailant.

It is frequently difficult to distinguish this species of Homicide (upon *chance-medley*, in self-defence), from that of manslaughter, in the proper legal sense of the word. 3 *Inst.* 55. But the true criterion between them seems to be this: when both parties are actually combating at the time when the mortal stroke is given, the slayer is then guilty of manslaughter: but if the slayer hath not begun to fight, or (having begun) endeavours to decline any farther struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is Homicide excusable by self-defence. *Fost.* 277. For which reason the law requires, that the person who kills another in his own defence, should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant: and that not fictitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood. And though it may be cowardice, in time of war between two independent nations, to flee from an enemy; yet between two fellow-subjects, the law countenances no such point of honour: because the King and his Courts are the *vindices injuriarum*, and will give to the party wronged all the satisfaction he deserves. 1 *Hal. P. C.* 481. 483. The party assaulted must therefore flee as far as he conveniently can, either by reason of some wall, ditch, or other impediment, or as far as the fierceness of the assault will permit him, for it may be so fierce as not to allow him to yield a step, without manifest danger of his life, or enormous bodily harm; and then, in his defence, he may kill his assailant instantly. 1 *Hal. P. C.* 483. And as the *manner* of the defence, so is also the time to be considered: for if the person assaulted does not fall upon the agressor till the affray is over, or when he is running away, this is revenge and not defence. Neither under the colour of self-defence, will the law permit a man to screen himself from the guilt of deliberate murder: for if two persons A. and B. agree to fight a duel, and A. gives the first onset, and B. retreats as far as he safely can, and then kills A. this is murder; because of the previous malice and concerted design. 1 *Hal. P. C.* 479. But if A. upon a sudden quarrel assaults B. first, and upon B's. returning the assault, A. really and *bonâ fide* flees, and being driven to the wall, turns again upon B. and kills him; this may be *se defendendo*, according to some of our writers. 1 *Hal. P. C.* 482. Though others have thought this opinion too favourable; inasmuch as the necessity, to which he is at last reduced, originally arose from his own fault. 1 *Hawk. P. C. c.* 29. § 17.

It is agreed, that, if a man strike another upon *malice prepense*, and then fly to the wall, and there kill him in his own defence, he is guilty of murder. 1 *Hawk. P. C. c.* 29. § 17. *S. P. C.* 15, *a.* *Crom.* 28, *a.* *Dalt. cap.* 98. *Kelynge*, 58. *H. P. C.* 42. See 1 *East's P. C. c.* 5. § 53. and *post*, III. 3.

Under this excuse, of self-defence, the principal civil and natural relations are comprehended; therefore master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are excused; the act of the relation assisting being construed the same as the act of the party himself. 1 *Hal. P. C.* 484.

Homicide *se defendendo*, or by self-defence, says *Hawkins*, seems to be, where one who has no other possible means of preserving his life from one who combats with him on a sudden quarrel, or of defending his person from one who attempts to beat him, (especially if such attempts be made upon him in his own house,) kills the person by whom he is reduced to such an inevitable necessity. 1 *Hawk. P. C. c.* 22. § 13, &c. *H. P. C.* 40. *S. P. C.* 15.

And not only he who on an assault retreats to a wall, or some such streight, beyond which he can go no further before he kills the other, is adjudged by the law to act upon unavoidable necessity: but also he who being assaulted in such a manner and in such a place, that he cannot go back without manifestly endangering his life, kills the other without retreating at all. 1 *Hawk. P. C. c.* 29. § 14. *Bro. Coro.* 125. 43 *Ass.* 31. 3 *Inst.* 56. *H. P. C.* 41.

And notwithstanding a person, who retreats from an assault to the wall, give the other divers wounds in his retreat, yet if he give him no mortal one till he get thither, and then kill him, he is guilty of Homicide *se defendendo* only. 1 *Hawk. P. C. c.* 29. § 15. *H. P. C.* 41. *Crom.* 28. *S. P. C.* 15, *a.*

And an officer who kills one who resists him in the execution of his office, and even a private person that kills one who feloniously assaults him in the highway, may justify the fact without ever giving back at all. 1 *Hawk. P. C. c.* 29. § 16. *H. P. C.* 41. 3 *Inst.* 56. *Crom.* 28, *a.*

There is one species of Homicide *se defendendo*, where the party slain is equally innocent as he who occasions his death: and yet this Homicide is also excusable from the great universal principle of self-preservation, which prompts every man to save his own life preferable to that of another, where one of them must inevitably perish. As, among others, in that case mentioned by *Lord Bacon*, where two persons being shipwrecked, and getting on the same plank, but finding it not able to save them both, one of them thrusts the other from it, whereby he is drowned. He who thus preserves his own life at the expence of another man's, is excusable, through unavoidable necessity, and the principle of self-defence; since their both remaining on the same weak plank is a mutual, though innocent, attempt upon, and endangering of each other's life. See *Bac. Elem. c.* 5. 4 *Comm. c.* 14.

According to Lord Hale, a man cannot excuse the killing of another who is innocent, under a threat or assault however urgent, endangering the losing his own life if he do not comply; but the person threatened or assailed ought rather to die himself than kill an innocent person. See 1 *Hale P. C.* 51. 434. 1 *East's P. C. c.* 5. § 61.

2. The circumstances wherein these two species of Homicide, by misadventure and self-defence, agree, are in the *blame* and *punishment*. For the law sets so high a value upon the life of a man, that it always intends some misbehaviour in the person who takes it away, unless by the command or express permission of the law. In the case of misadventure, it presumes negligence, or at least a want of sufficient caution in him who was so unfortunate as to commit it; who is therefore not altogether faultless. And as to the necessity which excuses a man who kills another *se defendendo*, *Lord Bacon* entitles it *necessitas culpabilis*, and thereby distinguishes it from the former necessity of killing a thief or a malefactor. *Bac. Elem. c.* 5. For the law intends that the quarrel or assault arose from some unknown wrong, or some provocation, either in word or deed; and since, in quarrels, both parties may be and usually are, in some fault, and it scarcely can be tried who was originally in the wrong, the law will not hold the survivor entirely guiltless. But it is clear, in the other case, that where I kill a thief that breaks into my house, the original fault can never be upon my side. The law besides may have a farther view, to make the crime of Homicide more odious, and to caution men how they venture to kill another upon their own private judgment, by ordaining that he who slays his neighbour, without an express warrant from the law so to do, shall in no case be absolutely free from guilt.

*The Penalty* inflicted by our laws in these cases is said, by *Sir Edward Coke*, to have been anciently no less than death; 2 *Inst.* 248. 315. which however is with reason denied by later and more accurate writers. 1 *Hal. P. C.* 425. 1 *Hawk. P. C. c.* 29. § 20. *Fost.* 282, *&c.* It seems rather to have consisted in a forfeiture, some say, of all the goods and chattels, others of only part of them, by way of fine or *weregild*: which was probably disposed of, *in pios usus*, according to the humane superstition of the times, for the benefit of *his* soul, who was thus suddenly sent to his account, 'with all his imperfections on his head.' *Fost.* 287. But that reason having long ceased, and the penalty (especially of a total forfeiture) growing more severe than was intended, in proportion as personal property has become more considerable, the delinquent has now, and has had as early as our records will reach, a pardon, and a writ of restitution of his goods as a matter of course and right, only paying for suing out the same. *Fost.* 283. 2 *Hawk. P. C. c.* 37. § 2. And indeed to prevent this expence, in cases where the death has notoriously happened by misadventure or in self-defence, the Judges permit (if not direct) a general verdict of acquittal. *Fost.* 288. As they do now in all cases where the Homicide does not amount to murder or manslaughter.

There may, however, be cases so bordering upon and not easily distinguishable from manslaughter, that the offender may with propriety be put to sue out his pardon according to the provision of the statute of Gloucester. 6 *Edw.* 1. *c.* 9. and consequently not be entitled to a general verdict of acquittal. *Fost.* 289.

It seems clear that neither of these Homicides, by *misadventure* or *se defendendo*, are felonious, because they are not accompanied with a felonious intent, which is necessary in every felony. 1 *Hawk. P. C. c.* 29. § 19. 3 *Inst.* 56. 2 *Inst.* 149.

And from hence it seems plainly to follow, that they were never punishable with loss of life; and the same also farther appears from the writ *de odio et atiâ*, by virtue whereof, if any person committed for killing another, were found guilty of either of these Homicides, and no other crime, he might be bailed; and indeed it seems to be against natural justice to condemn a man to death, for what is owing rather to his misfortune than his fault. 1 *Hawk. P. C. c.* 29. § 20.

It is true indeed, that some of our best authors have argued from the statute of *Marlbridge*, *ch.* 26. which enacts, that *murdrum de cætero non adjudicetur*, *ubi infortunium tantummodo adjudicatum est*, *&c.* that, before this statute, homicides by misadventure, or *se defendendo*, were adjudged murder, and consequently punished by death. 1 *Hawk. P. C. c.* 29. § 21. 2 *Inst.* 56. *S. P. C.* 16.

But to this it may be answered, that murder in those days signified only the private killing of a man, by one who was neither seen nor heard by any witness; for which the offender, if found, was to be tried by ordeal, and if he could not be found, the town in which the fact was done, was to be amerced sixty-six marks, unless it could be proved that the person killed was an Englishman: otherwise it was presumed he was a Dane or Norman, who in those days were often privately made away with by the English. And it being a doubt whether Homicide by misadventure, &c. were to be esteemed murder in this sense, it seems to have been the chief intent of the makers of this statute to settle this question. 1 *Hawk. P. C. c.* 29. § 22. *Bract.* 134, *b.* 135, *a.* *Kelynge*, 121.

However it is certain, that notwithstanding neither of these offences be felonies, yet a person guilty of them is not bailable by *justices of peace*, but must be committed till the next coming of the Justices of eyre or gaol-delivery. 1 *Hawk. P. C. c.* 29. § 23. *H. P. C.* 98, 99. 2 *Inst.* 315. *Dalt. cap.* 98. But such offender may be brought up by *habeas corpus* before any of the twelve Judges, and bailed.

Indeed, antiently a person committed for the death of a man, might sue out the writ *de odio et atiâ*, which by *Magna Charta*, *c.* 16. is grantable without fee; and if thereon, by an inquest taken by the sheriff, he were found to have done the fact by misadventure, or *se defendendo*, he might be mainprised by twelve men, upon the writ *de ponendo in ballium*. But such writs and enquries were taken away by the statute of *Gloucester*, *c.* 9. and *stat.* 28 *Ed.* 3. *c.* 9. and though perhaps they were again revived by *stat.* 42 *Ed.* 3. *c.* 1. which makes all statutes contrary to *Magna Charta* void, yet at this day they seem to be obsolete, and, indeed, useless; inasmuch as the party may probably be sooner delivered in the usual course, by the coming of the Justices of gaol-delivery. 1 *Hawk. P. C. c.* 29. § 24. *S. P. C.* 77 *g.* 2 *Inst.* 43. 315. 9 *Co.* 56. *Co. Bail and Mainprize*, *c.* 10.

It is also agreed, that no one can excuse the killing another, by setting forth in a special plea, that he did it by misadventure, or *se defendendo*, but that he must plead 'Not guilty,' and give the special matter in evidence. And that wherever a person is found guilty of such Homicide, either by a special indictment for the same, or by a verdict setting forth the circumstances of the case on a general indictment of murder or Homicide, he shall be discharged out of prison upon bail, and forfeit his goods: but, that upon removing the record by *certiorari* into Chancery, he shall have his pardon of course, without staying for any warrant from the King to that purpose. 1 *Hawk. P. C. c.* 29. § 25. 4 *H.* 7. 2, *a. Keilw.* 53, *a.* 108, *b.* 2 *Inst.* 316. *S. P. C.* 15, *b.* 16, *b. Dalt. cap.* 96. 98. *F. N. B.* 246. *C. H.*

III. Felonious Homicide, is an act of a very different nature from the former, being the killing of a human creature, of any age or sex, without justification or excuse. This may be done either by killing one's self or another person.

1. Self-Murder, is ranked among the highest crimes, being a peculiar species of felony; a felony committed on one's self. The party must be in his senses, else it is no crime. But this excuse ought not to be strained to that length, to which our Coroner's Juries are too apt to carry it, *viz.* that the very act of suicide is an evidence of insanity; as if every man who acts contrary to reason had no reason at all; for the same argument would prove every other criminal *non compos*, as well as the self-murderer. The law very rationally judges, that every melancholy or hypochondriac fit does not deprive a man of the capacity of discerning right from wrong, and therefore if a real lunatic kills himself in a lucid interval, he is *felo de se* as much as another man. 1 *Hale P. C.* 412.

As to the punishment which human laws inflict on this crime; they can only act upon what he has left behind him, his reputation and fortune: on the former, by an ignominious burial in the highway, with a stake driven through his body; on the latter, by the forfeiture of all his goods and chattels to the King.

In this as well as all other felonies, the offender must be of the age of discretion, and *compos mentis*; and therefore, an infant killing himself under the age of discretion, or a lunatic during his lunacy, cannot be a *felo de se*. 1 *Hawk. P. C. c.* 27. § 1. *Crom.* 30. *a, b.* 31, *a. H. P. C.* 28. *Dalt. cap.* 92. 3 *Inst.* 54.

Our laws have always had such an abhorrence of this crime, that not only he who kills himself with a deliberate and direct purpose of so doing, but also in some cases he who maliciously attempts to kill another, and in pursuance of such an attempt unwillingly kills himself, shall be adjudged in the eye of the law a *felo de se*; for wherever death is caused by any act done with a murderous intent, it makes the offender a murderer. 1 *Hawk. P. C. c.* 27. § 4. *Dalt. cap.* 92. 144. 44 *E.* 3. 44. 44 *Ass.* 55. *Bro. Cor.* 12. 14. *S. P. C.* 16. *Pult.* 119, *b. Crom.* 28. 1 *Hale, P. C.* 412.

He who kills another upon his desire or command, is in the judgment of the law as much a murderer, as if he had done it merely of his own head: and the person killed is not looked upon as a *felo de se*, in as much as his assent was merely void, being against the law of God and man. 1 *Hawk. P. C. c.* 27. § 6. *Keilw.* 136. *Moor*, 754.

Where two persons agree to die together, and one at the persuasion of the other buys poison and mixes it in a potion, and both drink of it, it is held the better opinion that the one who dies shall be adjudged *felo do se*. 1 *Hawk. P. C. c.* 27. § 6.

Further as to what a *felo de se* shall forfeit, it seems clear, that he shall forfeit all chattels real or personal which he hath in his own right; and also all chattels real whereof he is possessed either jointly with his wife, or in her right; and also all bonds and other personal things in action, belonging solely to himself; and also all personal things in action, and as some say, entire chattels in possession to which he was intitled jointly with another, on any account, except that of merchandize. But it is said, that he shall forfeit a moiety only of such joint chattels as may be severed, and nothing at all of what he was possessed of as executor or administrator. 1 *Hawk. P. C. c.* 27. § 7. However the blood of a *felo de se* is not corrupted, nor his lands of inheritance forfeited, nor his wife barred of her dower. 1 *Hawk. P. C. c.* 27. § 8. *Plowd. Com.* 261, *b.* 262, *a.* 1 *Hal. P. C.* 413. The will of a *felo de se* therefore becomes void as to his personal property, but not as to his real estate. *Plowd.* 261.

Not any part of the personal estate is vested in the King, before the self-murder is found by some inquisition; and consequently the forfeiture thereof, is saved by a pardon of the offence before such finding. 5 *Co.* 110, *b.* 3 *Inst.* 54. 1 *Saund.* 362. 1 *Sid.* 150. 162. But if there be no such pardon, the whole is forfeited immediately after such inquisition, from the time of the act done by which the death was caused, and all intermediate alienations and titles are avoided. *Plowd. Com.* 260. *H. P. C.* 29. 5 *Co.* 110. *Finch, L.* 216. All such inquisitions ought to be by the Coroner *super visum corporis*, if the body can be found; and an inquisition so taken, as some say, cannot be traversed. *H. P. C.* 29. 3 *Inst.* 55. See 1 *Hawk. P. C. c.* 27. § 9, 10, 11. But see 3 *Mod.* 238.

But if the body cannot be found, so that the coroner, who has authority only *super visum corporis*, cannot proceed, the inquiry may be by Justices of peace; (who by their commission have a general power to inquire of all felonies;) or in the King's Bench, if the felony were committed in the county where that court sits: and such inquisitions are traversable by the executor, &c. 1 *Hawk. P. C. c.* 27. § 12. 3 *Inst.* 55. *H. P. C.* 29. 2 *Lev.* 141.

Also all inquisitions of this offence being in the nature of indictments, ought particularly and certainly to set forth the circumstances of the fact: and in the conclusion add, that the party in such manner murdered himself. 1 *Hawk. P. C. c.* 27. § 13. 3 *Lev.* 140. 3 *Mod.* 100. 2 *Lev.* 152. Yet if it be full in substance, the coroner may be served with a rule to amend a defect in form. 1 *Sid.* 225. 259. 3 *Mod.* 101. 1 *Keb.* 907. 1 *Hawk. P. C. c.* 27. § 15.

If a person is unduly found *felo de se*, or on the other hand found to be a lunatick, when in fact he was not so, and therefore *felo de se*, although a writ of *melius inquirendum* will not be granted, yet the inquisition is traversable in the King's Bench. 3 *Mod.* 238.

By the rubrick in the Common Prayer, before the burial office (confirmed by *stat.* 13 & 14 *Car.* 2. *c.* 4.) persons who have laid violent hands upon themselves, shall not have that office used at their interment.—See further on this subject this Dict. tit. *Felo de se.*

The other species of criminal Homicide is that of killing another man. But in this there are also degrees of guilt, which divide the offence into *Manslaughter*, and *Murder*. The difference between which may be partly collected from what has been incidentally mentioned in the preceding articles; and principally consists in this, that *Manslaughter* (when voluntary) arises from the sudden heat of passions: *Murder* from the wickedness of the heart.

2. Manslaughter is therefore thus defined: *The unlawful killing of another, without malice, either express or implied:* which may be either *voluntarily*, upon a *sudden heat*; or *involuntarily*, but in the commission of some *unlawful act*. 1 *Hal. P. C.* 466. And hence it follows, that in Manslaughter there can be no accessories before the fact; because it must be done without premeditation. But there may be accessories after the fact. 1 *Hale P. C.* 430. 1 *East's P. C. c.* 5. § 123. This

seems to have been doubted before the *stat.* 1 *Ann. stat.* 2. *c.* 9. § 1. but the effect of that statute seems to have removed the doubt. See this Dict. tit. *Accessory*, II, 4. 2 *Hawk. P. C. c.* 29. § 4.

As to the first, or *voluntary* branch; if upon a sudden quarrel two persons fight, and one of them kills the other, this is Manslaughter: and so it is, if they, upon such an occasion, go out and fight in a field; for this is one continued act of passion, and the law pays that regard to human frailty, as not to put a hasty and deliberate act upon the same footing with regard to guilt. 1 *Hawk. P. C. c.* 31. §§ 29, 30. So also if a man be grently provoked, as by pulling his nose, or other great indignity, and immediately kills the aggressor, though this is not excusable *se defendendo*, since there is no absolute necessity for doing it, to preserve himself; yet neither is it murder, for there is no previous malice; but it is Manslaughter. *Kelynge*, 135. But in this, and in every other case of Homicide, upon provocation, if there be a sufficient cooling-time for passion to subside and reason to interpose, and the person so provoked afterwards kills the other, this is deliberate revenge, and not heat of blood, and accordingly amounts to murder. *Fost.* 296. So if a man takes another in the act of adultery with his wife, and kills him directly upon the spot; this is not absolutely ranked in the class of justifiable Homicide, as in case of a forcible rape, but it is Manslaughter. 1 *Hal. P. C.* 486. It is however the lowest degree of it, and therefore in such a case, the court directed the burning in the hand to be gently inflicted, because there could not be a greater provocation. *Raym.* 212. Manslaughter therefore on sudden provocation differs from Excusable Homicide *se defendendo* in this; that in one case there is an apparent necessity, for self-preservation, to kill the aggressor; in the other no necessity at all, being only a sudden act of revenge. 4 *Comm. c.* 14.

The second branch, or *involuntary* Manslaughter, differs also from Homicide excusable by misadventure, in this: that misadventure always happens in consequence of a lawful act, but this species of manslaughter in consequence of an unlawful one. As if two persons play at sword and buckler, unless by the King's command, and one of them kills the other, this is manslaughter, because the original act was unlawful; but it is not murder, for the one had no intent to do the other any personal mischief. 3 *Inst.* 56. So where a person does an act, lawful in itself, but in an unlawful manner, and without due caution and circumspection: as when a workman flings down a stone or piece of timber into the street, and kills a man; this may be either misadventure, manslaughter, or murder, according to the circumstance under which the original act was done; if it were in a country village where few passengers are, and he calls out to all people to have a care, it is misadventure only; but if it were in London, or other populous town, where people are continually passing, it is manslaughter, though he gives loud warning; and murder, if he knows of their passing, and gives no warning at all, for then it is malice against all mankind. *Kel.* 43. 3 *Inst.* And in general when an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter, according to the nature of the act which occasioned it. If it be in prosecution of a felonious intent, or in its consequences naturally tended to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will only amount to manslaughter. 4 *Comm. c.* 14. See *post*, 3. more at large.

Our statute law has severely animadverted on one species of criminal negligence, whereby the death of a man is occasioned. For by *stat.* 10 *Geo.* 2. *c.* 31, if any Waterman between Gravesend and Windsor receives into his boat or barge a greater number of persons than the act allows, and any passenger shall then be drowned, such waterman is guilty (not of manslaughter, but) of felony; and shall be transported as a felon.

Next as to the *Punishment* of this degree of Homicide; the crime of manslaughter amounts to felony, but within the benefit of clergy; and the offender shall be burnt in the hand, and forfeit all his goods and chattels, and may be imprisoned not exceeding twelve months. See *stat.* 18 *Eliz. c.* 7. and this Dict. tit. *Clergy, Benefit of.*

But there is one species of manslaughter, which is punished as murder, the benefit of clergy being taken away from it by statute; namely, the offence of mortally *stabbing* another, though done upon sudden provocation. For by *stat.* 1 *Jac.* 1. *c.* 8. when one thrusts or stabs another, who has not then a weapon drawn, or who hath not then first stricken the party stabbing, so that he dies thereof within six months after, the offender shall not have the benefit of clergy, *though he did it not of malice aforethought.* This statute was made on account of the frequent quarrels, and stabbing with short daggers, between the Scotch and the English, at the accession of James the First; and, being therefore of a temporary nature, ought perhaps to have expired with the mischief which it meant to remedy. 1 *Lord Raym.* 140. It was however continued indefinitely by *st.* 3. *Car.* 1. *c.* 4. and by *stat.* 16 (or 17) *C.* 1. *c.* 4. till some other act shall be made touching the continuance or discontinuance thereof.—It seems that in point of solid and substantial justice it cannot be said that the mode of killing, whether by stabbing, strangling, or shooting, can either extenuate or enhance the guilt; unless where, as in the case of poisoning, it carries with it an internal evidence of cool and deliberate malice. But the benignity of the law hath construed the statute so favourably in behalf of the subject, and so strictly when against him, that the offence of stabbing now stands almost upon the same footing, as it did at the Common-law. *Fost.* 299, 300. Thus, (not to repeat the cases before mentioned, of stabbing an adultress, &c. which are barely manslaughter, as at Common-law) in the construction of the statute it hath been doubted, whether, if the deceased had struck at all before the mortal blow given, this does not take it out of the statute, though in the preceding quarrel the stabber had given the first blow; and it seems to be the better opinion, that this is not within the statute. *Fost.* 301. 1 *Hawk. P. C. c.* 30. § 6. Also it hath been resolved, that the killing a man by throwing a hammer or other blunt weapon is not within the statute; and whether a shot with a pistol be so or not, is doubted. 1 *Hal. P. C.* 470. And if the party slain had a cudgel in his hand, or had thrown a pot or bottle, or discharged a pistol at the party stabbing, this is sufficient having a weapon drawn on his side within the words of the statute. 1 *Hawk. P. C. c.* 30 § 8.

It is generally holden that this statute is but declarative of the Common-law, and in the construction thereof, the following points have been also resolved. 1 *Bulst.* 97. *Kelynge*, 55.

That he who actually gives the stroke, and not any of those who may be said to do it by construction of law, as being present, and aiding and abetting the fact, are within the statute; and from whence it follows, That if it cannot be proved by whom the stroke was given, none can be found guilty within the statute. 1 *Hawk. P. C. c.* 30. § 7. *H. P. C.* 58. *Alleyn*, 44.

That there is no need to lay the conclusion of the indictment *contra formam statuti*, because the statute makes no new offence, but only takes away the privilege of clergy from an old one, and leaves it to the judgment of the Common-law; from whence it follows, that a person indicted on the statute, may be found guilty of manslaughter generally. Also from the same ground it hath been resolved, That if an indictment lay, and a verdict also find, a fact to be *contra formam statuti*, which cannot possibly be so, as that A. and B. aided and abetted C. *contra formam statuti*, yet neither such indictment nor verdict are void; but A. and B. shall be dealt with in the

same manner as they should have been, if these words *contra formam statuti*, had been wholly omitted, because the substance of the indictment being found, they may be rejected as senseless and surplusage: and, *à fortiori*, therefore it is certain, that they shall do no hurt to an indictment or verdict containing a fact which may be within the statute. 1 *Hawk. P. C. c.* 30. § 9. *H. P. C.* 58. 266. *Allen*, 47. *Cro. Jac.* 283.

That, as these words, *contra formam statuti*, do not vitiate an indictment which would be good without them; so also, they will not supply a defect in a vitious one, which does not specially pursue the statute. 1 *Hawk. P. C. c.* 30. § 10.

A prisoner whose case may be brought within this statute, is commonly arraigned upon two indictments, one at Common-law for murder, and the other upon the statute. *Fost* 293.—But the same circumstances which at Common-law will serve to justify, excuse or alleviate a charge of murder, have always had their due weight in prosecutions, grounded on this statute. *Fost.* 298. As where a husband stabs an adulterer whom he seizes in the act. 1 *Vent.* 158. *Raym.* 212.—Or where a man is assaulted by thieves in his house, the thieves having no weapon drawn, nor having struck him; and he stabs one of them. *Strab.* 469. Or where an officer entering violently into the chamber of a gentleman to arrest him, but without announcing the purpose for which he came, is stabbed by the gentleman with his sword. *Kel.* 136. 1 *Hal.* 470. *Sty.* 467. —Or where upon an outcry of thieves a person who had innocently hidden himself in a closet, was mistaken for the thief, and stabbed in the dark. See 1 *Hal.* 42. 474. *Cro. Car.* 538. *W. Jon.* 429. *Kely.* 136.; and many other instances of this kind which were held not to be within the statute. 1 *Hawk. P. C. c.* 30. *in n.* For the punishment of stabbing, &c. with intent to murder, &c. see *post*, *Div.* 5. and this Dict. title *Mischief, Malicious*.

3. The term of MURDER (as a crime) was anciently applied only to the *secret* killing of another; *Dial de Scacch. l.* 1. *c.* 10; which the word *moerda* signifies in the Teutonic language; and it was defined, "*homicidium quod, nullo vidente, nullo sciente, clam perpetratur:*" *Glanv. lib.* 14. *c.* 3. for which the vill wherein it was committed, or (if that were too poor) the whole hundred, was liable to a heavy amercement: which amercement itself was also denominated *murdrum. Bract. l.* 3. *tr.* 2. *c.* 15. § 7. *Stat. Marl. c.* 26. *Fost.* 281. The word *murdre* in our old *statutes* also signified any kind of concealment or stifling: So in the stat. of Exeter, 14 *E.* 1. "*je riens ne celerai ne suffrerai etre celé ne murdré.*" which is thus translated in *Fleta*, *l.* 1. *c.* 18. § 4. "*Nullam veritatem celabo, nec celari permittam, nec murdrari.*" And the words "*pur murdre le droit*" in the articles of that statute, are rendered in *Fleta*, *ibid.* § 8. "*pro jure alicujus muirdriendo.*" The word *murdrum*, (by some derived from the Saxon *Morth*,) whence (as it is said) comes the barbarous Latin *Mordrum*, and *Murdrum*; in *French Meurtre*; though the word *Murdrare*, evidently comes from the Latin *Morti dare*, was a word in use long before the reign of King Canutus, which some would have to signify a violent death; and sometimes the Saxons expressed it by *morthdæd* and *morth weorc*, a deadly work: But the Sax. *morth* relates generally to *mors*.

The usage of fining the vill or the hundred was common among the ancient Goths, in Sweden and Denmark, who supposed the neighbourhood, unless they produced the murderer, to have perpetrated, or at least connived at, the murder; and, according to Bracton, it was introduced into this kingdom by King Canute to prevent his countrymen the Danes from being privily murdered by the English; and was afterwards continued by William the Conqueror, for the like security of his own Normans. *Bract. l.* 3. *tr.* 2. *c.* 15. 1 *Hal. P. C.* 447. And therefore if, upon inquisition had, it appeared that the person slain was an Englishman, (the presentment whereof was denominated *Englescherie*) the county seems to have been excused from this burthen. *Bract. ubi supra.* See this Dict. tit. *Englecery*. But, this difference being totally abolished by *stat.* 14 *E.* 3. *c.* 4. we must define murder in quite another manner; without regarding whether the party slain was killed openly or secretly, or whether he was of English or foreign extraction. See *Staunf. P. C. l.* 1. *c.* 10. as also 1 *Hawk. P. C.* 31. where it is said that in the ancient times above alluded to, the open killing of a man through anger or malice was not called *murder*; but *voluntary Homicide*. *Bract.* 121, *a.* 134, *b.* 135, *a.* *Kel.* 121.

The law concerning *Englescherie* having been abolished by *stat.* 14 *Ed.* 3. *c.* 4. the killing of an Englishman or foreigner through malice prepense, whether committed openly or secretly, was by degrees called *murder*; and *stat.* 13 *Rich.* 2. *c.* 1. which restrains the King's pardon in certain cases, does in the preamble, under the general name of *murder*, include all such *Homicide* as shall not be pardoned without special words; and, in the body of the act, expresses the same by *murder*, or killing by *await*, *assault*, or *malice prepensed*. And doubtless the makers of *stat.* 23 *H.* 8. *cap.* 1. which excluded all *wilful murder* of *malice prepense* from the benefit of clergy, intended to include open, as well as private, *Homicide*, within the word *murder*. 1 *Hawk. P. C. c.* 31. § 2. *S. P. C.* 18, *b.* 19, *a.*

By *Murder*, therefore, says Hawkins, at this day we understand, the wilful killing of any Subject whomsoever, through *malice forethought*, whether the person slain be an *Englishman* or foreigner. 1 *Hawk. P. C. c.* 31. § 3.

*Murder* is thus defined, or rather described, by Sir *Edward Coke*: "When a person of sound memory and discretion, unlawfully killeth any reasonable creature in being, and under the King's peace, with malice aforethought, either express or implied." 3 *Inst.* 47. 1 *Hale, P. C.* 424. 448. 9. 1 *Hawk. P. C. c.* 31. § 3. *Fost.* 256. 1 *East's P. C. c.* 5. § 2. The best way of examining the nature of this crime will be by considering the several branches of this definition.

First, murder must be committed by a *person of sound memory and discretion*: for lunaticks or infants, as was formerly observed, are incapable of committing any crime; unless in such cases where they shew a consciousness of doing wrong, and of course a discretion, or discernment, between good and evil.

One under the age of discretion, or *non compos mentis*, cannot be guilty of *murder*; though if it appears by circumstances, as that the infant did hide the body, &c. *it is felony. H. P. C.* 43. 3 *Inst.* 46. 54.

If an infant under twelve years old, hath an extraordinary wit, that *it may be presumed he knows what he does*, and he kill another, it may be felony and *murder*; otherwise it shall not. 3 *H.* 7. 13. *Plowd.* 191.

See the case of *William York*, at Bury Summer assizes in 1741. *Foster's Rep.* 70. and this Dict. tit. *Infant*, I.

Next, murder happens when a person of such sound discretion *unlawfully killeth*. The unlawfulness arises from the killing without warrant or excuse: and there must also be an actual killing to constitute murder; for a bare assault, with intent to kill, is only a great misdemeanour, though formerly it was held to be murder. See 1 *Hal. P. C.* 425.

The killing may be by poisoning, striking, starving, drowning, and a thousand other forms of death, by which human nature may be overcome. And if a person be indicted for one species of killing, as by *poisoning*, he cannot be convicted by evidence of a totally different species of death, as by *shooting* with a pistol, or *starving*. But where they only differ in circumstances, as if a *wound* be alledged to be given by a sword, and it proves to have arisen from a staff, an ax, or a hatchet, this difference is immaterial. 3 *Inst.* 319. 2 *Hal. P. C.* 185. Of all species of deaths, the most detest-

able is that of poison; because it can of all others be the least prevented either by manhood or forethought. 3 *Inst.* 48. And therefore by the *stat.* 22 *Hen.* 8. *c.* 9. it was made treason, and a more grievous and lingering kind of death was inflicted on it than the Common-law allowed; namely, boiling to death; but this act did not live long, being repealed by *stat.* 1 *Ed.* 6. *c.* 12. § 10. 13. which declares that all wilful killing by poisoning of any person shall be adjudged wilful murder, of malice prepensed. By *stat.* 43 *Geo.* 3. *c.* 58. administering poison with intent to kill is a capital felony. See title *Mischief, Malicious.*

There was also, by the ancient Common-law, one species of killing held to be murder which may be dubious at this day, as there hath not been an instance wherein it has been held to be murder, for many ages past; namely by bearing *false witness* against another, with an express, premeditated design to take away his life, so as the innocent person be condemned and executed. *Mirror c.* 1. § 9. 19. *Brit. c.* 52. *Bracton l.* 3. *c.* 4. There is no doubt but this is equally murder *in foro conscientiæ*, and in principle of law, as killing with a sword; though the modern law (to avoid the danger of deterring witnesses from giving evidence upon capital prosecutions, if it must be at the perils of their own lives,) has not yet punished it as such. See 3 *Inst.* 48. *Fost.* 131. 4 *Comm.* 196. 1 *East's P. C. c.* 5. § 94. *n.* and this Dict. tit. *Perjury.*

A gaoler knowing a prisoner to be affected with an epidemic distemper, confines another prisoner against his will, in the same room with him, by which he catches the infection, of which the gaoler had notice, and the prisoner dies; this is a felonious killing. *Stra.* 856. 9 *St. Tr.* 146. So to confine a prisoner in a low, damp, unwholesome room, not allowing him the common conveniences, which the decencies of nature require, by which the habits of his constitution are so affected as to produce a distemper of which he dies; this is also a felonious Homicide. *Stra.* 884. *Ld. Raym.* 1578.—For though the law invests gaolers with all necessary powers, for the interest of the common-wealth, they are not to behave with the least degree of wanton cruelty to their prisoners, O. B. 1784. *p.* 1177.—And those were deliberate acts of cruelty, and enormous violations of the trust the law reposeth in its ministers of justice. *Fost.* 322.

In some cases a man shall be said, in the judgment of the law, to kill one who is in truth actually killed by another, or by himself; as where one by duress of imprisonment compels a man to accuse an innocent person, who, on his evidence, is condemned and executed; or where one incites a madman to kill himself or another: or where one lays poison with an intent to kill one man, which is afterwards accidentally taken by another who dies thereof. 1 *Hawk. P. C. c.* 31. § 7. *S. P. C.* 36. 3 *Inst.* 91. *Dalt. cap.* 93. *Plowd. Com.* 474.

If a man however does such an act, of which the probable consequence may be, and eventually is death, such killing may be murder although no stroke be struck by himself, and though no killing may be primarily intended; as was the case of the unnatural son, who exposed his sick father to the air, against his will, by reason whereof he died. 1 *Hawk. P. C. c.* 31. § 5. Of the harlot, who laid her child under leaves in an orchard, where a kite struck it and killed it. 1 *Hal. P. C.* 432. And of the parish officers, who shifted a child from parish to parish, till it died for want of care and sustenance. *Palm.* 545. And where a child was placed in a hog-stye where it was devoured. 1 *East's P. C. c.* 5. § 13. So also, in general, any one who, assuming to take care of another, refuses them necessary subsistence, or by any other severity, though not of a nature to produce immediate death, as by putting the party in such a situation as may possibly be dangerous to life or health, if death actually and clearly ensues in consequence of it, it is murder.—And this mode of killing is of the most aggravated kind, because a long time must unavoidably intervene before the death can happen, and also many opportunities of deliberation, and reflection. *Self's Case.* 1 *East's P. C. c.* 5. § 13. and *Squire's Case, Staffordshire Ass.* 1799. *Russell on Crimes, lib.* 3. *c.* 1.

If a man hath a beast that is used to do mischief; and he, knowing it, *suffers* it to go abroad, and it kills a man, even this is manslaughter in the owner; but if he had purposely *turned it loose*, though barely to frighten people and make what is called sport, it is as much murder, as if he had incited a bear or dog to worry them. See 1 *Hal. P. C.* 431.

*Hawkins* says, that he who wilfully neglects to prevent a mischief, which he may and ought to provide against, is, *as some have said*, in judgment of the law, the actual cause of the damage which ensues; and therefore if a man have an ox or horse, which he knows to be mischievous, by being used to gore or strike at those who came near them, and do not tie them up, but leave them to their liberty, and they afterwards kill a man, according to some opinions, the owner may be indicted, as having himself killed him; and this is agreeable to the Mosaical law. However, it is agreed by all, such a person is guilty of a very gross misdemeanour. 1 *Hawk. P. C. c.* 31. § 1. *Fitz. Corone*, 311. *S. P. C.* 17, *a.* *Crom.* 24, *b.* *Dalt. cap.* 93. *Pult.* 122, *b.* *H. P. C.* 53. *Exodus, c.* 2. *v.* 29.

If a physician or surgeon gives his patient a potion or plaister to cure him, which contrary to expectation kills him, this is neither murder, nor manslaughter but misadventure; and he shall not be punished criminally, however liable he might formerly have been to a civil action, for neglect or ignorance. *Mirror, c.* 4. § 16. But it hath been holden, that if he is not a *regular* physician or surgeon, who administers the medicine or performs the operation, it is manslaughter at the least. *Britt. c.* 5. 4 *Inst.* 251. Yet Sir Mathew Hale very justly questions the law of this determination. 1 *Hal. P. C.* 430.

A question has been raised whether an indictment for murder could be maintained for killing a female infant by *ravishing* her, but the point was not decided; the judges to whom the point was referred gave no opinion, as the indictment was held defective in not having stated that the prisoner gave the deceased a mortal wound. *Ladd's Ca.* 1 *Leach*, 96. 1 *East. P. C.* 226.

In order also to make the killing murder, it is requisite that the party die within a year and a day after the stroke received, or cause of death administered; in the computation of which the whole day upon which the hurt was done shall be reckoned the first. 1 *Hawk. P. C. c.* 31. § 9.

But if a person hurt by another, die thereof within a *year and a day*, it is no excuse for the other, that he might have recovered, if he had not neglected to take care of himself. 1 *Hawk. P. C. c.* 31. § 10. 3 *Inst.* 53. *Kelynge*, 26. 1 *Keb.* 17.

If one dies within a year and a day, through disorderly living, it shall be no excuse, *the wound will be judged the principal cause of his death;* but if one wounded die after that time, the law will presume he died a natural death. 3 *Inst.* 53. *H. P. C.* 55. *Kel.* 26. If a man receive a wound that is not mortal; but either for want of help, or by neglect, it turns to a fever, &c. which causes the party's death, it is *murder:* so it is, where a man has some disease, which possibly would terminate his life in half a year, and another wounds him, that it hastens his end, &c. But if, by ill applications of the party, or those about him, of unwholesome medicines, the wounded person dies; if this plainly appears, it is not *murder*, by *Hale, Hist. P. C.* 428.

As to the place where murder is within the conusance of the law; it seems that the killing of one who is both wounded and dies out of the realm, or wounded out of the realm and dies here, cannot be determined at Common-law, because it cannot be tried by a jury of the neighbourhood where the fact was done. But it is agreed, that the death of one who is

both wounded and dies beyond sea, and it is said by some, that the death of him who dies here of a wound given him there, may be heard and determined before the Constable and Marshal, according to the Civil law, if the King please to appoint a Constable. And it seemeth also to be clear, that such a fact being examined by the privy council, may by force of *stat.* 33 *H.* 8. *cap.* 23. be tried before commissioners appointed by the King, in any county of England. 1 *Hawk. P. C. c.* 31. § 11. 3 *Inst.* 48. 2 *Inst.* 51. *Co. Lit.* 75. *S. P. C.* 65, *a. Bro. Appeal,* 153. *Cro. Car.* 247. 1 *And.* 195.

It has been positively decided that this act, 33 *H.* 8. extends to all murders committed out of the realm, *Ealing's Case,* 1 *East P. C. c.* 5. § 133. By *stat.* 43 *Geo.* 3. *c.* 113. § 6. the powers of that act, 33 *H.* 8. *c.* 23. are extended to accessories before the fact; and the jury is empowered to find the accused guilty of manslaughter, if the facts require it, or may find a special verdict.

A murder at sea was anciently cognisable only by the Civil law; but now by force of *stats.* 27 *H.* 8. *c.* 4. 28 *H.* 8. *c.* 15. it may be tried and determined before the King's Commissioners in any county of England, according to the course of the Common-law; yet the death of one who is at land, of a wound received at sea, is neither determinable at Common-law, nor by force of either of these statutes; but it seems, that it may be tried by the Constable and Marshal, or before the commissioners appointed in pursuance of the aforesaid statute of 33 *H.* 8. *c.* 23. 1 *Hawk. P. C. c.* 31. § 12. 3 *Inst.* 48, 49. 1 *Leon.* 270. *H. P. C.* 54. 3 *Inst.* 48. See *post, stat.* 2 *Geo.* 2. *c.* 21.

The Commissioners to be appointed under *stats.* 27 & 28 *H.* 8. are the Admiral or his deputy, and three or four more (among whom two Common-law judges are constantly appointed, who in effect try all prisoners); the indictment being first found by a Grand Jury of 12 men, and afterwards tried by another jury. This is now the only method of trying marine felonies in the Court of Admiralty. The Judge of the Admiralty still presiding therein, just as the Lord Mayor presides at the Sessions, in London. 4 *Comm.* 269. See this Dict. tit. *Admiralty.*

By *stat.* 39 *Geo.* 3. *c.* 37. persons tried under the act 28 *H.* 8. *c.* 15. for murder, and found guilty of manslaughter only, are declared entitled to the benefit of clergy, &c. as if it had been committed on land. And by *stat.* 46 *Geo.* 3. *c.* 54. such offences may be tried in any of his Majesty's islands or colonies by virtue of a commission under the Great Seal to Commissioners, who shall have all such powers as are given by *st.* 28 *H.* 8. *c.* 15. And by *st.* 57 *Geo.* 3. *c.* 53. murders, &c. committed in the Bay of Honduras, New Zealand, Otcheite, or any islands or places, not within his Majesty's dominions, by the master or crew of any British ship, or persons having been such, may be tried in any of his Majesty's islands or colonies, under a commission issued by virtue of the act 46 *G.* 3. *c.* 54. Now, at Honduras such offences may be tried by commissioners specially appointed by virtue of a subsequent act. 59 *Geo.* 3. *c.* 44. See also *stat.* 58 *Geo.* 3. *c.* 98, as to offences relative to the Slave-trade, tit. *Slaves.* Under *stat.* 10, 11 *W.* 3. *c.* 25. § 13. murders committed in Newfoundland, &c. may be tried in any county in England; and it does not appear that this act is repealed by *stat.* 32 *Geo.* 3. *c.* 46. or the acts creating courts of jurisdiction in that country.

It is said by some, that the death of one who died in one county, of a wound given in another, is not indictable at all at Common-law, because the offence was not complete in either county, and the jury could inquire only of what happened in their own county. But it hath been holden by others, that if the corpse were carried into the county where the stroke was given, the whole might be inquired of by a jury of the same county. And it is agreed, that an appeal might be brought in either county, and the fact tried by a jury returned jointly from each. And at this day, by force of *stat.* 2 & 3 *Ed.* 6. *c.* 24. the whole is triable by a jury of the county wherein the death shall happen, on an indictment found, or appeal brought, in the same county. 1 *Hawk. P. C. c.* 31. § 13. 3 *Inst.* 48, 49. *Bro. Coro.* 140, 141. 143. *Indictm.* 31. *S. P. C.* 90, *c.* 6 *H.* 7. 10, *a. Finch. Law,* 411. *S. P. C.* 182. *Bro. Appeal,* 3. 80. 83. 85. 149.

Also by force of *stat. H.* 8. *cap.* 6. a murder in Wales may be enquired of in an adjoining English county. 1 *Hawk. P. C. Cro. Car.* 247. 1 *Jon.* 255. 1 *Lev.* 113. *Latch.* 13. 118. *Wils.* 320.

By *stat.* 2 *Geo.* 2. *cap* 21. it is enacted that where any person shall be feloniously stricken or poisoned upon the sea, or at any place out of England, and shall die of the same in England; or where any person shall be feloniously stricken or poisoned within England, and shall die of such stroke or poisoning upon the sea, or out of England, an indictment thereof found by jurors of the county in England, in which such *death, stroke,* or *poisoning* shall happen, whether it be found before any coroner upon view of such dead body, or before justices of peace, or other justices who shall have authority to inquire of murders, shall be as effectual, as well against the principals as the accessories, as if such stroke or poisoning and death, and the offence of such accessories, had happened in the same county; and every such offender shall have the like defences, (except challenges for the hundred) as if such stroke of poisoning and death, and the like offence of such accessories, had happened in the same county where such indictment shall be found. See title *Indictment,* II.

With respect to *Accessories* in murders, as distinguished from aiders and abettors actually present, see this Dict. title *Accessory*:—In the case of several persons being present at the death of a man, all of whom are principals, yet they may be guilty of different degrees of Homicide, as one of murder and another of manslaughter: (or one of murder and one of petty treason, see *post, Div.* 4.) If there be no malice in the party striking, but malice in an abettor, it will be murder in the latter, though only manslaughter in the former. 1 *East. P. C. c.* 5. § 121. And it has been decided that if the person charged as principal be acquitted, a conviction of another charged in the indictment as present, aiding and abetting in the murder, is good; for all are principals, and it is not material who actually did the murder. *Wallis's Ca. Salk.* 334. See *Shaw's Case,* 1 *Leach,* 360. 1 *East. P. C. c.* 5. § 121. And though antiently the person who gave the fatal stroke was considered as the principal, and those who were present aiding and assisting only as accessories, yet it has been long settled, that all who are present aiding and assisting, are equally principals with him who gave the stroke whereof the party died; though they are called principals in the second degree. 1 *Hale,* 437. 4 *Plowd. Com.* 100, *a.* So that if A. be indicted for murder or manslaughter, and B. and C. for being present aiding and assisting, if A. appear not, but B. and C. appear, they shall be arraigned, and if convicted shall receive judgment, though A. neither appear nor be outlawed. 1 *Hale,* 437. *Plowd.* 97. 100. *Gythin's case.* And if A. be indicted as having given the mortal stroke, and B. and C. as present aiding and assisting, and upon the evidence it appears that B. gave the stroke, and A. and C. were only aiding and assisting, it maintains the indictment, and judgment shall be given against all: for it is only a circumstantial variance, and in law it is the stroke of all that were present aiding and abetting. 1 *Hale,* 438. *Plowd. Com.* 98, *a.* 9 *Rep.* 67, *b. Mackaley's Case,* 1 *East P. C. c.* 5. § 121.

If two having *malice* fight, and the servant of one of them, not knowing of the malice, killeth the other, this is murder in the master, and manslaughter in the servant: though if there be a conspiracy to kill a man, but *no malice* against his

servant; if the servant be slain, the malice against the master shall be construed to extend to his servant; and the killing the servant is murder. *Dyer*, 128.

Farther; the person killed must be "*a reasonable creature in being, and under the King's peace*," at the time of the killing; therefore to kill an alien, a Jew, or an outlaw, who are all under the King's peace and protection, is as much murder, as to kill the most regular born Englishman, except he be an alien enemy in time of war. 3 *Inst.* 50. 1 *Hal. P. C.* 433. To kill a child in its mother's womb was formerly not held murder, but a great misprision. 3 *Inst.* 50. 1 *Hal. P. C. c.* 31. § 16. But see 1 *Hawk. P. C.* 433. In this case, as also in the case of the murder of bastard children by the mother, special provisions are enacted by *stat.* 43 *Geo.* 3. *c.* 58. which repeals 21 *Jac.* 1. *c.* 27. See title *Bastard*, II, 2.

It seems agreed, that where one counsels a woman to kill her child when it shall be born, who afterwards kills it in pursuance of such advice, he is an accessory to the murder. 1 *Hawk. P. C. c.* 31. § 17. *Dyer*, 186. 3 *Inst.* 51.

Lastly, the killing must be committed *with malice aforethought*, to make it the crime of murder. This is the grand criterion which now distinguishes murder from other killing, and this malice prepense, *malicia præcogitata*, is not so properly spite or malevolence to the deceased in particular, as any *evil design* in general, the dictate of a wicked, depraved, and malignant heart. *Fost.* 256. *un disposition à faire un male chose.* 2 *Rol. Rep.* 461. and it may be either *express* or *implied* in law. Express is, when one with a sedate, deliberate mind, and formed design, doth kill another; which formed design is evidenced by external circumstances, discovering that inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes, to do him some bodily harm. 1 *Hal. P. C.* 451. This takes in the case of deliberate *duelling*, where both parties meet avowedly, with an intent to murder; thinking it their duty as gentlemen, and claiming it as their right to wanton with their own lives and those of their fellow creatures; without any warrant or authority from any power, either divine or human, but in direct contradiction to the laws both of God and man; and therefore the law has justly fixed the crime and punishment of murder on them and on their seconds also. 1 *Hawk. P. C. c.* 31. § 21, *et seq.*

As to the first instance of this kind, it seems agreed, that wherever two persons in cold blood meet and fight, on a precedent quarrel, and one of them is killed, the other is guilty of murder, and cannot help himself by alleging that he was first struck by the deceased; or that he had often declined to meet him, and was prevailed upon to do it by his importunity; or that it was his only intent to vindicate his reputation, or that he meant not to kill, but only to disarm his adversary: for since he deliberately engaged in an act in defiance of the laws, he must at his peril abide the consequences thereof. 1 *Hawk. P. C. c.* 31. § 21. 1 *Bulst.* 86, 87. 2 *Bulst.* 147. *Crom.* 22, *b.* 1 *Rol. Rep.* 360. 3 *Bulst.* 171. *H. P. C.* 48.

From hence it clearly follows, that if two persons quarrel over night, and appoint to fight the next day, or quarrel in the morning, and agree to fight in the afternoon, or such a considerable time after, by which, in common intendment, it must be presumed that the blood was cooled, and then they meet and fight, and one kill the other, he is guilty of murder. 1 *Hawk. P. C. c.* 31. § 22. 3 *Inst.* 51. *H. P. C.* 48. *Kelynge*, 56. 1 *Lev.* 180.

And wherever it appears, from the whole circumstances of the case, that he who kills another on a sudden quarrel was master of his temper at the time, he is guilty of murder; as if after the quarrel he fall into other discourse, and talk calmly thereon: or perhaps, if he has so much consideration as to say, that the place wherein the quarrel happens is not convenient for fighting; or that if he should fight at present, he should have the disadvantage by reason of the height of his shoes, &c. 1 *Hawk. P. C. c.* 31. § 23. *Kelynge*, 56. 1 *Sid.* 177. 1 *Lev.* 180.

If A. on a quarrel with B. tells him that he will not strike him, but that he will give B. a pot of ale to strike him, and thereupon B. strike, and A. kills him, he is guilty of murder; for he shall not elude the justice of the law by such pretence to cover his malice. 1 *Hawk. P. C. c.* 31. § 24. *H. P. C.* 48.

In like manner, if B. challenge A. and A. refuse to meet him; but, in order to evade the law, tells B. that he shall go the next day to such a town about his business, and accordingly B. meet him the next day in the road to the same town, and assault him, whereupon they fight, and A. kills B. he is in the opinion of *Hawkins*, guilty of murder; unless it appear by the whole circumstances that he gave B. such information accidentally, and not with a design to give him an opportunity of fighting. 1 *Hawk. P. C. c.* 31. § 25. *Crom.* 22, *b.* *H. P. C.* 48.

And at this day it seems to be settled, that if a man assaults another with *malice prepense*, and after be driven by him to the wall, and kill him there in his own defence, he is guilty of murder in respect of his first intent. *Hawk. P. C. c.* 31. § 26. *Crom.* 22, *b.* *Dalt. cap.* 93. *H. P. C.* 47. *Kelynge*, 58. *Mawgridge's* case.

If A. and B. meet deliberately to fight, and A. strike B. and pursue B. so closely, that B. in safeguard of his life kills A. this is murder in B. because their meeting was a compact and an act of deliberation, in pursuance of which all that follows is presumed to be done. 1 *Hale*, 452. 480. See 1 *East's P. C. c.* 5. § 54.

It hath been adjudged, that even upon a sudden quarrel, if a man be so far provoked by any bare words or gestures of another, as to make a push at him with a sword, or to strike at him with any other such weapon as manifestly endangers his life before the other's sword is drawn, and thereupon a fight ensue, and he who made such assault kill the other, he is guilty of murder; because that by assaulting the other in such an outrageous manner, without giving him an opportunity to defend himself, he shewed that he intended not to fight with him but to kill him, which violent revenge is no more excused by such a slight provocation, than if there had been none at all. 1 *Hawk. P. C. c.* 31. § 27. *Crom.* 23, *a*, *b.* *Dalt. cap.* 93. *Kelynge*, 61. *Mawgridge's* case.

But it is said, that if he who draws upon another in a sudden quarrel, make no pass at him till his sword is drawn, and then fight with him, he is guilty of manslaughter only; because that, by neglecting the opportunity of killing the other, he was on his guard, and in a condition to defend himself, with like hazard to both, he shewed that his intent was not so much to *kill*, as to *combat* with the other; in compliance with those common notions of honour, which, prevailing over reason during the time that a man is under the transports of a sudden passion, so far mitigate his offence in fighting, that it shall not be adjudged to be of *malice prepense*. *Hawk. P. C. c.* 31. § 28. *Kelynge*, 55. 61. 131. 2 *Rol. Rep.* 461.

And if two happen to fall out upon a sudden, and presently agree to fight, and each of them fetch a weapon, and go into the field, and there one kills the other, he is guilty of manslaughter only, because he did it in the heat of blood. 1 *Hawk. P. C. c.* 31. § 29. *H. P. C.* 48. 3 *Inst.* 51.

And such an indulgence is shewn to the frailties of human nature, that where two persons, who have formerly fought on malice, are afterwards to all appearance reconciled, and fight again on a fresh quarrel, it shall not be presumed that they were moved by the old grudge, unless it appear by the whole circumstances of the fact. 1 *Hawk. P. C. c.* 31. § 30. *Crom.* 23, *a.* *Dalt. cap.* 93. *H. P. C.* 49. 1 *Rol. Rep* 360.

But the law so far abhors all duelling in cold blood, that

not only the principal who actually kills the other, but also his seconds are guilty of murder, whether they fought or not; and some have gone so far as to hold, that the seconds of the persons killed are also equally guilty, in respect of that countenance which they give to their principals in the execution of their purpose, by accompanying them therein, and being ready to bear a part with them: but perhaps the contrary opinion is the more plausible; for it seems too severe a construction to make a man by such reasoning the murderer of his friend, to whom he was so far from intending any mischief, that he was ready to hazard his own life in his quarrel. 1 *Hawk. P. C. c.* 31. § 32. *H. P. C.* 51. *Dalt. cap.* 93.

Any formed design of doing mischief may be called malice; and therefore not only such killing as proceeds from premeditated hatred or revenge against the person killed, but also in many other cases, such as is accompanied with those circumstances that shew the heart to be perversely wicked, is adjudged to be of malice *prepense* or *aforethought*, and consequently murder. 1 *Hawk. P. C. c.* 31. § 18. *Kelynge*, 127. *Stran.* 766.

If a man happen to kill another in the execution of a malicious and deliberate purpose to do him a personal hurt, by wounding or beating him; or in the wilful commission of any unlawful act, which necessarily tends to raise tumults and quarrels, and consequently cannot but be attended with the danger of personal hurt to some one or other; he shall be adjudged guilty of murder. 1 *Hawk. P. C. c.* 29. § 10. *H. P. C.* 52. 57. *Kelynge*, 117.

*A fortiori*, He shall come under the same construction, who, in the pursuance of a deliberate intention to commit a felony, chances to kill a man, as by shooting at tame fowl with an intent to steal them, &c. for such persons are by no means favoured, and they must at their peril take care of the consequence of their actions; and it is a general rule, that wherever a man, intending to commit one felony, happens to commit another, he is as much guilty as if he had intended the felony which he actually commits. 1 *Hawk. P. C. c.* 29. § 11. 3 *Inst.* 56. *Helynge*, 117. *H. P. C.* 52.

If any one shoot at any wild fowl upon a tree, and the arrow killeth any reasonable creature afar off, without any evil intent in him, this is misadventure; for it was not unlawful to shoot at the wild fowl: But if he had shot at a cock or hen, or any tame fowl of another man's, and the arrow by mischance had killed a man; if his intention was to steal the poultry, (which must be collected from circumstances) it will be murder by reason of that felonious intent: but if it was done wantonly, and without that intention, it will be barely manslaughter. *Fost.* 258, 259.

The rule before laid down supposeth, that the act from which death ensued, was *malum in se*. For if it was barely *malum prohibitum*, as shooting at game by a person not qualified by statute-law to keep or use a gun for that purpose; the case of a person offending, will fall under the same rule as that of a qualified man. For the statutes prohibiting the destruction of the game under certain penalties, will not in a question of this kind, enhance the accident beyond its intrinsic moment. *Fost.* 259.

If upon a sudden provocation one beats another in a cruel and unusual manner, so that he dies, though he did not intend his death, yet he is guilty of murder by express malice; that is, by an express *evil design*, the genuine sense of *malitia*. As when a park-keeper tied a boy, that was stealing wood, to a horse's tail, and dragged him along the park; when a master corrected his servant with an iron bar, and a school-master stamped on his scholar's belly; so that each of the sufferers died: these were justly held to be murders, because the correction being excessive, and such as could not proceed but from a bad heart, it was equivalent to a deliberate act of slaughter. 1 *Hal. P. C.* 454. 473. 474. Neither shall he be guilty of a less crime, who kills another in consequence of such a wilful act, as shews him to be an enemy to all mankind in general; as going deliberately, and with an intent to do mischief, upon a horse used to strike, or coolly discharging a gun among a multitude of people. *Ld. Raym.* 143. 1 *Hawk. P. C. c.* 29. § 12.

And it is no excuse that he intended no harm to any one in particular, or that he meant to do it only for sport, or to frighten the people, &c. *H. P. C.* 32. 44. 3 *Inst.* 59. *Dalt. cap.* 93. 97. 11 *H.* 7. 23, *a. Bro. Coro.* 229.

So if a man resolves to kill the next man he meets, and does kill him, it is murder, although he knew him not; for this is universal malice. And if two or more come together to do an unlawful act against the King's peace, of which the probable consequence might be bloodshed, as to beat a man, to commit a riot, or to rob a park; and one of them kill a man, it is murder in them all, because of the unlawful act, the *malitia præcogitata*, or evil intended before hand. 1 *Hawk. P. C. c.* 31. § 46.

Murder occasioned through an express purpose to do some personal injury to him who is slain, is properly said to be of express malice: Such as happens in the execution of an unlawful action, principally intended for some other purpose, and *not expressed in its nature to do a personal injury* to him in particular that is killed, is most properly malice implied. *Kel.* 129, 130.

In many cases where no malice is expressed, the law will imply it: as, where a man wilfully poisons another, in such a deliberate act the law presumes malice, though no particular enmity can be proved. 1 *Hal. P. C.* 455. And if a man kills another suddenly, without any, or without a considerable provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act, upon a slight or no apparent cause. No affront, by words or gesture only, is a sufficient provocation, so as to excuse or extenuate such acts of violence as manifestly endanger the life of another. 1 *Hawk. P. C. c.* 31. § 33. 1 *Hal. P. C.* 455, 456. But if the person so provoked had unfortunately killed the other, by beating him in such a manner as shewed only an intent to chastise, and not to kill him, the law so far considers the provocation of contumelious behaviour as to judge it only manslaughter, and not murder. *Fost.* 291. In like manner, if one kills an officer of justice, either civil or criminal, in the execution of his duty, or any of his assistants endeavouring to conserve the peace, or any private person endeavouring to suppress an affray; or apprehends a felon, knowing his authority, or the intention with which he interposes; the law will imply malice; and the killer shall be guilty of murder. 1 *Hal. P. C.* 457. *Fost.* 308, &c. And if one intends to do another felony, and undesignedly kill a man, this is also murder. 1 *Hal. P. C.* 465. Thus if one shoots at A. and misses *him*, but kills B. this is murder; because of the previous felonious intent, which the law transfers from one to the other. The same is the case where one lays poison for A.; and B. against whom the prisoner had no malicious intent, takes it, and it kills him; this is likewise murder. 1 *Hal. P. C.* 466. So also if one gives a woman with child a medicine to procure abortion, and it operates so violently as to kill the woman, this is murder in the person who gave it. 1 *Hal. P. C.* 429.

As to such murder as happens in killing another *without any provocation*, or but upon a slight one; it is to be observed, that wherever it appears that a man killed another, it shall be intended *primâ facie* that he did it maliciously, unless he can make out the contrary, by shewing that he did it on a sudden provocation, &c. 1 *Hawk. P. C. c.* 31. § 32. *Kelynge*, 27.

As the indulgence which is shown by the law in some cases to the first transport of passion is a condescension to

human frailty, to that *furor brevis*, which while the frenzy lasts, renders a man deaf to the voice of reason, so the provocation which is allowed to extenuate in the case of Homicide, must be something which a man is conscious of, which he feels and resents at the instant the fact, which he would extenuate, is committed. *Fost.* 315. All the circumstances of the case must lead to the conclusion that the act done, though intentional of death or great bodily harm, was not the result of a cool deliberate judgment and previous malignity of heart, but solely imputable to human infirmity. 1 *East. P. C. c.* 5. § 19. For there are many trivial, and some considerable, provocations which are not permitted to extenuate an act of Homicide, or rebut the conclusion of malice, to which the other circumstances of the case may lead. See *Russell on Crimes, lib.* 3 *c.* 1. § 1.

It seems agreed, that no breach of a man's word or promise, no trespass either to lands or goods, no affront by bare words or gestures, however false or malicious it may be, and aggravated with the most provoking circumstances, will excuse him from being guilty of murder, who is so far transported thereby, as immediately to attack the person who offends him, in such a manner as manifestly endangers his life, without giving him time to put himself upon his guard, if he kills him in pursuance of such assault, whether the person slain did at all fight in his defence or not: for so base and cruel a revenge cannot have too severe a construction. 1 *Hawk. P. C. c.* 31. § 33. *Kelynge*, 131. 135. 2 *Rol. Rep.* 460, 461. *Dalt. cap.* 93. *Cro. Eliz.* 779. *Noy*, 171. 1 *Sid.* 277. 1 *Levinz.* 180. *Hob.* 121. *con.* 1 *Jon.* 432, *a.*

But if a person so provoked had beaten the other only in such a manner, that it might plainly appear that he meant not to kill, but only chastise him; or if he had restrained himself till the other had put himself on his guard, and then, in fighting with him, had killed him, he had been guilty of manslaughter only. 1 *Hawk. P. C. c.* 31 § 34. *Kelynge*, 55. 61. 131.

And of the like offence shall he be adjudged guilty, who, seeing two persons fighting together on a private quarrel, whether sudden or malicious, takes part with one of them, and kills the other. 1 *Hawk. P. C. c.* 31. § 35. *Kelynge*, 61, 136. *Cro. Jac.* 296. 12 *Co.* 87.

He cannot be thought guilty of a greater crime than manslaughter, who, finding a man in bed with his wife, or being actually struck by him, or pulled by the nose, or fillipped upon the forehead, immediately kills him; or who happens to kill another in a contention for the wall; or in the defence of his person from an unlawful arrest; or in the defence of his house from those who, claiming a title to it, attempt forcibly to enter it, and *to that purpose shoot at it*, &c. or in the defence of his possession of a room in a public house, from those who attempt to turn him out of it, and thereupon draw their swords upon him; in which case the killing the assailant hath been holden by some to be justifiable; but it is certain that it can amount to no more than manslaughter. 1 *Hawk. P. C. c.* 31. § 36. *H. P. C.* 57. 3 *Inst.* 57. *Kelynge*, 51, 137. *Crom.* 27, *a.*

Nor was he judged criminal in a higher degree, who, seeing his son's nose bloody, and being told by him that he had been beaten by such a boy, ran three quarters of a mile, and having found the boy, beat him *with a small cudgel*, whereof he afterwards died. 1 *Hawk. P. C. c.* 31. § 48. *Cro. Jac.* 296. 12 *Co.* 87.

Nor was he thought more criminal, who encouraged by a concourse of people, threw a pick-pocket into a pond adjoining to the road, in order to avenge the theft, by ducking him, but without any apparent intention to take away his life, and the pick-pocket was drowned; for although this mode of punishment is highly unjustifiable and illegal, yet the law respects the infirmities and imbecilities of human nature, where certain provocations are given. O. B. 85, N°. 751.—So also where three Scotch soldiers were drinking together in a public-house, one of them struck some strangers that were drinking in another box, with a small rattan; they having used several opprobrious epithets, reviling the character of the Scotch nation: an altercation ensued, and one of the strangers laid hold of the soldier who had stricken, and threw him against a settle.—The altercation increased, and when the soldiers had paid the reckoning, the strangers again shoved him from the room into the passage; upon this the soldier exclaimed, that "he did not mind killing an Englishman more than eating a mess of crowdy;" the strangers, assisted by another person, then violently pushed the soldier out of the house, whereupon the soldier instantly turned round, drew his sword, and stabbed the stranger to the heart. This was adjudged *Manslaughter*. 5 *Burr.* 2799.—But in every case of Homicide, upon provocation, how great soever it be, if there is sufficient time for passion to subside, and for reason to interpose, such Homicide will be murder. *Fost.* 278. 296. 1 *Hale*, 486. 1 *Vent.* 158. *Raym.* 212. *Leach's Hawk. P. C.* i. *c.* 31. § 37, in *n.*

When one executes his revenge, upon a sudden provocation, in such a cruel manner, *with a dangerous weapon*, as shews a malicious intention to do mischief; and death ensues, it is express malice and murder from the nature of the fact. *Kel.* 55. 61. 65. 130. A man chided his servant, and upon some cross answer given, he having a hot iron in his hand, ran it into the servant's belly, of which he died; this was adjudged murder. *Kel.* 64.

If a person is trespassing upon another, by breaking his hedges, &c. and the owner upon sight thereof, take up a hedge-stake, and give him a stroke on his head, whereof he dies, this is murder, because *it is a violent act beyond the proportion of the provocation*. *H. P. C.* And where a boy was upon a tree in a park cutting of wood, and the keeper bids him come down, which he did; and then the keeper struck him several blows with a cudgel, and afterwards, *with a rope, tied him to his horse's tail*, and the horse ran away with him and killed him; this was held to be murder out of malice, the boy having come down at the keeper's command. *Cro. Car.* 139. *H. P. C.*

As to such murder as happens *in killing one whom the person killing intended to hurt* in a less degree: it is to be observed, that wherever a person in cool blood, by way of revenge, unlawfully and deliberately beats another in such a manner that he afterwards dies thereof, he is guilty of murder, however unwilling he might have been to have gone so far. 1 *Hawk. P. C. c.* 31. § 38. *Kelyn.* 119. *Mawgridge's* case, *H. P. C.* 49—52.

Also it seems, that he who, upon a sudden provocation, executeth his revenge in such a cruel manner, as shews a cool and deliberate intent to do mischief, is guilty of murder if death ensue; as where the keeper of a park, finding a boy stealing wood, tied him to a horse's tail, and beat him, whereupon the horse ran away with him and killed him. 1 *Hawk. P. C. c.* 31. § 39. *Cro. Car.* 181. 1 *Jon.* 198, *Palm.* 545. *H. P. C.* 49.

Wherever there is evidence of *express malice*, the plea of provocation will not avail: and in most cases, not even previous blows or struggling, will extenuate Homicide. *Mason's* case, 1 *East. P. C. c.* 5 § 23.

As to the cases where such killing shall be adjudged murder, which happen in *the execution of an unlawful action*, principally intended for some other purpose, and not to do a personal injury to him in particular who happens to be slain, they are as follow: And *first*, such killing as happens in the execution of an *unlawful* action, whereof the principal intention was to commit another felony; it seems agreed, that wherever a man happens to kill another in the execution of

a deliberate purpose to commit any *felony*, he is guilty of murder; as where a person shooting at tame fowl, with an intent to steal them, accidentally kills a man; or where one sets upon a man to rob him, and kills him in making resistance; or where a person shooting at, or fighting with one man, with a design to murder him, misses him, and kills another. 1 *Hawk. P. C. c.* 31. § 40, 41. *Kelynge*, 117. *H. P. C.* 46. 50. *Dalt. cap.* 93. *Moore*, 87.

And not only in such cases, where the very act of a person having such a felonious intent, is the immediate cause of a third person's death, but also where it any way occasionally causes such a misfortune, it makes him guilty of murder; and such was the case of the husband who gave a poisoned apple to his wife, who eat not enough of it to kill her, but innocently, and against the husband's will and persuasion, gave part of it to a child, who died thereof; such also was the case of the wife who mixed *ratsbane* in a potion sent by an apothecary to her husband, which did not kill him, but afterwards killed the apothecary, who, to vindicate his reputation, tasted it himself, having first stirred it about. Neither is it material in this case, that the stirring of the potion might make the operation of the poison more forcible than otherwise it would have been; for inasmuch as such a murderous intention, which of itself perhaps, in strictness, might justly be made punishable with death, proves now, in the event, the cause of the King's losing a subject, it shall be as severely punished as if it had had the intended effect, the missing whereof is not owing to any want of malice, but of power. 1 *Hawk. P. C. c.* 31. § 42. *Plow. Com.* 474. 9 *Co.* 91.

But if one happened to be poisoned by *ratsbane* laid in order to destroy vermin, the person by whom he is so killed is guilty of Homicide *per infortunium* only, because his intentions were wholly innocent. 1 *Hawk. P. C. c.* 31. § 43.

Also if a third person accidentally happen to be killed by one engaged in a combat with another upon a sudden quarrel, it seems that he who kills him is guilty of manslaughter only; but it hath been adjudged, that if a justice of peace, constable, or watchman, or even a private person, be killed in the endeavouring to part those whom he sees fighting, the person by whom he is killed is guilty of murder; and that he cannot excuse himself by alleging that what he did was in a sudden affray in the heat of blood, and through the violence of passion; for he who carries his resentment so high as not only to execute his revenge against those who have affronted him, but even against such as have no otherwise offended him but by doing their duty, and endeavouring to restrain him from breaking through his, shews such an obstinate contempt of the law, that he is no more to be favoured than if he had acted in cool blood. 1 *Hawk. P. C. c.* 31. § 44. *H. P. C.* 45. 50. 3 *Inst.* 52. *Dalt. Cap.* 93. *Savil*, 67. *Kelynge*, 66. 22 *Ass.* 71. 4 *Co.* 40, *b.* 9 *Co.* 68. *Crom.* 25, *a. b.*

Yet it hath been resolved, that if the third person slain in such a sudden affray, do not give notice for what purpose he comes, by commanding the parties in the King's name to keep the peace, or otherwise manifestly shewing his intention to be not to take part in the quarrel, but to appease it, he who kills him is guilty of manslaughter only, for he might suspect that he came to side with his adversary. 1 *Hawk. P. C. c.* 31. § 45. *Kelynge*, 66. If the officer be within his proper district, and known, or but generally acknowledged to have the office he assumeth, the law will presume that the party killed had due notice of his intent, especially if it be in the day-time. *Fost.* 135. 311.

As to such killing as happens in the execution of an *unlawful* action, where the principle design is to commit a *bare breach of the peace*, not intended against the person of him who happens to be slain; it seems clear that where divers persons resolve generally to resist all opposers in the commission of any such breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays; as by committing a violent disseisin with great numbers of people, hunting in a park, &c. and in so doing happen to kill a man, they are all guilty of murder; for they must at their peril abide the event of their actions, who wilfully engage in such bold disturbances of the public peace, in open opposition to, and defiance of, the justice of the nation. 1 *Hawk. P. C. c.* 31. § 46. *Savil*, 67. *Moore*, 86. *Palm.* 35. *Crom.* 24, *b.* 25, *a. H. P. C.* 47. 5 *Mod.* 285. *Dyer*, 128. *pl.* 60. *S. P. C.* 17, *b.*

The fact however must appear to have been committed strictly in prosecution of the purpose for which the party was assembled. *Prin. P. L.* 234:—Therefore, if divers persons be engaged in an unlawful act, and one of them, with malice prepense against *one* of his companions, finding an opportunity, kills him, the rest are not concerned in the guilt of that act. *Kely*, 112; because it hath no connection with the crime in contemplation. *Prin. P. L.* 235.—So where two men were beating another man in the street, a stranger made some observations upon the cruelty of the act, upon which one of the two men gave him a mortal stab with a knife. Both the men were indicted as principles in the murder, yet although both were doing an unlawful act in beating the man, as the death of the stranger did not ensue upon that act, and it appearing that only one of them intended any injury to the person killed, the judges were of opinion that he could not be guilty either as principal or accessory; and upon the case of *R.* v. *Thompson*, *Kely*, 66, 67, he was acquitted. 8 *Mod.* 164. 12 *Mod.* 629. Yet see 12 *Mod.* 256.—*Leach's Hawk. P. C.* i. *c.* 31. § 46. in *n.*

Where divers rioters, having forcible possession of a house, afterwards killed the person whom they had ejected, as he was endeavouring in the night forcibly to regain the possession, and *to fire the house*, they were adjudged guilty of manslaughter only, notwithstanding they did the fact in maintenance of a deliberate injury; perhaps for this reason, *because the person slain was so much in fault himself.* 1 *Hawk. P. C. c.* 31. § 47. *Crom.* 28, *b. H. P. C.* 56.

But if in such, or any other quarrel, whether it were sudden or premeditated, a justice of peace, constable or watchman, or even a private person, be slain in endeavouring to keep the peace, and suppress the affray, he who kills him is guilty of murder; for notwithstanding it was not his primary intention to commit a felony, yet inasmuch as he persists in a less offence with so much obstinacy as to go on in it to the hazard of the lives of those who no otherwise offend him, but by doing their duty in maintenance of the law, which therefore affords them its more immediate protection he seems to be in this respect equally criminal, as if his intention had been to commit a felony. 1 *Hawk. P. C. c.* 31. § 48. *H. P. C.* 45. *Dalt. c.* 93. 3 *Inst.* 52. *Kelyn*, 66. 22 *Ass.* 71. 4 *Co.* 40, *b.* 9 *Co.* 68. *Crom.* 25. See *supra.*

If one attack another to rob him, and by the resistance of the party kills him, this is *murder.* 3 *Inst.* 52. *Dalt.* 334. A person stands by and encourages or commands another to *murder* a man; or if he come with others on purpose to kill him, and stand by while the other persons commit the fact: It will be *murder* in them all. *Plowd.* 98. 11 *Rep.* 5. And if two or more persons come together to do an unlawful act, as to beat a man, rob a park, &c. and one of them kills a person, this is *murder* in all present, aiding or assisting, or that were ready to aid and assist: All will be said to intend the *murder.* 3 *Inst.* 56. *Dalt.* 347. *H. P. C.* 31. And such persons will be judged to be present who are in the same house, though in another room, or in the same park, although half a mile off, &c. *H. P. C.* 47. *Kel.* 87. 116. 127. See tit. *Accessory.*

Several persons having conspired to enter the King's park,

and to hunt and carry away deer, *with design of killing any one that should oppose them;* though the keeper's servant began the assault, and required them first to stand, whereupon they fled, and one of the keeper's men discharged a piece at them, and they continued their flight until he laid violent hands upon one of the offenders, and then, and not before, they killed one of the keeper's servants, this was held to be *murder;* as they were doing an unlawful act, the law implies malice, and they ought not to have fled, but to have surrendered themselves. *Roll. Rep.* 20.

As to such killing, as happens in the execution of an *unlawful* action the principal motive whereof was *to assist a third person;* it seems clear, that if a master maliciously intending to kill another take his servants with him, without acquainting them with his purpose, and meet his adversary and fight with him, and the servants seeing their master engaged take part with him, and kill the other, they are guilty of manslaughter only, but the master of murder. *Pl. Com.* 100, 101, *a. Crom.* 23. *Dalt. c.* 92. *H. P. C.* 51, 52. 1. *Hawk. P. C. c.* 31. § 49. —Though if the master have malice, and he tells his servants of it, and that his intention is to kill the party, and they go with the master, if they kill another, it is murder both in master and servant. *Dy.* 26. 9 *Rep.* 66. *Pl.* 100.

And therefore it follows *à fortiori*, that if a man's servant or friend, or even a stranger, coming suddenly, see him fighting with another and side with him, and kill the other; or seeing his sword broken lend him another, wherewith he kills the other, he is guilty of manslaughter only. 1 *Hawk. P. C. cap.* 31. § 50. *Crom.* 26, *b. H. P. C.* 57. *Dalt c.* 94. 1 *Rol. Rep.* 407, 408. 3 *Bulst.* 206. *H. P. C.* 52.

Yet in this very case, if the person killed were a bailiff, or other officer of justice, resisted by the master, &c. in due execution of his duty, such friend or servant, &c. are guilty of murder, whether they knew the person slain were an officer or not. *Kelynge*, 67. 86, 87. But perhaps it may be objected, that in this last case there seems to be no more malice than in the former; and such third person being wholly ignorant that the party killed was an officer, seems to be no more in fault than if he had been a private person. To this it may be answered, that all fighting is highly unlawful, and that he who on a sudden seeing persons engaged in it, is so far from endeavouring to part them, as every good subject ought, that he takes part with one side, and fights in the quarrel, without knowing the cause of it, shews a high contempt of the laws, and a readiness to break through them on a small occasion, and must at his peril take heed what he does; and consequently might perhaps in strict justice be adjudged in the foregoing cases to act with *malice* which *doth not always signify a particular ill-will against the person killed*, as appears by many of the above-mentioned cases; and though such persons be favoured in respect of the suddenness of the occasion where both the quarrel and the persons are private, yet he must not expect such indulgence, where the fight, in which he so rashly engages, was begun in opposition to the justice of the nation, and a person happens to be killed thereby who engaged in the maintenance thereof, and on that account is under its more particular care; and it may be justly challenged, that his opposers be made examples to deter others from joining in such unwarrantable quarrels. 1 *Sid.* 160. *Noy*, 50. *Plow. Com.* 100.—See 1 *Hawk. P. C. c.* 31. § 51—53.

But if a man seeing another arrested, and restrained from his liberty, under colour of a press warrant or civil process, &c. by those who in truth have no such authority, happen to kill such trespassers in rescuing the person oppressed, he shall be adjudged guilty of manslaughter only, notwithstanding the injured person submitted to them, and endeavoured not to rescue himself; and the person who rescued him did not know that he was illegally arrested; for since in the event it appears, that the persons slain were trespassers, covering their violence, with a show of justice, he who kills them is indulged by the law, which in these cases judges by *the event*, which those who engage in such unlawful actions must abide at their peril. *Kelynge*, 66. 137. *Crom.* 27, *a. Dent's* case, 1 *Hawk. P. C. c.* 31. § 54—But the principles upon which this case was determined, are warmly controverted by Mr. Justice *Foster*, p. 315—318. And see *Borthwick's* case, *Doug.* 207. *Browning's* case, and *Dixon's* case, 1 *East's P. C. c.* 5. § 80.

Where an officer of the impress service in the navy, fires at a boat in order to bring her to, and kills a man, it is impossible that the offender should be made guilty of more than manslaughter, especially if he fires in the manner usual upon such occasions. *Coup.* 832. *per Ld. Mansfield*,

There were two men in an inner chamber quarrelling, and together by the ears; a brother of one of them standing at the door, that could not get in, cried to his brother to make him sure, and presently after he gave the other a mortal wound; this was held *manslaughter* in him that stood at the door. *Shep. Abr.* 493.

As to such killing as happens in the execution of an *unlawful* action, whereof *the direct design was to escape from an arrest*, it seems to be agreed that whoever kills a sheriff, or any of his officers, in the lawful execution of civil process, as on arresting a person upon a *capias*, &c. is guilty of murder. 1 *Hawk. P. C. c.* 31. § 55. *Dalt. cap.* 93. *H. P. C.* 45.

Neither is it any excuse to such a person, that the process was erroneous, (for it is not void by being so,) or that the arrest was in the night, or that the officer did not tell him for what cause he arrested him, and out of what court, (which is not necessary when prevented by the party's resistance): or that the officer did not show his warrant, which he is not bound to do at all, if he be a bailiff commonly known, nor without a demand, if he be a special one. 9 *Co.* 66. 68. *Cro. Jac.* 280. 486. 6 *Co.* 68, *b.* 69, *a.* 1 *Hawk. P. C. c.* 31. § 56.

Yet the killing of an officer in some cases will be manslaughter only; as, where the warrant by which he acts gives him no authority to arrest the party; as where a bailiff arrests J. S. a baronet, who never was knighted; by force of a warrant to arrest J. S. knight. 1 *Hawk. P. C. c.* 31. § 57. *Cro. Car.* 372. 1 *Jon.* 346. 12 *Co.* 49. So where a good warrant is executed in an unlawful manner; as if a bailiff be killed in breaking open a door or window to arrest a man; or perhaps if he arrest one on a *Sunday* since *stat.* 29 *Car.* 2. *cap.* 7. by which all such arrests are made unlawful. *H. P. C.* 46. 1 *Hawk. P. C. c.* 31. § 58.

If a bailiff is killed in executing a lawful warrant, &c. it is *murder:* nor is it any excuse to the person, that the process was erroneous; or that the arrest was in the night; that the officer did not tell him for what cause he arrested him; or that he did not show his warrant, &c. being a bailiff commonly known. 9 *Rep.* 68, 69. *Cro. Jac.* 280. 486. But if a bailiff who is not executing his office is killed, it is not *murder;* for he ought to be duly executing his office, by serving the process of the law, wherein he is assisted *cum potestate Regis et Legis. Cro. Car.* 537. 2 *Lill. Abr.* 212. Therefore where the warrant by which he acts gives him no authority to arrest the party; as where a bailiff arrests a wrong person, or J. S. a baronet, by force of a warrant to arrest J. S. knight; or if a good warrant is executed in an unlawful manner; as if a bailiff be killed in breaking open a door, or window, to arrest a man; or perhaps if he arrest one on a *Sunday;* since the *stat.* 29 *Car.* 2. *c.* 7, by which all such arrests are made unlawful, and he is slain; malice shall not be implied to make it *murder*, but it shall be manslaughter only. *H. P. C.* 46. *Cro. Car.* 372. 12 *Rep.* 49. 1 *Hawk. c.* 31. § 58. If bailiffs come to a house to arrest a person, and the house being locked they attempt to break in, whereupon the son of the person intended to be arrested, shoots and kills one of them, it is not *murder. Jones*, 429. *Foster's Rep.* 135, 138, 270. 308, 312.

318. 321. And see *Tranter & Reason's* case, 1 *Stra.* 499. *Fost.* 293. which was the case of killing by officers who had arrested a gentleman, and were struck by him; and in which they were found guilty of manslaughter only.

A person was arrested, and another not knowing the cause of the struggle, but seeing swords drawn, and to prevent mischief, came and defended the party arrested, and in the scuffle the bailiff was killed; it was resolved to be no *murder* in the person doing it, but that all that were present and assisting, *knowing of the arrest*, were principal *murderers*. *Kel.* 86. Though it has been held in such a case, that the person offending is guilty of *murder*, whether he knew that the person slain were an officer or not; for *all fighting is unlawful*, and he who, seeing persons engaged in it, takes part with one side, and fights in the quarrel *without knowing the cause of it*, shews a readiness to break through the laws on a small occasion, and must at his peril take heed what he doth. 1 *Sid.* 160. *Noy*, 50. See *ante*.

As to such killing as happens in the execution of an *unlawful action*, whereof *the principal purpose was to usurp an illegal authority*; it seems clear, that if persons take upon them to put others to death, either by virtue of a new commission wholly unknown to our laws, or by virtue of an unknown jurisdiction, which clearly extends not to cases of this nature; as if the Court of Common Pleas cause a man to be executed for treason or felony; or the Court Martial, in time of peace, put a man to death by the martial law, both the judges and officers are guilty of murder. 1 *Hawk. P. C. c.* 31. § 59. *H. P. C.* 46.

But where persons act by virtue of a commission, which, if it were strictly regular, would undoubtedly give them full authority, but which happens to be defective only in some point of *form*, it seems that they are no way criminal. 1 *Hawk. P. C. c.* 31. § 61.

As to such killing as happens in the execution of an *unlawful* action, *where no mischief was intended at all*, it is said, that if a person happen to occasion the death of another, in doing any idle wanton action, which cannot but be attended with the manifest danger of some other; as by riding with a horse known to be used to kick among a multitude of people, by which he means no more than to divert himself by putting them in a fright, he is guilty of murder. 1 *Hawk.* 87.

It has been already mentioned to have been anciently holden, that if a person not duly authorized to be a physician or surgeon, undertake a cure, and the patient die under his hand, he is guilty of felony: but in as much as the books wherein this opinion is holden were written before the statute of 23 *H.* 8. *c.* 1. which first excluded such felonious killing, as may be called *wilful murder of malice prepense*, from the benefit of clergy, it may be well questioned, whether such killing shall be said to be of malice prepense, within the intent of that statute; however, it is certainly highly rash and presumptuous for unskilful persons to undertake matters of this nature: and indeed the law cannot be well too severe in this case, in order to deter ignorant people from endeavouring to get a livelihood by such practice, which cannot be followed without the manifest hazard of the lives of those who have to do with them: but surely the charitable endeavours of those gentlemen who study to qualify themselves to give advice of this kind, in order to assist their poor neighbours, can by no means deserve so severe a construction from their happening to fall into some mistakes in their prescriptions, from which the most learned and experienced cannot always be secure. 1 *Hawk. P. C. c.* 31. § 62. *S. P. C.* 16, *b. Pult.* 32, *b. Crom.* 27. 43 *Ed.* 33, *b. Fitz. Coron.* 163. See *Dalt. c.* 93.

It were endless to go through all the cases of Homicide, which have been adjudged either expressly or impliedly, malicious: the above therefore may suffice as a pretty ample specimen; and we may take it for a general rule that all Homicide is malicious, and of course amounts to murder, unless where, 1. *justified* by the command or permission of the law: 2. *excused* on the account of accident or self-preservation; or 3. *alleviated* into manslaughter, by being either the involuntary consequence of some act, not strictly lawful, or (if voluntary) occasioned by some sudden and sufficiently violent provocation. And all these circumstances of justification, excuse, or alleviation, it is incumbent upon the prisoner to make out, to the satisfaction of the court and jury: the latter of whom are to decide whether the circumstances alleged are proved to have actually existed; the former, how far they extend to take away or mitigate the guilt. For all Homicide is presumed to be malicious, until the contrary appeareth upon evidence. *Fost.* 255.

It has been holden as a rule that no person should be convicted of murder unless the body of the deceased were found. 2 *Hale*, 290. But this rule, it seems, must be taken with some qualifications; and circumstances may be sufficiently strong to show the fact of murder in many cases where the body is not actually found. See *Hindmarsh's* case, 2 *Leach*, 571.

The *Punishment* of murder, and that of manslaughter were formerly one and the same: both having the benefit of clergy: so that none but unlearned persons, who least knew the guilt of it, were put to death for this enormous crime. 1 *Hal. P. C.* 450. But by several statutes the benefit of clergy is taken away from murderers through malice prepense, their abettors, procurers, and counsellors. See *stats.* 23 *H.* 8. *c.* 12. 1 *Ed.* 6. *c.* 12. 4 & 5 *P. & M. c.* 4. And title *Clergy, Benefit of.*

The Principal in murder is therefore now ousted of clergy in all cases, and the Accessory *before* is also ousted of clergy in all cases, but the Accessory *after* is in no case ousted of clergy. 2 *Hale's H.* 344.

In atrocious cases, it was frequently usual for the court to direct the murderer, after execution, to be hung upon a gibbet in chains near the place where the fact was committed; but this was no part of the legal judgment; and the like is still sometimes practised in the case of notorious thieves. But now in England, it is enacted by *stat.* 25 *Geo.* 2. *c.* 37. that the Judge before whom any person is found guilty of wilful murder, shall pronounce sentence immediately after conviction, unless he sees cause to postpone it; and shall in passing sentence direct him to be executed on the next day but one (unless the same shall be *Sunday*, and then on the *Monday* following) and that his body be delivered to the surgeons to be dissected and anatomised; and that the Judge may direct his body to be afterwards hung in chains, but in no wise to be buried without dissection. See *Fost.* 107. And during the short but awful interval between sentence and execution the prisoner shall be kept alone, and sustained only with bread and water. But a power is allowed to the Judge upon good and sufficient cause to respite the execution, and relax the other restraints of the act.

At a meeting of the Judges to consider of this act, there was some doubt whether *hanging in chains* might ever be made *part of the sentence*; but on debate it was agreed by nine judges, that in all cases within the act, the *judgment* for *dissecting and anatomizing only* should be *part of the sentence*, and if it should be thought advisable, the Judge might *afterwards* direct the *hanging in chains* by *special order* to the sheriff, pursuant to the power given by the act. *Fost.* 107.

This statute extends in all particulars to peers. *Ld. Ferrers's* case, *Fost.* 138, 139. 1 *East. P. C. c.* 5. § 136.

It appears that sentence pursuant to this statute may be passed by a Judge at *Nisi Prius* upon an indictment removed by *certiorari* into K. B. and afterwards tried at *Nisi Prius*, without remitting the transcript of the record to K. B. *Rex v. Thomas*, 4 *Maul. & Selw.* 447.

4. PETIT TREASON. This is a breach of the lower allegiance of private and domestic faith, and considered as proceeding from the same principle of treachery in private life as would have led the person, harbouring it, to have conspired in public against his liege lord and sovereign. At common law, the instances of this crime were more numerous than they are at present, and involved in some uncertainty. 1 *Hale P. C.* 37. By the statute of Treasons, 25 *Ed.* 3. *stat.* 5. *c.* 2. they were reduced to the following cases: A servant killing his master, a wife her husband, or an ecclesiastical person (either secular or regular,) his superior, to whom he owes faith and obedience.

By the Roman law *Parricide*, or the murder of one's parents or children, was punished in a much severer manner than any other kind of Homicide. But the English laws treat it no otherwise than as simple murder, unless the child be also the servant of his parent; probably under the idea of the impossibility of committing so enormous a crime.

But though the breach of natural relation is unobserved, yet the breach of civil or ecclesiastical connections, when coupled with murder, denominates the offence, *Petit Treason*: which is however nothing else but an aggravated degree of murder; although, on account of the violation of private allegiance, it is stigmatized as an inferior species of treason. And thus, in the ancient Gothic constitution, we find the breach both of natural and civil relations ranked in the same class with crimes against the State and Sovereign.

A servant who kills his master whom he has left, upon a grudge conceived against him during his service, is guilty of Petit Treason, for the traitorous intention was hatched while the relation subsisted between them, and this is only an execution of that intention. 1 *Hawk. P. C.* 89. 1 *Hal. P. C.* 380.

If a servant kill his mistress or the wife of his master, she is master within the letter of the statute, and it is petit treason. But if a son kill his father, this is not petit treason, except he served his father for wages, and then he shall be indicted by the name of servant. 3 *Inst.* 20. *Hale P. C.* 23. 11 *Rep.* 34.

A servant procured another to kill his master, who killed him in the servant's presence; this was held petit treason in the servant, and murder in the other, and that if the servant had been absent, the crime would have been murder to which he was accessory. 3 *Inst.* 20. *Moor*, 91. *Dyer*, 128.

If a wife be divorced *à mensa et thoro*, still the *vinculum matrimonii* subsists; and if she kills such divorced husband, she is a traitress. 1 *Hal. P. C.* 381. So a wife divorced *causâ adulterii vel sævitiæ*, is still within this law, because the bond of matrimony is not thereby dissolved, and she may again lawfully cohabit with her husband. But a divorce *causâ consanguinitatis vel pre-contractûs*, entirely dissolves the nuptial tie, and annihilates the very character of wife.—Therefore a wife *de facto* only, and not *de jure*, cannot commit this crime, for she has no lawful lord to whom she owes subjection and obedience.—Nor a second wife married to a man whose first wife is alive.—Neither can a husband be guilty of this crime by killing his wife *de jure*, for there is no reciprocity of obedience and subjection.—*Leach's Hawk. P. C.* i. *c.* 32. § 7. 1 *Hale P. C.* 381.

If a wife and a stranger kill the husband, this is petit treason in the wife, and murder in the stranger. *Dalt.* 337. But where a wife and a servant *conspired* to kill the husband, and appointed time and place for it, and the murder was committed by the servant alone in the absence of the wife, this was held petit treason in both. A servant procured by the wife to kill the husband, is guilty of petit treason: and a stranger procuring a wife or servant to kill the husband or neighbour, is an accessory to petit treason. *Dy.* 128. *Crompt.* 41.

Where a wife and another, not her servant, conspired the death of her husband, the indictment was that the wife *traitorously*, and the other *feloniously*, gave him poison, &c. whereof he died; the wife being acquitted on the indictment, brought an action for a malicious prosecution against the son of the husband, and recovered damages: the son afterwards brought an appeal of murder against her, upon which she was convicted and executed. *Cro. Car.* 331. 382.

A clergyman is understood to owe canonical obedience to the bishop who ordained him, to him in whose diocese he is beneficed, and also to the metropolitan of such suffragan or diocesan bishop: and therefore to kill any of these is petit treason. 1 *Hal. P. C.* 381. As to the rest, whatever is applicable, with respect to wilful murder, is also applicable to the crime of petit treason, which is no other than murder in its most odious degree: except that the trial shall be as in cases of high treason, before the improvements therein made by the statutes of *William* 3. *Fost.* 337. But a person indicted of petit treason may be acquitted thereof, and found guilty of manslaughter or murder. *Fost.* 106. 1 *Hal. P. C.* 378. 2 *Hal. P. C.* 184. and in such case it should seem that *two* witnesses are not necessary, as in case of petit treason they are. Which crime is also distinguished from murder in its punishment. 4 *Comm. c.* 14.

Petit treason is included in a pardon under the name of murder. 1 *Hal.* 378. An offender may be *indicted* either for petit treason, murder or manslaughter, and tried and found guilty on such indictment, of either of those crimes respectively, according as the case may appear upon the evidence. 1 *Hal.* 378. *Foster*, 326.—But if the prosecutor be apprised of the real case, he ought to adopt the bill to the truth of the fact. *Fost.* 104. 326. For though the offences are to most purposes considered as substantially the same, yet there is, as we have seen, some difference with regard to the judgment; and also a very material one with regard to the trial. *Fost.* 327.—On the trial the prisoner is entitled to a peremptory challenge of *thirty-five*. *Fost.* 327.—Two witnesses, it is also positively stated, by *Foster*, are required both on the indictment and at the trial. *Fost.* 337. See *stat.* 1 *Ed.* 6. *c.* 12. And the *stat.* 5 & 6 *Ed.* 6. *c.* 11. by general words extending to all treasons, requireth that the witnesses, *if living*, shall be examined in person upon the trial in open court. Depositions therefore taken before the coroner, or informations taken by a justice of the peace, are not evidence whereon to ground a conviction of petty treason, if the party be living, though unable to travel, or kept out of the way by the prisoner, or his procurement. *Fost.* 337. cites *stat.* 1 & 2 *P. & M. c.* 13. 1 *Hale*, 305. 2 *Hale*, 284.

The punishment of petit treason, in a man, is to be drawn and hanged, and in a woman was formerly to be drawn and burned, but which latter sentence is now changed to hanging by *stat.* 30 *Geo.* 3. *c.* 48. See title *Judgment in criminal cases*. Persons guilty of petit treason were first debarred the benefit of clergy by *stat.* 12 *Hen.* 7. *c.* 7. which was afterwards extended to their aiders, abettors and counsellors, by *stat.* 23 *Hen.* 8. *c.* 1. 4 & 5 *P. & M. c.* 4. See title *Clergy, Benefit of.*

5. ATTEMPTS *to commit Murder* appear to have been considered as felonies in the earlier cases of our law. *Staundford, P. C.* 17. 1 *East's P. C. c.* 8. § 5. But that doctrine did not long prevail, and such attempts became, and still remain punishable only as high misdemeanours:—except as provided against by special acts. A person was indicted for intending to murder the Master of the Rolls, *Mic.* 16. *Car.* 2. and for offering money to another to do it: and another person was committed for lying in wait to perform the murder: they were punished by heavy fines, imprisonment, and finding security for their good behaviour for life. 1 *Lev.* 146. 1 *Sid.* 230.

Where an indictment is preferred for an assault with intent to murder, the intent as laid must be fully established to support the indictment. Where a defendant was so charged, the judge (Lord Kenyon) being of opinion, upon the facts, that if death had ensued, the crime could only have been manslaughter, the defendants was acquitted. *Milton's* case, 1 *East's P. C. c.* 8. § 5.

By *stat.* 3 *H.* 7. *c.* 14. the conspiracy to destroy or murder (the King or) any lords of the council, &c. was declared felony, inquirable by the steward, treasurer, and comptroller of the household.

By *stat.* 9 *Ann. c.* 16. (passed on the occasion of the attempt by Guiscard, to assassinate Mr. Harley, and already alluded to) any person who shall unlawfully attempt to kill, &c. any Privy Counsellor, in the execution of his office, shall be guilty of felony, without clergy.

By 9 *Geo.* 1. *c.* 22. the Black Act, any person who shall wilfully and maliciously shoot at any one in a dwelling house, or other place, or shall by gift or promise, induce any one to join in such act, shall be guilty of felony, without clergy.

By *stat.* 26 *Geo.* 2. *c.* 19. passed to repress enormities practised on persons shipwrecked, the beating or wounding persons escaping from shipwreck, with intent to kill them, or putting out false lights to bring a ship into danger, is declared felony, without clergy.

By *stat.* 43. *Geo.* 3. *c.* 58. persons shooting at, or attempting to shoot, or stabbing or cutting any with intent to murder, maim, or do grievous bodily harm, &c. are declared guilty of felony, without benefit of clergy—but it is provided, that if it shall appear on the trial, that the offence was committed under such circumstances, that if death had ensued thereon, the crime could not in law have amounted to murder, the party charged shall be acquitted of the felony.—See this statute stated more at large, title *Mischief, Malicious.*

By the Irish Acts, 36 *Geo.* 3. *c.* 27. 38 *Geo.* 3. *c.* 57. the *conspiring* to murder any person, or the proposing, soliciting, encouraging, persuading, or endeavouring to encourage, or persuade to murder, are made capital felonies.

HOMINATIO. *Domesday* tit. *Northampton Sockmanni de Risden.*—The mustering of men; also the doing of homage. *Cowell, edit.* 1727.

HOMINE CAPTO IN WITHERNAMIUM. A writ to take him that had taken any bondman or woman, and led him or her out of the country, so that he or she could not be *replevied* according to law. *Reg. Orig. fol.* 79. See this Dict. tit. *Withernam.*

HOMINE ELIGENDO AD CUSTODIENDAM PECIAM SIGILLI PRO MERCATORIBUS EDITI. A writ directed to a corporation, *for the choice of a man to keep one part of the seal appointed for Statutes merchants*, when a former is dead, according to the statute of *Acton-Burnel. Reg. Orig.* 178.

HOMINE REPLEGIANDO. A writ to bail a man out of prison. *F. N. B. fol.* 6. *Reg. Orig. fol.* 77.

This writ lies where a person is in prison, (not by special commandment of the King, or his Judges, or for any crime or cause irreplevisable,) directed to the sheriff to cause him to be *replevied*; in the same manner that chattels taken in distress may be replevied; and if the person be conveyed out of the sheriff's jurisdiction, he may return, that the defendant hath *essoined* the plaintiff's body, so that he cannot deliver him; then the plaintiff shall have a *capias in withernam* to take the defendant's body, and keep him without bail or mainprize till he produces the party. 3 *Comm.* 129. *c.* 8. And if the sheriff return *non est inventus* in that writ against the body, the plaintiff shall have a *capias* against the defendant's goods, &c. *F. N. B.* 66. *New Nat. Br.* 151, 152.

Where one takes away secretly, or keeps in his custody another man against his will, upon oath made thereof, and a petition to the Lord Chancellor, he will grant a writ of *replegiari facias*, with an *alias* and *pluries*, upon which the sheriff returns an *elongatus*, and thereupon issues out a *capias in withernam*: and when the party is taken, the sheriff cannot take bail for him; but the court where the writ is returnable may, if they think fit, grant a *habeas corpus* to the sheriff to bring him into court and bail him. 2 *Lill.* 23.

In a *Homine replegiando* it hath been adjudged, that it doth not differ from a common *replevin*, on which the sheriff must return a *deliberari feci*, or an excuse why he doth not: that where he cannot make deliverance if he return an *elongatus*, the defendant is not concluded by that return to plead *non cepit*; and after the return of an *elongatus*, and a *capias in withernam*, if the defendant pleads this plea, he shall be bailed, for the *withernam* is no execution; and after a defendant is bailed upon the *capias in withernam*, there may be a new *withernam* against him. And it was held, that in a *homine replegiando* after an *elongatus* returned, if the defendant comes in *gratis*, and calls for a declaration, and pleads *non cepit*, he shall not be obliged to give bail, but if he come in upon the return of the *capias*, he must give bail, and shall not be admitted to it till he call for a declaration, and plead *non cepit*. 2 *Salk.* 381.

The sheriff returned an *elongavit* in a *homine replegiando*, and then a *capias in withernam* went forth; afterwards the defendant, having entered an appearance, moved for a *supersedeas* to the *withernam* and offered to plead *non cepit*; which was opposed, unless he would give bail to deliver the person, in case the issue was found against him: though it was ruled, that if any property had been pleaded in the party then the defendant ought to give bail to deliver him; but he says he hath not the person, and therefore *non cepit* is a proper plea, and he shall put in bail to appear *de die in diem*. In this case, the defendant shall not be compelled to *gage deliverance*; and a *supersedeas* was granted to the *withernam*. See 4 *Mod.* 183.

A *homine replegiando* cannot be brought either by the wife herself, or by her *prochein amy* against her husband; and the nature and proceedings in the writ shew it to be so. *Ch. Prec.* 492.

This writ is now seldom used to deliver a person out of custody, being superseded by the more beneficial effects of the writ of *Habeas Corpus*, particularly as were extended by modern acts. See title *Habeas Corpus.*

HOMINES. A term applied to a sort of *feudatory* tenants, who claimed a privilege of having their causes and persons tried only in the court of their lords; and when *Gerard de Canvil Anno 5 R.* 1. was charged with treason and other misdemeanors, he pleaded that he was *Homo comitis Johannis*, &c. and would stand to the law and justice of his court. *Paroch. Antiq.* 152.

HOMIPLAGIUM. Is used in the laws of *Hen.* 1. *cap.* 80. for the maiming a man. *Si quis in domo vel curia Regis fecerit homicidium vel* homiplagium.

HOMO. This Latin word includes both man and woman, in a large or general understanding. 2 *Inst.* 45.

HOMOLOGATION. Is when a man either expressly or impliedly ratifies a deed that formerly was null or invalid. *Scotch Dict.*

Implied Homologation is admitted only from some act which clearly and expressly implies a knowledge and approbation of the deed. The effect of it on the person homologating is to give the deed the same validity against him and his heirs, as if it had been a perfectly legal deed from the first; but against third parties who do not represent the person homologating, the deed is liable to all its original objections. *Bell's Scotch Law Dict.*

HOMSTALE. A home-stall, or mansion-house. As in a charter granted about the 5 *Ed.* 1. *Cowell.*

HOND-HABEND. See *Hand Habend.* This bond also signifies the right which the lord hath of determining the offence in his court.

HONEY. All vessels of honey are to be marked with the name of the owner, and be of a certain content, under penalties; and if any *honey* sold, be corrupted with any deceitful mixture, the seller shall forfeit the *honey*, &c. *Stat.* 23 *Eliz. c.* 8.

HONOUR. Is, besides the general signification, used especially for the more noble sort of *Seigniories*, on which other inferior lordships or manors depend, by performance of some customs or services to those who are lords of them; (though anciently *Honor* and *Baronia* signified the same thing.) See *Spelman*, in v. *Honor.* The manner of creating these *Honours* by act of parliament, may in part be collected out of the statute of 33 *Hen.* 8. *cc.* 37, 38. for erecting certain manors and possessions of the Crown into *Honours.*

In the early times of our legal constitution, the King's greater barons, who had a large extent of territory held under the crown, granted out frequently smaller manors to inferior persons to be holden of themselves; which do now therefore continue to be holden under a superior lord, who is called in such cases the lord paramount over all these manors: and his seignory is frequently termed an *Honour*, not a manor; especially if it hath belonged to an ancient feudal baron, or hath at any time been in the hands of the crown. 2 *Comm.* 91. *c.* 6. See title *Tenure.*

An Honour ought to consist of lands, liberties, and franchises. 1 *Bulst.* 197. 2 *Rol.* 72. *l.* 48. And it is the most noble seigniory. *Co. Lit.* 108, *a.* One or more manors may be parcel of an Honour. 2 *Rol.* 72. *l.* 45. So a forest may be appendant to it. 2 *Rol.* 73. *l.* 3.

An *Honour* originally shall be created by the King. *Co. Lit.* 108, *a.* Every *Honour* must be holden of the King. *R.* 1 *Bul.* 195. And if it be assigned, or granted over to another, it shall not be bolden of a subject. For it may be granted by the King to a subject. A man may claim an *Honour* by grant, or by prescription. But the King at this day cannot make an *Honour* by grant, without an act of parliament. *R.* 1 *Bul.* 195, 196. *Co. Lit.* 108, *a.* See *Cowell*, title *Honour.*

The following is a list of *Honours* within the realm, *viz.* Ampthill, (by *stat.* 33 *H.* 8. *c.* 37.) Aquila, (formerly Pevensey) Arundel, (see *post*) Abergavenny, Boloine, Berkhamstead, Beaulieu, Barnard's Castle, Bullingbroke, Barstaple, Bononia, Brecknock, Brember, Bedford, Clare, Crevecure, Clun, Christchurch, Cockermouth, Cormayle, Candicut, Carisbrook, Clifford Castle, Chester, Carmarthen, and Cardigan, Donning-Castle, (by *stat.* 37 *H.* 8. *c.* 18.)—Dudley, and Dover Castle, Eye, and Egremond.

The *Honour* of East and West Greenwich, Glamorgan, Glocester, Grentmesnil, Gower, Grafton, (by *stat.* 33 *H.* 8. *c.* 38.)—Haganet, Hampton Court, (by *stat.* 31 *H.* 8. *c.* 5.) —Huntindon, (in Herefordshire) Heveningham, Hawenden-Castle, Hertford, and Halton, Lancaster, Lincoln, Leicester, Lovetot, Hinckley, Kingston upon Hull, (by *stat.* 37 *H.* 8. *c.* 18.)—Kington, and Folkingham.

The *Honour* of Montgomery, Mowbray, Middleham, and Maidstone, Nottingham, Newelhn or Newelme, Oakhampton, St. Osith, (by *stat.* 37 *H.* 8. *c.* 18.)—Oxford.

The *Honour* of Plimpton, Peverel, Pickering, Raleigh. Richard's Castle, Skipton, Stafford, Strigul, Tickhil, Tremanton, Totness, Theony, Tamworth.

The *Honour* of Wigmore, Willingford, Westminster, (by *stat.* 37 *H.* 8. *c.* 18.)—Windsor, Wormgay, Whirwelton (in Yorkshire,) Werk, Whitchurch, and Warwick, Webley, and Tutbury.

The King granted to a subject a great manor, called *an Honour*, and passed it by the name of *an Honour*, and well. *Jenk.* 277. *pl.* 99.

It is illegal to purchase *Honour* (as a dukedom) for money. *Vern.* 5. See title *Peers.*

The Earl of Arundel was the only peer who held his Earldom by prescription. See title *Peers.*

HONOUR-COURTS. Are courts held within the *honours*, or manors last noticed, mentioned in the *stats. Hen.* 8.

There is also a *Court of Honour* of the Earl Marshal of England, &c. which determines disputes concerning precedency and points of *Honour.* 2 *Hawk. P. C.* This court of *Honour*, which is also exercised to do justice to *Heralds*, is a court by prescription, and has a prison belonging to it, called the White Lyon in Southwark. 2 *Nels.* 935. See title *Court of Chivalry.*

HONOURARY FEUDS. Are titles of nobility, descendible to the eldest son in exclusion of all the rest. See title *Tenures.*

HONOURARY SERVICES. Are those that are incident to the tenure of *Grand Sergeanty*, and commonly annexed to some *honour. Stat.* 12 *Car.* 2. 29.

HONTFONGENETHEF. *Cum omnibus aliis libertatibus tantummodo* hontfongenethef *mihi retento.—Charta Wil. Comitis Matesialsci. In Mon. Angl.* 1 *par. fo.* 724.

This should have been written *honfangencthef*, and signifies a *thief*, taken with *hondhabend, i. e.* having the thing stolen in his hand. *Cowell.*—See *Backherind.*

HOPCON. Signifies a valley, in *Domesday Book*; so do *hope, hawgh* and *howgh. Cowell, edit.* 1727.

HOPS AND HOP-BINDS. Penalty on importing or using corrupt hops, *stat.* 1 *Jac.* 1. *c.* 18.—No bitter to be used in brewing but hops, *stat.* 9 *Ann. c.* 12. § 24.—No hops to be imported into Ireland from other parts but Great Britain, *stat.* 5 *Geo.* 2. *c.* 9. but see tit. *Ireland.*—Landing foreign hops before duty paid, hops to be burnt, and ship forfeited, *stat.* 7 *Geo.* 2. *c.* 19.—Penalty on sophisticating hops, 7 *G.* 2. *c.* 19. § 2.—Cutting hop-binds, 10 *Geo.* 2. *c.* 32. § 4.—By *stat.* 6 *Geo.* 2. *c.* 37. § 6. Unlawfully and maliciously cutting hop-binds is made felony, without benefit of clergy.—The duty upon hops is a branch of the Excise and regulated by many statutes made for the purpose. See *stats.* 39 & 40 *Geo.* 3. *c.* 81. and 48 *Geo.* 3. *c.* 134. for preventing frauds in the trade of Hops: These acts regulate the mode of packing, bagging, and weighing of Hops.

HORA AURORÆ. The morning bell, or what we now call the *four o'clock bell*, was anciently called *Hora Auroræ*; as our eight o'clock bell, or the bell in the evening, was called *Ignitegium* or *Coverfeu. Cowell.*

HORDERA, from the Sax. *Hord. Thesaurus.*] A treasurer: and hence we have the word *Hord* or *Hoard*, as used for treasuring or laying up a thing. *Leg. Adelston. cap.* 2.

HORDERIUM. A hoard, a treasury, or repository. *L. Canuti, c.* 104.

HORDEUM PALMALE. Beer-barley, which in Norfolk is called sprat-barley, and battledore barley; and in the marches of Wales, Cymridge, it being broader in the ear, and more like a *hand* than the common barley, which in old deeds is called *Hordeum quadragesimale. Cowell.*

HORNE-BEAM. See *Timber.*

HORNGELD, from the Saxon word *horn, cornu,* and *geld solutio.*] A tax within a forest to be paid for horned beasts. *Cromp. Jurisd.* 197. And to be free thereof is a privilege granted by the King unto such as he thinketh good, *Cowell, edit.* 1727.

HORN WITH HORN, OR HORN UNDER HORN. The promiscuous feeding of bulls and cows, or all *horned* beasts, that are allowed to run together upon the same common. *Spelman.* To which may be added, that the common-

ing of cattle *horn with horn*, was properly when the inhabitants of several parishes let their common herds run upon the same open spacious common, that lay within the bounds of several parishes, and therefore, that there might be no dispute upon the right of tithes, the bishop ordains, that the cows should pay all profit to the minister of the parish where the owner lived, &c. *Cowell.*

HORNAGIUM. *Hornegeld*. See that title.

HORNERS. No stranger was to buy any English horns gathered or growing in London, or within twenty-four miles thereof, by the *stat.* 4 *Ed.* 4. *c.* 8. And none may sell English *horns* unwrought to any stranger, or send them beyond sea, on pain of forfeiting double value; the wardens of *Horners* in London may search all wares, &c. *Stat.* 7 *Jac.* 1. *cap.* 14. See title *London.*

HORNGELD. See *Hornegeld.*

HORNING, Letters of. Warrants for charging persons in Scotland to pay or perform certain debts or duties; probably so termed from being originally proclaimed by the horn or trumpet.

HORS DE SON FEE, Fr. *i. e.* out of his fee.] An exception to avoid an action brought for rent or services, &c. issuing out of land, by him that pretends to be the lord; for if the defendant can prove that the land is *without the compass* of his *fee*, the action falls. *Broke.* In an *avowry*, a stranger may plead generally *hors de son fee;* and so may tenant for years; and such stranger to the *avowry*, being made a party, is at liberty to plead any matter in abatement of it. 9 *Rep.* 30. 2 *Mod.* 104. A tenant in fee-simple ought either to disclaim, or plead *Hors de son fee.* 1 *Danv. Abr.* 655. *Vide* 9 *Rep. Bucknel's case,* 22 *Hen.* 6. 2, 3. *Keilw.* 73. 14. *Ass. pl.* 13. *Co. Lit.* 1, *b.* 2 *Mod.* 103, 104. & 14 *Vin. Abr. tit. Hors de son fee.* See title *Pleading.*

HORSE BREAD. Inn-keepers shall not make horse-bread. *Stats.* 13 *Ric.* 2. *stat.* 1. *c.* 8. 4 *Hen.* 4. *c.* 25. Permitted to bake Horse bread. *Stat.* 32 *Hen.* 8. *c.* 41.

## HORSES

Were not to be conveyed out of the realm, without the King's licence, &c. on pain of forfeiture, by an ancient statute. 11 *H.* 7. *c.* 13. Persons having lands of inheritance in parks, &c. were ordered to keep two mares apt to bear foals thirteen hands high, for the increase of the breed of *horses*, on pain of 40*s.* for every month they are wanting; and not suffer them to be leaped by stoned *horses* under fourteen hands, on a certain penalty by *stat.* 27 *Hen.* 8. *c.* 6. And for the preservation of a strong breed of *Horses*, stone horses above two years old are directed to be fifteen hands high, or they shall not be put into forests or commons, where mares are kept, upon pain of forfeiture; and scabbed or infected *Horses* shall not be put into common fields, under the penalty of 10*s.* leviable by the Lord of the leet. *Stat.* 32 *H.* 8. *c.* 13. still in force.

Stealing of any horse, gelding, or mare, is felony without benefit of clergy: but accessories to this offence are not excluded clergy. *Stat.* 1 *Ed.* 6. *c.* 12. 2 & 3 *Ed.* 6. *c.* 33. The first made stealing horses, geldings or mares felony; a doubt was entertained whether this extended to the stealing *one* horse, &c. on which the latter act was passed. And if any *Horse* that is stolen be not sold according to the statute 2 & 3 *P. & M. c.* 7. the owner may take the *Horse* again wherever he finds him, or have action of *detinue*, &c. To prevent *Horses* being stolen and sold in private places, this *stat.* 2 & 3 *P. & M. c.* 7. provides, that owners of fairs and markets shall appoint toll-takers or book-keepers, who are to enter the names of buyers and sellers of *Horses*, &c. And to alter the property, the *Horses* must be rid or stand in the open fair one hour; and all the parties to the contract must be present with the *Horse.*—And by *stat.* 61 *Eliz. cap.* 12, sellers of *Horses* are to procure vouchers of the sale to them; and the names of the buyer, seller and voucher, and price of the *Horse* are to be entered in the toll taker's book, and a note thereof delivered to the buyer; and if any person shall sell a *Horse* without being known to the book-keeper, or bringing a voucher; or if any one shall vouch without knowing the seller; or the book-keeper shall make an entry without knowing either, in either of these cases the sale is void, and a forfeiture is incurred of 5*l.* and the said statute provides that a *Horse* stolen, though sold according to the direction of the act, may be redeemed and taken by the owner within six months, repaying the buyer what he shall swear he gave for the same. 2 *Comm.* 450.

By *stat.* 22 & 23 *Car.* 2. *c.* 7. any person maliciously killing or destroying any horses in the night shall be guilty of felony, punishable by transportation for seven years.—Maliciously hurting or wounding horses in the night, to forfeit treble damages to the owner.

By various acts Duties are imposed in Great Britain and Ireland upon horses kept for drawing carriages, or for riding, or letting out to hire, race horses, &c.

*Horse-Stealing* having got to a great pitch, and many of those useful animals having been stolen, merely for the purpose of selling them as dog's meat, and for their hides, the following act was made to put a stop to this iniquitous traffick.

By *stat.* 26 *Geo.* 3. *c.* 71. no person shall keep any place for slaughtering any horse or other cattle, not killed, for butcher's meat, without taking out a licence at the general quarter sessions, to be granted upon a certificate of the minister and churchwardens that the person applying is proper to be trusted with the carrying on such business. § 1.

Such licence to be signed by the Justices at sessions, and a copy entered in a book to be kept for that purpose by the clerk of the peace, and all persons so licensed shall cause to be painted over their gates, their name and the words "licensed for slaughtering Horses pursuant to an act passed in the 26th year of his Majesty King George III." § 2.

Every occupier of such licensed slaughter-house shall, six hours previous to the slaughtering any live horse, or to the slaying any horse brought dead to the slaughtering-house, give notice in writing to the after-mentioned inspector, who is to take an exact account of the height, age, colour, and particular marks of every horse, &c. and keep the same in a book: [see *sect.* 5.] And no such Horse shall be slaughtered or flayed but between 8 in the morning and 4 in the evening, from October to March, both inclusive, and between 6 in the morning and 8 in the evening from April to September, both inclusive. § 3.

Every person so licensed shall at the time any horse, &c. shall be brought, make an entry in a book of the name and abode, and profession of the owner, and also of the person who shall bring the same to be slaughtered or slayed, and the reason why the same is so brought; which book shall, at all times, be open for the examination of the inspector, and produced before any justice, when required. § 4.

The parishioners in vestry shall annually or oftener appoint one or more persons to be inspectors of such slaughtering house. And in case such inspector shall upon examination of any Horse, &c. intended to be slaughtered believe that such Horse, &c. is free from disease, and in a sound and serviceable state, or that the same has been stolen, he shall prohibit the slaughtering such Horse, &c. for not exceeding 8 days; and in the mean time shall cause an advertisement to be inserted in some public newspaper twice or oftener (unless the owner of such Horse shall sooner claim the same) at the expence of the occupier of such slaughtering house; who on refusal to pay the same, shall forfeit double the amount, to be raised by distress. § 5.

Every inspector may at all times in the day or night, but if in the night, then in the presence of a constable, enter into and inspect any place kept for slaughtering horses by licensed persons, and take an account of the Horses, &c. there. § 6.

In case any person offering to sale or bringing any Horse, &c. to be slaughtered or slayed shall refuse to give an account of himself, or of the means the same came into his possession, or if there be reason to suspect that such Horse, &c. is stolen; such person shall be carried before a justice of peace, who shall commit him for not more than 6 days to be further examined, and if such justice shall be satisfied that such Horse, &c. is stolen, the person bringing the same is to be committed to gaol to be dealt with according to law. § 7.

Any person keeping such slaughtering house transgressing the rules before laid down by the act, shall be guilty of *felony* and punished by fine and imprisonment, and such corporal punishment by whipping, or shall be transported for not more than 7 years, as the court shall direct. § 8.

Any such person destroying or defacing with lime, or burying the hide or skin of any horse, &c. or being guilty of any offence against this act for which no punishment or penalty is provided shall be adjudged guilty of a misdemeanour, and punished by fine and imprisonment and such corporal punishment by whipping, as the court shall direct. § 9.

Making false entries subjects the party to a forfeiture not exceeding 20*l.* nor less than 10*l.* to be levied by distress; half to the informer and half to the poor; and in case the offender shall not have effects to the amount of the penalty, he may be committed to hard labour in the house of correction for not more than three months, nor less than one. § 10.

The book of the inspector shall be produced at every general quarter sessions. § 10.

If any person shall occasionally lend any barn or place for slaughtering any horse, &c. without taking out such licence he shall forfeit not more than 20*l.* nor less than 10*l.* half to the informer and half to the poor; or be committed to gaol for not more than three months nor less than one, unless the penalty is sooner paid. § 13.

This act does not extend to curriers, &c. nor to furriers, nor persons killing Horses, &c. to feed their own dogs. § 14.

If any currier, tanner, &c. shall under colour of their trades, knowingly kill any sound horse, or boil the flesh thereof to sell, such tradesman becomes an offender under the act, and shall forfeit not more than 20*l.* nor less than 10*l.* § 15.

[The forms of the several convictions are specified in the act.]

HORSE RACES, for small sums, having encouraged idleness, and impoverished the meaner sort of people; it is enacted, that no person shall run any *horse* at a *race*, unless it be his own, nor enter more than one *horse* for the same plate, upon pain of forfeiting the *horses*; and no plate is to be run for under 50*l.* on the penalty of 500*l.* Also every *horse-race* must be begun and ended in the same day, &c. *Stat.* 13 *Geo.* 2. *cap.* 19.

*Horses* at *races* to be entered by the owners, 13 *Geo.* 2. *c.* 19. *Horse* racing with *horses* carrying small weights, prohibited. *Ib. Horses* may run for the value of 50*l.* with any weight and at any place. 18 *Geo.* 2. *c.* 34. § 11.

A plaintiff shall not be allowed to recover a wager on such an horse-race, as is illegal within the statute. 4 *Term Rep.* 1. A match for 25*l.* a side is a match for 50*l.* See this Dict. tit. *Gaming*, *Wager*.

HORSTILERS, Fr. *Hostelliers.*] Is used for Innkeepers: and in some old books the word *hostlers* is taken in the same sense, *stat.* 31 *Ed.* 3. *c.* 2.

HOSPES GENERALIS. A great chamberlain,—*Volumus, quantum ad* hospitia *pertinet, omnes indifferenter nostro* hospiti generali *obediant, &c. Du Cange.*



HOSPITALLERS, *Hospitalarii.*] Were the knights of a religious order, so called because they built an *hospital* at Jerusalem, wherein pilgrims were received. To these Pope Clement transferred the Templars, which order, by a council held at Vienne in France, he suppressed for their many and great offences. The institution of their order was first allowed by Pope Gelasus the Second, *anno* 1118; and confirmed in this kingdom by Parliament, and had many privileges granted them, as immunities from payment of tithes, &c. Their privileges were reserved to them by *Magna Charta, cap.* 37. and the right of the King's Subjects vindicated from the usurpation of their jurisdiction, by the statute of *Westm.* 2 *cap.* 43. Their chief abode is now in Malta, an island given them by the Emperor Charles V. after they were driven from Rhodes by Solyman the Magnificent, Emperor of the Turks; and for that they are now called *Knights of Malta.* All the lands and goods of these knights here in England were given to the King, by 32 *Hen.* 8. *c.* 24. See *Mon. Angl.* 2 *par. fol.* 489. *Tho. Walsingh. in Hist. E. II. Stowe's Ann. ib.* See title *Knights Templars.*

## HOSPITALS

Are either *Aggregate*, in which the master or warden and his brethren have the estate of inheritance: or *Sole*, in which the master, &c. only has the estate in him, and the brethren or sisters, having college, and common seal in them, must consent, or the master alone has the estate not having college, or common seal. So Hospitals are *eligible*, *donative*, or *presentative.* 1 *Inst.* 342, *a.*

The Master of the Hospital, who has college, and common seal, may have a writ of right; for the right, and inheritance is in him. If he has no college, or common seal, he may have a *juris utrum. Co. Lit.* 341, *b.* 342, *a.*

Any person seised of an estate in fee-simple may by deed inrolled in *Chancery* erect and found an *Hospital* for the sustenance and relief of the poor, to continue for ever; and place such heads, &c. therein as he shall think fit; and such *Hospital* shall be incorporated, and subject to such visitors, &c, as the Founder shall nominate; also such corporations have power to take and purchase lands not exceeding 200*l. per annum*, so as the same be not holden of the King, &c. and to make leases for twenty-one years, reserving the accustomed yearly rent; but no *Hospital* is to be erected unless upon the foundation it be endowed with lands or hereditaments of the clear yearly value of 10*l. per annum. Stat.* 39 *Eliz. cap.* 5. made perpetual by *stat.* 21 *Jac.* 1. § 1.

It has been adjudged upon this statute, that if lands given to an *Hospital* be at the time of the foundation or endowment of the yearly value of 200*l.* or under, and afterwards they become of greater value by good husbandry, accidents, &c. they shall continue good to be enjoyed by the *Hospital*, although they be above the yearly value of 200*l.* And goods and chattels (real or personal) may be taken of what value soever. 2 *Inst.* 722. And if one give his land then worth 10*l.* a year to maintain poor, &c. and the land after comes to be worth 100*l.* a year, it must all of it be employed to increase their maintenance, and none of it be converted to private use. 8 *Rep.* 130.

If a devise be to the poor people maintained in the *Hospital* of St. Lawrence in Reading, &c. (where the mayor and burgesses capable to take in mortmain, do govern the *Hospital*) albeit the poor, not being a corporation, are not capable by that name to take; yet the devise is good; and commissioners appointed to enquire into lands given to *Hospitals*, &c. may order him that hath the land to assure it to the mayor and burgesses for the maintenance of the *Hospital. Stat.* 43 *Eliz. c.* 4. See titles *Charitable Uses*, *Mortmain.*

A gift must be to the poor, and not to the aged or impotent of such a parish, without expressing their poverty; for poverty is the principal circumstance to bring the gift within the *stat.* 43 *Eliz. c.* 4. Although at Common Law a corporation may be of an *Hospital*, that is *in potestate* of certain persons to be governors of the *Hospital*, and not of the persons placed therein; the safest way upon the *stat.* 39 *Eliz. c.* 5. is first to prepare the *Hospital*, and to place the poor therein, and to incorporate the persons therein placed; and after the incorporation, to convey the lands, tenements, &c. to the said corporation, by bargain and sale, or otherwise, between the founder of the one part, and the master and brethren, &c. of the other part, in consideration of 5*s.* in hand paid by the master of the said *Hospital*, &c. 2 *Inst.* 724, 725. And the founder cannot erect an *Hospital* for years, lives, or any other limited time, but it must be for ever, according to the *stat.* 39 *Eliz. c.* 5. See 10 *Rep.* 17. 34.

The *stat.* 43 *Eliz. c.* 4. under which *Commissions* may be awarded to certain persons to enquire of lands or goods given to *Hospitals*; and the Lord Chancellor is empowered to issue commissions to commissioners for inquiring, by a jury, of all grants, abuses, breaches of trust, &c. of lands given to charitable uses, does not extend to lands given to any college or hall in the Universities, &c. nor to any *Hospital* over which special governors are appointed by the founders; and it shall not be prejudicial to the jurisdiction of the bishop or ordinary, as to his power of inquiry into and reforming abuses of *Hospitals*, by virtue of the *stat.* 2 *Hen.* 5. *st.* 1. *c.* 1, *&c.* See also statutes, 58 *Geo.* 3. *c.* 91. and 59 *Geo.* 3. *cc.* 81. 91. and this Dict. tit. *Charitable Uses.*

The commissioners under *stat.* 43 *Eliz. c.* 4. may order houses to be repaired by those who receive the rent; see that the lands be let at the utmost rent: and on any tenant's committing waste, by cutting down and sale of timber, they may decree satisfaction, and that the lease shall be void. *Hil.* 11 *Car.* Where money is kept back, and not paid, or paid where it should not, they have power to order the payment of it to the right use; and if money is detained in the hands of executors, &c. any great length of time, they may decree the money to be paid, with damages for detaining it. *Duke Read.* 123. See 4 *Rep.* 104.

The *Hospital* of St. Cross, near Winchester, and several other large *Hospitals*, were anciently founded by *particular statutes* or acts of parliament. King Charles I. granted to the Mayor and Commonalty of London the keeping of *Bethlem Hospital*, and the manors and lands belonging to it. The *Hospital* in London for *Foundling Children*, under the care of governors and guardians, who may purchase lands or tenements to the value of 4000*l.* a year; and they are to receive as many such *children* as they think fit, which may be brought to the *Hospital*, and shall there be bred up and employed, or placed apprentice to any trade, or the sea-service, the males till the age of twenty-four, and the females till twenty-one. They may likewise be let out or hired, &c. See *stats.* 13 *Geo.* 2. *cap.* 29. 29 *Geo.* 2. *c.* 29. § 13. 30 *Geo.* 2. *c.* 26. § 14.—See also *stat.* 13 *Geo.* 3. *c.* 82. regulating *Lying-in Hospitals*, and ordering them to be licenced. As to hospitals or asylums for lunatics in England, 48 *Geo.* 3. *c.* 96.—In Ireland, see, as to county hospitals and infirmaries, 5 *Geo.* 3. *c.* 20. 25 *Geo.* 3. *c.* 39. acts of the Irish parliament, and the acts 45 *Geo.* 3. *c.* 111. 46 *Geo.* 3. *c.* 95. 47 *Geo.* 3. *st.* 1. *c.* 44. and *st.* 2. *c.* 50. 48 *Geo.* 3. *c.* 113. 49 *Geo.* 3. *c.* 36. 54 *Geo.* 3. *c.* 62. 58 *Geo.* 3. *c.* 47. 59 *Geo.* 3. *c.* 41. passed since the Union. See further in general this Dict. titles *Mortmain*, *Corporation*, I. IV. *Charitable Uses.*

HOSPITALARIA. See *Hostilaria.*

HOSPITIUM, *Hostagium.* Procuration, or visitation-money. *Neubrigensis, lib.* 4. *c.* 14. *Brompton, fol.* 1193.

HOSTELLAGIUM. A right to have lodging and entertainment; reserved by lords in the houses of their tenants. *Cartular. Radinges, M.S.* 157.

HOSTELER, or HOSTLER, *Hostellarius.* From the Fr. *hosteler*, i. e. *hospes.*] An inn-keeper, see *stats.* 9 *E.* 3 *st.* 2. *c.* 11. 31 *E.* 3. *st.* 2. *c.* 2.

HOSTERIUM. A hoe, an instrument well known *Chart. Antiq.*

HOSTIÆ. Hoast bread, or consecrated wafers in the *Holy Eucharist*: and from this word *hostia*, *Somner* derives the Sax. *husel*, used for the Lord's supper, and *hustan* to administer the sacrament; which were kept long in our old English, under *housel*, and to *housal. Paroch. Antiq.* 270.

Shakspeare uses the term *unhouseled*, &c. in Hamlet; meaning that his father gave up the ghost, without having the holy bread, or sacrament, administered to him. See *Fabian's Chron.* edit. 1516. fo. 14.

HOSTILARIUS. An *hospitaller.*

HOSTILARIA, HOSPITALARIA. A place or room in religious houses, allotted to the use of receiving guests and strangers; for the care of which there was a peculiar officer appointed, called *Hostillarius*, and *Hospitalarius. Cart Eccl. Ely MSS.*

HOST-MEN. An ancient gild or fraternity, at Newcastle-upon-Tyne, who dealt in sea-coal. See *stat.* 21 *Jac.* 1. *c.* 3. and title *Coals.*

HOSTRICUS, *Austercus*, from the Latin *astur.*] A goshawk. *Paroch. Antiquities*, p. 569.

HOTCHPOT, *In partem positio.*] A word brought from the Fr. *hotchepot*, used for a confused mingling of divers things together, and among the Dutch it signifies flesh cut into pieces, and sodden with herbs or roots; but by a *metaphor* it is *a blending or mixing of lands together given in marriage, with other lands in fee falling by descent:* as if a man seised of thirty acres of land in fee, hath issue only two daughters, and he gives with one of them ten acres in marriage to the man that marries her; and dies seised of the other twenty acres: now she that is thus married, to gain her share of the rest of the land, must put her part given in marriage into *Hotchpot*, i. e. she must refuse to take the sole profits thereof, and cause her land to be mingled with the other; so that an equal division may be made of the whole between her and her sister, as if none had been given to her; and thus for her ten acres she shall have fifteen, otherwise her sister will have the twenty acres of which her father died seised. *Lit.* 55. *Co. Lit. lib.* 3. *cap.* 12.

There is also a bringing of *money* into *Hotchpot*, upon the clauses and within the intent of the statute for distribution of intestate's estates. *Stat.* 22 & 23 *Car.* 2. *c.* 10. Where a certain sum is to be raised, and paid to a daughter for her portion, by a marriage settlement, this has been decreed to be an advancement by the father in his life-time, within the meaning of the *statute*, though future and contingent; and if the daughter would have any further share of her father's personal estate, she must bring this *money* into *Hotchpot*, and shall not have both the one and the other. 1 *Eq. Ab.* 253. See 2 *Vern.* 638. and this Dict. tit. *Executor*, V. 8.

By the custom of London, there is likewise a term of *Hotchpot*, where the children of a *freeman* are to have an equal share of one third part of his personal estate, after his death. *Precod. Canc.* 3. See title *London*; and title *Executor*, V, 9.

There is also in the Civil Law *collatio bonorum*, answering to this, whereby if a child advanced by the father, do after his father's decease challenge a child's part with the rest, he must call in all that he had formerly received, and then take out an equal share with the others. *Cowell.*

See farther *Britton*, *c.* 72. *Lit. sect.* 267, 268, 2 *Comm.* 190. 517. and this Dict. title *Parceners.*

HOVEL, *Mandra.*] A place wherein husbandmen set their ploughs and carts out of the rain or sun. *Law Lat. Dict.*

HOUGHING OF CATTLE. See tit. *Mischief, Malicious.* In Scotland this is capital by the act 1606, *c.* 5. and in Ireland by Irish acts, 9 *Ann. c.* 11. 2 *Geo.* 1. *c.* 22.

HOUNSLOW-HEATH. A large *heath* containing 4293 acres of ground, and extending into several parishes; so much thereof as is in the King's inheritance, and fit for pasture, meadow, or other several grounds, shall be of the nature of *copyhold lands;* or the steward of the manor may let it for twenty-one years, &c. and the lessees may improve the same. *Stat.* 37 *H.* 8. *c.* 2.

HOUR, *Hora.*] Is a certain space of time of sixty minutes, twenty-four of which make the natural day. It is not material at what *hour* of the day one is born. *Co. Lit.* 135. See titles *Age, Fraction, Time.*

HOUSAGE. A fee paid for *housing* goods by a carrier, or at a wharf or quay, &c. *Shep. Epit.* 1725.

HOUSE, *Domus.*] A place of dwelling or habitation; also a family or household. Every man has a right to air and light in his own *house;* and therefore if any thing of infectious smell be laid near the house of another, or his lights be stopped up and darkened by buildings, &c. they are nusances punishable by our laws. 3 *Inst.* 231. 1 *Danv. Abr.* 173. But for a prospect, which is only matter of delight, no action will lie for its being stopped. 9 *Rep.* 58. See title *Nusance.*

The dwelling-*house* of every man is as his castle; therefore if thieves come to a man's *house* to rob or kill him, and the owner or his servant kill the thieves in defending him and his *house*, that is not felony, nor shall he forfeit any thing. 2 *Inst.* 316. See title *Homicide.* A man ought to use his own *house*, so as not to damnify his neighbour: and one may compel another to repair his *house*, in several cases by the writ *de domo reparanda.* 1 *Salk. Rep.* 360. Doors of a *house* may *not* be broken open on arrests, unless it be for treason, or felony, &c. *H. P. C.* 137. *Plowd.* 5. 5 *Rep.* 91. See title *Arrest.*

Several things have been resolved on the subject, as to the protection a man's house affords him, as, 1. That every man's house is as his castle, as well to defend him against injuries at for his repose. 2. Upon recovery in any real action or ejectment, the sheriff may break the house and deliver seisin, &c. to the plaintiff, the writ being *habere facias seisinam* or *possessionem;* and after judgment it is not the house of the defendant in right and judgment of law. 3. In all cases, where the King is party, the sheriff (if no door be open) may break the party's house to take him, or to execute other process of the King, if he cannot otherwise enter; but he ought first to signify the cause of his coming, and request the door to be opened; and this appears by the *stat. Westm.* 1. *c.* 17. which is only in affirmance of the Common Law: and without default in the owner, the law will not suffer a house to be broken. 4. In all cases, when the door is open, the sheriff may enter and make execution at the suit of any subject, either of body or goods; but otherwise where the door is shut, there he cannot break it to execute process at the suit of a subject. 5. Though a house is a castle for the owner himself and his family, and his own goods, &c. yet it is no protection for a stranger flying thither, or the goods of such an one, to prevent lawful execution; and therefore in such case, after request to enter, and denial, the sheriff may break the house. 5 *Rep.* 91, *a*, to 93, *a*.

From the particular and tender regard which the law of England has to a man's house arises in part the animadversion of the law upon *eaves-droppers*, *nusancers*, and *incendiaries:* and to this principle it must be assigned that a man may assemble people together lawfully (at least if they do not exceed *eleven*) without danger of raising a *riot*, *rout*, or unlawful assembly, in order to protect and defend his house, which he is not permitted to do in any other case. 4 *Comm. c.* 19. *p.* 223. cites 1 *Hal. P. C.* 547.

Commissioners of bankruptcy cannot break open a house to search for the bankrupt's goods, unless it be the house of the bankrupt. 2 *Show.* 247. See title *Bankrupt.*

The Hundred liable to damages by the burning of houses, 9 *G.* 1. *c.* 22. *sect.* 7. See title *Hundred.* See titles *Arrest, Execution, Constable, Homicide, &c.* as to the cases in which officers may break open a house to execute legal process; and as to felonies in or relative to Houses, See titles *Arson, Burglary, Felony, Larceny, Riot, Robbery, &c.*

HOUSEBOLD AND HAYBOLD. Seem to signify *housebote* and *hedgebote*, in *Mon. Ang.* 2. *par. fol.* 633. *Cowell. edit.* 1727.

HOUSEBOTE. A compound of *house* and *bote, i. e. compensatio:* signifies *estovers*, or an allowance of necessary timber out of the lord's wood, for the repairing and support of a *house* or tenement. And this belongs of common right to any lessee for years or for life; but if he take more than is needful, he may be punished by an action of waste. *Housebote*, says *Co.* on *Lit. fo.* 41. is two-fold, *viz. Estoveriam ædificandi et ardendi. Cowell.* See titles *Bote, Estovers, Common of Estover.*

HOUSE-BREAKING, OR HOUSE-ROBBING. See titles *Burglary, Larceny, Robbery.*

HOUSE-BURNING. See *Arson, Burning.*

HOUSE OF CORRECTION. In every county of England there shall be a *House of Correction* built at the charge of the county, with conveniences for the setting of people to work, or every justice of peace shall forfeit 5*l.* and the justices in sessions are to appoint governors or masters of such *Houses of Correction* and their salaries, &c. which are to be paid quarterly by the treasurer out of the county stock: These governors are to set the persons sent on work, and moderately correct them, by whipping, &c. and to yield a true account every quarter-sessions of persons committed to their custody; and if they suffer any to escape or neglect their duty, the justices may fine them. See *stats.* 7 *Jac.* 1. *c.* 4. 14 *Geo.* 2. *c.* 33.

The *House of Correction* is chiefly for the punishing of idle and disorderly persons; parents of bastard children, beggars, servants running away, trespassers, rogues, vagabonds, &c. Poor persons refusing to work are to be there whipped, and set to work and labour: and any person who lives extravagantly, having no visible estate to support him, may be sent to the *House of Correction*, and set at work there, and may be continued there until he gives the justice satisfaction in respect to his living; but not be whipped. A person ought to be convicted of vagrancy, &c. before he is ordered to be whipped. 2 *Bulst.* 351. *Sid.* 281. *Bridewell* is a prison for correction in London, and one may be sent thither. *Style*, 57.

By *stats.* 14 *Geo.* 2. *c.* 33. 17 *Geo.* 2. *c.* 5. upon presentment of the Grand Jury or under *stat.* 22 *Geo.* 3. *c.* 64. on presentment of any one justice, on view, the justices at Session may build or purchase land for building, or enlarge, buy or hire fit *Houses of Correction.* And the justices are to take care that the *House of Correction* be provided with proper materials for relieving, employing, and correcting persons sent to the same: and two justices shall visit the same twice or oftener in a year, and examine into the estate and management thereof, and report the same at the sessions. The governor or master of a *House of Correction* misbehaving himself, may be fined or turned out, at the discretion of the justices. Offenders liable to be sent to the *House of Correction*, where the time and manner of their punishment is not expressly limited by law, may be committed until the next sessions, or until discharged by due course of law.

By the said *stat.* 22 *Geo.* 3. *c.* 64. § 1. and the *stat.* 24 *Geo.* 3. *st.* 2. *c.* 55. § 1. the Quarter Sessions may appoint certain justices to be visitors and inspectors of such houses. The *stat.* 31 *Geo.* 3. c. 46. regulates the appointment and conduct of the governor and other officers of such houses; as also the appointment of the visiting justices. The above statutes contain also many other regulations as to such *Houses of Correction*, a schedule of *Rules and Orders* for their government, as to employing and feeding the persons therein; and which rules and orders are to be fixed up in every House of Correction. See further titles *Poor*, *Prison*, *Transportation*, *Vagrants*.

HOUSEL. See *Hostiæ*.

HOUSEHOLDER, *Pater-familias*.] The occupier of a house, a house-keeper, or master of a family.

HREDIGE. Readily, or quickly. *Leg. Adelstan. c.* 16. From the Sax. *hredinge, i. e. brevi*, in a short time. *Cowell.*

HUDEGELD. See *Hidgeld.*

HUDSON'S BAY COMPANY. An exclusive trade to a part of America was granted in 1610, by Charles II, *to the Governor and Company of Adventurers of England trading to Hudson's Bay*: They were to have the sole trade and commerce of and to all the seas, bays, straits, creeks, lakes, rivers, and sounds in whatsoever latitude, that lie within the entrance of the Streight commonly called *Hudson's Streights*; together with all the lands, countries, and territories upon the coasts of such seas, bays, and streights, which were then possessed by any English subject, or the subjects of any other Christian State; together with the fishing of all sorts of fish, of whales, sturgeon, and all other royal fish, together with the royalty of the sea. But this extensive charter has not received any parliamentary confirmation or sanction. *Reeve's Law of Shipping.* See this Dict. title *Navigation-Acts.*

## HUE AND CRY.

Hutesium et Clamor; from two French words *Huer* and *Crier*, both signifying to shout or *cry* aloud.] *Manwood*, in his *Forest Law*, *cap.* 19. *num.* 11. saith, that *Hue* in Latin, *est vox delentis*, as signifying the complaint of the party, and *Cry* is the pursuit of the felon upon the highway upon that complaint; for if the party robbed, or any in the company of one robbed or murdered, come to the constable of the next town, and desire him to raise the *hue* and *cry*, that is make the complaint known, and follow the pursuit after the offender, describing the party, and shewing as near as he can which way he went; the constable ought forthwith to call upon the parish for aid in seeking the felon, and if he be not found there, then to give the next constable notice, and the next, until the offender be apprehended, or at least until he be thus pursued unto the sea side. Of this see *Bracton*, *lib.* 3. *tract.* 2. *cap.* 5. *Smith de Rep. Anglor. lib.* 2. *cap.* 20. and the *stat. of Winchester*, 13 *Edw.* 1. *Stats.* 28 *Ed.* 3. 11. 27 *Eliz.* 13.

The Normans had such pursuit with a *cry* after offenders, which they called *Clamor de haro*; See *Grand Customary*, *cap.* 54. And it may probably be derived from *harrior*, *flagitare*. *Hue* is used alone in *stat.* 4 *Ed.* 1. *st.* 2. In the ancient records this is called *Hurtesium et clamor*. See 2 *Inst. fol.* 172.

But the *Clamor de haro* was not a pursuit after offenders, but a challenge of any thing to be his own after this manner, *viz.* He who demanded the thing did with a loud voice, before many witnesses, affirm it to be his proper goods, and demanded restitution. This the Scots call *hutesium*; and *Skene* saith it is reduced from the French *oyer*, *i. e. audire*, (or rather *oyez*) being a *cry* used before a proclamation; the manner of their *hue and cry* he thus describeth; If a robbery be done, a horn is blown, and an *out-cry* made, after which, if the party flee away, and doth not yield himself to the King's bailiff, he may lawfully be slain, and hanged upon the next gallows. See *Skene* in v. *Hutesium*.

In *Rot. Claus.* 30 *H.* 3. *m.* 5. we find a command to the King's treasurer to take the city of London into the King's hands, because the citizens did not, *secundum legem et consuetudinem Regni*, raise the *hue and cry* for the death of *Guido de Aretto* and others who were slain. *Cowell.*

*Hue and cry* is also defined the pursuit of an offender from town to town, till he be taken; which all that are present when a felony is committed, or a dangerous wound given, are by the Common Law, as well as by the statute, bound to raise against the offenders who escape, on pain of fine and imprisonment. 3 *Inst.* 116, 117. 2 *Inst.* 172. *Dalt. Justice*, *cap.* 28. 109. *Fitz. Coron.* 395. *Cro. Eliz.* 654.

The raising of *hue and cry* is enjoined by the Common Law, which may be called a raising of it at the suit of the King, as well by several acts of parliament, which may be called a raising of it at the suit of a private person. 3 *New Abr.* 61.

Hue and Cry, says *Blackstone*, is the old Common Law process, of pursuing with horn and with voice, all felons and such as have dangerously wounded another. *Bract. l.* 3. *tr.* 2. *c.* 1. § 1, *Mirr. c.* 2. § 6. It is also mentioned in *stat. Westm.* 1. 3 *E.* 1. *c.* 9. and 4 *E.* 1. *de officio coronatoris.* But the principal statute relative to this matter, is that of *Winchester*, 13 *E.* 1. *cc.* 1. 4. which directs that from henceforth every county shall be so well kept, that immediately upon robberies and felonies committed, fresh suit shall be made from town to town, and from county to county; and that *hue and cry* shall be raised upon the felons, and they that keep the town shall follow with Hue and Cry, with all the town and the towns near; and so Hue and Cry shall be made from town to town, until they be taken and delivered to the sheriff. And that such Hue and Cry may more effectually be made, the Hundred is bound by the same statute, *c.* 3. to answer for all robberies therein committed, unless they take the felon: which is the foundation of an action against the Hundred in case of any loss by robbery.

By *stat.* 27 *Eliz. c.* 13. no Hue and Cry is sufficient, unless made with both horsemen and footmen. And by *stat.* 8 *Geo.* 2. *c.* 16. the constable or like officer refusing or neglecting to make Hue and Cry, forfeits 5*l.* half to the King and half to the prosecutor, with full costs; and the whole vill or district is still in strictness liable to be amerced, according to the law of Alfred, if any felony be committed therein and the felon escapes. Hue and Cry may be raised either by precept of a Justice of the peace, or by a peace-officer, or by any private man that knows of a felony. 2 *Hal. P. C.* 100. 104. The party raising it must acquaint the Constable of the vill with all the circumstances which he knows of the felony, and the person of the felon; and thereupon the Constable is to search his own town, and raise all the neighbouring vills, and make pursuit with horse and foot; and in the prosecution of such Hue and Cry the Constable and his attendants have the same powers, protection, and indemnification, as if acting under the warrant of a Justice of peace. But if a man wantonly or maliciously raises an Hue and Cry, without cause, he shall be severely punished as a disturber of the public peace. 1 *Hawk. P. C. c.* 12. § 5,

As to *hue and cry* at Common Law, it seems to be clearly agreed, that a private person who hath been robbed, or who knows that a felony hath been committed, is not only authorized to levy *hue and cry*, but is also bound to do it under pain of fine and imprisonment. 2 *Inst.* 172. 3 *Inst.* 116. 1 *Hal. Hist. P. C.* 464.

From hence it follows, that although it is a good course, as *Lord Hale* says, to have precept or a warrant from a justice of peace for raising *hue and cry*, yet it is neither of absolute necessity, nor sometimes convenient, for the felons may es-

cape before the justice can be found; also *hue and cry* was part of the law before the *stat.* 1 *Ed.* 3. *cap.* 16. which first instituted justices of the peace. 2 *Hal. H. P. C.* 99.

It is incumbent upon constables to pursue *hue and cry* when called upon, and they are severely punishable if they neglect it: and it prevents many inconveniences if they be there; for it gives a greater authority to their pursuit, and enables the pursuant, in his assistance, to plead the general issue upon the statutes 7 *Jac.* 1. *cap.* 5. 21 *Jac.* 1. *cap.* 12. without being driven to special pleading: therefore, to prevent inconveniencies which may happen by unruliness, it is most advisable that the constable be called: yet upon a robbery, or other felony committed, *hue and cry* may be raised by the country in the absence of the constable; and in this there is no inconveniency, for if *hue and cry* be raised without cause, they that raise it are punishable by fine and imprisonment. 2 *Hal. Hist. P. C.* 99, 100.

The regular method of levying *hue and cry* is for the party to go to the constable of the next town, and declare the fact, and describe the offender, and the way he is gone; whereupon the constable ought immediately, whether it be night or day, to raise his own town, and make search for the offender; and upon the not finding him, to send the like notice, with the utmost expedition to the constables of all the neighbouring towns, who ought in like manner to search for the offender, and also to give notice to their neighbouring constables, and they to the next, till the offender be found. 3 *Inst.* 116. *Dalt. Justice, cap.* 28. *Cromp.* 178. 2 *Hawk. P. C.* 75.

The constable is not only to make search in his own vill, but also to raise all the neighbouring vills, who are all to pursue the *hue and cry* with horsemen as well as footmen, until the offender be taken. 2 *Hal. Hist. P. C.* 101. In case of *hue and cry* once raised and levied upon supposal of a felony committed, though in truth there was no felony committed; yet those who pursue *hue and cry* may arrest and proceed as if a felony had been really committed. 2 *Hal. Hist. P. C.* 101. 5 *H.* 5. *a.* 21 *H.* 7. 28. *a. per Rede.* 2 *Ed.* 4. 8 & 9. 29 *Ed.* 3. 39. 2 *Inst.* 173. 2 *Hal. Hist. P. C.* 102.

If *hue and cry* be raised against a person certain for felony, though possibly he is innocent, yet the constables, and those who follow the *hue and cry*, may arrest and imprison him in the common gaol, or carry him to a justice of the peace. 2 *Hal. Hist. P. C.* 102.

If the person pursued by *hue and cry* be in a house, and the doors are shut, and refused to be opened upon demand of the constable, and notice given of his business, he may break open the doors; and this he may do in any case where he may arrest, though it be only on suspicion of felony, for it is for the King and Commonwealth, and therefore a virtual *non omittas* is in the case; and the same law is upon a dangerous wound given, and a *hue and cry* levied upon the offender. 7 *Ed.* 3. 16, *b.* 2 *Hal. Hist. P. C.* 102. See title *Constable.*

It seems in this case, that if he cannot be otherwise taken, he may be killed, and the necessity excuseth the constable. 1 *Hal. Hist. P. C.* 102. See title *Homicide.*

Upon *hue and cry* levied against any person, or where any *hue and cry* comes to a constable, whether the person be certain or uncertain, the constable may search in suspected places within his vill, for the apprehending of the felons. *Dalt. cap.* 28. 2 *Ed.* 4. 8. *b. Cromp. de Pace,* 178. 3 *Ual. Hist. P. C.* 103. See title *Constable.*

But though he may search suspected places or houses, yet his entry must be by *open doors*, for he cannot break open doors barely to search, unless the person against whom the *hue and cry* is levied be there, and then it is true he may; therefore, in case of such a search, the breaking open the door is at his peril, *viz.* justifiable if he be there; but it must be always remembered, that in case of breaking open a door, there must be first a notice given to them *within*, of his business, and a demand of entrance, and a refusal, before doors can be broken. 2 *Hal. Hist. P. C.* 103. See title *Constable.*

If the *hue and cry* be not against a person certain, but by the description of his stature, person, clothes, horse, &c. the *hue and cry* doth justify the constable, or other person following it, in apprehending the person so described, whether innocent or guilty, for that is his warrant; it is a kind of process that the law allows, (not usual in other cases,) *viz.* to arrest a person by description. 2 *Hal. Hist. P. C.* 103.

But if the *hue and cry* be upon a robbery, burglary, manslaughter, or other felony committed, but the person that did the fact is neither known nor described by person, clothes, or the like; yet such a *hue and cry* is good as hath been said and must be pursued, though no person certain be named or described. 2 *Hal. Hist. P. C.* 103.

And therefore in this case, all that can be done is, for those who pursue the *hue and cry*, to take such persons as they have probable cause to suspect; as for instance, such persons as are vagrants, that cannot give an account where they live, whence they are, or such suspicious persons as come late into their inn or lodgings, and give no reasonable account where they had been, and the like. 2 *Ed.* 4. 8. *b.* 2 *Hal. Hist. P. C.* 103.

There can be no doubt but that both by the Common Law, as also by the several statutes which enjoin the levying of *hue and cry*, they who neglect to levy one, (whether officers of justice or others,) or who neglect to pursue it when rightly levied, are punishable by indictment, and may be fined and imprisoned for such neglect. 2 *Hal. Hist. P. C.* 104.

We shall proceed to enquire more particularly, 1, On what robbery Hue and Cry may be raised, and how it ought to be pursued: 2, Of bringing the Action; at what Time; and the Evidence necessary; and what shall excuse the Hundred: 3, Of levying the Money.

1. The levying of Hue and Cry is enjoined by several acts of parliament; and to this purpose it is enacted by *stat. Westm.* 1. 3 *Ed.* 1. *cap.* 9. "That all be ready and apparelled at the summons of the sheriff, to pursue and arrest felons."

Though some imagined that Hue and Cry was grounded on this statute; yet *Lord Coke* says, that it was used long before, as appears even by this statute, which instead of introducing a new law, enforces obedience to that which was founded on the ancient laws of the realm. 2 *Inst.* 171.

By the statute of 4 *Ed.* 1. *De officio coronatoris*, Hue and Cry shall be levied for all murders, burglaries, men slain, or in peril to be slain, as otherwhere is used in England; and all shall follow the Hue and steps as near as they can.

Next came the *stat.* of *Winchester*, the effect of which has been already stated.

By *stat.* 27 *Eliz. c.* 13. § 2. it is enacted, "That the inhabitants and resiants of every hundred, (with the franchises within the precinct thereof) wherein *negligence*, fault, or defect of pursuit and fresh suit after Hue and Cry made shall happen to be, shall answer and *satisfy the one moiety* of all such money and damages as shall be recovered against the hundred, with the franchises therein, in which any robbery or felony shall be committed, to be recovered by action of debt, &c. by and in the name of the clerk of the peace for the time being, of or in every such county, and recovery by the party or parties robbed shall be, without naming the christian name or surname of the said clerk of the peace; which moiety so recovered shall be to the use of the inhabitants of the hundred where any such robbery, &c. shall be committed."

It seems to be admitted that no kind of robbery will make the hundred liable, but that which is done openly, and with force and violence; and that therefore the private stealing,

or taking any thing from the party, does not come within the statutes which make the hundred liable, because the hundred is not liable for not preventing the robbery, but because they did not apprehend the robbers, which in private felonies, and of which they had no notice, it would be difficult, if not impossible, for them to do. 7 *Co.* 6, 7. 2 *Salk.* 614.

Also it hath been adjudged, and is admitted in all the books which speak of this matter, that a robbery in a house, whether it be by day or by night, does not make the hundred liable: The reasons whereof are, that every man's house is in law esteemed his castle, which he himself is obliged to defend, and into which no man can enter, to see what is doing there, without his leave; also being done in a house, the inhabitants of the hundred cannot be presumed to have notice of it so as to be able to apprehend the offenders. 7 *Co.* 6, *a. Sendil's* case.

But if a person be assaulted in the highway, and carried into a house, and there robbed, it seems the hundred shall be liable; for otherwise the provision made by the statute would be eluded. 1 *Sid.* 263. and see 1 *Salk.* 614. 7 *Mod.* 159. Also it does not seem necessary, that the robbery should be committed in the highway, nor alleged to have been so by the plaintiff in his declaration. 7 *Mod.* 159. It may be in a private way, or be in a coppice; and in both cases the hundred shall be chargeable. 2 *Salk.* 614. and vide *Carth.* 71. 1 *Mod.* 221. 3 *Mod.* 258. 1 *Show.* 60. *Comb.* 150. S. C. 2 *Saunders*, 376, *n.* 8. *Williams's Edit.*

It is clearly agreed, that for a robbery committed in the night the hundred is not chargeable, because they cannot be presumed to have notice thereof, so as to be able to apprehend the robbers. 7 *Co.* 6, *b.* 2 *Inst.* 569. 3 *Leon.* 350.

But yet it is not necessary that the robbery should be committed after sun-rise, and before sun-set; for if there be as much day-light at the time, that a man's countenance may be discerned thereby, though it be before sun-rise or after sun-set, the hundred shall be liable. 7 *Co.* 6, *a. Cro. Jac.* 106. 1 *And.* 158. 1 *Leon.* 57. *Savil*, 33. vide *Carth.* 71. *Com.* 150. 3 *Mod.* 258. 1 *Show.* 60. S. P.

It hath been held, that if robbers drive or oblige the waggoner to drive his waggon from the highway by day, but do not rob or take any thing till night, that yet this is a robbery in the day-time, so as to charge the hundred. 1 *Sid.* 263. 7 *Mod.* 159. *Hutton*, 125.

It need not be averred that the robbery was committed in the day-time, although it must be so proved. 1 *Show.* 60. *Carth.* 71.

If he that is robbed, after *hue and cry*, make no farther pursuit after the robbers, action lies against the hundred. 4 *Leon.* 180. The party robbed is not bound to pursue the robbers himself, or to lend his horse for that purpose; but still has his remedy against the hundred, if they are not taken: though if any of them are taken, either within forty days after the robbery, or before the plaintiff recovers, the hundred is discharged. *Sid.* 11. When a man is robbed on a Sunday, on which day persons are supposed to be at church, and none ought to travel, the hundred is not liable. See *stat.* 27 *El. c.* 13. But where a robbery, is done on a Sunday, though the hundred is not chargeable, *hue and cry* shall be made by *stat.* 29 *Car.* 2. *c.* 7. And if a person be robbed going to church in a country town or village, on a Sunday, which is a religious duty required by law, it has been held an action lies against the hundred; but not if one be robbed on that day in other travelling for pleasure, &c. which is prohibited by statute. 6 *Geo.* 1. *C. B.* per *King*, chief justice.

And it was formerly ruled by three judges on the *stat.* of *Winton*, where a man was robbed on a Sunday, in time of divine service, and made *hue and cry*, that the hundred should be charged; for many persons are necessitated to travel on this day; as physicians, &c. 2 *Cro.* 496. 2 *Rol.* 59. *Godb.* 280. See 2 *Nels. Abr.* 937, 938. A robbery must be and open robbery that the country may take notice of it, to make the hundred answerable. 7 *Rep.* 6.

A man is set upon and assaulted by robbers in one hundred, and carried into a wood, &c. in another hundred, near the highway, and there robbed; the action shall be brought against the hundred where the robbery was done, as particularly expressed in the statute, and not the hundred where the man was taken or assaulted: because the assault is not the efficient cause of the robbery, as a stroke is the cause of murder. 2 *Salk.* 614. 7 *Mod.* 157.

But where goods are taken from a man in one hundred, and opened in another; where they are first taken or seized, they are stolen, and the robbery is committed. 2 *Lill. Abr.* 27.

By the *stat.* 8 *Geo.* 2. *c.* 16. no process for appearance is to be served against the hundred, &c. for a robbery committed, but on the high constable, who shall give notice of it in one of the principal market-towns, &c. and then enter an appearance, and defend the action. By *stat.* 22 *Geo.* 2. *c.* 24. no person shall recover on any of the statutes of *hue and cry* above 200*l.* unless the person or persons so robbed shall at the time of such robbery, be together in company, and be in number two at the least, to attest the truth of his or their being so robbed.

And by *stat.* 30 *Geo.* 2. *c.* 3. § 116. and 4 *Geo.* 3. *c.* 2. § 118. no receiver general of the land-tax, or his agents, can sue the hundred for a robbery, unless the persons carrying the money be three in company.

2. The general doctrine as to actions is as follows. Where a robbery is done on the highway in the day time, of any day except Sunday, the hundred where committed is answerable for it: but notice is to be given of it, with convenient speed, to some of the inhabitants of the next village, to the intent that they may make *hue and cry* for the apprehending of the robbers, or no action will lie against the hundred: and if any of the robbers are taken within forty days, and convicted, the hundred shall be excused.

On the statute roll in the Tower, it appears that the statute of *Winton* gives only forty days to the county to apprehend the robbers, but in other copies of such statute equally ancient and almost as authentic the term of half a year is mentioned. By *stat.* 28 *E.* 3. *c.* 11. the term is positively confined to 40 days, and this was then considered as a confirmation, not an amendment of the statute of *Winton*; and accordingly it was adjudged good, where the plaintiff brought an action on the statute, and declared that he was robbed, and none of the robbers taken within forty days, according to the said statute; and with this the modern precedents agree, as *Rast. Ent.* 406. *Co. Ent.* 351. *Hern.* 215. *Thes. Brev.* 141. 2 *Salk.* 376.

The action is by original writ, and cannot be brought until 40 days after the robbery, *Pierson* v. *Westward*, *H.* 3 *Lev.* 320. 2 *Saund.* 375. *n. a. Williams's Edit.* (*Query*, now 40 days after notice in the Gazette, see *stat.* 8 *Geo.* 2. *c.* 16. *post.*) If any of the robbers are taken at any time before the action is commenced, (which by 27 *Eliz. c.* 13. § 9. must be within 12 months,) the hundred is discharged. *Baskerville* v. *Abridge*, *H.* 1 *Sid.* 11.

If a servant be robbed in the absence of his master, of his master's money, it is clear that the master may maintain an action for it against the hundred, but then the servant must make oath that he knew not any of the robbers. *Cro. Car.* 37. Also the servant being robbed in his master's absence, may himself maintain an action against the hundred, and may declare that he was possessed *ut de bonis suis propriis*, &c. And though the jury find that he was robbed of his master's money, yet shall he recover; for the servant is possessed *ut de bonis suis propriis*, against all, and in respect of all, but

him that hath the very right. 2 *Salk.* 613, 614. 4 *Mod.* 303. *Comb.* 263. 1 *Sid.* 45.

If a servant be robbed in the presence of the master, the master must sue; and the oath of the master is sufficient. 2 *Salk.* 613. *Carth.* 147.

There must be an oath, vide *Carth.* 145. 2 *Salk.* 613. 1 *Show.* 94. 3 *Mod.* 287.

Where a servant is robbed, he must be examined and sworn; but if the master be present, it is a robbery of him. *Show.* 241. 1 *Leon.* 323. If a quaker be robbed, or a man's servant being a quaker, and either refuse to take an oath of the robbery, and that he did not know any of the robbers, the hundred is not answerable; for the *stat.* of 27 *Eliz. c.* 13. was made to prevent combination between persons robbed and robbers. 2 *Salk.* 613.

But the master's oath where the servant is a quaker, or otherwise, and being robbed in his presence, will maintain the action in his own name. *Carth.* 146. And a plaintiff had judgment on his oath, though his servant that was robbed with him knew one of the robbers. *Noy*, 150. When a carrier is robbed of another man's goods, he or the owner may sue the hundred; but the carrier is to give notice, and make oath, &c. though the owner of the goods brings the action. 2 *Saund.* 380.

If A. and B. travelling together are robbed of a sum of money, to which they are both jointly entitled, they may both join in an action against the hundred; but otherwise if they had separate and distinct interests. *Dyer*, 370, *a. pl.* 59.

By *stat.* 27 *Eliz. c.* 13. § 11, it is enacted, That no person that shall happen to be robbed shall maintain any action, or take any benefit of the statutes which make the hundred liable, except the person so robbed shall, with as much convenient speed as may be, give notice of the robbery so committed unto some of the inhabitants of some town, village, or hamlet, near unto the place where any such robbery shall be committed.

In the construction of this clause of the statute it hath been holden, That if a person be robbed in a highway *in divisis hundredorum*, he need not give notice to the inhabitants of each hundred, but notice to either of them is sufficient. *Cro. Jac.* 675. See *Cro. Car.* 41. 379. 1 *Show.* 94.

It hath been resolved, that though the notice given be five miles from the place where the robbery was committed, that it is sufficient; the reason whereof is, because that the party, who is a stranger to the country, cannot have conuzance of the nearest place or town. *March.* 11. and see 2 *Leon.* 82. 2 *Stra.* 1170.

Also if the party robbed give notice with as much convenient speed as may be, though he be otherwise remiss in not pursuing the robbers, or refuses to lend his horse for that purpose, yet he shall not lose his action for this, nor the hundred be excused. *March.* 11. 2 *Leon.* 82.

Now, by *stat.* 8 *Geo.* 2. *cap.* 16. § 1, it is further enacted, "That no person shall maintain any action against the hundred, unless he shall, (besides the notice already required by the *Stat.* 27 *Eliz. c.* 13,) with as much convenient speed as may be, after any robbery committed, give notice thereof to one of the constables of the hundred, or to some constable, borsholder, headborough, or tithingman of some town, parish, village, hamlet, or tithing near unto the place where such robbery shall happen, or shall leave notice in writing of such robbery at the dwelling-house of such constable, &c. describing, so far as the nature and circumstances of the case will admit, the felon, and the time and place of the robbery, and also shall, within the space of twenty days next after the robbery committed, cause public notice to be given thereof in the *London Gazette*, therein likewise describing, so far as the nature and circumstances of the case will admit, the felon, and the time and place of such robbery, together with the goods and effects whereof he was robbed." And by § 3 of the same act it is provided that no hundred, &c. shall be chargeable if one or more of the robbers be apprehended within forty days next after such public notice in the Gazette.

By *Stat.* 27 *Eliz.* c. 13. § 11, it is enacted, "That the party robbed shall not have any action, except he shall first, within twenty days next before such action to be brought, be examined upon his corporal oath, before some justice of the peace of the county where the robbery was committed, whether he knows the parties that committed the robbery, or any of them; and if, upon examination, it be confessed, that he knows the parties, or any of them, that then he shall, before the action be commenced, enter into sufficient bond, by recognizance, before the said justice, effectually to prosecute the same person and persons."

If the party does not know the robbers at the time of the robbery committed, though he happens to know them afterward, it is not material. *March*, 11.

In a description of the robber an omission of mentioning that he had red eye-brows was held fatal. 2 *Wils.* 113.

The oath may be taken before a justice of the county, though not in the county at the time of administering it. 1 *Jones*, 239. *Cro. Car.* 211.

As to giving bond for payment of costs, by *Stat.* 8 *Geo.* 2. *cap.* 16, it is enacted, "That, before any action commenced, the party shall go before the chief clerk, or secondary, or the filazer of the county wherein such robbery shall happen, or the clerk of the pleas of that court wherein such action is intended to be brought, or their respective deputies, or before the sheriff of the county wherein the robbery shall happen, and enter into a bond to the high constable, or high constables of the hundred in which the robbery shall be committed, in the penal sum of one hundred pounds, with two sufficient sureties to be approved of by such chief clerk, &c. with condition for securing to such high constable or high constables, the due payment of his or their costs, after the same shall be taxed by the proper officer, in case the plaintiff in such action shall happen to be nonsuited, or shall discontinue the action, or in case judgment shall be given on demurrer, or a verdict against him."

Costs are always given in actions on the statutes of Hue and Cry, where damages are recovered. 1 *Term Rep.* 72.

By *stat.* 27 *Eliz. c.* 13. § 9, the action is to be brought within *one year* after the robbery committed.

In the construction of this statute it hath been holden; That if a person be robbed the 9th of October, 13 *Jac.* and so laid that the teste of the writ be the 9th of October, 14 *Jac.* that this is not pursuant to the statute; and that in this action, which is penal against the hundred, there is no reason to exclude the day on which the fact was done, nor to make such construction as is done in protections and the inrolment of deeds, which have always received a benign interpretation. *Hob.* 139, 140. *Moor*, 878, *pl.* 1233, 1 *Brownl.* 156. S. C. Vide 1 *Sid.* 139. 1 *Keb.* 495. and see *Wms. Saund.* 375, *b*, *n.*

An action was brought by the master, on the statute of *Winton*, for a robbery committed on his servant, in which he declared of an assault and battery done to himself, (though then 50 miles from the place), also that he made oath that he did not know any of the persons: the issue was entered of record, and the jury appeared at the bar ready to try it; but being for other business adjourned to another day, the plaintiff observing his mistake moved to amend, by declaring of a robbery on his servant, &c. and it appearing that the year in which the action must be brought was expired, and consequently the action must be lost if not allowed, the court, after long debate and consideration of former precedents, admitted him to amend. 3 *Lev.* 317.

It seems that, from the necessity of the case, the party himself that was robbed is to be admitted as a witness, but then his testimony must be corroborated by collateral proof

and circumstances, and such as may induce a jury to believe that a robbery was actually committed, and that the party lost what he declared for. 2 *Leon.* 12.

By *stat.* 8 *Geo.* 2. *c.* 16, it is enacted, "That in any action against any hundred, any person inhabiting within the hundred, or any franchise thereof, shall be admitted as witness for or on behalf of the hundred."

If any action against the hundred be discontinued on a new action brought, there must be a new oath taken within forty days before the last action brought. *Sid.* 139.

In action upon the statute of *Hue and Cry*, the declaration is good, though the plaintiff doth not say, that the justice of peace, who took the oath, lived *prope locum* where the robbery was committed. And oath was made before a justice of peace of the county where the robbery was done, in a place of another neighbouring county; and it was held good. *Cro. Car.* 211.

If a justice of peace refuse to examine a person robbed, and to take his oath, action on the statute lies against the justice. 1 *Leon.* 323. It is safe to say the plaintiff gave notice at such a place, near the place where the robbery was done: and though that place where notice is given be in another hundred or county, yet it is good enough; for a stranger may not know the confines of the hundred or county. *Cro. Car.* 41. 379. 3 *Salk.* 184.

If there be a mistake of the parish in the declaration where the robbery was, if it be laid in the right hundred it is well enough. 2 *Leon.* 212. And though the party puts more in his declaration than he can prove, for so much as he can prove it shall be good. *Cro. Jac.* 348.

Upon a trial in these cases, the party must file his original, and be sure to have a true copy thereof, and witnesses to prove it; and he must also have the affidavit or oath, and a witness to prove the taking it. 2 *Lill. Abr.* 25.

By *stat.* 27 *Eliz. c.* 13. § 8, it is enacted, "That where any robbery is committed by two, or a greater number of malefactors, and that it happen any one of the said offenders to be apprehended by pursuit, to be made according to the statutes, that then, no hundred or franchise shall in any wise incur the penalty, loss, or forfeiture mentioned in the statutes, although the residue of the malefactors shall happen to escape." See 1 *Vent.* 118. 325. *Raym.* 221. 2 *Lev.* 4.

If Hue and Cry be made towards one part of the county, and an inhabitant of the hundred apprehends one of the robbers within another, this is a taking within the statute. 1 *Vent.* 118, 119.

3. By *stat.* 27 *Eliz. c.* 13. § 14, it is enacted, "That after execution of damages by the party or parties so robbed had, it shall be lawful (upon complaint made by the party charged) to and for two justices of the peace (whereof one to be of the *quorum*) of the same county, inhabiting within the hundred, or near unto the same where any such execution shall be had, to assess and tax rateably and proportionably, according to their discretions, all and every the towns, parishes, villages, and hamlets, as well of the said hundred where any such robbery shall be committed, as of the liberties within the said hundred to and toward an equal contribution, to be had and made for the relief of the inhabitants, against whom the party or parties robbed before that time had execution."

The constables, &c. are to levy the money, and pay it over to the justices, and they are to deliver it over to the inhabitants, for whose use it was collected.

The same taxation is to be in cases where there is default or negligence of pursuit and fresh suit, for the benefit of inhabitants having damages or money levied on them. (See *ante*, I.)

By the *stat.* 8 *Geo.* 2. *cap.* 16. already referred to, after judgment against the hundred, no process shall be served on the high constable or any inhabitant: but the sheriff on receipt of the writ of execution shall show it *gratis* to two justices of the peace in or near the hundred, who shall speedily cause an assessment to be levied pursuant to the *stat.* 27 *Eliz. c.* 13. and also for the necessary expenses of the high constable above the costs and damages recovered, of which, on notice from the two justices, he shall give an account and proof on oath to their satisfaction, having first caused his attorney's bill to be taxed. § 4.

The sheriff shall pay the money levied to the parties without fee, and indorse the day of receiving the writ of execution, and not be called upon for a return till sixty days after. And see *stat.* 22 *Geo.* 2. *cap.* 46. § 34.

And the like assessment shall be in case the plaintiff be nonsuit, discontinue, or have a verdict or judgment on demurrer against him, if by insolvency of the plaintiff or his sureties, he cannot be reimbursed on the bond of 100*l.* penalty; and the money levied shall be paid to the justices for the high constable in ten days after it is levied. § 7, 8. of said *stat.* 8 *Geo.* 2. *c.* 16.

And the justices may limit a time not exceeding thirty days for levying such assessment; and the officer appointed refusing or neglecting to levy and pay the money, &c. in such time, forfeits double the sum. § 9, 10.

If there be judgment against the hundred, it may be levied against the inhabitants of the same hundred by *fieri facias*. So it may be levied upon any one, who has lands in his possession within the hundred, though he has no house nor lodging there; for he is an inhabitant. *R.* 2 *Saund.* 423.—Upon a lessee, or purchaser after the robbery committed. *R. Noy*, 155.—So it may be levied upon one or two of the inhabitants. But if a man come to inhabit in a hundred after a robbery done, he shall not be charged. *R. Hutt.* 125. *Cont. per Barckley, Mar. pl.* 28.

It has been suggested, that in all these cases it would be convenient to provide, that instead of a specific rate, the high constable should, by order of justice of peace, add the sum to be levied to the general county rate.

HUERS. See *Conders.*

HUISSERIUM. A ship used to transport horses; derived, as some will have it, from the Fr. *huis*, *i. e.* a door; because, when the horses are put on shipboard, the doors or hatches are shut upon them, to keep out the water. *Brompton Anno.* 1190.—These ships have been termed *Uffers.*

HUISSIER. An usher of a court, or in the King's palace, &c. See *Usher.*

HULKA. A hulk or small vessel. *Walsing.* 394.

HULKS. For felons. See title *Transportation.*

HULL. A restraint of exactions taken there, *stat.* 27 *Hen.* 8. *c.* 3. Their duties on salt fish and herrings restored, *stats.* 33 *Hen.* 8. *c.* 33. 5 *Eliz. c.* 5. *sect.* 3. The Customer of Hull to have a deputy resident at York, *stat.* 1 *Eliz. c.* 11. § 8. For erecting workhouses and maintaining the poor at Hull, see *stats.* 15 *Geo.* 1. *c.* 10. 28 *Geo.* 2. *c.* 27. See this Dict. titles *Fish*, *Navigation Acts.*

HULLUS. A hill.—*In* hullis *et holmis*, *i. e.* in hills and dales. *Mon. Angl. tom.* 2. *p.* 292.

HUMAGIUM. A moist place, *Mon. Angl.* 1 *par. f.* 628, *a.*

HUMBER. (river) in Yorkshire, fish-guards and piles, &c. to be removed. *Stat.* 23 *Hen.* 8. *c.* 18. See title *Fish.*

## HUNDRED.

HUNDREDUM, *Centuria.*] A part or division of a Shire; so called, either because of old each *hundred* found 100 fidejussors of the King's peace, or a hundred able men for his wars. But more probably it is so called, because it was composed of an hundred families. It is true, *Brompton* tells us, that an hundred contains *centum villus*; and *Giraldus Cambrensis* writes, that the Isle of Man had 343 *villas.* But in these places the word *villa* must be taken for a country family; for it cannot mean a village, because there are not above 40 villages in that island. So where *Lambard* says,

that an hundred is so called, *à numero centum hominum*, it must be understood of an hundred men who are heads or chiefs of so many families.

The word *hundredum* is sometimes taken for an immunity or privilege, whereby a man is quit of money or customs due to the hundreds. *Cowell.*

Hundreds were first ordained by King Alfred, King of the West Saxons: *Lambard verbo* Centuria. This dividing counties into hundreds, for better government, King Alfred brought from Germany: for there *centa*, or *centena*, is a jurisdiction over an hundred towns. See 1 *Comm.* 115. *Introd.* § 4.

In ancient times, it was ordained for the more sure keeping of the peace, that all free-born men should cast themselves into several companies by 10 in each company; and that every of these ten men should be surety and pledge for the forthcoming of his fellows. For which cause these companies in some places were called *tithings*; and as ten times ten makes an hundred, so because it was also appointed that ten of these tithings should at certain times meet together for matters of greater weight, therefore that general assembly was called an hundred.—*Lamb. Const.*

The hundred is governed by an high constable or bailiff; and formerly there was regularly held in it the hundred-court for the trial of causes, though now fallen into disuse. In some of the more Northern counties these hundreds are called wapentakes. 1 *Comm. Introd.* § 4. *p.* 115; and see 4 *Comm. c.* 33.

This is the original of hundreds, which still retain the name, but the jurisdiction is devolved to the county-court, some few excepted, which have been by privilege annexed to the crown, or granted to some great Subject, and so remain still in the nature of a franchise. This has been ever since the *stat.* 14 *Ed.* 3. *st.* 1. *cap.* 9. whereby these hundred-courts, formerly farmed out by the Sheriff to other men, were all, or the most part, reduced to the County-court, and so remain at present.

But now, by hundred-courts we understand several franchises, wherein the sheriff has nothing to do by his ordinary authority, except they of the hundred refuse to do their office. See *West. part* 1. *Symbol, lib.* 2. § 228. *Ad* hundredum *post Pascha, et ad proximum* hundredum *post festum St. Mich.—Mon. Angl.* 2 *par f.* 293, *a.*

An hundred is to have jurisdiction or power to administer justice in 100 vills, or of 100 men, or of 100 parishes, *Br. Court Baron, pl.* 8. cites 8 *H.* 7. 3. *par Rede.*

Every ward in London is an hundred in a county, and every parish in London is a vill in an hundred. 9 *Rep.* 66, *b.*

Hundreds were either parcel of the counties, and there the sheriffs did constitute bailiffs, (*viz.* those hundreds which were anciently parcel of the farm of the sheriffs, that the statute 2 *Ed.* 3. *c.* 12, speaks of); or else they were such as were granted out, which the lord of the hundred sometimes held at farm, and sometimes in fee, called hundreds in fee, liberties of hundreds, franchises of hundreds. *Vent.* 405.

In the time of King Alfred the kingdom was in gross, and then divided into counties and hundreds, and all persons then came within one hundred or other; and then the King's relations had the government of them, and therefore they were called *Consanguinei* (*cousins*); and so are the Earls (*Comites*) Lord lieutenants, styled at this day; but when the office became troublesome, there were ordained *Vicecomites*, (*Sheriffs*,) which name remains to this day, and the others continue to be called *Consanguinei*, but have no power in the county, having only the honorary name of Earls or *Comites* of such or such a county, &c. For the better government of these counties, the *Vicecomites* had two courts; but out of those the King granted petty leets and courts baron; but the tourn of the sheriff had yet a superintendant power, they being derived out of the sheriff's tourn. See *Dyer*, 13.

The King afterwards granted away some hundreds in fee-simple, and some franchises, and the last excluded the King utterly, but the hundreds granted in fee were not wholly exempt. On this arose some confusion, and the parliament hereon took notice, that the execution of justice was by this much interrupted, and therefore came the statute of *Linc.* 9 *Ed.* 2. *st.* 2. That sheriffs should be sufficient persons, and have lands in the county, and so be able to answer both the King and county, and that bailiffs and farmers of hundreds should be sufficient men. And at this time hundreds were grantable for years.

Then came the statute of 2 *Ed.* 3. *cc.* 4, 5. that sheriffs should continue but for one year. But this took not away the whole inconvenience: for the Crown still granted away bailiwicks and hundreds, for lives, at rents at such excessive dear rates, that made them endeavour to make up their money by unlawful means; and therefore came the *statutes* 2 *Ed.* 3. *cap.* 12. 14 *Ed.* 3. *cap.* 9. By the first it was enacted, that all hundreds and wapentakes granted by the King shall be annexed to the county, and not severed. And by the other statute, that all should be annexed, and the sheriff should have power to put in bailiffs, for which he will answer, and no more should be granted for the future; and one reason of this was, because the King granted away hundreds, and abated not the sheriff's farm. 2 *Show.* 98, 99.

By various statutes the Hundred is made liable to damages sustained by parties injured by *Riots*, and *Malicious Mischief.* See those titles.—As to proceedings and recoveries against the hundred, in cases of robbery, see *Hue and Cry.*

The several statutes by which the Hundred is made liable to damages may be thus enumerated:

*Stat.* 1 *Geo.* 1. *st.* 2. Riot Act.

*Stat.* 9 *Geo.* 1. *c.* 22. Black Act; (and see 29 *Geo.* 2. *c.* 36.) killing cattle, cutting down trees, burning houses, &c.

*Stat.* 11 *Geo.* 1. *c.* 22.; 36 *Geo.* 3. *c.* 9. violently hindering the exportation of corn.

*Stat.* 19 *Geo.* 2. *c.* 34. for satisfying damages, and recompensing officers of Customs or Excise, wounded, &c. by offenders against those laws.[1]

*Stat.* 41 *Geo.* 32. (*U. K.*) *c.* 24. Injuries to mills.

*Stat.* 52 *Geo.* 3. *c.* 130. setting fire to manufactories, engines, &c.

*Stat.* 56 *Geo.* 3. *c.* 125. Injuries to collieries, or engines there.

*Stat.* 8 *Geo.* 2. *c.* 20. Destroying turnpikes, or works, upon navigable rivers.

*Stat.* 10 *Geo.* 2. *c.* 32. § 4. Cutting hop-binds.

For the mode of proceeding in actions against the hundred, see *Saunders*, 374, and *Williams's* note there.

In order to bring an action against the hundred, to recover damages, under *stat.* 9 *G.* 1. *c.* 22. for a barn set on fire, notice, as required by the act, must be given to some of the inhabitants of the hundred, within *two* days, after the injury; and the party injured (or his servants) must within four days after such notice, give in his examination, a week before, to a justice of peace, as to the outrage.—If the examination is taken *before* the notice, it will defeat the action. See *Fowler* v. *Loninboro' Hund. Term. Rep. C. P. East*, 59 *Geo.* 3. *p.* 64.

In an action on *stat.* 52 *G.* 3. *c.* 130. to recover the value of premises feloniously destroyed, brought against the hundred, by several parties in trade, three of whom were present when the fact was committed; one only gave his examination, on oath, without stating that, to the best of his knowledge and belief, the others had no knowledge of the person who committed the fact. This was held insufficient, under the directions of that act. *Nesham* v. *Armstrong, Term. Rep. K. B. Mic.* 58 *Geo.* 3. 146.

Where the leader of a mob having entered a gunsmith's shop, and demanded arms, was detained, and the mob then declared, that unless he were released, they would pull the house down, and they did enter, break the windows, &c. and

for that purpose, used some of the arms in the shop, and carried away others; the Court of K. B. held that this was evidence of a purpose to demolish the house, and that the owner might recover against the hundred, a reparation in damages for the injury done to the house itself, and to the arms actually used in the act of demolishing; but that he was not entitled to recover for the value of the arms carried away, that being a substantive and distinct felony, and therefore not within the provisions of the Riot Acts 1 *Geo.* 1. *st.* 2. *c.* 5. *Beckwith* v. *Wood*, *Term. Rep. K. B. E.* 58. *G.* 3. 487.

Inhabitants within the hundred may be witnesses for the hundred. 8 *Geo.* 2. *c.* 16.

HUNDRED-COURT. Is only a larger court-baron, being held for all the inhabitants of a particular hundred instead of a manor. The free suitors are here the judges, and the steward the register, as in the case of a court-baron. It is *not a Court of record*, and it resembles a court-baron in all points, except that in point of territory it is of a greater jurisdiction.

According to *Blackstone*, its institution was probably coeval with that of hundreds themselves, introduced, though not invented, by Alfred, being derived from the polity of the ancient Germans. See 1 *Comm. Introd.* § 4. and this Dict. titles *County Court*, *Court Baron*, *Court Leet*, *Constable*, *Hundred*, &c.

HUNDRED LAGH, from the Sax. *laga*, lex.] Is in Saxon the *hundred* court. *Manwood*, *par.* 1. *pag.* 1.

HUNDREDORS, *hundredarii*.] Persons serving on *juries*, or fit to be impanelled thereon for trials, dwelling within the hundred where the land in question lies. *Stat.* 35 *H.* 8. *c.* 6. And default of *Hundredors* was a challenge or exception to panels of jurors for default of *Hundredors*, &c. writs of *venire facias* for trial of any action in the courts at Westminster, shall be awarded of the *body* of the proper *county* where the issue is triable. See title *Jury*, I. II.

*Hundredor* also signifies him that hath the jurisdiction of the *hundred*, and is in some places applied to the *bailiff* of an *hundred*. See *stats.* 13 *Ed.* 1. *c.* 38. 9 *Ed.* 2. 2 *Ed.* 3. *Horn's Mirror*, *lib.* 1.

HUNDRED-PENNY. Was collected by the sheriff or lord of the *hundred*, *in oneris sui subsidium*. *Camd.* and see *Spelm. Gloss.* *Pence* of the *hundred* is mentioned in *Domesday*. And it is elsewhere called, *hundredfeh*. *Chart. K. Joh. Egidio Episc. Heref.*

HUNDRED-SETENA. Dwellers or inhabitants of a *Hundred*. *Charta Edgar. Reg.* *Mon. Ang. tom.* 1. p. 16.

HUNGER. According to the present doctrine, *Hunger* will not justify stealing food, to relieve a present necessity. 1 *Hal. P. C.* 54. And the doctrine seems just, as (on conviction) a judge may respite and a King *pardon*, an advantage which is wanting in many States; particularly those which are democratical. The ancient doctrine, (that it would justify) if now in force, might open a door to many villanies. And, in this commercial state, those who can labour need not fear starving. Those that cannot, and who are *poor*, the laws have made a provision for. See 4 *Comm.* 31.

HUNTING. By *stat.* 1 *Hen.* 7. *c.* 7. *unlawful hunting*, in any legal forest, park or warren, not being the King's property, *by night*, or with *painted faces* declared to be single *felony*. And by *stat.* 9 *Geo.* 1. *c.* 22. Appearing armed with faces *blacked*, or disguised, to *hunt*, wound, kill, or steal deer, to rob a warren, or steal fish, is *felony*, without benefit of clergy.

In *Scotland*, by the Common Law, all men have a right and privilege of the game, on their own estate or property—the only existing act, by which any limitation of that right can now be enforced, is 1621, *c.* 31. which requires the qualification of a plough-land (96 acres, or less if distinguished as a plough-gate) in heritage or property.—The regulations of certificates of such qualification, is, however, extended to Scotland, (and *Ireland*).—The person possessed of such qualification may hunt on his own lands, or (by permission) on those of his neighbours. But the practice in sheep countries, of farmers and their servants entering in hunting *foxes*, is considered as an act of necessary trespass, which the law regards with favour. The time of killing game is regulated in Scotland, by statute. By 13 *Geo.* 3. *c.* 54, Ptermagan are prohibited from Dec. 10, to August 12.—Heath-fowl from Dec. 10, to Aug. 20.—By 39 *Geo.* 3. *c.* 34, Partridges are prohibited from Feb. 1, to Sept. 1. Hares, Rabbits, and Deer, cannot be destroyed in time of snow, by several ancient acts: and there are several also which prohibit stalkers, slaying deer, &c. The burning of heath, or muir, is prohibited as prejudicial to the game, from 11 April, to 1 Nov. by *stat.* 13 *Geo.* 3. *c.* 54. § 3. of which act punishes unqualified persons, having game in their possession, without the licence of a qualified person, by penalties of 20*s.* &c. See titles *Deer-Stealers*, *Game*, *Black Act*.

HURDLE. A sledge or Hurdle used to draw traitors to execution. See title *Execution* (*Criminal*).

HURDEREFERST. A Domestick or one of the family, from the Sax. *hyred*, *familia*, and *fæest*, *firmus*. *Leg. H.* 1 .*c.* 8.

HURRERS. The cappers and hat makers of London were formerly one division of the *Haberdashers*, called by this name. *Stow's Surv. Lond.* 312.

HURST, HYRST, HERST, from the Sax. *Hyrst*, *i. e.* a wood or grove of trees.] There are many places in Kent, Sussex and Hampshire, which begin and end with this syllable; and the reason may be, because the great wood called *Anderswould* extended through those counties. *Cowell.*

*Hurst Castle*, is so called because situated near the woods. *Hurslega* is a woody place; and probably from thence is derived *Hursley*, now *Hurley*, a village in Berkshire. *Cowell.*

HURTARDUS, HURTUS. A ram or wether, a sheep. *Mon. Angl. tom.* 2. *pag.* 666.

HUS AND HANT. Words used in ancient pleadings.—Henricus P. *captus per querimoniam mercatorum Flandriæ et imprisonatus*, *offert Domino Regi* Hus et Hant *in plegio ad standum recto*, *et ad respondendum prædictis mercatoribus et omnibus aliis*, *qui versus eum loqui voluerint*: *et diversi veniunt qui manucapiunt quod dictus* Hen. P. *per* Hus et Hant *veniet ad summonitionem Regis vel Concilii sui in Curia Regis apud* Shepway, *et quod stabit ibi recto*, *&c. Placit. coram Concilio Dom. Reg. Anno* 27 H. 3: Rot. 9. See *commune Plegium*, *sicut* Johannes Doe et Richardus Roe. 4 *Inst.* 72.

HUSBAND AND WIFE. Are made so by marriage, and being thus joined, are accounted but one person in law. *Lit.* 168. See this Dict. title *Baron and Feme*.

HUSBANDRY AND HUSBANDMAN. There having been great decay of *Husbandry* and hospitality, it was enacted by *stat.* 39 *Eliz. c.* 1. now obsolete, that one half of the houses decayed should be erected, and forty acres of arable land laid to them, by the person, his heir, executor, &c. who suffered the decay: and they were to keep the houses and lands in repair.

The decaying of houses of husbandry prohibited, *stats.* 4 *H.* 7. *c.* 19. 6 *H.* 8. *c.* 5. 7 *H.* 8. *c.* 1. 27 *H.* 8. c. 22. 2 *&* 3 *Ph. & Ma. cc.* 1, 2. 39 *El. c.* 1. All now apparently expired or obsolete.—Wood not to be turned to tillage or pasture. *stat.* 35 *H.* 8. *c.* 17. § 3. Land to be re-converted to tillage, 5 *&* 6 *Ed.* 6. *c.* 5. 5 *El. c.* 2. repealed by *stat.* 35 *El. c.* 7. § 20. Who may be compelled to serve in husbandry, 5 *El. c.* 4. § 7.—How Husbandmen shall take apprentices. 5 *El. c.* 4. § 25. See titles *Labourers*, *Apprentices*. Arable land not to be converted to pasture, 39 *El. c.* 2. but not to extend to Northumberland, 43 *El. c.* 9. § 32.

HUSBRECE, from Sax. *hus*, a house and *brice*, a breaking.] Was that offence formerly which we now call *burglary*. *Blount*. See title *Burglary*.

HUSCARLE. A menial servant. It signifies properly a stout man, or a domestic; also the *domestical* gatherers of the Danes tributes were anciently called *huscarles*. The word is often found in *Domesday*, where it is said the town of Dorchester paid to the use of *huscarles* or *housecarles*, one mark of silver. *Domesday*.

HUSCANS, Fr. *hauseau*.] A sort of boot, or buskin made of coarse cloth, and worn over the stockings, mentioned in the ancient *stat.* 4 *Ed.* 4. *c.* 7.

HUSFASTNE, Sax. *hus*, i. e. domus et *fæest*, fixus.] He that holdeth house and land.—*Bract. lib.* 3. *tract.* 2. *cap.* 10. See *Heordfeste*.

HUSGABLE, *husgablum*.] House-rent, or some tax or tribute laid upon houses. *Mon. Ang. tom.* 3. *p.* 254.

HUSSELING-PEOPLE. Communicants; from the Sax. *housel* or *hussel*, which signifies the holy sacrament. See title *Hostiæ*.

HUSTINGS, *hustingum*, from the Sax. *hustinge*, i. e. *concilium* or *curia*.] A court held before the *Lord Mayor* and Alderman of London, and is the principal and supreme court of the city: and of the great antiquity of this court, we find honourable mention made in the laws of King *Edward the Confessor*: *Debet etiam in* London, *quæ est caput Regni et Legum, semper Curia Domini Regis singulis septimanis die lunæ* hustings *sedere et teneri; fundata enim erat olim et ædificata ad instar, et ad modum et in memoriam veteris Magnæ* Trojæ, *et usque in hodiernum diem leges et jura et dignitates, et libertates regiasque consuetudines antiquæ magnæ* Trojæ, *in se continet: et consuetudines suas una semper inviolabilitate conservatur, &c.* Other cities and towns have also had a Court of the same name; as Winchester, York, Lincoln, &c. *Fleta, lib.* 2. *c.* 55. 4 *Inst.* 247. *Stat.* 10 *Ed.* 2. *c.* 1. See this Dict. titles *Court of Hustings*, *London*.

HUTESIUM ET CLAMOR; HUE AND CRY. See that title.

HUTILAN, Taxes. *Mon. Angl. tom.* 2. p. 586.

HYBERNAGIUM. The season for sowing winter corn between Michaelmas and Christmas; as *Tremagium* is the season for sowing the summer corn in the spring of the year; These words were taken sometimes for the different seasons; other times for the different lands on which the several kinds of grain were sowed; and sometimes for the diferent corn: as *Hybernagium* was applied to wheat and rye, which we still call *winter corn*; and *tremagium* to barley, oats, &c. which we term *summer corn*: these words are likewise written *ibernagium* and *thornagium*. *Fleta, lib.* 2. *cap.* 73. § 18.

HYDAGE. See *Hidage*.

HYDE OF LAND, AND HYDEGILD. See *Hide* and *Hidage*.

HYPOTHECA. In the civil law, was where the possession of the thing pledged remained with the *debtor*. *Inst. l.* 4. *c.* 6. *s.* 7. see *East*, 2 *Comm.* 159. See title *Bailment*. In the Scotch law it is synonimous with *Lien*; see that title.

To *Hypothecate*, a ship, from the Lat. *hypotheca*, a pledge. Is to pawn the same for necessaries; and a master may hypothecate either ship or goods for relief when in distress at sea; for he represents the traders as well as owners; and in whose hands soever a ship or goods hypothecated come, they are liable. 1 *Salk.* 34. 2 *Lil. Abr.* 195. See titles *Insurance*, IV. *Factor*, *Merchant*, *Ship*, *Mortgage*, *&c.*

HYTH. A port or little haven to lade or unlade wares at, as Queen-hyth, Lamb-hyth, &c. *New Book of Entries, fol.* 3.—*De tota medietate hythæ suæ in, &c. cum libero introitu et exitu, &c. Mon. Ang.* 2 *par. fol.* 142. Also a Wharf, &c.

# I.



JACK. A kind of defensive coat-armour formerly worn by horsemen in war, not made of solid iron, but of many plates fastened together; which some persons by tenure were bound to find upon any invasion. *Walshingham.* It was called *lorica*, because at first it was made with leather. *Cowel.*

JACTITATION OF MARRIAGE. Is one of the first and principal matrimonial causes in the Ecclesiastical Courts; as, when one of the parties *boasts* or gives out that he or she is married to the other, whereby a common reputation of their marriage may ensue. On this ground the party injured may libel the other; and, unless the defendant undertakes and makes out a proof of the actual marriage, he or she is enjoined perpetual silence upon that head: which is the only remedy those courts can give for this injury. 3 *Comm.* 93.

JACTIVUS, *Lat.*] He that loseth by default: *Formul. Solen.* 159.

JACTUS *Mercium.* See *Jetsam.*

JAIL. See GAOL.

JAMAICA. An American island taken from the Spaniards, in the year 1655. See this Dict. tit. *Navigation-Acts.*

JAMBEAUX. Leg-armour; from *jambe, tibia, Blount.*

JAMPNUM, JANNUM, JAUN. Furze, whins, or gorse, and gorsy ground; a word used in *fines* of lands, &c. when law proceedings were in Latin, and which seems to be taken from the Fr. *jaune, i. e.* yellow; because the blossoms of furze or gorse are of that colour. *Cro. Car.* 179. *Cowell.*

No man can cut down furze, or whins in the *forest* without licence. *Manwood, cap.* 25. *num.* 3.

JAQUES. Small money. *Staundford's P. C. c.* 30.

JAR, *Span. Jarro, i. e.* an earthen pot.] An earthen pot or vessel of oil, containing twenty gallons.

JARROCK, A kind of cork, or other ingredient, prohibited to be used in dying cloth. *Stat.* 1 *R.* 3. *c.* 8.

JAUN. See *Jampnum.*

IBERNAGIUM, *hibernagium, ybernagium.*] Season for sowing winter-corn. *Cart. Antiq.* MSS.

ICENI. The ancient name for the people of Suffolk, Norfolk, Cambridgeshire, and Huntingdonshire.

ICH DIEN, From the German.] The motto belonging to the arms of the Prince of Wales, signifying *I serve:* It was formerly the motto of John, king of Bohemia, slain in the battle of Cressy, by Edward the Black Prince; and taken up by him to shew his subjection to his father King Edward III.

ICONA, *Iconia.*] A figure or representation of a thing. *Mat. Paris.* 146. *Hoveden,* 670.

ICTUS ORBUS. A maim, bruise, or swelling; any hurt without cutting the skin and shedding of blood, which was called *plaga:* it is mentioned in *Bracton, lib.* 2. *tract.* 2. *cap.* 5 & 24. and in the laws of *Henry* 1. *c.* 34.

IDENTITATE NOMINIS. An ancient, and now obsolete, writ that lay for one taken and arrested in any personal action, and committed to prison for another man of the same name; which writ was in nature of a commission to enquire, whether he were the same person against whom the action was brought; and if not, then to discharge him. *Reg. Orig.* 194. *F. N. B.* 267.

By *stat.* 37 *E.* 3. *c.* 2. this writ is given for wrongfully seizing lands or goods of a person outlawed, for want of a good declaration of his surname; and officers shall take security, to answer the value of what is seised, if the party cannot discharge it, on pain of double damages. And this writ shall be maintainable by executors, &c. by *stat.* 9 *H.* 6. *c.* 4. Vide 3 *Com. Dig.* 14 *Vin. Abr.* title *Identitate Nominis.*

Where one person is by mistake arrested for another, the person so arrested, may maintain an action for false imprisonment, against the officer to recover damages, though he sue this writ, for immediate relief, from the imprisonment. See titles *Arrest, False imprisonment.*

IDENTITY OF PERSON. Where a person convicted of, or outlawed for a criminal offence, being asked what he hath to alledge why execution should not be awarded against him, pleads diversity of person, a jury shall be impannelled to try this *collateral issue*, viz. the *identity of the person.* See 4 *Comm.* 396. and this Dict. titles *Execution and Reprieve.*

IDEOTS. See *Ideots.*

IDES. *Idus.*] With the ancient Romans were eight days in every month, so called; being the eight days immediately after the *Nones.* In the months of March, May, July, and October, these eight days begin at the eighth day of the month, and continue to the fifteenth day: in other months they begin at the sixth day, and last to the thirteenth. But it is observable, that only the last day is called *Ides*, the first of these days is the eighth *Ides*, the second day the seventh, the third the sixth, *i. e.* the eighth, seventh, or sixth day before the *Ides*, and so it is of the rest of the days: wherefore when we speak of the *Ides* of any month in general, it is to be taken for the fifteenth or thirteenth of the month mentioned. See title *Calends.*

## IDIOTS AND LUNATICKS.

The law relating to persons labouring under the infirmities of idiocy and lunacy: being in many respects the same, and in all cases depending on similar reasoning, is here reduced to one head; under which we may consider:

I. *The Distinction between Idiots and Lunaticks; and the Effects of that Distinction.*
II. *How they are to be found such.*
III. *Of the Care of Lunaticks; of appointing* Committees *or Curators; and of their Power and Duty.*
IV. *The Effect of Idiocy or Lunacy, on the* civil *Acts of Persons under those Infirmities.*
V. *Of their Effect in criminal Cases.*

I. AN IDIOT, [derived originally from the *Greek* ἰδιωτης, a private individual,] or *Natural fool*, is one that hath had no understanding from his nativity, and therefore is by law presumed never likely to attain any. For which reason the custody of him and his lands was formerly vested in the lord of the fee. *Flet. l.* 1. *c.* 11. § 10. And therefore still, by special custom in some manors, the lord shall have the ordering of idiot and lunatic copyholders. *Dy.* 302. *Huit.* 17. *Noy,* 27. But by reason of the manifold abuses of this power by subjects, it was at last provided by common consent, that it should be given to the king as the general conservator of his people; in order to prevent the Idiot from wasting his estate, and reducing himself and his heirs to poverty and distress. *F. N. B.* 232. This fiscal prerogative of the king is declared in parliament by *stat.* 17 E. 2. *c.* 9. which directs in

affirmance of the common law, that the king shall have ward of the lands of *Natural Fools*, taking the profits without waste or destruction, and shall find them necessaries; and after the death of such Idiots, he shall render the estate to the heirs; in order to prevent such Idiots from aliening their lands, and their heirs from being disinherited. 4 *Rep.* 126.

*Lord Coke* in 4 *Co. Beverley's* case, says, that this prerogative was by the common law, and that the statute *de prærogativâ Regis*, 17 *Ed.* 2. *c.* 9. above mentioned, is only declarative thereof. 2 *Inst.* 14. 4 *Co.* 126.

A man is not an Idiot if he hath any glimmering of reason, so that he can tell his parents, his age, or the like common matters. *F. N. B.* 233. But a man who is born deaf, dumb, and blind, is looked upon by the law as in the same state with an Idiot; he being supposed incapable of any understanding, as wanting all those senses which furnish the human mind with ideas. *Co. Litt.* 42. *Fleta, l.* 6. *c.* 40.

A Lunatic, or *Non Compos Mentis*, is one who hath had understanding, but by disease, grief, or other accident, hath lost the use of his reason. *A Lunatick* is, indeed, properly one that hath lucid intervals, sometimes enjoying his senses, and sometimes not; and that frequently depending upon the change of the moon. But under the general name of *non compos mentis*, and which is the most legal term, are comprized not only Lunaticks, but persons under phrenzies, or who lose their intellects by disease; those that *grow* deaf, dumb, and blind, not being *born* so, or such in short as are judged by the Court of Chancery incapable of conducting their affairs. See *post*, II. To these also, as well as Lunaticks, the king is guardian, but to a very different purpose. For the law always imagines, that these accidental misfortunes may be removed; and therefore only constitutes the Crown a trustee for the unfortunate persons, to protect their property, and to account to them for all profits received if they recover, or after their decease to their representatives. And therefore it is declared by *stat.* 17 *E.* 2. *c.* 10. that the king shall provide for the custody and sustentation of Lunaticks, and preserve their lands and the profits of them for their own use when they come to their right mind: and the king shall take nothing to his own use; and if the parties die in that state, the residue shall be distributed for their souls by the advice of the Ordinary; and of course, by the subsequent amendments of the law of administration, shall now go to their executors or administrators. 1 *Comm.* 304.

The distinction, established by this statute, between the king's interest in the lands of an *Idiot* and those of a *Lunatick*, is laid down and admitted in all the books which speak of this matter; and on this foundation it hath been resolved, that the king may grant the custody of an *Idiot* and his lands to a person, his heirs and executors, and that he had the same interest in such a one as he had in his *ward* by the common law. *Bro. Idiot*, 4, 5. *Dyer*, 25. *Moor*, 4. *pl.* 12. 1 *And.* 23. 4 *Co.* 127. *Co. Litt.* 247.

The more general description of a person, who, from his want of reason and understanding, comes within the protection of the law, is that of *Non compos mentis. Co. Litt.* 246. 4 *Co.* 124. *Skin.* 177.

There are, says *Coke*, four kinds of men who may be said to be *non compos:* 1. An Idiot who is *non compos* from his nativity. 2. One made such by sickness. 3. Lunatick, *qui aliquando gaudet lucidis intervallis;* who is *non compos* only for the time that he wants understanding. 4. One that is drunk; which last is so far from coming within the *protection* of the law, that his drunkenness is an aggravation of whatever he does amiss. *Co. Lit.* 247. 4 *Co.* 124. See 1 *Hale Hist. P. C.* 30—37. 3 *P. Wms.* 130. and this Dictionary, title *Drunkenness.*

1 An Idiot is a fool or madman from his nativity, and one who never has any lucid intervals; therefore the king has the protection of him and his estate, during his life, without rendering any account; because it cannot be presumed that he will be ever capable of taking care of himself or his affairs: and such a one is described a person that cannot number twenty, tell the days of the week, does not know his father or mother, his own age, &c. But these are mentioned as instances only; for idiot, or not, being a question of fact, must be tried by jury, or inspection. *Dyer*, 25. *Moor*, 4. *pl.* 11. *Bro. Idiots. F. N. B.* 233.

But though an Idiot must be so *à nativitate*, yet, if by inquisition it be found, that A. is an Idiot not having any lucid intervals *per spatium octo annorum*, this is a sufficient finding; for the inquisition having found the party an Idiot, the adding *spatium octo annorum* is surplusage, and shall be rejected. 3 *Mod.* 43, 44. 2 *Shaw.* 171. *Skin.* 5. 177. *S. C. Prodgers* and *Lady Frazier.*

2. One made such by sickness, which *Lord Hale* calls *Dementia accidentalis vel adventitia*, and which he again distinguishes into a total and a partial insanity, from its being more or less violent, is such a madness as excuseth in criminal cases; and though the party also in every thing else be entitled to the same protection with an Idiot; and though his disorder seems permanent and fixed, yet as he had once reason and understanding, and as the law sees no impossibility but what he may be restored to them again, it makes the king only a trustee for the benefit of such a one, without giving him any profit or interest in his estate. 1 *Hale's Hist. P. C.* 30.

3. A Lunatick; this is also *Dementia accidentalis vel adventitia*, and though such a one hath intervals of reason, yet during his phrenzy he is entitled to the same indulgence as to his acts, and stands in the same degree with one whose disorder is fixed and permanent. 4 *Co.* 125. *Co. Lit.* 247. 1 *Hale's Hist. P. C.* 31.

4. One made mad by drunkenness, which is called *Dementia effectata;* and though, as has been said, such a person be not entitled to the protection of the law, yet if a person by the unskilfulness of his physician, or by the contrivance of his enemies, eat or drink such a thing as causeth phrenzy, this puts him in the same condition with any other phrenzy, and equally excuseth him; also if by one or more such practices an habitual or fixed phrenzy be caused, though this madness was contracted by the vice and will of the party, yet this habitual and fixed phrenzy thereby caused puts the man in the same condition, as if the same was contracted involuntarily at first. *Plowd.* 19, *a. Co. Lit.* 247. 1 *Hale's Hist. P. C.* 23.

But though this subject of madness may be branched into several kinds and degrees, yet it appears that the prevailing distinction in law is between *Idiocy* and *Lunacy:* the first a fatuity *à nativitate, vel dementia naturalis:* the other accidental or adventitious madness, which, whether permanent and fixed, or with lucid intervals, goes under the general name of lunacy. 4 *Co.* 125, *a.*

But a commission of lunacy is not confined to strict insanity, but is applied to cases of imbecility of mind, to the extent of incapacity, from any cause; as disease, age, or habitual intoxication. *Ridgeway* v. *Darvin*, 8 *Vez. Ch. Rep.* 65.

II. Every person of the age of discretion is in law presumed to be of sound mind and memory, unless the contrary appear; and this rule holds as well in civil as criminal cases. 1 *Hale's Hist. P. C.* 33.

By the old common law there is a writ *de idiotâ inquirendo*, to enquire whether a man be an Idiot or not; which must be tried by a jury of twelve men; and if they find him *merus idiota*, the profits of his lands, and the custody of his person may be granted by the king to some subject who has interest enough to obtain them. *F. N. B.* 232. This branch of the

royal revenue hath been long considered as a hardship upon private families; and so long ago as 8 *Jac.* I, it was under the consideration of Parliament, to vest this custody in the relations of the party, and to settle an equivalent on the crown in lieu of it; it being then proposed to share the same fate with the feodal tenures which have been since abolished. 4 *Inst.* 203. *Com. Journ.* 610. Yet few instances can be given of the oppressive exertion of it, since it seldom happens that a jury finds a man an Idiot, *à nativitate*, but only *non compos mentis* from some particular time; which has an operation very different in point of law. 1 *Comm.* 304.

The method of proving a person *non compos* is very similar to that of proving him an Idiot. The Lord Chancellor, to whom, by special authority from the king, the custody of Idiots and Lunatics is entrusted, upon petition or information grants a commission in nature of the writ *de idiota inquirendo*, to enquire into the party's state of mind; and if he be found *non compos*, the chancellor usually commits the care of his person, with a suitable allowance for his maintenance, to some friend, who is then called his Committee. See *post*, III.

The Chancellor inclined to quash the inquisition: the commission not having been executed near the place of abode; and an order, that the Lunatick should have due notice, having been disobeyed. *Ex parte Hall*, 7 *Ves. Ch. Rep.* 261.

The *stat.* 2 *E.* 6. *c.* 8. § 6. also provides, that "if any be or shall be untruly found lunatic, &c. that every person or persons grieved or to be grieved by any such office or inquisition, shall and may have his or their traverse to the same immediately, or after, at his or their pleasure, and proceed to trial therein, and have like remedy and advantage as in other cases of traverse upon untrue inquisitions or offices founden." It has been doubted, however, whether the party aggrieved by the inquisition must not apply to Chancery, notwithstanding this provision of the statute. *Ley.* 26, 27. Certain it is, that he must apply in order to suspend the grant of the custody of the person, which regularly is immediate upon the return of the inquest; though according to *stat.* 18 *H.* 6. *c.* 6. the custody of the land ought not to be granted till a month after; in order that the parties affected by it may have time to traverse it: *ex parte Roberts*, 3 *Atk.* 5. For the doctrine of traversing an inquisition, see the cases referred to in *ex parte Roberts*, 3 *Atk.* 7. 311. The *stat.* 2 *E.* 6. gives the right of traverse to all persons aggrieved by the inquisition; yet the heir may not traverse it, but is bound upon the traverse by the Lunatick, or his alienee, who may traverse it. *Ex parte Roberts*, 3 *Atk.* 308. 1 *Ch. Ca.* 113.

If by inquisition a person be found a *Lunatick*, and the custody granted to J. S., and the party thus found bring a *scire facias* to set aside the inquisition, the Committee of the Lunatick cannot plead nor join issue in such *scire facias*; for he can have no interest in the estate of the Lunatick, being only in the nature of a bailiff to the king, and therefore his duty is to inform the king's attorney-general of the nature of the affair, who is the proper person to contest the matter in behalf of the king. 2 *Sid.* 121.

The rules of judging upon the point of insanity being the same at law and in equity, the Court of Chancery cannot assume any kind of discretion upon the subject; and therefore the return of an inquest, stating that W. B. was, at the time of taking the inquisition, from the weakness of his mind, incapable of governing himself and his lands and tenements, was held illegal and void; and many adjudged cases being cited to the same effect, Lord Hardwicke congratulated himself, that, upon search of precedents, the Court had not gone further, in departing from the legal definition of a Lunatick, than in allowing returns of *non compos mentis*, or *insanæ mentis*, or, since the proceedings had been in English, of *unsound mind*, which amounts to the same thing. And in *Lord Donegal's* case upon the same principle, a commission of lunacy was refused, though it was admitted that the weakness of Lord Donegal's understanding was extreme. See 3 *P. Wms.* 130. 2 *Atk.* 327. 3 *Atk.* 168. 2 *Ves.* 407.

But though a court of equity, in judging upon the point of insanity, is governed by the rules of law, yet, if a man, by age or disease, is reduced to a state of debility of mind, which, though short of lunacy, renders him unequal to the management of his affairs, the court will, in respect of his infirmities, if the demand in question be but small, appoint a guardian to answer for him, or to do such other acts as his interest, or the rights of others, may require. 3 *P. Wms.* 111. *n.* B. Upon petition, praying a reference to the master as to the state of the plaintiff and her fortune, and directions for her maintenance, the property being too small to bear a commission of lunacy, an order was made upon affidavits, without a reference, for payment of the dividends for two ensuing quarters. *Eyre* v. *Wake*, 4 *Ves. Ch. Rep.* 795. As to the general rules of determining what shall be considered a lucid interval, where previous lunacy has been proved or admitted; See *Attorney-General* v. *Parnther*, 3 *Bro. C. R.*

If a man be found by a jury an Idiot, *à nativitate*, he may come in person into the Chancery before the Chancellor, or be brought there by his friends, to be inspected and examined whether Idiot or not; and if upon such view and enquiry it appears he is not so, the verdict of the jury, and all the proceedings thereon, are utterly void and instantly of no effect. 9 *Rep.* 30, 1. 4 *Co.* 126.

In case of the Lunatick's recovery, he must petition the Chancellor to supersede the commission; upon the hearing of which, the Lunatick must attend in person, that he may be inspected by the Chancellor: it is also usual for the physician to attend, and to make an affidavit that the Lunatick is perfectly recovered. *Fonblanque Treat. Eq. c.* 2. § 3. *in note.*

As to the authority of the court, to enforce the production of persons suspected to be Idiots or Lunaticks, it seems clearly established, that upon the commission being sued out, the person having the Lunatick, must, when required, produce him. 1 *P. Wms.* 701. 2 *P. Wms.* 638. And though it was formerly doubted, it now seems to be settled that a commission may be sued out against a Lunatick resident abroad, and may be executed where his mansion house was; *ex parte Southcote*, *Amb.* 109.

III. As the King, being *parens patriæ*, hath the protection of all his subjects, so is he in a more peculiar manner to take care of all those who, by reason of their imbecility and want of understanding, are incapable of taking care of themselves; this, in some books, is called a prerogative in the crown, and in others a *regium munus*, or duty which the King owes to his subjects in return for their subjection and allegiance to him. *Staund. Prærog. cap.* 9. *fol.* 23. 2 *Inst.* 14. 4 *Co.* 126, *a.* *Dyer*, 25.

On the first attack of lunacy, or other occasional insanity; while there may be hopes of a speedy restitution of reason, it is usual to confine the unhappy objects in private custody under the direction of their nearest friends and relations; who by law may beat or use such other methods as are necessary for their cure. 2 *Ro. Ab.* 546. And the Legislature, to prevent all abuses incident to such private custody, hath thought, too, proper to interpose its authority, by *stat.* 14 *Geo.* 3. *c.* 49. continued by 19 *Geo.* 3. *c.* 15. and made perpetual by *stat.* 26 *Geo.* 3. *c.* 91. for regulating private mad-houses. By these acts no person shall confine more than one Lunatick in a house kept for the reception of Lunaticks, without an annual licence from commissioners appointed by the college of Physicians, or the justices in sessions, under a penalty of 500*l.*; and if the keeper of a licensed house receive any person as Lunatick without a certificate from a physician, surgeon, or

apothecary, that he is a fit person to be received as a Lunatick, he shall forfeit 100*l.* No person to keep two houses under one licence; commissioners to visit houses once a year, or when required by Chancellor, or either chief justice, or when they think fit, and examine persons confined.

But when the disorder is grown permanent, and the circumstances of the party will bear such additional expence, it is proper to apply to the royal authority, as delegated to the Chancellor, to warrant a lasting confinement. 1 *Comm.* 305.

In the case of absolute madmen, as they are not answerable for their actions, they should not be permitted the liberty of acting, unless under proper controul; and in particular they ought not to be suffered to go loose, to the terror of the King's subjects. It was the doctrine of our ancient law, that persons deprived of their reason might be confined till they recovered their senses, without waiting for the forms of a commission, or other special authority from the crown: and now by the vagrant acts a method is directed to be pursued for imprisoning, chaining, and sending them to their proper houses. 4 *Comm.* 25. see *stat.* 17 *Geo.* 2. *c.* 5. § 20, 21. and this Dictionary, titles *Poor, Vagrants.*

Although the statutes respecting Idiots and Lunaticks, *stat.* 17 *E.* 2. *cc.* 9, 10. refer only to the lands of the Idiot or Lunatick, yet it seems that the prerogative extends to the custody of his person, goods, and chattels, *Beverley's case.* 4 *Co.* 126. *F. N. B.* 232. As to the manner in which this branch of the prerogative is vested in the Chancellor, before the Court of Wards was erected, the jurisdiction, both as to Idiots and Lunaticks, was in Chancery, and therefore all such commissions were taken out and returned in Chancery; and after the Court of Wards was abolished by act of parliament, it reverted back to the Court of Chancery, and the sign manual is a standing warrant to the Lord Chancellor to grant the custody of Lunaticks, and is a beneficial one in case of idiocy, because the King could not only grant the custody of Idiots, but also the rents and profits of their lands. 2 *Atk.* 553. And the power of the Chancellor extends to making grants from time to time of the Idiot's and Lunatick's estates. 3 *Atk.* 635. And as this power is derived under the sign manual, in virtue of the prerogative of the crown, the Chancellor, who is usually invested with it, is responsible to the crown alone for the right exercise of it; and therefore an appeal will not lie to the House of Lords, from an order made in lunacy, but must be made to the King in Council. 3 *P. Wms.* 107. *Rochfort* v. *Ely*, (*E*) *Bro.* P. C. Though the King may, by *scire facias*, or by information, avoid all acts done during the incapacity, yet his right to the mesne profits shall have relation only to the time of the office. 8 *Rep.* 170, *a.* The doubt, whether the King could grant the custody of an Idiot to one and his executors, proceeded on the possibility of the executorship devolving on an infant, who, being held incapable of managing his own estate, could scarcely be thought a proper person to be intrusted with the charge of the person and lands of another. The Court of King's Bench, however, did, upon an issue directed, adjudge the grant to be good, holding it to be a trust coupled with an interest, of which an infant is capable. 3 *Mod.* 43. *Skin.* 177. see 1 *Vern.* 9.

Though in strictness the guardianship of the King may be said to be determined by the death of the Lunatick, yet it has been held, that the Chancellor may make an order in a Lunatick's affairs, after the death of the Lunatick. *Amb.* 706. see also 3 *Bro. C. R.* 238.

The custody of Lunaticks being a branch of the prerogative, the appointment of the Committees must necessarily be in the discretion of the person to whom that branch of the prerogative is intrusted; but in the exercise of this discretion, certain rules have been regarded, as best calculated, to protect the person and interests of the unfortunate Lunatick.

To prevent sinister practices, the next heir is seldom permitted to be the Committee of the person of a Lunatick, because it is his interest that the party should die; but it hath been said there lies not the same objection against his next of kin, provided he be not his heir; for it is his interest to preserve the Lunatick's life, in order to increase the personal estate, by savings (out of the rents and profits of the real) which he or his family may hereafter be entitled to enjoy. 2 *P. Wms.* 638. The heir is generally made the manager or Committee of the estate, it being clearly his interest, by good management, to keep it in condition; accountable however to the Court of Chancery, and to the *non compos* himself if he recovers, or otherwise to his administrators. 1 *Comm.* 305.

This distinction was, however, very severely reprobated by *Lord Chancellor Macclesfield*, in *Justice Dormer's* case, 2 *P. Wms.* 264. as founded in barbarous times, before the nation was civilized; but it may be observed in defence of it, that it gives the custody of the person to those who, in point of nearness of blood, have equal pretensions to the charge, without the same temptation, in point of interest, to abuse it. *Lord Chancellor Finch*, in *Lady Mary Cope's* case, 2 *Ch. Ca.* 239. appears indeed to have strained the rule beyond its original extent, in deciding that a half-sister should not be Committee of the person of the Lunatick, because concerned to outlive her. A reason which, in fact, does not apply; for indeed the personal estate may increase, and probably will, by good management, during the life of the Lunatick; thus, the longer the Lunatick lives, it will be the better for the next of kin. 2 *P. Wms.* 638. 544.

Though no Committee should get any thing by his appointment, yet the allowance for the support of a Lunatick should be liberal and honourable; and, if necessary, the court will allow the yearly value of the Lunatick's estate. See 2 *C. C.* 239. *Amb.* 78. 2 *P. Wms.* 262. 3 *P. Wms.* 110.

So strictly does the court consider the committeeship a mere authority without any interest, that where the custody of the Lunatick's estate was granted to husband and wife, the wife being next of kin to the Lunatick, *Lord Talbot* held, that the husband's right was determined by the death of the wife, the grant being joint. *Forester*, 143. It must not, however, be inferred from this case, that the husband was necessarily joined in the grant. *Lord Parker* having held (*ex parte* Kingsmill, *Mich. T.* 1720,) that the custody of a Lunatick may be granted to a feme covert, though not *sui juris*; and indeed, the court will seldom grant the custody to two, and in its choice is influenced by the sex of the parties applying, as well as by other circumstances. Therefore, where two persons equally a-kin to a feme Lunatick, the one a man, the other a woman, applied for the custody, the woman was preferred as being of the same sex, and better knowing how to take care of her. 2 *P. Wms.* 635.

With respect to the powers with which the Committee of a Lunatick is intrusted, they are necessarily restrained by the object of the trust; and as a discretionary power might, in some instances, endanger that object, the Committee cannot make leases, nor incumber the Lunatick's estate, without special order of the court, though the profits be not sufficient to maintain the Lunatick; therefore, where the Lunatick when sane had mortgaged his estate for 50*l.* and the Committee had afterwards taken up more upon it, the court refused to allow the mortgage to stand, as a security for more than the 50*l.* or to charge the heir of the Lunatick with the improvements made by the Committee. 1 *Vern.* 262.

The court, however, will allow the Committee of a real estate of a Lunatick to exercise the same power over it, in regard to cutting timber for repairs, as any discreet person who was the absolute owner of it might do. 2 *Atk.* 407. Though it has been stated as a rule never departed from, not to vary or change the property of a Lunatick, so as to effect any al-

teration as to the succession to it; it has been decreed, that incumbrances paid off in the life-time of the Lunatick, out of savings of the estate, should be assigned to attend the inheritance, and not in trust for the next of kin; the ruling principle in the management of a Lunatick's estate being considered to be the doing of that which is most beneficial to the Lunatick. And it is upon this principle, that the court will order part of the Lunatick's personal estate to be laid out in repairs, or even upon improvements of his real estate, if the interest of the Lunatick requires it, and the next of kin cannot shew good cause against it. See *Amb.* 81. 706. 2 *Atk.* 414.

Bankruptcy of the Committee of the person of a Lunatick is a sufficient cause for removing him on account of the fund for maintenance: but the custody of the person will not be changed, if the master finds it proper, with regard to the comfort of the Lunatick, that it should continue. *Ex parte Mildmay*, 3 *Ves. Ch. Rep.* 2.

The old rule, that the next of kin of a Lunatick, if entitled to his estate upon his death, was not to be Committee of the person, is not now adhered to. *Ex parte Cockayne*, 7 *Ves. Ch. Rep.* 591.

The *stat.* of Lunaticks (17 *Ed.* 2. *c.* 10.) does not introduce any new right in the Crown: the words *waste and destruction* in it are to be construed in the ordinary, not the technical sense. 2 *Ves. Ch. Rep.* 71. Where timber makes part of the general rental of an estate, in case of lunacy it would be a breach of duty not to manage it in the usual manner. *ib.*

Under the *stat.* the crown commits the care of Lunaticks to some great officer, not of necessity the Chancellor. The warrant confers no jurisdiction, but only a power of administration. The appeal is to the King in council. *ib.*

In managing the estate of a Lunatick, the general principle is, to attend solely to the interest of the owner, without any regard to the succession. *ib.* 72.

And great care must be taken, that nothing extraordinary is attempted; as purchasing estates, disposing of interests, engaging in adventures, &c. *ib.* 73.

A trustee found a Lunatick by the master's report cannot be ordered to convey under the *stat.* of 4 *Geo.* 2. *c.* 10. unless a commission of Lunacy has issued. *Ex parte Gillam*, 2 *Ves. Ch. Rep.* 587.

A person found a Lunatick by a competent jurisdiction abroad, may be considered a Lunatick here. *ib.* 588.

IV. An *Idiot*, or person *non compos* may inherit; because the law, in compassion to their natural infirmities, presumes them capable of property. *Co. Lit.* 2. 8.

It was formerly adjudged, that the issue of an Idiot was legitimate, and consequently that his marriage was valid. A strange determination! since consent is absolutely requisite to matrimony, and neither Idiots nor Lunaticks are capable of consenting to any thing; and therefore the civil law judged more sensibly when it made such deprivations of reason a previous impediment; though not a cause of divorce if they happened after marriage. And modern resolutions have adhered to the reason of the civil law, by determining that the marriage of a Lunatick, not being in a lucid interval, was absolutely void. But as it might be difficult to prove the exact state of the party's mind at the actual celebration of the nuptials, the *stat.* 15 *Geo.* 2. *c.* 30. and the *stat.* 51 *Geo.* 3. *c.* 37. extending to Ireland, have therefore provided that the marriage of Lunaticks and persons under phrenzies (if found Lunaticks under a commission, or committed to the care of trustees by any act of parliament) before they are declared of sound mind by the Lord Chancellor, or majority of such trustees, shall be totally void.

If an *Idiot* or *Lunatick* marry, and die, his wife shall be endowed; for this works no forfeiture at all, and the King has only the custody of the inheritance in one case, and the power of providing for him and his family in the other; but in both cases the freehold and inheritance is in the *Idiot* or *Lunatick*; and therefore if lands descend to an *Idiot* or *Lunatick* after marriage, and the King, on office found, takes those lands into his custody, or grants them over to another, as *Committee*, in the usual manner; yet this seems no reason why the husband should not be *tenant* by the *curtesy*, or the *wife endowed*; since their title does not begin to any purpose till the death of the husband or wife, when the King's title is *at an end. Co. Lit.* 31, *a.* 4 *Co.* 124, 125. Yet see *Plowd.* 263, *b.* 1 *Vern.* 10.

A *Lunatick* shall be *tenant* by the *curtesy*, and shall have dower; so though a woman, being a *Lunatick*, kill her husband or any other, yet she shall be endowed, because this cannot be *felony* in her, who was deprived of her understanding by the act of God. *Perk.* 365.

If a person *non compos* be disseised and a descent cast, this it is said, takes away his entry, but not the entry of the heir; for regularly the *non compos* in this case cannot allege the disability in himself, because he cannot be supposed conscious of it, nor is he allowed ever, at any time, to allege it; for when he is once *non compos*, there is no certain time when he can be adjudged to recover that disability, unless where he is legally *committed*, and then the acts during his *lunacy* will be set aside and discharged, and afterwards the *commission* superseded; for in no other way can the *non compos* be legally restored to his right, and to his capacity of acting. *Lit.* § 405. *Co. Lit.* 247.

A person *non compos*, being lord of a copyhold manor, may make grants of copyhold estates, for such estates do not take their perfection from any power or interest in the lord, but from the custom of the manor, by which they have been demised and demisable time out of mind. 4 *Co.* 23, *b. Co. Copyholder*, 79. 107.

*Idiots and Lunaticks* are, both by the civil law and likewise by the common law, incapable of being executors or administrators; for these disabilities render them not only incapable of executing the trust reposed in them, but also by their insanity and want of understanding, they are incapable of determining whether they will take upon them the execution of the trust or not. *Godolph. Orph. Leg.* 86.

Therefore it hath been agreed, that if an executor become *non compos*, that the spiritual court may (on account of this natural disability) commit administration to another. 1 *Salk.* 36.

An Idiot can have no executor; for, being *non compos à nativitate*, he could at no time make a will; but a Lunatick may have an executor, for Lunacy is not a revocation of a will made when *compos.* 4 *Co.* 61, *b.* But equity will not entertain a suit to perpetuate the testimony of witnesses to such a will in the life-time of the Lunatick. 1 *Vern.* 105. In supporting the validity of the will, notwithstanding the subsequent lunacy, the rule of the common law is conformable to the civil law, which provides that "*neque testatum rectè factum, neque ullum aliud negotium recte gestum, postea furor interveniens perimit.*" *Inst. l.* 2. *t.* 12. § 1.

Distinction must be made between acts done by *Idiots* and Lunaticks *in pais*, and in a court of record. As to those solemnly acknowledged in a court of record, as Fines and Recoveries, and the uses declared on them, they are good, and can neither be avoided by themselves nor their representatives; for it is to be presumed, that had they been under these disabilities, the judges would not have admitted them to make these acknowledgments. 4 *Co.* 124. 2 *And.* 145. *Co. Lit.* 247.

Therefore, if a person *non compos* acknowledges a *fine*, it shall stand against him and his heirs, for though the judges ought not to admit of a fine from a madman under that disability, yet when it is once received, it shall never be reversed, because the record and judgment of the court being the highest evidence that can be, the law presumes the conu-

nor at that time capable of contracting; and therefore the credit of it is not to be contested, nor the record avoided by any averment against the truth of it, though an office find him an idiot *à nativitate*. 4 *Co.* 124. 2 *Inst.* 483. *Bro.* tit. *Fines*, 75. *Co. Lit.* 247. 2 *And.* 193. 4 *Co.* 124.

The rule of law in these cases is *fieri non debet, sed factum valet;* and *Mansfield's* case, 12 *Co.* 123. furnishes a striking instance of the extreme anxiety of courts of law to protect the authority of their records; for though in that case a fine was levied by a man obviously an Idiot, and by a most gross contrivance, and though *Lord Dyer* observed, that the judge who had taken it, ought never to take another, yet he allowed it to prevail. As by the common law a fine might be avoided on account of fraud, or even on account of infancy, by inspection during the infancy; (*Bracton*, 436, *b.* 437, *a. Co. Litt.* 380, *b.*) it seems remarkable, that idiocy or lunacy should not have been held entitled to the same effect; but *Mansfield's* case abundantly proves that the grossest imbecility of mind was not at law a ground of annulling the record. But, in equity, a remainder-man has been relieved against a fine levied by an Idiot, even against a purchaser. *Toth.* 42. see also 2 *Vern.* 678. The Court of Chancery, however, in the case of fraud, does not absolutely set aside or vacate the fine; but considering those who have taken it under such circumstances as trustees, decrees a reconveyance of the estate to the persons prejudiced by the fraud; and though this does not distinctly appear to be the practice, in the case of fines levied by Idiots or Lunaticks, yet from the argument in *Day* v. *Hungat*, 1 *Rolle's Rep.* 115. such may be inferred to be the rule of proceeding. See this Dict. tit. *Fines of Lands, Recovery.*

If an *Idiot* or *Lunatick* enter into a recognizance, or *acknowledge* a *statute*, neither they themselves, nor their heirs nor executors, can avoid them; for these are securities of a higher nature than specialties and obligations, which yet they themselves cannot avoid, and being *matters of record*, and equivalent to *judgments* of the superior courts, neither they themselves, their heirs, nor executors, can avoid them. 4 *Co.* 124, *a.* 10 *Co.* 42, *b.* 2 *Inst.* 483. *Bro. Fait. Inrol.* 14.

As to acts in *pais;* Idiots and Persons of nonsane memory, are not totally disabled either to convey or purchase, but *sub modo* only; for their conveyances and purchases are voidable, but not actually void. The King, indeed, on behalf of an Idiot, may avoid his grants, or other acts. 1 *Inst.* 247. But it hath been said, that a *non compos* himself, though he be afterwards brought to a right mind, shall not be permitted to allege his own insanity, in order to avoid such grant; for that no man shall be allowed to stultify himself, or plead his own disability. The maxim, however, that a man shall not stultify himself has been handed down as law from very loose authorities, which *Fitzherbert* does not scruple to reject as contrary to reason; and later opinions, feeling the inconvenience of the rule, have in many points endeavonred to restrain it. *F. N. B.* 202. *Litt.* § 405. *Cro. Eliz.* 398. 4 *Rep.* 123. *Jenk.* 40. *Comb.* 469. 3 *Mod.* 310, 311. 1 *Eq. Ab.* 379. See *Fonblanque's Treat. Eq. c.* 2. § 1. and *Stra.* 1104. 2 *Vent.* 198. there cited.

A person having an interest under a contract with the Lunatick, permitted to traverse. *Ex parte Hall.* 7 *Ves. Ch. Rep.* 261.

Though the principles upon which Courts of Equity in general relieve, appear to entitle a Lunatick to a remedy in such cases, there does not appear a single case in which the plea of *non compos* by the Lunatick himself before inquisition has been allowed: on the contrary, in *Toth.* 130. it is said, that Chancery will not retain a bill to examine the point of lunacy. But after the Lunatick is so found by inquisition, his Committee may avoid his acts from the time he is found to have been *non compos.* See 2 *Vern.* 412. 678. 1 *Eq. Ab.* 279. Courts of Equity were formerly so anxious to adhere to the rule of law, that the Lunatick was not allowed to be a party to a suit, to be relieved against an act done during his lunacy. 1 *C. C.* 112. though he might be party to a suit, to enforce performance of an agreement entered into prior to his lunacy. 1 *C. C.* 153.

And clearly the next heir or other person interested may, after the death of the *Idiot* or *non compos*, take advantage of his incapacity, and avoid his grant. *Perk.* § 21. So, too, if he purchases under this disability, and does not afterwards upon his recovering his senses agree to the purchase, his heir may either wave or accept the estate at his option. 1 *Inst.* 2.

The Guardians or Committees of a Lunatick also are empowered by *st.* 11 *Geo.* 3. *c.* 20. to renew in his right, under the directions of the Court of Chancery, any lease for lives or years, and apply the profits of such renewals for the benefit of such Lunatick, his heirs or executors. See 2 *Com.* 291.

If *Parceners* of *nonsane memory* make *partition*, unless it be equal, it shall only bind the parties themselves, but not their issue: and the reason it binds the parties themselves is the same that all other contracts bind them, *viz.* because no man is admitted to stultify himself: and the reason their issue may avoid such partition is the same likewise, for which they may avoid all other contracts made by such ancestors during their *insanity, viz.* because they may be admitted to shew the incapacity of their ancestors, and so avoid all acts done by them during that time. *Co. Lit.* 166, *a.*

Courts of equity will not only sustain contracts completed by the Lunatick while sane: but, under certain circumstances, will enforce performance of such as were entered into before, but were not complete at the time of the lunacy; for the change of the condition of a person entering into an agreement, by becoming lunatick, will not alter the rights of the parties, which will be the same as before, provided they can come at the remedy: as, if the legal estate be vested in trustees, a court of equity ought to decree a performance; but, if the legal estate be vested in the Lunatick himself, that may prevent the remedy in equity, and leave it at law. 1 *Vez.* 82.

A court of equity will not interfere to set aside a contract, over-reached by an Inquisition in lunacy, if fair and without notice; especially where the parties cannot be reinstated. 9 *Vez. Ch. Rep.* 478.

Acts by a Lunatick done during a lucid interval, valid. *ib.* 610.

General lunacy being established, the proof is thrown upon the party alleging a lucid interval; who must establish beyond a mere cessation of the violent symptoms, a restoration of mind, sufficient to enable the party soundly to judge of the act. *ib.* 611.

As to the effect of a defendant becoming insane after an arrest at law, it seems to be now settled, that such circumstance is not a reason for discharging him out of custody, on filing common bail. 2 *Term Rep.* 390. Nor will a court of law interpose, though the party be insane at the time of arrest. 4 *Term Rep.* 121.

It seems that, even at law, the *contracts of Idiots* and *Lunaticks*, after office found, and the party legally committed, are void, and it must be at the peril of him who deals with such a one; and that if afterwards the commission of lunacy be superseded or discharged, the *non compos* shall be restored to his legal right: but this, it seems, must be at the suit and application of his *Committee*. 4 *Co.* 125.

When an *Idiot* doth sue or defend, he shall not appear by guardian, prochein amy, or attorney, but he must be ever in proper person. *Co. Lit.* 135, *b. F. N. B.* 27. The statute of *Westm.* 2. *cap.* 15. extends not to an *Idiot*. 2 *Inst.* 390.

But otherwise of him who becomes *non compos mentis;* for he shall appear by guardian, if within age, or by attorney if of full age. 4 *Co.* 124, *b. Palm.* 520. *& vid.* 2 *Saund.* 335.

If a trespass be committed in the lands of a Lunatick who is legally committed, the *Committee* cannot bring an action of trespass; but this must be brought in the name of the Lunatick. 2 *Sid.* 125.

If a *Lunatick* be sued, he must have a Committee assigned to him to defend the suit. 1 *Vern.* 106.

Many questions as to the acts of Lunaticks are now set at rest by modern statutes. As to those which relate to Lunaticks, (Infants, &c.) being Trustees, see this Dict. title *Trusts*.

By *stat.* 29 *Geo.* 2. *c.* 31. Lunaticks (infants and femes-covert) may, by their committees, (guardians, &c.) surrender leases in order to have the same renewed for the benefit of their estates, on application to the Court of Chancery, &c. and by *stat.* 11 *Geo.* 3. *c.* 20. Lunaticks entitled to renew leases, may, in like manner, by their committees, under direction of Chancery accept surrenders of old leases, and grant new ones.

By *stat.* 43 *Geo.* 3. *c.* 75. the Lord Chancellor (in Great Britain or Ireland) may order the freehold and leasehold estates of Lunaticks to be sold or mortgaged for raising money for payment of debts or performance of contracts, on behalf of Lunaticks. By the same act, the power of leasing the lands of Lunaticks, having only a limited estate, may be executed by their Committees under the direction of the Chancellor; and where Lunaticks are seised of estates in fee, or tail, &c. the Chancellor may direct the Committees to make leases thereof in all cases for the benefit of the estate. By *stat.* 59 *Geo.* 3. *c.* 80. § 2. this act is extended to the *Copyhold* Estates of Lunaticks.

V. One case of a deficiency in will, which excuses from the guilt of crimes, arises from a defective, or vitiated understanding: viz. in an *Idiot* or *Lunatick*. For the rule of law as to the latter, which may be easily adapted also to the former, is *furiosus furore solum punitur*. In criminal cases, therefore, Idiots and Lunaticks are not chargeable for their own acts, if committed under these incapacities; no, not even for treason itself. 3 *Inst.* 6. Also if a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned; if after pleading, he shall not be tried; if after trial, he shall not receive judgment; if after judgment, execution shall be stayed. See this Dictionary, titles *Execution and Reprieve*.

It seems to have been anciently holden, (in respect of that high regard which the law has for the safety of the King's person,) that a *madman* might be punished as a traitor for killing or offering to kill the King; but this is now contradicted by better and later opinions. *Fitz. Coron.* 351. *Regist.* 309. 4 *Co.* 124, *b.* 1 *Rol. Rep.* 324. In the reign of Henry VIII. a statute was made, 33 *H.* 8. *c.* 20. that if one *compos mentis* should commit high treason, and after fall into madness, he might be tried in his absence, and should suffer death as if he were of perfect memory; but this was repealed by *stat.* 1 & 2 *P. & M. c.* 10. see 3 *Inst.* 6. But if there be any doubt whether the party be *compos* or not, this shall be tried by a jury; and if he be so found, a total idiocy or absolute insanity excuses from the guilt, and of course from the punishment, of any criminal action committed under such deprivation of the senses: but if a Lunatick hath lucid intervals of understanding, he shall answer for what he does in those intervals, as if he had no deficiency. 1 *Hal. P. C.* 31.

Now by *stat.* 39, 40 *Geo.* 3. *c.* 94. "for the safe custody of insane persons charged with offences," it is enacted, that the jury, in cases where any person charged with treason shall be proved to be insane, shall declare whether he was acquitted by them on account of insanity, and if he was, the Court shall in such case order him to be kept in custody till the pleasure of the King is signified, who may direct such Lunatick to be kept in safe custody. By § 2 of the act, insane persons indicted for any offence, who may be found insane by the jury impannelled on their arraignment, shall be kept in custody in like manner. By § 3, for the prevention of crimes by insane persons, such person may be committed to safe custody, and shall not be bailed except by two justices, one thereof being the committing justice, or by the Quarter Sessions, or the Courts at Westminster, or the Lord Chancellor. By § 4, insane persons endeavouring to intrude into the presence or palaces of the King, may be committed by the Privy Council, until his insanity is decided by the Lord Chancellor under a commission in the nature of a writ *de lunatico inquirendo*.

It is laid down as a general rule, that *Idiots* and *Lunaticks* being, by reason of their natural disabilities, incapable of judging between good and evil, are punishable by no *criminal* prosecution whatsoever. 1 *Hawk. P. C.* 2.

And therefore a person who loses his memory by sickness, infirmity, or accident, and kills himself, is no *felo de se*. 3 *Inst.* 54.

So if a man give himself a mortal stroke while he is *non compos*, and recovers his understanding, and then dies, he is not *felo de se*; for though the death complete the homicide, the act must be that which makes the offence. But it is not every melancholy or hypochondriacal distemper that denominates a man *non compos*, for there are few who commit this offence, but are under such infirmities; but it must be such an alienation of mind that renders them to be madmen, or frantic, or destitute of the use of reason. 1 *Hal. P. C.* 412.

And as a person *non compos* cannot be a *felo de se* by killing himself; so neither can he be guilty of *homicide* in killing another, nor of *petit treason*. 1 *Hawk. P. C.* 2.

The great difficulty in these cases is, to determine where a person shall be said to be so far deprived of his sense and memory, as not to have any of his actions imputed to him; or where, notwithstanding some defects of this kind, he still appears to have so much reason and understanding as will make him accountable for his actions, which *Lord Hale* distinguishes between, and calls by the name of *total* and *partial insanity*; and though it be difficult to define the indivisible line that divides *perfect* and *partial insanity*, yet, says he, it must rest upon circumstances, duly to be weighed and considered both by the judge and jury; lest on the one side there be a kind of inhumanity towards the defects of human nature, or, on the other side, too great an indulgence given to great crimes; and the best measure he can think of is this: such a person, as labouring under melancholy distempers, hath yet *ordinarily* as great understanding as a *child of fourteen years* commonly hath, is such a person as may be guilty of treason or felony. 1 *Hale Hist. P. C.* 30.

He who incites a madman to do a murder, or other crime is a principal offender, and as much punishable as if he had done it himself. *Keilw.* 53. *Dalt. cap.* 95. 1 *Hawk. P. C.* See titles *Accessory, Murder*.

And here we must observe a difference the law makes between civil suits that are terminated in *compensationem damni illati*, and criminal suits or prosecutions that are *ad penam et in vindictam criminis commissi*; and therefore it is clearly agreed, that if one who wants discretion commits a trespass against the person or possession of another, he shall be compelled in a *civil* action to give satisfaction for the damage. 2 *Roll. Abr.* 547. *Hob.* 134. *Co. Lit.* 247. 1 *Hawk. P. C.* 2. 1 *Hal. Hist.* 15, 16. 38.

As to *Idiocy*, *Lunacy*, or *Madness*, (the latter of which is defined by *Hale* to be a *total alienation of the mind*) which excuses in *capital* cases, it is not necessary that it was found by inquisition that the party was a *Madman*, *Idiot*, or *Lunatick*, previous to the commitment of the fact; for if he was *actually mad* at the time of the fact committed, this shall excuse; and this regularly is to be tried by an inquest of office to be returned by the sheriff of the county wherein the court sits for the trial of the offence; and if it be found that he was *actually mad*, he shall be discharged without any other trial;

but if they find that the party only feigns himself mad, and he refuses to answer or plead, he shall be dealt with as one who stands mute. 26 *Ass. pl.* 27. *Bro. Cor.* 101. 1 *And.* 107. 154. *Sav.* 50. 57. 1 *Hawk. P. C.* 2. 1 *Hal. Hist. P. C.* 35.

These defects, whether permanent or temporary, must be unequivocal and plain; not an idle frantic humour or unaccountable mode of action, but an absolute dispossession of the free and natural agency of the human mind. 8 *S. T.* 322. 1 *Hal. P. C. c.* 4. 1 *Hawk. P. C. c.* 1. § 1. *in n.*

If a man in a *frenzy* happen by some oversight, or by means of the gaoler, to plead to his indictment, and is put upon his trial, and it appears to the court upon his trial that he is *mad*, the judge in discretion may discharge the jury of him, and remit him to gaol to be tried after the recovery of his understanding, especially in case any doubt appear upon the evidence touching the guilt of the fact, and this is *in favorem vitæ;* and if there be no colour of evidence to prove him guilty, or if there be a pregnant evidence to prove his *insanity* at the time of the fact committed, then, upon the same favour of life and liberty, it is fit it should be proceeded in the trial, in order to his acquittal and enlargement. 1 *Hal. Hist. P. C.* 33. 36.

So if a person during his *insanity* commits a *capital* offence, and recovers his understanding, and being indicted and arraigned for the same, pleads Not Guilty, he ought to be acquitted; for, by reason of his *incapacity*, he cannot act *felleo animo.* 1 *Hal. Hist. P. C.* 36.

By 48 *Geo.* 3. *c.* 96.; 51 *Geo.* 3. *c.* 79.; 55 *Geo.* 3. *c.* 46.; and 59 *Geo.* 3. *c.* 127. several regulations are made for the better care and maintenance of Lunaticks, being paupers or criminals, in England, by the establishment of Lunatick Asylums in the several counties, under the visitation and superintendance of the magistrates; and by 56 *Geo.* 3. *c.* 117. Offenders committed under 39, 40 *Geo.* 3. *c.* 94. may be removed to and detained in these asylums. By 57 *Geo.* 3. *c.* 106. provision is made for the establishment of asylums for the lunatick poor in Ireland, and particularly as to the Richmond Lunatick Asylum in Dublin, by 55 *Geo.* 3. *c.* 107.

IDIOTA INQUIRENDO. See the preceding title *Idiots and Lunatics.*

IDLENESS. See titles *Poor, Vagrants.*

IDONEUM SE FACERE; IDONEARE SE. To purge himself by oath of a crime of which he is accused. *Leg. Hen.* 1. *cap.* 15. where the word *idoneus* is taken for *innocens.* But he is said in our law to be *idoneus homo*, who hath these three things, *honesty, knowledge*, and *ability.*

IDUMANUS FLUVIUS, *Blach Water* in Essex.

JEJUNIUM, Fasting, *Purgatio per jejunium*, is mentioned *in Leg. Canuti, cap.* 7. *apud Brompton.* See tit. *Ordeal.*

JEMAN, Sometimes used for *yeoman. Cowel.*

JEOFAILS, *j'ai faillé; ego lapsus sum;* I have failed.] An oversight in pleadings, or other law proceedings. See this Dict., title *Amendment.*

JERSEY, GUERNSEY, SARK, AND ALDERNEY. These islands and their appendages were parcel of the duchy of Normandy, and were united to the crown of England by the first princes of the Norman line. They are governed by their own laws, which are, for the most part, the ducal customs of Normandy, being collected in an ancient book of very great authority, entitled *Le Grand Coustumier.* The King's writ or process from the courts at Westminster is there of no force, but his commission is. They are not bound by common acts of our parliament, unless particularly named. 4 *Inst.* 286. All causes are originally determined by their own officers, the bailiffs and jurats of the islands; but an appeal lies from them to the king and council in the last resort. 1 *Com.* 106. See further this Dict. titles *Navigation Acts, Plantations.*



JESSE. A large brass *candlestick*, with many *sconces*, hanging down in the middle of a church or choir: which invention was first called *Jesse*, from the similitude of the branches to those of the *Arbor Jesse.* This useful ornament of churches was first brought over into this kingdom by *Hugh de Flory*, abbot of St. Austin's in Canterbury, about the year 1100. *Chron. Will. Thorn.*

JETSAM, JETZON, and JOTSON, from the French *jetter, ejicere.*] Any thing thrown out of a ship, being in the danger of wreck, and by the waves driven to the shore. See this Dict., titles *Flotsam, Wreck, Insurance*, II. 5.

JESUITS. The society of *Jesuits* was instituted by *Ignatius Loyola*, a Biscayan gentleman. It has been termed most political and best regulated of all the monastic orders, and from which mankind have derived more advantages, and received greater hurt, than from any other of the many religious fraternities. *Roberts. Hist. Emp. Char.* V. 2 *V.* 134, 135, &c.

By the statutes against papists, persons born in the king's dominions and *ordained* by the pretended jurisdiction of Rome, remaining in England, or coming from beyond sea into his kingdom, and not submitting to some bishop or justice of peace within three days, and taking the oaths, are guilty of high treason; and receivers, aiders, and harbourers of them are guilty of felony. Persons knowing priests, *Jesuists*, &c. and not discovering them to a justice of peace, shall be fined and imprisoned. See title *Papists.*

JEWELS. See *Jocalia;* and also titles *Carrier, Navigation Acts, Baron and Feme.*

JEWS, *Judæi.*] In former times the *Jews* and all their goods were at the disposal of the chief lord where they lived; who had an absolute property in them; and they might not remove to another lord without his leave: and we read that king *Henry* III. sold the *Jews* for a certain term of years to earl *Richard* his brother. They were distinguished from the *Christians* in their lives, and at their deaths; for they wore a badge on their outward garments, in the shape of a table, and were fined if they went abroad without such badges; and they were never buried within the walls of any city, but without the same, and anciently not permitted to burial in the country. *Matt. Paris*, 521. 606, &c.

There were particular judges and laws by which their causes and contracts were decided here, and there was a court of justice assigned for the *Jews.* 4 *Inst.* 254. A *Jew* may be witness by our laws, being sworn on the Old Testament. According to our ancient books, *Jews*, Hereticks, &c. are adjudged out of the statutes allowing benefit of clergy. But this doctrine is now exploded. See title *Clergy, Benefit of.*

The statute 53 *Hen.* 3. was called *provisiones de Judaismo;* and by the statute 18 *Ed.* 1, the king had a fifteenth granted him *pro expulsione Judæorum.* In the 16th year of *Edward* I, all the *Jews* in England were imprisoned; but they redeemed themselves for a vast sum of money: notwithstanding which, *anno.* 19 of that king, he banished them all. *Stow's Survey, b.* 3. *p.* 54. And they remained in banishment 364 years; till at the time of the grand rebellion they were again allowed in the kingdom.

A plaintiff had leave given him by the court to alter the *Venue* from London to Middlesex, because all the sittings in London were on a Saturday, and his witness was a *Jew*, and would not appear that day. 2 *Mod.* 271.

A *Jew* brought an action, and the defendant pleaded that the plaintiff was a *Jew*, and that all *Jews* are perpetual enemies of the king and our religion. But, by the court, a *Jew* may recover as well as a villain, and the plea is but in disability so long as the king shall prohibit them to trade; and judgment for the plaintiff. *L. P. R.* 4. cites *Mich.* 36 *Car.* 2 *B. R.*

A *Jew* was ordered to swear his answer in Chancery, upon the *Pentateuch*, and that the plaintiff's clerk should be present to see him sworn. 1 *Vern*, 263.

The *Jews*, it has been said, are here by an implied licence, but on a proclamation of banishment, they are in the same situation as alien enemies on a determination of letters of safe conduct. *Arg.* 2 *Show.* 371.

In the beginning of this century, an instance occurred, where a *Jew* of immense riches turned out of doors his only daughter who had embraced Christianity; and on her application for relief, it was held he could not be compelled to afford her any. *Lord Raym.* 699. But, to prevent such inhumanity in future, the statute 1 *Anne*, *c.* 30, ordains that if *Jewish* parents refuse to allow their protestant children a fitting maintenance suitable to the fortune of the parent, the Lord Chancellor on complaint may make such order therein as he shall see proper. See 1 *P. Wms.* 524. 2 *Eq. Ab.* 513. c. 2. See further, as to the privileges and incapacities of *Jews*, this Dict. title *Alien*.

IFUNGIA. The finest white bread, formerly called cocket bread. *Blount*.

IGNIS JUDICIUM. Purgation by fire, or the old judicial fiery trial. *Blount*. See *Ordeal*.

IGNORAMUS. We are ignorant.] The word formerly written on a bill of indictment by the *Grand Jury* impanelled on the inquisition of criminal causes, when they rejected the evidence as too weak or defective to make good the presentment against a person so as to put him on the trial; the words now used are, *not a true bill*, or *not found*, and all proceedings are thereby stopped, and he is delivered without further answer. 3 *Inst.* 30. See this Dict. title *Indictment*.

IGNORANCE, *Ignorantia*.] Want of knowledge of the law, shall not excuse any man from the penalty of it. Every person is bound at his peril to take notice what the law of the realm is; and *Ignorance* of it, though it be invincible, where a man affirms that he hath done all that in him lies to know the law, will not excuse him. *Plowd.* 343.

Though *Ignorance* of the *law*, excuseth not, *Ignorance* of the *fact* doth: as if a person buy a horse or other thing in open market, of one that had no property therein, and not knowing but he had right; in that case he hath good title, and the ignorance shall excuse him. *Doct. & Stud.* 309. But if the party bought the horse out of the market, or knew the seller had no right, the buying in open market would not have excused. *Ibid.* 5 *Rep.* 83. Also where a man is to enter into land or seize goods, &c. he must see that what he does be rightly done, or his *Ignorance* shall be no excuse. *Wood's Inst.* 608.

Ignorance of fact is a defect of will, when a man intending to do a lawful act, does that which is unlawful. For here the deed and the will acting separately, there is not that conjunction between them which is necessary to form a criminal act; as if a man intending to kill a thief or housebreaker in his own house, by mistake kills one of his own family. This is no criminal action. *Cro. Car.* 538. But if a man thinks he has a right to kill a person excommunicated or outlawed wherever he meets him, and does so, this is murder, as it proceeds from a criminal Ignorance of the law. 4 *Comm.* 27.

IKENILD-STREET. One of the four famous ways that the Romans made in England, called *Stratum Icenorum*, because it took its beginning among the *Iceni*, which were the people that inhabited Norfolk, Suffolk, and Cambridgeshire. *Cam. Brit.* See title *Watling-Street*.

ILET. Corruptly *eight*; a little island. *Blount*.

ILLEVIABLE. A debt or duty that cannot or ought not to be levied; as *nihil* set upon a debt is a mark for *illeviable*.

ILLITERATE. If an *illiterate* man be to seal a deed, he is not bound to do it, if none be present to read it, if required; as reading a deed false, will make it void. 2 *Rep.* 3. 11 *Rep.* 28. A man may plead *non est factum* to a deed read false; as where a release of an annuity was read to an illiterate person, as a release of the arrears only, &c. agreed to be released. *Moor*, 148. If there is a time limited for a person to seal a writing, in such case, *illiteracy* shall be no excuse, because he might provide a skilful man to instruct him; but when he is obliged to seal it upon request, &c. there he shall have convenient time to be instructed. 2 *Nels. Abr.* 946.

If a man for great age cannot see to read, and seals an obligation upon false reading, he shall avoid it, though he was lettered; for now he has all his intelligence by hearing. 11 *Rep.* 28. See title *Deed*.

ILLUMINARE. To *illuminate*, to draw in gold and colours the initial letters and the occasional pictures in manuscript books.—See *Brompton*, *sub anno.* 1076. Those persons who particularly practised this art were called *illuminatores*, whence our *limners*.

IMAGES. How to be defaced. *Stat.* 3 & 4 *Ed.* 6. *c.* 10. See title *Papist*.

IMAGINING (or *compassing*, &c.) the king's death, is high treason, 25 *Ed.* 3. *stat.* 5. *c.* 2. See this Dict. title *Treason*.

IMBARGO, *Span. Navium detentio.*] A stop, stay, or arrest upon ships or merchandize, by public authority. See statute 18 *Car.* 2. *c.* 5. This arrest of shipping is commonly of the ships of foreigners in time of *war* and difference with States to whom they are belonging: but, by an ancient statute foreign merchants in this kingdom are to have forty days notice to sell their effects and depart, on any difference with a foreign nation. 27 *Ed.* 3. *c.* 17. See title *Merchant*. This term has also a more extensive signification, for ships are frequently detained to serve a prince in an expedition; and for this end have their lading taken out without any regard to the colours they bear, or the government to whose subjects they belong. The legality of such a measure has been doubted by some, but it is certainly conformable to the law of nations, for a prince in distress to make use of whatever vessels he finds in his ports that may contribute to the success of his enterprise. *Parke on Insurance*, *c.* 4. *p.* 78. The king may grant *Imbargoes* on ships, or employ the ships of his subjects, in time of danger, for the service and defence of the nation; but a warrant to stay a single ship, on a private account, is no legal *Imbargo*. *Moor*, 892. *Carth.* 297. Prohibiting commerce in the time of war, or of plague, pestilence, &c. is a kind of *Imbargo on shipping*.

Imbargoes laid on shipping in the ports of Great Britain, by royal proclamation, *in time of war*, are strictly legal, and are equally binding as an act of parliament; because such proclamation is founded on a prior law, namely that the king may prohibit any of his subjects from leaving the realm. But in times of peace the power of the king to lay such restraints is doubtful; and therefore where a proclamation issued in the year 1766, to prevent the exportation of corn against the words of a statute, (22 *C.* 2. *c.* 13,) then in force, although the measure was absolutely necessary to prevent a dearth, it was thought prudent to procure an act of the legislature, (*stat.* 7 *Geo.* 3. *c.* 7,) to indemnify all who advised or acted under that proclamation. See *Parke on Insurance*, 79. 1 *Comm.* 270. 4 *Mod.* 177. 179. And see a similar statute 30 *Geo.* 3. *cap.* 1. And further this Dictionary, title *Insurance*, II. 3.

IMBASING of *Money*. Mixing the species with an *alloy* below the standard of sterling; which the king by his prerogative may do, and yet keep it up to the same value as before: *Inhancing* of it, is when it is raised to a higher rate, by proclamation. 1 *Hale's Hist. P. C.* 102. See title *Coin*.

IMBEZZLE. To steal, pilfer, or purloin; or where a person entrusted with goods, wastes and diminishes them. The word *imbezzle* is mentioned in several statutes, particularly relating to workers of wool, &c. *stat.* 7 *Jac.* 1. *c.* 7. 1 *Ann. stat.* 2. *c.* 18. See title *Manufacturers*.

If any servant *imbezzles*, purloins, or makes away his master's goods, to 40*s.* value, it is made felony without benefit of clergy, by *stat.* 12 *Ann. c.* 7. See titles *Felony*, *Robbery*, *Servant*, *Apprentice*.

*Imbezzling the king's armour or stores*, is felony without clergy by 31 *Eliz. cap.* 4. As to *naval* stores, the benefit of clergy, is taken away by 22 *C.* 2. *c.* 5. Other inferior imbezzlements and misdemeanours, that fall under this denomination, are punished, by *stat.* 1 *Geo.* 1. *stat.* 2. *c.* 25. with fine and imprisonment.

*Imbezzling the public money.* If committed by high officers, is usually punished by impeachment in parliament. At common law, the offender is subject to a discretionary fine and imprisonment. 4 *Comm.* 121, 122. And see *stat.* 50 *G.* 3. *c.* 59. title *Servants*.

*Imbezzling or vacating records* is a *felonious offence* against *public justice*, by *stat.* 8 *Hen.* 6. *cap.* 12. See titles *Records*, *Felony*, *Fine*, *Deeds*.

IMBRACERY. See *Embracery*.

IMBROCUS. A brook, a gut, a water-passage. *Somner of Ports and Forts*, p. 43.

IMBROIDERY. See *Embroidery*.

IMPALARE. To put in a pound. *Ll. Hen.* I. *c.* 9.

IMPANEL, *Impanellare vel impanulare Juratis.*] Signifies the writing and entering into a parchment schedule, by the sheriff, the names of a jury.

IMPARLANCE, *Interlocutio, vel licentia interloquendi*, from the Fr. *parler*, to speak.] In the *common law*, is taken for a petition, in court, of a day to consider or advise what answer the defendant shall make to the action of the plaintiff, or to an information or indictment in a criminal case; being a continuance of the cause or prosecution till another day, or a longer time given by the court.

Imparlance is said to be when the court gives the party leave to answer at another time, without the assent of the other party. *Com. Dig.* title *Pleader*, *D.* 1. But the more common signification of Imparlance is, time to plead, 2 *Show.* 310. 2 *Mod.* 62. And it is either *general*, without saving to the defendant any exception, which is always to another term, *Mod.* 28; or *special*, which is sometimes to another day in the same term, 6 *Mod.* 8. The *general Imparlance* is of course where the defendant is not bound to plead the same term; but a *special Imparlance* is not allowed, without leave of the court. *R. E.* 5 *Ann.* A special imparlance is with a saving of all exceptions to the writ, bill, or count, which may be granted by the prothonotary; or they may be still more special with a saving of all exceptions whatsoever, which are granted at the discretion of the court, and are called *general special Imparlances*. 12 *Mod.* 529.

A *general Imparlance* is set down and entered in general terms, without any special clause, thus: *And now at this day, to wit, on* Thursday *next after the* Octave *of St.* Hilary, *in the same term, until which day the aforesaid* C. D. *the defendant, had licence to* imparle *to the bill aforesaid, and then to answer, &c.*

*Special Imparlance*, is where the party desires a farther day to answer, adding also these words; *Saving all advantages, as well to the jurisdiction of the court, as to the writ and declaration, &c.* *Kitch.* 200. This *Imparlance* is had on the declaration of the plaintiff; and special *Imparlance* is of use where the defendant is to plead some matters which cannot be pleaded after a general *Imparlance*. 5 *Rep.* 75.

*Imparlance* is generally to the next term; and if the plaintiff amend his declaration after delivered or filed, the defendant may *imparl* to the next term, if the plaintiff do not pay costs; but if he pay costs, which are accepted, the defendant cannot *Imparl.* Also if the plaintiff declares against the defendant, but doth not proceed in three terms after, the defendant may *imparl* to the next term. 2 *Lill. Abr.* 35.

If the writ be returnable on the last day of term, the defendant is of course entitled to an imparlance, but must plead in four days of the next term, provided a rule be given either in a town or country cause.

On a declaration delivered of *Hilary*, there may be an Imparlance to *Trinity* term, if the defendant has not pleaded before; for it is the course of the court to give Imparlance or declaration till the day of pleading. If a writ be returnable in one term, and the declaration is not delivered *before* the essoign-day of the *second* term, the defendant is not obliged to plead in the *same* term, but is entitled to an Imparlance. *Impey, K. B.*

By *stat.* 60 *Geo.* 3. *c.* 4. it is enacted that where any person shall be prosecuted in the Court of K. B. (at Westminster or Dublin) for a *misdemeanor* either by information or indictment there found, or removed thither, and shall appear in court in person to answer thereto, such defendant, on being charged therewith, shall not be permitted to imparle to the next term, but shall plead or demur within four days, or judgment shall be entered for want of a plea: and in case of the defendant's appearing by attorney, a rule to plead, &c. shall be made.—As to proceedings on indictments for misdemeanors at sessions, see title *Indictment*.

*As to causes of Imparlance.* The not delivering a declaration in time is sometimes the cause of *Imparlance* of course: and where the defendant's case requires a special plea, and the matter which is to be pleaded is difficult, the court will, upon motion, grant the defendant an *Imparlance*, and longer time to put in his plea, than otherwise by the rules of the court he ought to have: if the plaintiff keeps any deed or other thing from the defendant, whereby he is to make his defence, *Imparlance* may be granted till the plaintiff delivers it to him, or brings it into court, and a convenient time after to plead. *Hil.* 22 *Car.* 1. *B. R.*

There are many cases wherein *Imparlances* are not allowed; no *Imparlance* is granted in an *homine replegiando*; or in an assise, unless on good cause shewn: nor shall there be an *Imparlance* in an action of special *clausum fregit*; though it is allowed in general actions of trespass. *Hil.* 9 *W.* 3. 3 *Salk.* 186. Where an attorney, or other privileged person of the court, sues another, the defendant cannot *imparl*, but must plead presently: if the plaintiff issues out a special original, wherein the cause of action is expressed, and the defendant is taken on a special *capias*, he shall not have an *Imparlance*, but shall plead as soon as the rules are out. 2 *Lil.* 35, 36. See title *Practice*.

A special Imparlance shall not be allowed the defendant, without the leave of the court first obtained. *R. E.* 5 *Ann.*

If the writ be returnable *before the last return of any term*, and the declaration not filed, and notice given four days exclusive before the end of such term, the defendant is entitled to an Imparlance. *R. Trin.* 22 *Geo.* 3.

Where a defendant is arrested by process out of B. R. in which the cause of action is specially expressed; or a copy of process is delivered, and the plaintiff hath declared; the defendant shall not have liberty of *imparlance*, without leave first granted, but shall plead within the time allowed a defendant prosecuted by original writ. *R. Hill.* 2 *Geo.* 2. And upon all processes, returnable the first or second return of any term, the declaration shall be delivered with notice to plead in eight days after delivery, where the defendant lives above twenty miles from London, &c. without any *Imparlance*; and, on default of pleading, the plaintiff may sign judgment. *R. Trin.* 5 & 6 *Geo.* 2. See further on this subject, and as to obtaining time to plead, this Dict. titles *Pleading*, I. 4. *Practice*.

Upon all process returnable the last return of any term, if the plaintiff declare in *London* or *Middlesex*, and the defendant live within twenty miles of London, the defendant

shall plead within four days after declaration filed, or delivered with notice to plead, *without any Imparlance.* Provided such declaration be filed or delivered, on the day of such return, or on the day next after, in case it shall not happen on a Sunday, when the plaintiff shall have the whole of the day following to file or deliver such declaration.—And if plaintiff live in any other county, or defendant live above twenty miles from London, defendant shall plead within eight days, without any Imparlance. *Reg. Gen. C. P. Hil. 55 Geo.* 3.

If process be returnable on the last return day of any term, and the plaintiff deliver a declaration, with notice to plead, on the return day, or the day following, (or if that is on a Sunday, then on the second day after the return,) defendant is not entitled to an Imparlance. *Crew* v. *Atwood*, 7 *W. P. Taunton*, 70.

*Of pleadings afterwards.* A plea to the jurisdiction may not be pleaded after general *Imparlance. Raym.* 34. Dilatory pleas also cannot be pleaded after a general Imparlance, which is an acknowledgment of the propriety of the action. 3 *Comm.* 301. *Tidd's Pract.* After *Imparlance*, the defendant cannot plead in *abatement;* if he doth, and the plaintiff tenders an issue, whereupon the defendant demurs, and the plaintiff joins in demurrer, such plea is not peremptory; because the plaintiff ought not to have joined in demurrer, but to have moved the court, that the defendant might be compelled to plead in chief. *Allen*, 65. Though a defendant may not plead in abatement after a general *Imparlance;* yet, if it appear by the record that the plaintiff hath brought his action before he had any cause, the court *ex officio* will abate the writ. 2 *Lev.* 197. See this Dict. titles *Abatement*, *Practice.*

The defendant cannot have *oyer* of a deed in a common case, after *Imparlance:* and a tender after *Imparlance* is nought. 2 *Lev.* 190. *Lutw.* 238. If it appears upon the record, that an *Imparlance* was due, and denied, it is error; but then such error must appear on the record. 3 *Salk.* 168. It has been held, that if the defendant doth not appear on a *dies datus*, the plaintiff shall not have judgment by default, as he may on *Imparlance*, because the *dies datus* is not so strong against him as an *Imparlance;* and therefore the plaintiff must take process against the defendant for not appearing at the time. *Moor*, 79. 2 *Nels.* 497.

After a general special Imparlance, the defendant may not only plead in abatement of the writ, bill, or count, but also privilege. 1 *Lev.* 54. 12 *Mod.* 529. 5 *Mod.* 335. But it seems that such plea must be intitled of the term the declaration is filed. *Impey, K. B.*

IMPARSONEE. A parson *Imparsonee, Persona impersonata*, is he that is inducted, and in possession of a benefice. *Dyer, fol.* 40. *num.* 72. says a Dean and Chapter are parsons *Imparsonees* of a benefice appropriate unto them. *Cowel.*

IMPEACHMENT, from Lat. *impetere.*] The accusation and prosecution of a person for treason, or other crimes and misdemeanours. Any member of the House of Commons may not only impeach any one of their own body, but also any Lord of parliament, &c. And thereupon *articles* are exhibited on behalf of the Commons, and managers appointed to make good their charge and accusation; which being done in the proper judicature, sentence is passed, &c. And it is observed, that the same evidence is required in an *Impeachment* in parliament, as in the ordinary courts of justice; but not in bills of attainder. See index to *State Trials*, *vol.* 6. title *Evidence.*

An Impeachment before the Lords by the Commons of Great Britain, in parliament, is a prosecution of known and established law, and hath been frequently put in practice; being a presentment to the most high and supreme court of criminal jurisdiction, by the most solemn grand inquest of the whole kingdom. 1 *Hal. P. C.* 150. A commoner cannot however be impeached before the Lords for any capital offence, but only for high misdemeanours: *Rot. Parl.* 4 *Ed.* 3. *n.* 2 & 6. 2 *Brad. Hist.* 190. *Selden Judic. in Parl. ch.* 1. But see contra, 4 *Comm. c.* 19. *in n.* & title *Parliament.*

A peer may be impeached for any crime. The articles of Impeachment are a kind of bills of Indictment, found by the House of Commons, and afterwards tried by the Lords; who are in cases of misdemeanours considered not only as their own peers, but as the peers of the whole nation. This is a custom derived to us from the constitution of the ancient Germans; who in their great councils sometimes tried capital accusations relating to the public: "*Licet apud concilium* "*accusare quoque et discrimen capitis intendere.*" *Tac. de mor. Germ.* 12.

By statute 12 & 13 *W.* 3. *c.* 2. it is enacted, that no pardon under the Great Seal shall be *pleadable* to an *Impeachment*, by the Commons in parliament. But the King may pardon after conviction on an Impeachment. 4 *Comm.* 400, and see *ib.* 259—261; and this Dict. title *Pardon.*

On the Impeachment of *Warren Hastings* for mal-conduct as Governor-general of India, the trial of which lasted, by adjournment, for seven years, from 1787 to 1794, it was solemnly determined, that an Impeachment is not abated, or put an end to, by the prorogation or dissolution of parliament. And an act was passed to prevent prorogation or dissolution from having the effect of putting a stop to the previous proceedings in the House of Commons. See *Raym.* 120. 1 *Lev.* 384. and title *Parliament*, VIII.

IMPEACHMENT OF WASTE, *Impetitio vasti*, from Fr. *empeschement*, i. e. *impedimentum.*] Signifies a restraint from committing of waste upon lands or tenements; or a demand of recompence for waste done by a tenant who hath but a particular estate in the land granted. He that hath a lease to hold *without Impeachment of Waste*, hath by that such an interest given him in the land, &c. that he may make waste without being *impeached* for it; that is, without being questioned, or any demand of recompence for the *waste* done. 11 *Rep.* 82, *b.* See title *Waste.*

IMPECHIARE, Fr. *empecher;* Lat. *impetere.*] To impeach, to accuse and prosecute, for felony, or treason. *Spelman* and *Somner* say, that it is derived from the Lat. *impetere*, which is to accuse, or *in jus vocare;* from whence *impetitio* signifies *an accusation*, viz. *fine impetitione vasti*, is without impeaching or accusing him of waste. See *Impeachment.*

IMPEDIATUS. *Expeditatus; impediati canes*, Dogs *lawed* and disabled from doing mischief in the forests, and purlieus of them. *Cowel.* See *Expeditate.*

IMPEDIENS. A defendant, or deforciant. *Cowel.*

IMPEDIMENTS IN LAW. Persons under *Impediments* are those within age, under coverture, *non compos mentis*, in prison, beyond sea, &c, who, by a saving in several laws, have time to claim and prosecute their rights, after the *Impediments* removed, in case of fines levied, &c. See title *Limitation of Actions.*

IMPERIALE. A sort of very fine cloth. *Cowel.*

IMPESCATUS. Impeached or accused. *Pat.* 18 *E.* 1.

IMPETITIO. See *Impeachment.*

IMPETRATION, *Impetratio.*] An obtaining any thing by request and prayer: and in our statutes it is a pre-obtaining of church benefices in England from the court of Rome, which belonged to the gift and disposition of the King, and other lay-patrons of this realm; the penalty whereof was the same with that inflicted on *provisors.* See *stats.* 25 *E.* 3. *st.* 6. 38 *E.* 3. *st.* 2. *c.* 1.

IMPIERMENT. Impairing or prejudicing, "to the *Impierment* and diminution of their good names." *Stat.* 23 *Hen.* 8. *c.* 9.

IMPLEAD, from Fr. *Plaider.*] To sue or prosecute by course of law.

IMPLEMENTS, from Lat. *impleo*, to fill up.] Things necessary in any trade or mystery, without which the work cannot be performed; also the furniture of an house, as all houshold goods, *Implements*, &c. And *Implements* of *household* are tables, presses, cupboards, bedsteads, wainscot, and the like. In this sense, we find this word often in gifts and conveyances of moveables. *Terms de Ley.*

IMPLICATION. A necessary inference of something not directly declared: between parties in deeds, agreements, &c. arising from what is admitted or expressed. When the law giveth any thing to a man, it giveth, *implicitly* (or rather *impliedly*) whatsoever is necessary for the enjoying the same.

It is a general rule, that where an estate is to be raised by implication, *it must be a necessary and inevitable Implication*, and such as that the words can have no other construction whatsoever. *Talb.* 3.

An implication cannot be intended by deed, unless there are *apt* words; but otherwise in a will. *Brownl.* 153.

An implied intent must not, without clear expression, alter the equitable general law. 1 *Chan. Cas.* 297.

An estate by Implication was never thought of in a deed, nor in a will but in case of necessity. 4 *Mod.* 156.

No implication shall be allowed against an express estate *limited by express words.* 1 *Salk.* 226.

An express estate for life cannot be enlarged by Implication, but by express words it may. 2 *Vern.* 449.

The want of words in some cases may be helped by *Implication*; and so one word or thing, or one estate given, shall be implied by another. There is an *Implication* in wills and devises of lands, whereby estates are gained; as if a husband devises the goods in his house to his wife, and that after her decease his son shall have them, and his house; though the house be not devised to the wife by express words, yet it has been held, that she hath an estate for life in it by *Implication*, because no other person could then have it, the son and heir being excluded, who was to have nothing till after her decease. 1 *Ventr.* 223.

Estates for life, and estates tail, may be raised by *Implication* in wills: a testator had *three* sons, the eldest son dying, leaving his wife with child, to whom the father devised an annuity *in ventre sa mere*, and if his middle son died before he had any issue of his body, remainder over, &c. And it was resolved, that such son had an estate-tail by *Implication*. *Moor*, 127. It is said a fee-simple estate shall not arise by *Implication* in a will; though there is a perpetual charge imposed by the devisor on the devisee, &c. *Bridgm.* 103. Also it hath been adjudged, that where a particular estate is devised by will expressly, a contrary intent shall not be *implied* by any subsequent clause. See title *Will.*

*Implication* is either *necessary* or *possible*, and wherever an estate is raised by that means in a will, it must be by *necessary Implication*; for the devisee must *necessarily* have the thing devised, and no other person can have it. 1 *Salk.* 236. 2 *Nels. Abr.* 494.

No *Implication* shall be allowed against an *express estate*, limited by *express words*, to drown the same. *Salk.* 266. There are *conditions* and *covenants*, *implied* by law, in deeds and grants: and *Implication* will sometimes help law proceedings, and supply defects. See titles *Intendment*, *Use*, *Deed*, *Covenant*, *Estate*, *Limitation*, *&c.*

IMPORTATION, *Importatio.*] The bringing goods and merchandize into this kingdom from other nations. See this Dictionary, title *Navigation Acts.*

IMPOSSIBILITY. A thing which is *impossible* in law, is all one with a thing *impossible* in nature: and if any thing in a bond or deed is *impossible* to be done, such deed, &c. is void. Yet where the condition of a bond becomes *impossible* by the act of God, in such case, it is held the obligor ought to do all in his power towards a performance: as when a man is bound to enfeoff the obligee and his heirs, and the obligee dies, the obligor must enfeoff his heir. 2 *Co. Rep.* 74. See titles *Bond*, *Condition*, *Deed.*

IMPOST, from Lat. *impono.*] The tax received by the prince, for such merchandizes as are *brought into any haven* within his dominions, from foreign nations. It may in some sort be distinguished from *customs*, because *customs* are rather that profit the prince maketh of wares *shipped* out; yet they are frequently confounded. *Cowel.* See this Dictionary, titles *Customs on Merchandize*, *Taxes.*

IMPOSTORS, *Religious.* Those who falsely pretend an extraordinary commission from heaven; or terrify and abuse the people with false denunciations of judgments. They are punishable by the Temporal Courts with fine, imprisonment, and infamous corporal punishment. 1 *Hawk. P. C. c.* 5.

IMPOTENCY. Is a canonical disability to avoid marriage in the Spiritual Court. The marriage is not void *ab initio*, but voidable only by sentence of separation, but to be actually made during the life of the parties. See title *Marriage.*

IMPOTENCY, *Property by reason of.* A qualified property may subsist with relation to animals *feræ naturæ*, *ratione impotentiæ*, on account of their own inability. As when hawks, herons, or other birds build in my trees, or conies or other creatures make their nests or burrows in my land, and have young ones there; I have a qualified property in those young ones, till such time as they can fly or run away, and then my property expires. *Carta de forestâ;* (9 *Hen.* 3. *c.* 13.) but till then it is in some cases trespass, and in others felony, for a stranger to take them away. 7 *Rep.* 17. *Lamb. Eiren*, 274. 2 *Comm.* 394. See title *Game.*

IMPRESSING (or *Impresting*, i. e. paying earnest to) SEAMEN. The power of impressing men for the sea service by the king's commission, has been a matter of some dispute, and submitted to with great reluctance; though it hath *very clearly* and learnedly been shewn by *Sir Michael Foster*, that the practice of impressing, and granting powers to the admiralty for that purpose, is of very ancient date, and hath been *uniformly continued*, by a regular series of precedents, to the present time: whence he concludes it to be part of the common law. The difficulty arises from hence, that no statute has expressly declared this power to be in the crown, though *many* of them very strongly imply it. The statute 2 *Ric.* 2. *c.* 4. speaks of mariners being arrested and retained for the king's service, as of a thing well known, and practised without dispute; and provides a remedy against their running away. By *statute* 2 *&* 3 *Ph. & M. c.* 16. if any waterman, who uses the river Thames, shall hide himself during the execution of any commission of pressing for the king's service, he is liable to heavy penalties. By *statute* 5 *Eliz. c.* 5. no fisherman shall be taken by the queen's commission to serve as a mariner; but the commission shall be first brought to two justices of the peace, inhabiting near the sea coast where the mariners are to be taken, to the intent, that the justices may choose out, and return such a number of able-bodied men as in the commission are contained, to serve her majesty. And, by others, (7 *&* 8 *W.* 3. *c.* 21. 2 *Ann. c.* 6. 4 *&* 5 *Ann. c.* 19. 13 *Geo.* 2. *c.* 17. *&c.*) especial protections are allowed to seamen in particular circumstances, to prevent them from being impressed. All which do most evidently imply a power of impressing to reside somewhere; and, if any where, it must from the spirit of our constitution as well as from the frequent mention of the king's commission, reside in the crown alone. 1 *Comm.* 419. *Comb.* 245. *Fost.* 154.

The legality of pressing is so fully established, that it will not now admit of a doubt in any court of justice. In the

case of *The King* v. *Tubbs, Lord Mansfield* said, "The power of pressing is founded upon immemorial usage allowed for ages. If not, it can have no ground to stand upon; nor can it be vindicated or justified by any reason but the safety of the State. The practice is deduced from that trite maxim of the constitutional law of England, That private mischief had better be submitted to, than public detriment and inconvenience should ensue. Though it be a legal power, it may, like many others, be abused in the exercise of it." *Cowp.* 517. In that case, the defendant was brought up by *habeas corpus*, upon the ground that he was entitled to an exemption; but the court held, that the exemption was not made out, and he was remanded to the ship from whence he had been brought. 1 *Comm.* 420, *n.* See also 5 *Term Rep.* 276. and further this Dictionary, titles *Mariners, Seamen, Murder, Navy.*

In addition to the authorities cited by *Foster* in support of the legality of pressing seamen, many more are collected by *Barrington*, (in his *Obs. on Anc. stats. p.* 334. *&c. edit.* 5.) who shews, that the crown anciently exercised a similar power of impressing men for the land service; not only for the army, but for the king's pleasure: and instances are given in the case of *Goldsmith's* (*Aurifabros,*) impressed *pro apparatibus personæ regis.* 14 *E.* 4. *Rym. vol.* V. *part* iii. *p.* 50. and *Minstrels in solatium regis. Rym.* 34 *Hen.* 6.

The freemen and livery of London are not exempted from being impressed for the sea service, if in other respects fit subjects for the service. 9 *East's Rep.* 466.

It does not appear, that the master of any vessel is, merely as such, exempted by law from being impressed, especially if his appointment appear to be collusive. 14 *East's Rep.* 346.

IMPREST MONEY, from *In*, and Fr. *prest, paratus.*] Money paid on enlisting soldiers. See *Prest-money.*

IMPRETIABILIS. Invaluable; in which sense it is often mentioned in *Mat. Paris.*

IMPRIMERY, *Fr.* A print, or impression; the art of printing, and a printing-house, are called *Imprimary*, in some statutes.

IMPRISII. Those who side with, or take the part of another, either in his defence, or otherwise. *Mat. Par.* 127.

IMPRISONMENT, *imprisonamentum.*] The restraint of a man's liberty under the custody of another; and extends not only to a gaol, but to a house, stocks, or where a man is held in the street, &c. for in all these cases the party so restrained is said to be a prisoner, so long as he hath not his liberty freely to go about his business, as at other times. *Co. Lit.* 253.

None shall be imprisoned *but by the lawful judgment of his peers*, or *by the law of the land. Magna Charta, c.* 2. *stat.* 25 *Ed.* 3. *stat.* 5. *c.* 4.

No person is to be imprisoned, but as the law directs, either by command and order of a court of record, or by lawful warrant, or the king's writ: by which one may be lawfully detained to answer the law. 2 *Inst.* 46. 3 *Inst.* 209.

At common law, a man could not be imprisoned in any case, unless he were guilty of some force or violence; for which his body was subject to Imprisonment, as one of the highest executions of the law; but Imprisonment is inflicted by statute in many cases. 3 *Rep.* 11. Whenever the common law, or any statute, gives power to imprison, there it is lawful and justifiable; but he who doth it in pursuance of a statute, must be sure exactly to follow the statute in the order and manner of doing thereof. *Dyer*, 204. 13 *E.* 1. See further on this subject, and connected therewith, this Dictionary, titles *Arrest, Bail, Capias, Commitment, Constable, False Imprisonment, Habeas Corpus. Wrongous Imprisonment.*

IMPROBATION. The act by which falsehood and perjury is proved. By an action of *reduction-improbation* in the Scotch law a deed may be falsified if refused to be produced. See *Bell's Scotch Law Dict.*

IMPROPRIATION. See title *Appropriation.*

IMPROVEMENT. See *Approvement.*

IMPRUIARE. To improve land.

IMPRUIAMENTUM. The improving of lands. *Cartular. Abbat. Glaston. MS. pag.* 50. Or rather the *improvement* itself, when made.

IN AUTER DROIT. In another's right; as where executors or administrators sue for a debt or duty, &c. in right of the testator or intestate.

INBLAURA. Profit or product of ground. *Cowel.*

INBORH AND OUTBORH, *Saxon.* See *Camden's Britain, in Ottadinis*, where he says, speaking of *Edelingham*, the barony of *Patrick* earl of *Dunbare*, which also was *Inborow* and *Outborow* between England and Scotland, as we read in the books of *Inquisitions*, that is, (as he believes,) he was to allow, and to observe in this part the ingress and egress of those who travelled to and fro between both realms; for Englishmen in ancient time called in their language an *entry* and *forecourt* or gate-house, inborow. *Cowel.*

INCASTELLARE. To reduce a thing to serve instead of a castle; and it is often applied to churches.—*Qui post mortem patris ecclesiam* incastellatam *retinebat. Gervas. Dorob. anno* 1144.

IN CASU CONSIMILI. See *Casu Consimili.*

IN CASU PROVISO. See *Casu proviso.*

INCAUSTUM, or ENCAUSTUM, Ink. *Fleta, lib.* 2. *c.* 27. *par.* 5.

INCENDIARIES. Burning of houses maliciously, to extort sums of money from those whom the malefactors should spare, was made treason the first year of king *H.* 6. 1 *Hale's Hist. P. C.* 270. The like offences of firing houses and sending letters demanding money of persons, &c. is made felony, by *stat.* 9 *Geo.* 1. *c.* 22. See titles *Arson, Black Act, Burning.*

INCERTAINTY. See title *Certainty.*

INCEST. In the year 1650, when the ruling powers found it for their interest to put on the semblance of a very extraordinary strictness and purity of morals, Incest and wilful adultery were made capital crimes. But at the Restoration, when men, from an abhorrence of the hypocrisy of the late times, fell into a contrary extreme of licentiousness, it was not thought proper to renew a law of such unfashionable rigour. And these offences have been ever since left to the feeble coercion of the Spiritual Court, according to the rules of the Canon law. 4 *Comm.* 64. In Scotland, the actual commission of this crime appears to be still capital; see *Bell's Scotch Law Dict.*, and this Dict. title *Lewdness.*

INCHANTMENT. See title *Conjuration.*

INCHANTOR, *incantator.*] He who by *charms* conjures the devil; and they were anciently called *carmina*, by reason in those days, their *charms* were in *verse.* 3 *Inst.* 44.

INCHANTRESS. *incantatrix.*] A woman who uses charms and incantations. See *Conjuration.*

INCHARTARE. To give or grant, and assure any thing by an instrument in writing. *Matt. Paris.*

INCH OF CANDLE. Is the manner of selling goods by merchants; which is done thus: First, Notice is to be given upon the Exchange, or other public place, of the time of sale; and, in the mean time, the goods to be sold are divided into lots, printed papers of which, and the conditions of sale, are also forthwith published; and when the goods are exposed to sale, a small piece of wax-candle, about an inch long, is burning, and the last bidder when the candle goes out, is entitled to the lot or parcel so exposed. If any difference happens in adjusting to whom a lot belongs, where several bid together, the lot is to be put up again; and the last bidder is bound to stand to the bargain, and take the lot whether good or bad. In these cases, the goods are set up at such a price; and none shall bid less than a certain sum, more than another hath before, &c. *Merch. Dict.* See title *Auction.*

INCIDENT, *incidens.*] A thing necessarily depending upon, appertaining to, or following another that is more worthy or principal. A court-baron is inseparably incident to a manor; and a court of piepowder to a fair; these are so inherent to their principals, that by the grant of one, the other is granted; and they cannot be extinct by release, or saved by exception, but in special cases. *Kitch.* 36. *Co. Lit.* 151.

Rent is incident to a reversion: timber trees are incident to the freehold, and also deeds and charters, and a way to lands; fealty is incident to tenures; distress to rent and amercements, &c. *Co. Lit.* 151. Tenant for life or years, hath incident to his estate, estovers of wood. *Co. Lit.* 41. And there are certain Incidents to estates-tail; as to be dispunishable of waste, to suffer a recovery, &c. *Co. Lit.* 224. 10 *Rep.* 38, 39. Incidents are needful to the well-being of that to which they are incident; and the law is tender of them. *Hob.* 39, 40.

If a man, either by grant or prescription, has a right to a wreck thrown on another's land, of consequence he has a right to a way over the same land to take it; and the very possession of the wreck is in him before seisure. 6 *Mod.* 149. See 14 *Vin. Abr.* title *Incidents.*

INCIDENT DILIGENCE. Is a diligence or process granted before *Litis Contestation* in improbations, for the recovery of writs craved to be produced, and in many other cases during the dependance of the principal process. *Scotch Dict.*

INCLAUSA. A home-close, or inclosure near the house. *Paroch. Antiq. pag.* 31.

INCLOSURES. Throwing down Inclosures is an offence punishable by our ancient laws and statutes. *Stat.* 13 *Ed.* 1. *stat.* 1. *c.* 46. But if the lord of a manor inclose part of the waste or common, and doth not leave sufficient for the commoners, they may break down such inclosure, or have writ of assize. *Stat.* 3 & 4 *Ed.* 6. *c.* 3. Large wastes or commons in the West-Riding of the county of York, with the consent of the lords of manors, &c. may be inclosed, a sixth part whereof shall be for the benefit of poor clergymen, whose livings are under 40*l.* a year, to be settled in trustees, who may grant leases for twenty-one years, &c. *Stat.* 12 *Ann. c.* 4.

Destroying them in the night, to be made good by the neighbouring towns, *stats.* 13 *Ed.* 1. *stat.* 1. *c.* 46. 3 & 4 *Ed.* 6. *c.* 3. Throwing down inclosures in the night, to be punished with treble damages, *stats.* 3 & 4 *Ed.* 6. *c.* 3. § 4. 22 & 23 *Car.* 2. *c.* 7. Taking away gates, pales, posts, stiles, or hedge wood, or destroying them, how punished, &c. See *stats.* 43 *Eliz. c.* 7. 15 *Car.* 2. *c.* 2. 9 *Geo.* 3. *c.* 29.

In Scotland by the act 1661, *c.* 41. proprietors may compel neighbouring proprietors to join in inclosing adjoining properties; bearing a proportion of the expence.

See titles *Common, Wastes.*

INCOME, Duties on. See *Taxes.*

INCOMPATIBILITY, *incompatibilitas beneficiorum.*] Is when benefices cannot stand one with another, if they be with cure, and of such a value in the King's books. *Whitlock's Read, p.* 4. See title *Advowson.*

INCONTINENCY. See titles *Adultery, Fornication, Lewdness, Rape,* &c.

INCOPOLITUS. A proctor, or vicar. *Leg. Hen.* 1.

INCORPORATION, power of. See title *Corporation.*

INCORPOREAL HEREDITAMENTS. See title *Hereditaments.*

INCREMENTUM. Increase or improvement; to which was opposed *decrementum* or abatement. *Paroch. Antiq.* 164. It is used in charters for a parcel of ground inclosed out of a common, or improved.

INCROACHMENT, Fr *accrochment*, a grasping.] An unlawful gaining upon the right or possession of another man. As where a man sets his hedge or wall too far into the ground of his neighbour, that lies next to him, he is said to make Incroachment upon him: and a rent is said to be encroached, when the lord by distress or otherwise compels his tenant to pay more than he owes; and so of services, &c. 9 *Rep.* 33. And sometimes this word is applied to power; for the Spencers, father and son, it is said, incroached unto them *royal power* and authority, *anno* 1 *Ed.* 3. And the admirals and their deputies are said in *statute* 15 *R.* 2. *c.* 3. to have incroached to themselves divers jurisdictions, &c.

INCUMBENT, from Lat. *incumbo*, to mind diligently.] A clerk resident on his benefice with cure; and is so called, because he does or ought to bend all his study to the discharge of the cure of the church to which he belongs. *Co. Lit.* 119. Where an incumbent is put out without due process, he shall be at large to sue for his remedy at what time he pleaseth, &c. *Statute* 4 *Hen.* 4. *c.* 22. See titles *Advowson, Church, Parson.*

INCUMBRANCE. See titles *Mortgage, Purchase,*

INCURRAMENTUM. The incurring or being subject to a penalty, fine, or amercement: so *incurri alieni* is to be liable to another's legal censure or punishment. *Westm. c.* 37.

INDEBITATUS ASSUMPSIT. See title *Assumpsit.*

INDECIMABLE, *indecimabilis.*] That is not *tithable*, or by law ought not to pay tithe. 2 *Inst.* 460.

INDEFEASIBLE or INDEFEISIBLE. That cannot be defeated or made void; as a good and *indefeasible estate, &c.*

INDEFEASIBLE RIGHT TO THE THRONE. See title *King.*

INDEFENSUS. One that is impleaded, and refuseth to make answer. *Mich.* 50. *H.* 3. *Rot.* 4.

INDEFINITE PAYMENT. Is where a debtor owes several debts to a creditor, and makes a payment without specifying to which of the debts it is to be applied. See title *Payment.*

INDEMNITY. On the *appropriation* of a church to any college, &c. when the archdeacon loses for ever his induction-money, the recompence he receives yearly out of the church so appropriate, as 12*d.* or 2*s.* more or less, as a pension agreed at the time of the appropriating, is called *Indemnity. MS. in Bibl. Cotton, p.* 84.

Acts of Indemnity are passed every session of parliament for the relief of those who have neglected to take the necessary oaths, &c. required to qualify them for their respective offices.

INDENTURE, *indentura.*] Is a writing containing some contract, agreement, or conveyance between two or more persons, being indented in the top answerable to another part, which hath the same contents. *Co. Lit.* 229. A deed of bargain and sale of freehold lands, &c. must be by Indenture, inrolled, &c. *Stat.* 27 *Hen.* 8. *c.* 16. Words in Indentures, though of one party only, are binding to both parties. *Cro. Eliz.* 202. 657. See this Dict. titles *Conveyance, Deed.*

INDIA COMPANY. See *East India Company.*

INDIA GOODS. See this Dict. titles *East India Company, Navigation Acts.*

INDICAVIT. A writ of prohibition that lies for a *Patron* of a *church*, whose clerk is sued in the Spiritual Court by another clerk for *tithes*, which amount to a fourth part of the profits of the advowson; when the suit belongs to the King's courts, by the *statutes, West.* 2. *c.* 5. 13 *E.* 1. *stat.* 4. The patron of the defendant is allowed this writ, as he is like to be prejudiced in his church and advowson, if the plaintiff recovers in the Spiritual Court. *Reg. Orig.* 35. *Old. Nat. Br.* 31.

This writ may be also purchased by the parson sued; and is directed as well unto the judge of the court, as unto the party plaintiff, that they do not proceed, &c. But it is not to be had before the defendant is libelled against in the Spiritual Court, the copy of which libel ought to be produced in Chancery, before the *Indicavit* is granted; and this writ must be brought before judgment given in the Spiritual

Court; for after judgment there, the *Indicavit* is void. *New. Nat. Br.* 66. 101. See *stat.* 34 *E.* 1. *st.* 1. The writ of *Indicavit* doth not lie of a less part of the tithes, &c. than a fourth part of the church; if they are not so much, this being surmised by the other party, a *consultation* shall be had. *Ibid.* The patron of the clerk, who is prohibited by the *Indicavit*, may have his writ of *right* of the *advowson of dismes*, &c. The Ecclesiastical Court may hold plea of tithes not amounting to the fourth of the church. *Stat. Circumsp. Agatis.* 13 *Ed.* 1. *st.* 4. See further titles *Prohibition*, *Tithes*.

INDICO, or INDIGO. See title *Navigation Acts*.

INDICTED, *Indictatus.*] When any one is accused by bill preferred to jurors at the king's suit, for some offence, either criminal or penal, he is said to be indicted thereof. *Cowel.*

INDICTIO. The same with Indictment. *Nonnunquam enim fiunt accusationes de foresta, et* indictiones *vulgariter sic appellatæ. Du Fresne.*

INDICTION, *Indictio; ab indicendo.*] The space of fifteen years, by which computation charters and public writings were dated at Rome; likewise anciently in England, which we find not only in the charters of King Edgar, but of King Hen. 3. And by this account of time, which began at the dismission of the Nicene Council, every year still increased one till it came to *fifteen;* and then returned again, making *first*, *second Indiction*, *&c. dat apud* Chippenham, 18 *die* Aprilis, indictione nona, *anno Dom.* 1266.

## INDICTMENT.

INDICTAMENTUM, from the Fr. *enditer*, i. e. *indicare*, to shew.] A bill or declaration of complaint drawn up in form of law, exhibited for some offence criminal or penal, and preferred to a grand jury; upon whose oath it is found to be true, before a judge or others, having power to punish or certify the offence. *Termes de Ley.*

Indictment in the Scotch Law, is the form of process by which a criminal is brought to trial at the instance of the Lord Advocate. Where a private party is a principal prosecutor he brings his action in what is termed the form of criminal letters.

What follows relates to Indictments in England.

I. *Of the Nature of an Indictment; how found, presented, and prosecuted.*
II. *Of the Locality of an Indictment.*
III. *Of Certainty, and the other Requisites in an Indictment, and of Errors and Amendments thereof.*
IV. *For what Offences Indictment will lie.*

I. LAMBARD says, an Indictment is an accusation, at the suit of the King, by the oaths of twelve men of the same county wherein the offence was committed, returned to enquire of all offences in general in the county, determinable by the court into which they are returned, and their finding a bill brought before them to be true: but when such accusation is found by a grand jury, without any bill brought before them, and afterwards reduced to a formed *Indictment*, it is called *A Presentment;* and when it is found by jurors returned to inquire of that particular offence only, which is indicted, it is properly called *An Inquisition. Lamb. lib.* 4. *cap.* 5.

By *Poulton*, an *Indictment* is an inquisition taken and made *by twelve men*, at the *least*, thereunto sworn, whereby they find and present, that such a *person*, of such a *place*, in such a *county*, and of such a degree, hath committed such a *treason*, *felony*, *trespass*, or other offence, against the peace of the King, his crown and dignity. *Palt.* 169. An *Indictment* according to Lord Chief Justice *Hale*, is only a plain, brief, and certain narrative of an offence, committed by any person, and of those necessary circumstances that concur to ascertain the fact and its nature. 2 *Hale's Hist. P. C.* 168, 169.

An Indictment seems to be thus shortly well defined:—"A written accusation, of one or more persons, of a crime or a misdemeanor, preferred to, and presented on oath by, a grand jury." 4 *Comm.* 302.

A bill of *Indictment* is said to be an accusation, for this reason; because the jury that inquires of the offence doth not receive it, until the party that offers the bill, appearing, subscribes his name, and offers his oath for the truth of it. *Standf. P. C. lib.* 2. *cap.* 23.

To this end the sheriff of every county is bound to return to every session of the peace, and every commission of oyer and terminer, and of general gaol delivery, twenty-four good and lawful men of the county, some out of every hundred, "to inquire, present, do, and execute all those things which, on the part of our lord the king, shall then and there be commanded them." As many as appear upon this pannel are sworn of the Grand Jury to the amount of twelve at least, and not more than twenty-three; that twelve may be a majority. See title *Jury*. This grand jury are previously instructed in the articles of their inquiry, by a charge from the judge on the bench. They then withdraw from court to sit and receive Indictments, which are preferred to them in the name of the king, but at the suit of any private prosecutor; and they are only to hear evidence on behalf of the prosecution: for the finding an Indictment is only in the nature of an inquiry or accusation, which is afterwards to be tried and determined; and the grand jury are only to inquire upon their oaths whether there be sufficient cause to call upon the party to answer it.

When the grand jury have heard the evidence, if they think it a groundless accusation, they used formerly to indorse on the back of the bill, *ignoramus*, *i. e.* "we know nothing of it;" intimating, that though the facts might possibly be true, the truth did not appear to them: but now they assert in English, more absolutely, *not a true bill;* or (which is the better way) *not found;* and then the party is discharged without farther answer. But a fresh bill may afterwards be preferred to a subsequent grand jury. If they are satisfied of the truth of the accusation, they then endorse upon it, *a true bill;* anciently *billa vera*. The Indictment is then said to be found, and the party stands indicted. But to find a bill, there must at least twelve of the jury agree: for so tender is the law of England of the lives of the subject, that no man can be convicted at the suit of the King for any capital offence, unless by the unanimous voice of twenty-four of his equals and neighbours,; that is, by twelve at least of the grand jury, in the first place, assenting to the accusation; and afterwards by the whole petit jury, of twelve more, finding him guilty upon his trial. But if twelve of the grand jury assent, it is a good presentment, though some of the rest disagree. 2 *Hal. P. C.* 161. And the Indictment, when so found, is publicly delivered into court.

Although a bill of *Indictment* may be preferred to a grand jury upon oath, they are not bound to find the bill, if they find cause to the contrary; and though a bill of *Indictment* be brought unto them without oath made, they may find the bill if they see cause; but it is not usual to prefer a bill unto them before oath be first made in court, that the evidence they are to give unto the grand inquest to prove the bill is true. 2 *Lill. Abr.* 44. The grand jury are to find *the whole* in a bill, or reject it, and *not find specially for part*, &c. 2 *Hawk. P. C. c.* 25. § 2. This rule relates only to cases where the grand jury take upon themselves to find part of the *same Indictment* to be true, and part false; and do not either affirm or deny the facts submitted to their inquiry. But where there are two distinct counts, *viz.* one for a riot,

and the other for an assault, and the grand jury find a true bill as to the assault, and indorse *ignoramus* as to the riot, this finding leaves the Indictment as to the count found just as if there had been originally only that one count. *Cowp.* 325.

Any one under prosecution for a crime, before he is indicted, may except against or challenge any of the persons returned on the grand jury; as being outlawed, returned at the instance of the prosecutor, or not returned by the proper officer, &c. 2 *Hawk. c.* 25. § 16. No *Indictment* shall be made but by inquest of lawful men returned by sheriffs, &c And if a person not returned by the sheriff on a grand jury, procures his name to be read among those of others who were actually returned, whereupon he is sworn of the jury, he may be indicted for it and fined, and the *Indictment* found by such a jury shall be void. *Stat.* 11 *Hen.* 4. *c.* 9. 12 *Rep.* 98. 3 *Inst.* 33.

Sheriffs had formerly power to take *Indictments*; which they did by roll indented, one part whereof remained with the *indictors.* 13 *Ed.* 1. 1 *Ed.* 3. Justices of peace have no power relating to *Indictment* for crimes, but what is given them by act of parliament: and it is said justices of peace in sessions cannot, on an *Indictment*, try and determine the offence in one and the same sessions in which the offenders are indicted. *Hill.* 11 *Car. Cro. Car.* 430. 448. And Indictments before justices of peace, &c. may be removed into the court of B. R. by *certiorari.* But an Indictment removed by *certiorari* into B. R may be sent back again into the country or place whence removed, if there be cause to do it. See title *Certiorari.*

An Indictment is the king's suit; for which reason the party who prosecutes, is a good witness to prove it: and no damages can be given to the party grieved upon an Indictment, or other criminal prosecution *unless particularly grounded on some statute;* but the court of B. R. by the king's privy seal may give to the prosecutor a third part of the fine assessed for any offence; and the fine to the king may be mitigated, in regard to the defendant's making satisfaction to a prosecutor for costs of prosecution, and damages sustained by the injury received. 2 *Hawk. c.* 25. § 3.

Upon the ground that an Indictment is the king's suit, and that the prosecutor may be, and generally is, a witness to prove it, the Court of K. B. will not suffer the prosecutor to address the jury in person, and state the case for the prosecution. Counsel for the prosecutor have this privilege allowed them, because it is expected that they will only state what it is proper for the jury to hear. *R.* v. *Price, Term Rep. K. B. East.* 59 *Geo.* 3. 606.

No man may be put upon his trial for a capital offence, except on an appeal or indictment, or something equivalent thereto. *H. P. C.* 210. All indictments ought to be brought for offences committed against the common law, or against some statute: and not for every slight misdemeanor. 2 *Lill.* 44. Where a statute appoints a penalty to be recovered by bill, plaint, or information, it cannot be by Indictment, but as directed to be recovered. An Indictment will not lie where only another remedy is provided by statute. *Cro. Jac.* 643. 3 *Salk.* 187.

Husband and wife may commit a trespass, felony, &c. and be indicted together; so for keeping a bawdy-house, though the house be the husband's. *Hob.* 65. 1 *Salk.* 382. See title *Baron and Feme.*

If an offence wholly arises from any joint act that is criminal of several defendants, they may be all charged in one *Indictment*, jointly and severally, or jointly only; and some of the defendants may be convicted, and others acquitted; for the law looks on the charge as several against each, though the words of it purport a joint charge against all: In other cases, the offences of several persons must be laid several, *because the offence of one cannot be the offence of another; and every man ought to answer severally for his own crime.* And three offences may be joined in an *Indictment*, and the party convicted of one offence, though he is found not guilty of the others. On penal statutes, several things shall not be joined in the *Indictment*, &c. except it be in respect of some one thing, to which all of them have relation. 2 *Hawk. P. C. c.* 25. § 89. 1 *Hal. P. C.* 561. 610.

Several defendants cannot be joined in one Indictment for perjury; for perjury is a separate act in each; and one may be desirous to have a *certiorari*, and the other not; and the jury on the trial of all, may apply evidence to all, that is but evidence against one. *Stra.* 921. So also in *the King* v. *Clendon et al.* where two were joined in the same Indictment for an assault, the court held they were distinct offences. *Stra.* 870. *Lord Raym.* 1572. But in another case, on an information against two for the same libel, it was held good; and the case of *the King* v. *Clendon*, held not to be law. *Burr.* 980.

A person indicted of felony, &c. may plead generally misnomer or wrongful addition; a former acquittal or conviction; a pardon, or other special plea; or the general issue; or may plead any plea in abatement of the *Indictment*, &c. 2 *Hawk. P. C. c.* 25. § 150. One indicted for felony may have counsel assigned him to speak for him in matter of *law only.* See titles *Trial, Treason, Abatement*, &c.

After a person is indicted for felony, the sheriff is commanded to attach his body by a *capias;* and on return of a *non est inventus*, a second *capias* shall be granted, and the sheriff is to seize the offender's chattels, &c. And if on that writ a *non est inventus* is returned, an *exigent* shall be awarded, and the chattels be forfeited, &c. *Stat.* 25 *Ed.* 3. *st.* 5. *c.* 2.

If an innocent person be indicted of felony and will not suffer himself to be arrested by the officer who has a warrant for it, he may be killed by the officer, if he cannot otherwise be taken; for there is a charge against him upon record, to which at his peril he is bound to answer. *Fitz. Coron.* 179. 261.—See title *Arrest.*

A person may be indicted twice at the same time, where he has committed two felonies, and if he hath his clergy for one, he may be hanged for the other. And if there is an Indictment and inquisition against one for the same offence, one found by the coroner's inquest and another by the grand jury, he may be tried on both at the same time: But if he be tried and acquitted upon the one, it may be pleaded in bar, on trial for the other. *Kel.* 30. 108. 1 *Salk.* 382.

When a person is convicted upon an *Indictment* for trespass or misdeameanor; he is to appear in court, on judgment pronounced; and the court having set a fine upon him, will commit him in execution, &c. 2 *Lil. Abr.* 41.

By *stat.* 60 *Geo.* 3. *c.* 4. for preventing delay in cases of *Misdemeanor*, it is enacted, that where any person shall be prosecuted in the Court of King's Bench at Westminster or Dublin, for any misdemeanor, either by information or indictment, found in, or removed to such courts, and shall appear in person, in term time, to answer thereto, such defendant shall not be allowed to imparl till the following term; but shall plead or demur *within four days;* or, in default thereof, judgment shall be entered against him. Where the defendant appears by attorney, a rule of court shall be made to require such plea or demurrer. The court may, on sufficient cause, allow further time to plead or demur.—Persons prosecuted for misdemeanors, by indictment at any sessions of the peace, &c. having been committed or bailed twenty days at least before the sessions, shall plead to such indictment, and the trial shall proceed at such same sessions, unless a *certiorari* be delivered before the jury is sworn for the trial. Such *certiorari* may be issued before indictment found, as well as after.—Persons committed or bailed at any period less than twenty days before any session, or having twenty

days' notice of an indictment found against them at a session subsequent to their being committed or bailed, shall plead, and be tried at such subsequent session. Indictments removed from cities or towns corporate, into counties, under 38 *Geo.* 3. *c.* 52. shall be tried according to this act; with power to the court to extend the time of pleading. In all prosecutions for misdemeanors by the attorney-general, the court, if applied to for that purpose, shall order a copy of the information or indictment to be delivered to the defendant, after his appearance, free of expence. And if any such prosecution shall not be brought to trial within twelve months after the plea of Not Guilty pleaded on application by the Defendant, giving twelve days' notice to the attorney-general, the court may make an order to authorize the defendant to bring on his trial, and which he may do accordingly, unless a *nolle prosequi* be entered. The act is not to extend to informations of *quo warranto*, or for non repair of bridges or highways.

II. The Grand Jury are sworn to inquire only for the body of the county; and therefore they cannot regularly inquire of a fact done out of the county for which they are sworn, unless particularly enabled by statute. At common law, therefore, where a man was wounded in one county and died in another, the offender was indictable in neither, because no complete act of felony was done in either county; but by *stat.* 2 & 3 *E.* 6. *c.* 24. the offender is now indictable in the county where the party died; and by *stat.* 2 *Geo.* 2. *c.* 21. if the stroke or poisoning be in England, and the death upon the sea, or out of England, or *vice versâ*, the offenders and their accessories may be indicted in the county where either the death, poisoning, or stroke shall happen. So in some other cases: as particularly, where treason is committed out of the realm, it may be inquired of in any county within the realm, as the king shall direct, in pursuance of *stats.* 26 *Hen.* 8. *c.* 13. 33 *Hen.* 8. *c.* 23. 35 *Hen.* 8. *c.* 2. 5 & 6 *E.* 6. *c.* 11.

Counterfeiters, washers, or minishers of the current coin, together with all manner of felons and their accessories, may by *stat.* 26 *Hen.* 8. *c.* 6. (confirmed and explained by *stat.* 34 & 35 *H.* 8. *c.* 26. § 75, 76.) be indicted and tried for those offences, if committed in any part of Wales, before the justices of gaol-delivery, and of the peace, in the next adjoining county of England, where the king's writ runneth; that is, at present in the county of Hereford or Salop; and not, as it should seem, in the county of Chester or Monmouth: the one being a county palatine where the king's writ did not run, and the other a part of Wales in the time of Henry VIII. *Str.* 533. 8 *Mod.* 134. See *Hardr.* 66. Murders also, whether committed in England, or in foreign parts, may, by virtue of *stat.* 33 *Hen.* 8. *c.* 23. be inquired of and tried by the king's special commission in any shire or place in the kingdom. By *stat.* 10 & 11 *W.* 3. *c.* 25. all robberies and other capital crimes committed in Newfoundland, may be inquired of and tried in any county of England. Offences against the black act, 9 *Geo.* 1. *c.* 22. may be inquired of and tried in any county of England, at the option of the prosecutor. So felonies in destroying turnpikes, or works upon navigable rivers erected by authority of parliament, may by *stats.* 8 *Geo.* 2. *c.* 20. 13 *Geo.* 3. *c.* 84. be inquired of and tried in any adjacent county. By *stat.* 26 *Geo.* 2. *c.* 19. plundering or stealing from any vessel in distress or wrecked, or breaking any ship contrary to 12 *Ann. st.* 2. *c.* 18. may be prosecuted either in the county where the fact is committed, or in any county next adjoining; and, if committed in Wales, then in the next adjoining English county: by which is understood to be meant such English county, as by *stat.* 26 *Hen.* 8. *c.* 6. above mentioned, had before a concurrent jurisdiction with the great sessions on felonies committed in Wales. Felonies committed out of the realm, in burning or destroying the king's ships, magazines, or stores, may by *stat.* 12 *Geo.* 3. *c.* 24. be inquired of and tried in any county of England, or in the place where the offence is committed. By *stat.* 13 *Geo.* 3. *c.* 63. misdemeanors committed in India, may be tried upon information or Indictment in the court of King's Bench in England; and a mode is marked out for examining witnesses by commission, and transmitting their depositions to the court.

But, in general, all offences must be inquired into as well as tried in the county where the fact is committed: yet, if larceny be committed in one county, and the goods carried into another, the offender may be indicted in either; for the offence is complete in both. 1 *Hal. P. C.* 507. Or, he may be indicted in England, for larceny in Scotland, and carrying the goods with him into England, or *vice versâ*, or for receiving in one part of the united kingdom goods that have been stolen in another, *stat.* 13 *Geo.* 3. *c.* 31. But, for robbery, burglary, and the like an offender can only be indicted where the fact was actually committed; for though the carrying away and keeping of the goods is a continuation of the original taking, and is therefore *larceny* in the second county, yet it is not a *robbery* or *burglary* in that jurisdiction. And if a person be indicted in one county for larceny of goods originally taken in another, and be thereof convicted or stands mute, he shall not be admitted to his clergy; provided the original taking be attended with such circumstances as would have ousted him of his clergy, by virtue of any statute made previous to the year 1691. *Stats.* 23 *Hen.* 8. *c.* 3. 3 *W.* & *M. c.* 9.

If no town or place be named where the fact was done the *Indictment* shall be void; though a mistake of the place in laying the offence is of no signification on the evidence, if the fact is proved at some other place in the same county. *H. P. C.* 264. See *stat.* 1 *Hen.* 5. *cap.* 5.

If, upon not guilty pleaded, to an *Indictment*, it shall appear that the offence was done in a *county* different from *that* in which the *Indictment* was found, the defendant shall be acquitted. *H. P. C.* 203. *Kel.* 15.

If there be an accessory in one county, to a felony committed in another, the accessory may be indicted and tried in the same county, wherein he was accessory. *Stat.* 2 & 3 *Ed.* 6. *c.* 24.

An *Indictment* being found in the proper county, may (in some cases) be heard and determined in any other county, by special commission. 3 *Inst.* 27.

In the two last rebellions, statutes passed empowering the crown to try the traitors in any county.

III. Indictments must have a precise and sufficient certainty. By *stat.* 1 *Hen.* 5. *c.* 5. all Indictments must set forth the christian name, surname and addition of the state and degree, mystery, town, or place, and county of the offender; and all this to identify his *person*. The *time* and *place* are also to be ascertained, by naming the day and township in which the fact was committed; though a mistake in these points is in general not held to be material, provided the *time* be laid previous to the finding of the Indictment, and the place to be within the jurisdiction of the court; unless where the place is laid, not merely as a *venue*, but as part of the description of the fact. 2 *Hawk. P. C. c.* 25. But sometimes the time may be material, where there is any limitation in point of time assigned for the prosecution of offenders, as by *stat.* 7 *W.* 3. *c.* 3. which enacts, that no prosecution shall be had for any of the treasons or misprisions therein mentioned, (except an assassination designed or attempted on the person of the king) unless the bill of Indictment be found within three years after the offence committed. *Fost.* 249. And, in case of murder, the time of the death must be laid within a year and a day after the mortal stroke was given.

The offence itself must also be set forth with clearness and certainty; and, in some crimes, particular words of art must

be used, which are so appropriated by the law to express the precise idea which it entertains of the offence, that no other words, however synonymous they may seem, are capable of doing it. Thus, in treason, the facts must be laid to be done, *treasonably, and against his allegiance;* antiently, *proditoriè et contra ligeantiæ suæ debitum;* else the Indictment is void. In Indictments for murder, it is necessary to say, that the party indicted, *murdered*, not *killed* or *slew*, the other, which was expressed in *Latin* by the word *murdravit*. In all indictments for felonies, the adverb *feloniously*, [*felonicè*] must be used; and for burglaries also, *burglariter*, or in *English*, *burglariously*, and all these to ascertain the intent. In rapes, the word *rapuit* or *ravished* is necessary, and must not be expressed by any periphrasis, in order to render the crime certain. So in larcenies also, the words *felonicè cepit et asportavit* [*feloniously took and carried away*] are necessary to every Indictment; for these only can express the very offence.

In Indictments for murder, the length and breadth of the wound should in general be expressed, in order that it may appear to the court to have been of a mortal nature; but if it goes through the body, then its dimensions are immaterial, for that is apparently sufficient to have been the cause of the death. Also, where a limb, or the like, is absolutely cut off, there such description is impossible. 5 *Rep.* 122.

In Indictments the *value* of the thing, which is the subject or instrument of the offence, must sometimes be expressed. In Indictments for larcenies this is necessary, that it may appear whether it be grand or petit larceny, and whether entitled or not to the benefit of clergy. In homicide, of all sorts, it is necessary, as the weapon with which it is committed is forfeited to the king as a deodand. See 4 *Comm. c.* 23.

An Indictment alleging that defendants conspired by divers false pretences and subtle means and devices, to obtain from A. divers large sums of money, and to cheat and defraud him thereof; the gist of the offence being the conspiracy, the Court of K. B. held that it was quite sufficient only to state that fact and its object, and that it was not necessary to set out the specific pretences. *R.* v. *Gill & Henry, Term Rep. K. B. Mic.* 59 *Geo.* 3. 204.

*Indictments* ought to be more certain than common pleadings in law, because they are more penal, and to be answered with more precision. *Hil.* 23 *Car. B. R.* They must be precise and certain in every point, and charge some offence in particular, and not a person as an offender in general, or set down goods, &c. stolen, without expressing what goods; and it ought to be laid positively, not by way of recital, &c. or be supplied by implication. *Cro. Jac.* 19. 2 *Hawk. P. C. c.* 25.

If an Indictment be generally of offences at several times, without laying any one of them on a certain day, as if it be laid between such a day and such a day, it hath been adjudged, that the Indictment is void: but a mistake in not laying an offence on the very same day, on which it is afterwards proved upon the trial, is not material upon evidence. 2 *Hawk. c.* 25. § 82. And it is said, the crown is not bound to set forth the very day, when treason, &c. was committed: evidence may be given of a treasonable conspiracy, &c. at any time before or after the time alleged in the Indictment, where it is laid on such a day, and divers other days, as well before as after; because the time is only a circumstance, and of form some day must be alleged, but it is not material. 1 *Salk.* 188.

When an Indictment is drawn upon a statute, it ought to pursue the words of it, if a private act; but it is otherwise on a general statute: it is best not to recite a public statute; *the recital is not necessary*, for the judges are bound *ex officio* to take notice of all public statutes, and mis-recitals are fatal; so that it is the surest way only to conclude generally "against the form of the statute." 4 *Rep.* 48. Though there be no necessity to recite a public statute in an *Indictment*, yet if the prosecutor take upon him to do it, and *materially* vary from the *substantial part* of the purview of the statute, and conclude *contra formam statut' prædict'* he vitiates the *Indictment*. *Plowd.* 79. 83. *Cro. Eliz.* 236. But many mis-recitals may be saved by a general conclusion *contra formam statuti*, without adding *prædict'*, &c. And mistakes may be helped by the constant course of precedents upon such statutes. 2 *Hawk. c.* 25. § 101. An *Indictment* is to bring the fact making an offence, within all the material words of the statute, or the words, *contra formam statuti*, will not make it good. 2 *Hawk. c.* 25. § 115. If a word of *substance* be omitted in the *Indictment*, the whole *Indictment* is bad; but it is otherwise where a word of *form* is omitted, or there is an omission of a synonymous word, where the sense is the same, &c. Judgment shall not be given by statute, upon an *Indictment* which doth not conclude *contra formam statuti:* and judgment by statute shall never be given out an *Indictment* at common law, as every *Indictment* which doth not thus conclude shall be taken to be. But where persons are indicted on the statute of *stabbing*, and the evidence is not sufficient to bring them within the statute, they may be found guilty of *general manslaughter* at common law, and the words *contra formam statut'* be rejected as useless: in other cases the same has been also adjudged; though formerly it was held, that an *Indictment* grounded on a statute, which would not maintain it, could not in any case be maintained as an *Indictment* at common law. 2 *Hawk. P. C. c.* 25. § 4.

In an Indictment on *stat.* 33 *Geo.* 3. *c.* 85 for embezzling bank notes, (See this Dict. title *Servants*,) it was held to be a sufficient description of the notes to say "divers, to wit, nine bank notes for the payment of divers sums of money, amounting in the whole to a certain sum of money, to wit, the sum of 9*l.* and of the value of 9*l.*" and that where in the body of the Indictment it was alleged that the defendant received them as clerk on account of his employers and feloniously embezzled the same, the Indictment was right in concluding "and so the said A. B. did feloniously steal, take, and carry away the said bank notes, knowing them to be the property of his employers:" for that is the statuteable conclusion from the facts alleged in the body of the indictment;—and that, under that statute, a count for embezzling bank notes might be joined with a count for larceny. *R.* v. *Johnson, Term. Rep. K. B. Hil.* 55 *Geo.* 3. 539.

The omission of *vi et armis et contra pacem*, is helped by *stat.* 4 & 5 *Ann. c.* 16. False *Latin*, antiently, did not hurt an *Indictment*, if by any intendment it could be made good; but if any word was not *Latin*, or allowed by law as a word of art; or if it had been insensible in a material point the Indictment was insufficient. 5 *Rep.* 121. 2 *Cro.* 108. 3 *Cro.* 465. An Indictment should not be set aside for a false concord between the substantive and the adjective, &c. the expressions being significant to make the sense appear. 5 *Co. Rep.* 121.

But an Indictment against two or more, laying the fact in the singular number, as if against one, hath been held insufficient for the incertainty. 2 *Hawk. c.* 25. A misnomer of the defendant's surname, will not abate the Indictment, as it will in case of the name of baptism; and if there be a mistake in spelling, if it sounds like the true name, it is good. 1 *Hen.* 5. A person may be indicted for felony against an unknown person: and when the name of one killed is unknown, or goods are stolen from a person that cannot be known, it is sufficient to say in the Indictment that *one unknown was killed by the person indicted*, or that *he stole the goods of one unknown*. *Wood's Inst.* 624. But though an Indictment may be good for stealing the goods *cujusdam ignoti*, of a person unknown, yet a property must be proved in somebody at the trial; otherwise it shall be presumed to

be in the prisoner by his pleading not guilty. *Mod. Cas. in L. & E.* 249. Where a person injured is known, his name ought to be put into the Indictment. 2 *Hawk. c.* 25.

*Indictments* may be *amended* the same term wherein brought into court, and not after. But criminal prosecutions are not within the benefit of the *statutes of amendments*; so that no amendment can be made to an *Indictment*, &c. but such only as is allowed by the common law. 2 *Lil.* 45. The body of a bill of *Indictment* removed into B. R. may not be amended, except from London, where the tenor only of a record is removed: though the caption of an *Indictment* from any place may, on motion, be amended by the clerk of the assizes, &c. so as to make it agree with the original record. *Captions* of *Indictments* ought to set forth the court in which, and the jurors by whom, and also the time and place at which, the *Indictment* was found; and that the jurors were of the county, city, &c. Also they must shew, that the *Indictment* was taken before such a court as had jurisdiction over the offence indicted. 2 *Hawk. P. C. c.* 25. While the jury who found a bill of *Indictment* is before the court, it may be amended by their consent in matter of form, the name, or addition of the party, &c. *Kel.* 37. Clerks of the assize and of the peace, &c. drawing defective bills of *Indictment*, shall draw new bills without fee, and take but 2*s.* for drawing any *Indictment* against a felon, &c. on pain of forfeiting 5*l.* *Stat.* 10 & 11 *W.* 3. *cap.* 23.

If one material part of an *Indictment* is repugnant, to or inconsistent with, another, the whole is void; but where the sense is plain, the court will dispense with a small impropriety in the expression. 2 *Hawk. P. C. c.* 25.

Many objections to *Indictments* are over-ruled. 5 *Rep.* 120. Where an *Indictment* is void for insufficiency, or if the trial is in a wrong county, another *Indictment* may be drawn for the same offence, whereby the insufficiency may be cured: and the *Indictment* may be laid in another county, (it is said,) though judgment be given. See 4 *Rep.* 45, *a.* *Sed qu.* if the judgment should not be reversed for error, before the party be arraigned, upon a second *Indictment?* By the common law, the court may quash any *Indictment* for such insufficiency as will make the judgment thereon erroneous: but the court may refuse to quash an *Indictment* preferred for the public good, though it be not a good *Indictment*, and put the party to traverse, or plead to it. *Mich.* 22 *Car. B. R.* Also the court will grant time for the king's counsel to maintain an *Indictment*, if they desire it.

Judges are not bound *ex debito justitiæ* to quash an *Indictment*; but may oblige the defendant either to plead or demur to it; and where *Indictments* are not good, the parties indicted may avoid them by pleading. 2 *Lil.* 42. 2 *Hawk.* 258. The court doth not usually quash *Indictments* for forgery, perjury, and nuisances, notwithstanding the *Indictments* are faulty; and it is against the course of the court to quash an *Indictment* for extortion. 3 *Lil.* 411. 5 *Mod.* 31.

If an *Indictment* be good in part, though the other part of it is bad, the court will not quash it; for if an offence sufficient to maintain the *Indictment* be well laid, it is good enough, although other facts are ill laid. *Latch.* 173. *Poph.* 208. 1 *Salk.* 384. One that is convicted upon an erroneous *Indictment*, cannot after the conviction move to have the *Indictment* quashed; but must bring his writ of error to reverse the judgment given against him upon the *Indictment*. 2 *Lil.* 43.

If the party indicted is outlawed upon the *Indictment*, the court will not quash the *Indictment*, though erroneous; but will force the party outlawed to bring his writ of error to reverse the outlawry. *Mich.* 21 *Car. B. R.*

The *stat.* 7 *W.* 3. *cap.* 3, ordains, That no *Indictment* for treason, &c. or any process thereon, shall be quashed, on motion of the prisoner, or his counsel, for mis-writing, false *Latin*, &c. unless exception be made before evidence given in court; nor shall any such defects, &c. after conviction, be caused to arrest judgment; though any judgment given upon such *Indictment* may be reversed on a writ of error, &c.

Counts in an *Indictment* cannot be struck out as they may in an information; for the court cannot strike out that which the grand jury have found. *Hardr.* 203.

IV. All Felonies and capital crimes whatsoever, and also all kinds of inferior crimes of a public nature, as misprisons and all other contempts, all disturbances of the peace, all oppressions, and all other misdemeanors whatsoever, of a public evil example *against the common law*, may be indicted; but no injuries of a private nature, unless they some way concern the king. 2 *Hawk. P. C. c.* 25. § 4.

Where an offence is made punishable by statute, the true rule seems to be, that if the offence was punishable before the statute prescribed a particular method of punishing it, then such particular remedy is cumulative, and does not take away the former remedy; but where the statute only enacts, That the doing an act not punishable before shall for the future be punishable in a certain particular manner, there it is necessary to pursue such particular method, and not the common law method of Indictment. 1 *Bur.* 543. 2 *Bur.* 799. 805. 834. *Cowp.* 524. 650.

With regard to *Felonies* created by statute, it seems clear that not only those crimes which are made Felony in express words, but also those which are subjected by statute to judgment of life or member become *felonies* thereby, whether the word *Felony* be omitted or *mentioned*. And where an act declares that the offender shall be deemed to have committed any act *feloniously*, this makes the offence a felony, and imposes all the common and ordinary consequences thereof. 3 *Maul & Selw.* 556.—See 1 *Hawk. P. C. c.* 40. § 2—5. Where an act makes an offence Felony which before was only a misdemeanor, it is not afterwards indictable as a misdemeanor only. *R.* v. *Cross*, 1 *Ld. Raym.* 711. 3 *Salk.* 193. And see more fully *Russell on Crimes*, *l.* 1. *c.* 3.

Indictments are for the benefit of the commonwealth and the public good; and to be preferred for *criminal* not *civil* matters; they may be of high treason, petit treason, felony, trespass, and in all sorts of pleas of the crown; but not of injuries of a *private* nature, which do not concern the king or the public. *Co. Lit.* 126. 303. 4 *Rep.* 44.

It seems to be an established principle, that whatever openly outrages decency, and is injurious to public morals is a misdemeanor at common law, and indictable as such. 1 *Hawk. P. C. c.* 5. § 4. 1 *East. P. C. c.* 1. § 1.

A Misdemeanor is any crime whatever less than Felony, and the word is generally used in contradistinction to Felony; misdeameanor therefore comprehends all indictable offences which do not amount to Felony, as perjury, assault and battery, libels, conspiracies, and public nuisances.

Although bare intention only is not punishable, yet, when any act is done, the law judges of it by the intent: on this ground the bare attempt to commit a felony is in many cases a misdemeanor and indictable; and even an attempt to commit a misdemeanor has been decided in many cases to be itself a misdemeanor. *Higgins's Case*, 2 *East's Rep.* 5. 8. 21. *R.* v. *Phillips*, 6 *East's Rep.* 464. and such intentions, manifested by act, are punishable by statute in several cases.—As by *stat.* 23 *Geo.* 3. *c.* 28. in case of persons found with implements of house-breaking, &c. 25 *Geo.* 2. *c.* 10. entering into black-lead mines with intent to steal. And 4 *Geo.* 3. *c.* 37. § 16. forcibly entering any house, &c. with intent to destroy linen yarn.

An Indictment lies against one for assaulting and stopping

another on the highway, being a breach of the peace. *Hil.* 22 *Car.* It lies for cheating a person at play, with false dice, or any other cheating: but it is not indictable for one man to make a fool of another, in the case of cheats getting money, &c. though action may be brought. 2 *Lill.* 44. 1 *Salk.* 479. Except in the cases specified in the act of 30 *Geo.* 2. *c.* 24. commonly called the statute of *False Pretences.* See title *Cheat.*

It was held an indictable offence, (and the parties were convicted and severely punished), to conspire by false rumours to raise the price of the public funds, on a particular day, with intent to injure the subjects who should purchase on that day. *R.* v. *De Berenger, Lord Cochrane, &c. Term Rep. K. B. Trin.* 54 *Geo.* 3. *c.* 67.

*Indictment* will not lie for a private nuisance, wherein action on the case only lies; and where a person is indicted for trespass, which is not indictable at law, but for which action should be had; or if a man be indicted for scandalous words, as calling another rogue, &c. such *Indictments* are not good; *for private injuries are to be redressed by private actions.* 2 *Lil. Abr.* 42.

A parson may be indicted for preaching against the government of the church, the civil and ecclesiastical government being so incorporated together, that one cannot subsist without the other; and both center in the king; wherefore to speak against the church, is within the statute 13 *Car.* 2. 1 *Sid.* 69. 2 *Nels. Abr.* 959. And a parson was indicted for pronouncing absolution to persons condemned for treason, at the place of execution, without shewing any repentance 5 *Mod.* 363. Also a parson hath been indicted, and fined, &c. for drinking healths to the memory of traitors. 3 *Mod. Rep.* 52.

It was held not to be an indictable offence to impede the public intercourse by delivering hand-bills in the streets. 1 *Bur.* 516. But the later and better decision is, that every unauthorised obstruction of a highway to the annoyance of the king's subjects is an indictable offence. *R.* v. *Cross,* 3 *Campb.* 227. where an Indictment was maintained for such obstruction by suffering stage-coaches to stand plying for passengers in the public streets.

It has been held not indictable to throw down skins into a public way, which accidentally occasions a personal injury. *Stra.* 190. Nor to kill a hare. *Stra.* 679. Nor can one be indicted for an offence made penal by statute, without it directs to whom the penalty is payable. *Stra.* 628. Nor for acting unqualified as a justice of peace. *Cro. Jac.* 643. Nor for selling *short* measure. 1 *Wils.* 301. 3 *Burr.* 1697. Nor for excluding commoners by enclosing. *Cro. Eliz.* 90. Nor for an attempt to defraud, if neither by false tokens or conspiracy. *Stra.* 793. 866. 6 *Mod.* 105. Nor for secreting another. 2 *Ld. Raym.* 1368. Nor for bringing a bastard child into a parish, not being chargeable there. *Stra.* 644. 3 *Burr.* 1645. 2 *Vez.* 540. Nor for entertaining idle and vagrant persons. 1 *Ld. Raym.* 790. Nor for keeping a house to receive women with child and deliver them. 3 *Burr.* 1646. And cases of non-feasance and particular wrong, are not generally speaking, the subject of Indictment: but the case of neglect to provide for a child of tender years may amount to such offence. See *Ridley's case,* 2 *Campb.* 650.

Refusing to admit a person to be a freeman of a corporation under an order from the mayor of a city, held not indictable. 3 *Salk.* 188. Nor keeping an open shop in a city not being free thereof. 3 *Salk.* 188. Nor exercising a trade in a borough according to the bye-laws thereof. 4 *Term Rep.* K. B. 77. *R.* v. *Sharpless.*

Mere private trespasses unaccompanied with any breach of the peace, are not indictable. 3 *Burr.* 1699. 1706. But where an Indictment stated the forcibly entering a dwelling-house, and *with strong hand* turning out the occupier, the court refused to quash it. 3 *Burr.* 1699. So an Indictment will lie for taking goods forcibly with a breach of the peace, although by the owner whose property they are. 3 *Salk.* 187.

The court of K. B. held, that Indictment would not lie against a miller for receiving good barley to grind for another at his mill, and delivering a mixture of oat and barley-meal different from the produce of the barley, and being musty and unwholesome. *R.* v. *Haynes, Trin.* 55 *Geo.* 3. But mixing alum with bread by a common baker was held indictable. *R.* v. *Dixon, Trin.* 54 *Geo.* 3.

See further on the subject of Indictments at length, 2 *Hawk. P. C. c.* 25, and the titles to which the several indictable offences relate; this Dict. *passim.*

INDICTOR. He that indicteth another man for any offence; as *indictee* is the party that is indicted.

INDISTANTER. Without delay. *Mat. Westm. Anno* 1244.

INDIVISUM. What two persons hold in common without partition; as where it is said he holds *pro indiviso,* &c. *Kitch.* 241.

INDOLIS. A studious young man, or a youth. *Mon. Angl.* 3 *tom.* p. 120.

INDOMIT. Boisterous and ungovernable. *Law French Dictionary.*

INDORSEMENT, *Indorsamentum.*] Any thing written on the back side of a deed; thus, receipts for consideration-money, and the sealing and delivery, &c. on the back of deeds, are called *Indorsements. West. Symb. par.* 2. *s.* 157. On sealing of a bond any thing may be *indorsed* or subscribed upon the back thereof, as part of the condition, and the *Indorsement* and that shall stand together. *Moor.* 679. See titles *Bond, Condition.* There is also an *Indorsement* of *bills* or *notes,* of what part thereof is paid, and when, &c. or for negociation by writing the payee's name on the back of *bills of exchange, &c.* See title *Bills of Exchange.*

INDOWMENT. See *Endowment.*

INDUCEMENT. What is alleged as a motive or incitement to a thing; the term is used specially in several cases, *viz.* Inducement to actions, to a traverse in pleadings, a fact or offence committed, &c. Inducements to actions need not have so much certainty as in other cases: a general *indebitatus* is not sufficient, where it is the ground of the action; but where it is but the Inducement to the action, as in consideration of forbearing a debt till such a day, (for that the parties are agreed upon the debt,) this being but a collateral promise, is good without showing how due. *Cro. Jac.* 548. 2 *Mod.* 70.

A man ought to induce his traverse when he denies the title of another, because he should not deny it till he show some colourable title in himself; for if the title traversed be found naught, and no colour of right appears for him who traversed, there can be no judgment given: but an Inducement cannot be traversed, because that would be a traverse after a traverse, and quitting a man's own pretence of title, and falling upon another. *Cro.* 265, 266. 3 *Salk.* 357. An Inducement to a traverse must be such matter as is good and justifiable in *law. Cro. Eliz.* 829. There is an Inducement to a justification, when what is alleged against it is not the substance of the plea, &c. *Cro. Jac.* 138. *Moor.* 847. 2 *Nels. Abr.* 986. See title *Pleading.*

INDUCIÆ LEGALES. The days between the citation of the defendant and the day of appearance. *Bell's Scotch Law Dict.* The days between the date and the return of a writ.

INDUCTION, *Inductio, i. e.* a leading into.] The giving a parson possession of his church: after the bishop

hath granted institution, he issues out his mandate to the archdeacon to induct the clerk, who thereupon either does it personally, or usually commissions some neighbouring clergyman for that purpose; which is compared to livery and seisin, as it is a putting the minister in actual possession of the church, and of the glebe lands, which are the temporalities of it. This Induction is done in the following manner: one of the clergymen commissioned takes the parson to be inducted by the hand, lays it on the key of the church, and pronounces these words; *By virtue of this commission, I induct you into the real and actual possession of the rectory of, &c. with all its appurtenances.* Then he opens the church door, and puts the parson into possession thereof, who commonly tolls a bell, &c. and thereby shows and gives notice to the people that he hath taken corporal possession of the said church: if the key of the church door cannot be had, the clerk to be inducted may lay his hand on the ring of the door, the latch of the church-gate, on the church-wall, &c. and either of these are sufficient: also Induction may be made by delivery of a clod, or turf of the glebe, &c. Ordinarily the bishop is to direct his mandate to the archdeacon, as being the person who ought to induct or give possession unto the clerks instituted to any churches within his archdeaconry: but it is said, the bishop may direct his mandate to any othér clergyman to make Induction. See *stat.* 38 *Ed.* 3. *stat.* 2. *cap.* 3. And by prescription, others as well as archdeacons may make Inductions. *Pars. Counsel.* 8. See 1 *Com.* 391.

An Induction made by the patron of the church, is void; but bishops and archdeacons may induct a clerk to the benefices of which they are patrons, by *prescription, &c.* 11 *H.* 4. 7. The dean and chapter of cathedral churches are to induct prebends; though it hath been held, if the bishop doth induct a prebend, it may be good *at the common law.* 11 *Hen.* 4. 7. 11 *Hen.* 6. In some places a prebend shall be in possession, without any Induction: as at Westminster, where the king makes collation by his letters patent. If the king grants one of his free chapels, the grantee shall be put in possession by the sheriff of the county, and not by the bishop.

But no Induction is necessary to a *donative*, where the patron by donation in writing puts the clerk into possession, without presentation, &c. 11 *Hen.* 4. 7. If the authority of the person who made the mandate for Induction, determines by death or removal, before the clerk is inducted, the Induction afterwards will be void; as where, before it is executed, a new bishop is consecrated, &c. But if the archbishop, during the vacancy of a see, as guardian of the spiritualities, issue a mandate to induct a clerk to a church, it is good though not executed before there is a new bishop. 2 *Lev.* 299. 1 *Ventr.* 309.

*Induction* is *a temporal act;* and if the archdeacon refuse to induct a parson, or to grant a commission to others to do it, action on the case lies against him, on which damages shall be recovered; he may likewise be compelled, by sentence in the Ecclesiastical Court, to induct the clerk, and shall answer the contempt. 12 *Rep.* 128.

It is *Induction* which makes the parson complete incumbent, and fixes the freehold in him; and a church is full by *Induction*, which cannot be avoided but by *quare impedit* at common law. 4 *Rep.* 79. *Plowd.* 529. *Hob.* 15. A bishop sued in the court of audience, to repeal an institution, after *Induction* had, and a *prohibition* was granted; *because an institution is not examinable in the Spiritual court after* Induction, but then a *quare impedit* lies. *Moor*, 860. It is *not* the *admission* and *institution*, but the *Induction* to a *second benefice*, which makes the *first void*, in case of *pluralities*, &c. *Moor*, 12. See this Dict. title *Advowson*, II; *Parson.*

INDULGENCES. According to the doctrine of the



Romish church, all the good works of the Saints, over and above those which were necessary towards their own justification, together with the infinite merits of Jesus Christ, are deposited in one inexhaustible treasury. The keys of this were committed to St. Peter, and to his successors the Popes, who may open it at pleasure, and by transferring a portion of this superabundant merit to any particular person, *for a sum of money*, may convey to him either the pardon of his own sins, or a release for any one in whom he is interested, from the pains of purgatory. Such indulgences were first invented in the eleventh century by Urban II. *Robertson's Char. V.* ii. 79. See the *stat.* 25 *Hen.* 8. *c.* 21. § 27. and this Dict. titles *Rome, Papists.*

IN ESSE, *In being.*] The learned make this distinction between things *in esse* and *in posse;* as a thing that is not, but may be, they say is *in posse* or *in potentiâ;* but what is apparent and visible, they allege is *in esse, viz.* that it has a real being, whereas the other is casual, and but a possibility. A child before he is born, is a thing *in posse;* after he is born, and for many legal purposes after he is conceived, he is said to be *in esse*, or actual being. See titles *Posthumous Children, Limitation, Estates, Wills, &c.*

INEWARDUS, *Inwardus.*] A guard, a watchman, one set to keep watch and ward. *Lib. Domesday. Chenth. Heref.*

INFALISTATUS. This word occurs only in *Ralph de Hengham, Summa parva, cap.* 3, recapitulating the several punishments for felony. Mr. *Selden*, in his notes on that author, says, "It appears that several customs of places "made in those days capital punishments several. But what "is *Infalistatus?* In regard of its being a custom used in a "port-town, I suppose it was made out of the *Fr.* word "*falize*, which is *fine sand by the water side*, or *a bank of the* "*sea.* In this sand or bank it seems their execution at "Dover was." The elaborate *Du Fresne* condemns this derivation and this sense of the word, but yet gives no better. Therefore (till we have more authority) we may conclude that *infalistatus* did imply some capital punishment inflicted on the sands or sea-shore: perhaps *infalistatio* was exposing the malefactor to be laid bound upon the sands, till the next full tide carried him away; of which custom, there is some dark tradition. The penalty took its name from the Norman *falese, falesia*, which signified not only the sands, but rather the rocks and cliffs adjoining or impending on the sea-shore. *Cowel.* See the like use of *Jalesia* in *Mon. Angl. tom.* 2. *p.* 165, *b.*

INFAMY. Which extends to forgery, perjury, gross cheats, &c. disables a man to be a witness, or juror; but a pardon of crimes restores a person's credit to make him a good evidence. 2 *Hawk. P. C. c.* 46. § 19. Judgment of the pillory induces *Infamy* by the common law: but, by the civil and canon law, if the cause for which the person was convicted was not infamous, it infers no *Infamy.* 3 *Lev.* 426. See titles *Evidence, Witness, Pillory.*

INFANGTHEF, INFANGENETHEOF, from Sax. *Fang* or *Fangen*, i. e. *capere*, and *Theof, Fur.*] A privilege or liberty granted unto lords of certain manors, to judge any thief taken *within* their fee. *Bract. lib.* 3. *c.* 35. In some ancient charters, it appears that the thief should be taken in the lordship, and with the goods stolen, otherwise the lord had no jurisdiction to try him in his court: though by the laws of king Edward the Confessor, he was not restrained to his own people or tenants, but might try any man who was thus taken in his manor: it is true afterwards, the word *infangthef* signified *Latro captus in terra alicujus seisitus de aliquo Latrocinio de suis propriis hominibus.* See *stat.* 1 & 2 *P & M c.* 15. The franchises of *infangthef* and *outfangthef*, to be heard and determined in court-barons, are antiquated, and long since gone. 2 *Inst.* 31. The word is sometimes preceded by an *H.*

INFANT, *Infans.*] A person under twenty-one years of age; whose acts are in many cases either *void*, or *voidable*. *Co. Lit. lib.* 1. *cap.* 21. *lib.* 2. *cap.* 28.

I. *The several Ages distinguished by Law for various Purposes.*
II. *Who are subject to, or free from, the Incapacities of Minors; and how far the Law regards Infants* in ventre sa mere.
III. *Of the* Trial *of Infancy.*
IV. *Of what* Officers, Trusts, *and* Functions *an Infant is capable.*
V. *What an infant may do for his own advantage; how far his Acts are* good, void, *or* voidable, &c. *Of Contracts for Necessaries, Judicial Acts, and Acts in Pais.*

I. Though a person is styled in law an Infant, till attaining the age of twenty-one years, which is termed his full age, yet there are many actions which he may do before that age, and for which various times or ages are appointed. Thus, a Male at *twelve* years old may take the oath of allegiance; at *fourteen* he is at years of discretion, and therefore may disagree or consent to marriage; may choose his guardian; and if his discretion be actually proved, may make his testament of his personal estate; at *seventeen* may be an executor; and at *twenty-one* is at his own disposal, and may alien his lands, goods, and chattles. A Female also, at *seven* years of age, may be betrothed or given in marriage; at *nine* is entitled to dower; at *twelve* is at years of maturity, and therefore may consent or disagree to marriage, and if proved to have sufficient discretion, may bequeath her personal estate; at *fourteen* is at years of legal discretion, and may choose a guardian; at *seventeen* may be executrix; and at *twenty-one* may dispose of herself and her lands: so that full age, in male or female, is twenty-one years; which age is completed on the day preceding the anniversary of a person's birth. *Salk.* 44. 625. *Ld. Raym.* 480. 1096. 1 *Bro. P. C.* 468. (8vo. edit.) *Toder* v. *Sansam.* If, therefore, one is born on the 1st of January, he is of age to do any legal act on the morning of the last day of December, though he may not have lived twenty-one years by near forty-eight hours; the reason is, that in law there is no fraction of a day, and if the birth were on the first second of one day, and the act on the last second of the other, than twenty-one years would be complete; and in law it is the same, whether a thing is done upon one moment of the day or another; and hence probably originated the distinction of a year *and a day*, &c, by which is meant a year complete in common acceptation.

From the observations made on the daily actions of *Infants*, as to their arriving at discretion, the laws and customs of every country have fixed upon particular periods, on which they are presumed capable of acting with reason and discretion; in our law the full age of man or woman is twenty-one years. 3 *New Abr.* 118.

Therefore, if one under the age of twenty-one years makes his will, and thereby devises his *lands*, and after attains the age of twenty-one years and dies, without making a new publication thereof, *this devise is void. Dyer* 143. *Raym.* 84. 1 *Sid.* 162.

Though a person under the age of twenty-one cannot directly dispose of his lands, yet as one under that age may (pursuant to the statute of 12 *Car.* 2. *cap.* 24.) dispose of the custody of his *infant* child, it is said, such disposition draws after it the land, &c. as incident to the custody. *Vaugh.* 178.

The reason why an *infant male* at *fourteen*, and *female* at *twelve*, may dispose of their personal estate at those ages is, that the common law has appointed no time, being a matter cognizable in the Spiritual Court, which herein proceeds according to the civil law; by which law, *Infants* at those ages are presumed to have sufficient discretion to make such disposition; therefore their testaments in these cases are not to be set aside, or controlled in Chancery, or the temporal courts. 2 *Mod.* 315. 2 *Jones*, 210. *Comb.* 50. 1 *Vern.* 469. *Preced. Chan.* 316.

Though the age of consent to a marriage in an *Infant male* is *fourteen*, and in a female *twelve*; yet they may marry before, and if they agree thereto when they attain these ages, the marriage is good; but they cannot disagree before then; and if one of them be above the age of consent, and the other under such age, the party so above the age may as well disagree as the other; for both must be bound or neither. *Co. Lit.* 33. 78, 79. 2 *Inst.* 434. 3 *Inst.* 88, 89. 6 *Co.* 22. 7 *Co.* 43. 1 *Rol. Abr.* 340, 341.

But though the party above age may as well disagree as the other, yet it is said that the party cannot do it *before* the other arrives at the proper age; also it is said to have been adjudged, that if a man marries a woman that is within the age of *twelve* years, and after the woman at *eleven* years of age disagrees to the marriage, and after the husband takes another wife, and hath issue by her, that this is a bastard; *for the first marriage continues notwithstanding the disagreement of the woman;* for she cannot disagree within the age of *twelve* years, and so her disagreement is void. *Co. Lit.* 79. 1 *Rol. Abr.* 341.

If a man marries a woman who is *within* the age of *twelve* years, and after the feme covert *within* the age of consent disagrees to the marriage, and *after* the age of *twelve* years marries another, the first marriage is absolutely dissolved, so that *he may take another wife;* for though the disagreement within the age of consent was not sufficient, yet her taking another husband, after the age of consent, *affirms the disagreement*, and so the marriage avoided *ab initio.* 1 *Rol. Abr.* 341. See the case of Mr. Fitzgerrard, Lord Decius, and Mr. Villers, 3 *New Abr.* 119, 120. See also, 1 *Inst.* 33. 1 *Rol. Abr.* 340. *Dyer* 369. *Moor*, 575. 1 *Rol. Abr.* 341. 1 *Inst.* 79. 7 *Co. Keen's case.* 6 *Co. Ambrosia George's case.* 7 *H.* 6. 11. 6 *Co.* 22.

At common law an Infant at *fourteen* was *out* of *ward* of guardian in socage, to *choose* a *guardian;* and at *fifteen* to have had *aid pur fair Fitz. Chevalier. Co. Lit.* 98, *b. Hob.* 225.

The authority of a guardian in socage, ceases at the age of fourteen, at which age the *Infant* may call his guardian to an account, and may choose a new guardian. *Lit. sect.* 103. *Co. Lit.* 75. 2 *Inst.* 135.

One *within* the age of *twenty-one* years may do *homage* but not fealty; because, in doing of fealty he ought to be sworn, which an *Infant* cannot be. *Co. Lit.* 65, *b.* 2 *Inst.* 11.

An *Infant* at the age of *seventeen*, may be a *procurator* as well as *executor;* and in this both the civil and common law agree. 5 *Co.* 29, *b. Off. Ex.* 307. 1 *Hal. Hist. P. C.* 17.

Infancy is a good cause of refusal of a clerk; also by the statutes 13 *Eliz. cap.* 12, and 13 & 14 *Car.* 2. *c.* 4. none is to be admitted a deacon, unless he be twenty-three *at least*, nor a priest, unless he be twenty-four. *Gibs. Cod.* 168. 3 *Mod.* 67.

By the custom of *gavelkind*, an *Infant* at the age of *fifteen* is reckoned *at full age to sell his lands;* and this seems to have been taken from the civil law, which reckons *fourteen* the *ætus pubertatis;* for they reckoned that though the *Infant* had ended his years of *guardianship* at *fourteen*, yet he might not have completed his account with his guardian till the age of *fifteen*, and that was esteemed to be the age when he was completely out of guardianship; therefore at this age

he was allowed to sell the lands descended to him; but in this the customs of England differ from the *civil law*; for the *civil law* does not allow of this disposition till the age of twenty-five; therefore this must have been allowed by the old Saxon law, because they thought that much time was lost, if the *Infant* could only use his own estate without being able to dispose of it in a way of traffick, or in marriage, till twenty-five; therefore they allowed the *Infant* to sell (but under great limitations and restrictions, that he might not be defrauded); and by this means they thought there was sufficient provision made for the necessity of commerce. *Lamb.* 624, 625. See title *Gavelkind*.

Also, by *custom* in some places, an *Infant* seised of lands in socage may, at the age of *fifteen years*, make a *lease for years*, which shall bind him after he comes of age; for the *custom* makes *fifteen* his full age to that purpose. *Co. Lit.* 45, *b.*

Also, by the *custom* of London, an *Infant* unmarried, and above the age of fourteen, if under twenty-one, may *bind himself apprentice* to a freeman of London, by indenture with proper covenants; which *covenants*, by the custom of London, shall be as binding as if he were of full age. *Moor*, 134. 2 *Buls.* 192. 2 *Rol. Rep.* 305. *Palm.* 361. 1 *Mod.* 271. See *stats.* 5 *Eliz. c.* 4. 43 *Eliz. c.* 2. and this Dict. title *Apprentice*.

In *Criminal Cases*, the law of England does in some cases privilege an Infant under the age of twenty-one, as to common misdemeanors, so as to escape fine, imprisonment, and the like; and particularly in cases of omission, as not repairing a bridge, or a highway, and other similar offences; for, not having the command of his fortune till twenty-one, he wants the capacity to do those things which the law requires. But where there is any notorious breach of the peace, a riot, battery, or the like, (which Infants when full-grown, are at least as liable as others to commit,) for these an Infant above the age of fourteen is equally liable to suffer, as a person of the full age of twenty-one. 1 *Hal. P. C.* 20, 21, 22.

With regard to capital crimes, the law is still more minute and circumspect, distinguishing with greater nicety the several degrees of age and discretion. By the ancient Saxon law, the age of twelve years was established for the age of possible discretion, when first the understanding might open. *L. L. Athelstan, Wilk.* 65. From thence till the offender was fourteen, it was *ætas pubertati proxima*, in which he might or might not be guilty of a crime, according to his natural capacity or incapacity. This was the dubious stage of discretion: but, under twelve, it was held that he could not be guilty in will, neither after fourteen could he be supposed innocent of any capital crime which he in fact committed. But by the law as it now stands, and has stood at least ever since the time of Edward III. the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment. For one lad of eleven years old may have as much cunning as another of fourteen; and in these cases our maxim is, that "*malitia supplet ætatem.*" Under seven years of age indeed an infant cannot be guilty of felony; *Mir. c.* 4. § 16. 1 *Hal. P. C.* 27. *Plowd.* 19. for then, by presumption in law, he cannot have discretion; and, in fact, a felonious discretion is almost an impossibility in nature, and no averment shall be received against that presumption; but at eight years old, he may be guilty of felony. *Dalt. Jus. c.* 147. Also, under fourteen, though an Infant shall be *primâ facie* adjudged to be *doli incapax;* yet if it appear to the court and jury that he was *doli capax*, and could discern between good and evil, he may be convicted and suffer death. Thus a girl of thirteen has been burnt for killing her mistress; and one boy of ten, and another of nine years old, who had killed their companions, have been sentenced to death, and he of ten years actually hanged, because it appeared upon their trials, that the one hid himself, and the other hid the body he had killed; which hiding manifested a consciousness of guilt, and a discretion to discern between good and evil. 1 *Hal. P. C.* 26, 27. And there was once an instance, where a boy of eight years old was tried at Abington for firing two barns: and, it appearing that he had malice, revenge, and cunning, he was found guilty, condemned, and hanged accordingly. *Emlyn on* 1 *Hal. P. C.* 25. Thus also, at the assizes for Bury, in the year 1748, one William York, a boy of ten years old, was convicted on his own confession of murdering his bed-fellow; there appearing in his whole behaviour plain tokens of a mischievous discretion; and, as sparing this boy merely on account of his tender years might be of dangerous consequence to the public, by propogating a notion that children might commit such atrocious crimes with impunity, it was unanimously agreed by all the Judges, that he was a proper subject of capital punishment. *Foster*, 72. But, in all such cases, the evidence of that malice, which is to supply age, ought to be strong and clear beyond all doubt and contradiction. 4 *Comm.* 22. 24.

Lord Hale lays down the following further cautions on this subject:—If the party be above twelve, though under fourteen, and appears to be *doli capax, and could discern between good and evil at the time of the offence committed*, he may be convicted, and undergo judgment and execution of death, though he hath not attained the age of fourteen; but herein, according to the nature of the offence and circumstances of the case, the Judge may, or may not, in discretion, reprieve him, before or after judgment, in order to obtain the king's pardon. If an infant be above *seven*, and under *twelve* years, and commit a capital offence, *primâ facie*, he is to be judged not guilty, and to be found so; because he is supposed not of discretion to judge between good and evil: yet if it appear, by *strong and pregnant evidence and circumstances*, that he had discretion to judge between good and evil, judgment of death may be given against him; for *malitia supplet ætatem;* but herein the circumstances must be inquired of by the jury, and the Infant is not to be convict upon his confession: also herein, my Lord Hale says, that it is prudent after conviction to respite judgment, or at least execution: but that if he be convicted, the Judge cannot discharge, but only reprieve him from judgment, and leave him in custody till the king's pleasure be known. 1 *Hal. Hist. P. C.* 26, 27.

II. The privilege or incapacity of infancy does not extend to the King; for the political rules of government have thought it necessary, that he who is to govern the whole kingdom should never be considered as a minor, incapable of governing himself and his affairs. *Co. Lit.* 43. *Dyer*, 209, *b.*

Therefore, if the King within age make any lease or grant, he his bound presently, and cannot avoid them, either during his minority, or when he comes of full age. *Plowd.* 213, *a.* 5 *Co.* 27. 7 *Co.* 12. So, if the king aliens land which he had by descent from his mother, he shall not defeat it, by reason that he was within age at the time of the alienation; for his body politic, which is annexed to his body natural, takes away the imbecility of the natural body, and draws it, and all the effects thereof, to itself; *quia magis dignum trahit ad se minus dignum.* See *Plowd.* 213, 214.

So if the King consent to an act of parliament during his minority, yet he cannot after avoid this act; because the king, *as king*, cannot be a minor; for as king he is a body politic. *Co. Lit.* 43. 1 *Roll. Abr.* 728.

Also the acts of a mayor, and commonalty, shall not be avoided, by reason of the nonage of the mayor. *Cro. Car.* 557. 5 *Co.* 27.

Although a duke, earl, or the like, be but a minor, or not above ten years of age, in the custody and in the family of another nobleman, who may and doth retain chaplains, yet he may qualify chaplains to hold two benefices with cure, as if he was of full age. 4 *Co.* 119.

An Infant in gavelkind shall have his age, and all other privileges of the Infant at common law; because though he hath the privilege of alienation at fifteen, yet that doth not take from him any privilege he had before at common law. 1 *Rol. Abr.* 144.

A bastard being impleaded shall have his age: *for that dilatory plea must be determined before the pleas in chief can come on;* so that the plea of infancy will stay the suit before it can be inquired whether he is or is not a bastard. *Co. Lit.* 244, *b.*

An Infant *in ventre sa mere*, or in the mother's womb, is supposed, in law, to be born for many purposes. It is capable of having a legacy, or, a surrender of a copyhold estate made to it. (See *post* this division.) It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born. *Stat.* 10 & 11 *W.* 3. *c.* 16. 1 *Comm.* 130. See this Dict. title *Posthumous Children.*

A child *in ventre sa mere* may be appointed executor; also if there are two or more at a birth, they shall be joint executors, or joint legatees of the thing bequeathed. *Godolph. Orph. Leg.* 102.

If there be bastard *eigne* and *mulier puisne*, and the bastard enters, and dies seised, his issue shall inherit the lands, and exclude the *mulier* for ever; but in this case if the bastard had died leaving issue *in ventre sa mere*, and the *mulier* had entered, and then a son is born, yet he cannot enter upon the *mulier:* herein our law differs from the civil law: for our law requires an immediate descent, which cannot be before the person is *in esse;* also by our law the freehold cannot be in abeyance. *Co. Lit.* 244.

A devise of lands to an Infant *in ventre sa mere* is good, and the freehold shall not be in abeyance, but shall descend to the heir at law in the mean time. Though formerly it was doubted. *Vide* 11 *Hen.* 6. 13. *Bro. Devise* 32. *Moor*, 177. 637. 2 *Buls.* 273. *Cro. Eliz.* 423. 1 *Lev.* 135. 1 *Sid.* 153. *Raym.* 163. 1 *Keb.* 85. 1 *Salk.* 231. 2 *Mod.* 9.

However, all the books agree, that a devise to an Infant *when he shall be born*, or *when God shall give him birth*, is good, *as an executory devise*, and that the freehold shall descend to the heir at law in the mean time. 1 *Sid.* 153. 1 *Lev.* 135. *Raym.* 163. *S. C. Snow.* v. *Cutler.* It may be devised to *Trustees.*

So it is clear, that if land be devised for life, the remainder to a posthumous child, that this is a good contingent remainder; because there is a person in being to take the particular estate; and if the contingent remainder vests during the continuance of the particular estate, or *eo instante* that it determines, it is sufficient. *Moor*, 637. 3 *Lev.* 408. 4 *Mod.* 359. 1 *Salk.* 227. *Carth.* 309. See this Dictionary, titles *Remainder, Estate, Posthumous Child, Executory, Devise.*

Also it seems agreed, that a man may surrender copyhold lands immediately to the use of an Infant *in ventre sa mere;* for a surrender is a thing executory, and nothing vests before admittance; and therefore, if there be a person to take at the time of the admittance, it is sufficient, and not like a grantor at common law, which putting the estate out of the grantor must be void, if there be nobody to take. 1 *Roll. Rep.* 109. 138. 2 *Bulst.* 273. *Co. Copyh.* 9. and see *Moor*, 637. and this Dict. title *Copyhold.*

If an usurpation be had on one *in ventre sa mere;* at the next turn after his birth, he shall be relieved on the statute of *Westm.* 2. *cap.* 5. *Hob.* 210.

An Infant *in ventre sa mere* may have a distributive share of intestate property even with the half blood. 1 *Ves.* 81. It is capable of taking a devise of lands. See *ante*, and 2 *Atk.* 117. 1 *Freem.* 244. 293. It takes, under a marriage settlement, a provision made for children living at the death of the father. 1 *Ves.* 85. And it has lately been decided, that marriage, and the birth of a posthumous child, amount to a revocation of a will executed previous to the marriage. 5 *Term Rep.* 49. It takes lands by descent, though, in that case, the presumptive heir may enter and receive the profits for his own use till the birth of the child, which seems to be the only interest it loses by its situation. 3 *Wils.* 526. See this Dictionary, titles *Descent, Posthumous Children.*

III. Infancy is to be tried by inspection of the court, or by jury: and herein it is laid down as a rule in some books, that wheresoever it is alledged upon the pleading, that the party was and yet is under age, there it shall be tried by inspection; but where the Infant is of full age at the time of the plea, there it shall be tried *per pais.* 1 *Lev.* 142. 1 *Sid.* 321. 1 *Keb.* 796. *Cro. Jac.* 59. 581.

But as to judicial acts, or acts done by an Infant in a court of record, and which he is allowed to avoid, the trial thereof must be by inspection; therefore, if an Infant levies a fine, he must reverse it by writ of error: and this must be brought during his minority, that the court may by inspection determine the age of the Infant. *Co. Lit.* 380. *Moor*, 76. 2 *Rol. Abr.* 15. 2 *Inst.* 483. 2 *Bulst.* 320. 12 *Co.* 122.

If an Infant brings a writ of error to reverse a fine for his nonage, and, after inspection and proof of infancy, by witnesses, dies before the fine is reversed, his heir may reverse it; because the court, having recorded the nonage of the cognizor, ought to vacate his contract when he appeared to be under a disability at the time he entered into it. *Co. Lit.* 380. *Moor*, 884.

An Infant acknowledged a fine, and the cognizees omitting to have the fine ingrossed till he came of age, in order to prevent the infant from bringing a writ of error; yet the court upon view of the conuzance produced by the Infant, and upon his prayer to be inspected and his age examined, *recorded his nonage, to give him the benefit of his writ of error*, which he must otherwise lose, his nonage determining before the next term. *Moor*, 189. *and vide Cro. Jac.* 230, 231.

So if an Infant suffer a common recovery by appearing in person, this must be reversed during his minority by inspection of the judges. But it is said, that if an Infant suffers a recovery, in which he appears by attorney, he may reverse it after his full age, as it may be discovered whether he was within age when the recovery was suffered; because it may be tried *per pais* whether the warrant of attorney was made by him when he was an Infant. 1 *Sid.* 321. 1 *Lev.* 112.

It is said, that in all cases where the party pleads that he was within age at B. and alleges a place, that there the trial may be well enough where it is alleged; where no place is alleged, there, in personal actions, where the writ is brought: and in real actions where the right of the land depends upon infancy, there the trial is to be where the land lies, and if not, where the action is brought. *Skin.* 10, 11. *Cro. Eliz.* 818.

In case of a suit to reverse a fine for nonage of the cognizor, or to set aside a statute or recognizance entered into by an Infant; here, and in other cases of the like sort, a writ shall issue to the sheriff, commanding him that he constrain the said party to appear, that it may be ascertained by the view of his body by the king's justices, whether he be of full age or not; "*ut per aspectum corporis sui constare poterit justiciariis nostris si prædictus A sit plenæ ætatis necne.*" 9 *Rep.* 31. This question of nonage was formerly, according to *Glanvil*, (*l.* 13. *c.* 15.) tried by a jury of eight men; though now it is tried by inspection. If however the court

has, upon inspection, any doubt of the age of the party, (as may frequently be the case,) it may proceed to take proofs of the fact, by witnesses, church-books, &c.; and particularly, may examine the Infant himself upon an oath of *voire dire* (*veritatem dicere*,) that is, to make true answer to such questions as the court shall demand of him; or the court may examine his mother, his godfather, or the like. 2 *Roll. Abr.* 573.

IV. An Infant, it seems, is capable of such offices as do not concern the administration of justice, but only require skill and diligence; and there he may either exercise them himself when of the age of discretion, or they may be exercised by deputy; such as the offices of park-keeper, forester, gaoler, &c. *Plowd.* 379. 381. 9 *Co.* 48. 97. See title *Offices.*

But it is said, that an Infant is not capable of the stewardship of a manor, or of the stewardship of the courts of a bishop; because by intendment of law he hath not sufficient knowledge, experience, and judgment to use the office, and also because he cannot make a deputy. *Co. Lit.* 3, *b.* 2 *Rol. Abr.* 153. *March*, 41. 43. *Cro. Eliz.* 636. *Cro. Car.* 556.

An Infant cannot be an attorney, bailiff, factor, or receiver. *F. N. B.* 118. 1 *Rol. Abr.* 117. *Co. Lit.* 172. *Cro. Eliz.* 637. An *Infant* cannot exercise an office in a corporation. *Hardw.* 8, 9.

An Infant cannot be a common informer; for *stat.* 18 *Eliz. c.* 5. directs that such shall sue in proper person, or by attorney, which an Infant cannot do. *Bull. N. P.* 196.

As to Infants being witnesses, there seems to be no fixed time in which children are excluded from giving evidence; but it will depend in a great measure on the sense and understanding of the child, as it shall appear on examination in court. See *Bull. N. P.* 293. And where they are admitted, concurrent testimony seems peculiarly desirable. 4 *Comm.* 214.

If an infant, being master of a ship at St. Christopher's beyond sea, by contract with another, undertakes to carry certain goods from St. Christopher's to England, and there to deliver them; but does not afterwards deliver them according to agreement, but wastes and consumes them, he may be sued for the goods in the court of Admiralty, though he be an Infant; for this suit is but in nature of a detinue, or trover and conversion at the common law. 1 *Rol. Abr.* 530.

If an Infant keeps a common inn, an action on the case upon the custom of inns will not lie against him. 1 *Rol. Abr.* 2. cited *Carth.* 161.

So if an Infant draws a bill of exchange, yet he shall not be liable on the custom of merchants, but he may plead infancy in the same manner that he may to any other contract of his. *Carth.* 160. Or he may in this, as in all cases, give it in evidence on the general issue, but the fairest way is to plead it. *Bull. N. P.* 152. An Infant cannot be a juror. *Hob.* 325.

An Infant, or one under the age of twenty-one years, cannot be elected a member of the House of Commons; nor can any lord of parliament sit there till he be of the full age of twenty-one years. 2 *Inst.* 47. See title *Parliament.* As to Infant trustees, see *post*, V.

If an Infant be lord of a manor, he may grant copyholds, notwithstanding his nonage: for these estates do not take their perfection from the interest or ability of the lord to grant, but from the custom of the manor by which they have been demised, and are demisable time out of mind. See title *Copyhold.*

An Infant, may present to a church; and here it is said, that this must be done by himself, of whatsoever age he be, and cannot be done by his guardian, for the guardian can make no advantage thereof, consequently has nothing therein whereby he can give an account, therefore the Infant himself shall present. *Co. Lit.* 17, *b.* 89, *a.* 29 *Ed. 3. c.* 5. 3 *Inst.* 156.

V. Infants have various privileges, and various disabilities; but their very disabilities are privileges, in order to secure them from hurting themselves, by their own improvident acts. An Infant cannot be sued but under the protection, and joining the name of his guardian; for he is to defend him against all attacks as well by law as otherwise; but he may sue either by his guardian, or *prochein amy*, his next friend who is not his guardian. *Co. Lit.* 135. This *prochein amy* may be any person who will undertake the Infant's cause: and it frequently happens, that an infant, by his *prochein amy*, institutes a suit against a fraudulent guardian.

If an Infant defendant appear by attorney, the court will, at the instance of the plaintiff, compel an amendment of the appearance by substituting a guardian. *Headmarsh* v. *Chandler*, 7 *W. P. Taunton*, 488.

With regard to estates and civil property, an Infant hath many privileges, which will be better understood on farther investigation: but this may be said in general, that an Infant shall lose nothing by non-claim or neglect of demanding his right; nor shall any other *laches* or negligence be imputed to an Infant, except in some very particular cases: *viz.* in case of a fine where the time begins in the life of the ancestor; or of an appeal of death of his ancestor, where he brings not his appeal within a year and a day, &c. 1 *Inst.* 246. 380. *Wood's Inst.* 13. *Laches* shall prejudice an *Infant*, if he presents not to a church in six months. *Lit.* 402. It is generally true, that an Infant can neither alien his lands, nor do any legal act, nor make a deed, nor indeed any manner of contract that will bind him. But still to all these rules there are some exceptions; part have been mentioned (see *ante*, I.) in reckoning up the different capacities which they assume at different ages; and there are others, a few of which when mentioned will serve as a general specimen of the whole. And, first, it is true, that Infants cannot alien their estates: but Infant trustees, or mortgagees, are enabled to convey, under the direction of the Court of Chancery or Exchequer, or other courts of equity, the estates they hold in trust or mortgage, to such person as the court shall appoint. *Stat.* 7 *Ann. c.* 19. 4 *Geo.* 3. *c.* 16. See title *Trusts.*—Infants are also enabled by *stat.* 29 *Geo.* 2. *c.* 31. to surrender leases in order to a beneficial renewal thereof. See *Leases.*—By *stat.* 52 *Geo.* 3. *cc.* 32. and 158. the courts of Chancery and Exchequer are empowered to order dividends upon stocks or funds belonging to Infants, to be paid to guardians for the maintenance of the Infants.

An Infant may purchase lands, but his purchase is incomplete, for, when he comes to age, he may either agree or disagree to it, as he thinks prudent and proper, without alleging any reason; and so may his heirs after him, if he dies without having completed his agreement. *Co. Lit.* 2. It is farther generally true, that an Infant under twenty-one can make no deed but what is afterwards voidable; yet by custom in certain cities, &c. he may bind himself apprentice by deed indented, or indentures for seven years; and he may by deed or will appoint a guardian to his children, if he has any. See *stats.* 5 *Eliz. c.* 4. 43 *Eliz. c.* 2. *Cro. Car.* 179. *Stat.* 12 *Car.* 2. *c.* 24. and this Dictionary, titles *Apprentice*, *Guardian.* See also *stat.* 4 *Geo.* 1. *c.* 11. § 5. as to Infants contracting to serve in the plantations.

To enter more particularly into the subject.—An Infant is capable of inheriting, for the law presumes him capable of property; also an Infant may purchase, because it is intended for his benefit, and the freehold is in him till he disagree thereto; because an agreement is presumed, it being for his benefit, and because the freehold cannot be in the grantor contrary to his own act, nor can be in abeyance, for then a stranger would not know against whom to demand his right; and if at his full age the Infant agrees to the purchase, he cannot afterwards avoid it; but if he dies during his minority,

his heirs may avoid it; for they shall not be bound by the contracts of a person who wanted capacity to contract. *Co. Lit.* 2. 8. 2 *Inst.* 203.

If an Infant take a lease for years rendering rent; if he enter upon the land, he shall be charged with an action during his minority, because the purchase is intended for his benefit; but he may waive the term, and not enter, and if more rent be reserved upon the lease than the land is worth, he may avoid it. 2 *Bulst.* 69. If an Infant make a lease for years with remainder over, rendering rent, and, at full age, accepts the rent of the tenant for years, this shall be an assent to him in remainder, so that he shall not oust him after. *Plowd.* 546.

As to *Contracts for necessaries*, made by Infants, it is to be observed that, (strictly speaking,) all contracts made by Infants, are either void or voidable; because a contract is the act of the understanding, which during their state of infancy they are presumed to want; yet civil societies have so far supplied that defect, and taken care of them, *as to allow them to contract for their benefit and advantage*, with power, in most cases, *to recede from and vacate it, when it may prove prejudicial to them;* but in this contract for necessaries they are absolutely bound, and this likewise is in benignity to Infants, for if they were not allowed to bind themselves for necessaries, nobody would trust them, in which case they would be in worse circumstances than persons of full age. 10 *H.* 6. 14. 18 *Ed.* 4. 2. 1 *Rol. Abr.* 729.

Therefore it is clearly agreed, that an Infant may bind himself to pay for his necessary meat, drink, apparel, physick, and such other necessaries, and likewise for his good teaching and instruction, whereby he may profit himself afterwards. *Co. Lit.* 172, *a. &c.* This binding means by *parol:* in fact, for *necessaries*, if there is not an actual promise, the law implies a promise, but the Infant will not be bound by any bond, note, or bill, which he gives, though for necessaries, therefore a tradesman's best security will be the actual or implied promise. With respect to *schooling*, &c. it must be in cases where the credit was given, *bonâ fide*, to the Infant. But where an Infant is *sub potestate parentis*, and living in the house with his parents, he shall not then be liable even for necessaries. 2 *Black. Rep.* 1325.

It must appear that the things were actually *necessary*, and *of reasonable prices*, and *suitable to the Infant's degree and estate*, which regularly must be left to the jury; but if the jury find that the things were necessaries, and of reasonable price, it shall be presumed they had evidence for what they thus find: and they need not find particularly what the necessaries were, nor of what price each thing was: also, if the plaintiff declares for other things, as well as necessaries, or alleges too high a price for those things that are necessary, the jury may consider of those things that were really necessaries, and of their intrinsick value, and proportion their damages accordingly. *Cro. Jac.* 360. 2 *Rol. Rep.* 144. *Poph.* 151. *Palm.* 361. *Gouls*, 168. *Godb.* 219. 1 *Leon.* 114.

If an Infant promises another, that if he will find him meat, drink and washing, and pay for his schooling, that he will pay 7*l.* yearly, an action upon the case lies upon this promise; *for learning is as necessary as other things*, and though it is not mentioned what learning this was, yet *it shall be intended what was fit for him*, till it be shewn to the contrary on the other part; and though he to whom the promise was made does not instruct him, but pays another for it, the promise of re-payment thereof is good; if it appears that the learning, meat, drink, and washing could not be afforded for a less sum than 7*l.* 1 *Rol. Abr.* 729. *Palm.* 528. 1 *Jon.* 182.

*Assumpsit*, for labour and medicines in curing the defendant of a distemper, &c. who pleaded infancy; the plaintiff replied, it was for necessaries generally; and upon a demurrer to this replication it was objected, that the plaintiff had not assigned in certain, how, or in what manner, the medicines were necessary: but it was adjudged, that the replication in this general form was good. *Carth.* 110.

If an Infant be a mercer, and hath a shop in a town, and *there buys and sells*, and contracts to pay a certain sum to J. S. for wares sold to him by J. S. to resell, yet he is not chargeable upon this contract, for this trading is not immediately necessary *ad victum et vestitum;* and if this were allowed, Infants might be infinitely prejudiced, and buy and sell, and live by the loss. 1 *Rol. Abr.* 729. *Cro. Jac.* 494. 2 *Rol. Rep.* 45.

And as the contract of an Infant for wares, for the necessary carrying on his trade, whereby he subsists, shall not bind him; *so neither shall he be liable for money which he borrows to lay out for necessaries;* therefore the lender must, at his peril, lay it out for him, or see that it is laid out in necessaries. 5 *Mod.* 368. 1 *Salk.* 386, 387.

In debt upon a single bill, the defendant pleaded that he was within age; the plaintiff replied, that it was for necessaries, *viz.* 10*l.* for clothes, and 15*l.* money lent for and towards his necessary support at the university; the defendant rejoined, *that the money was lent him to spend at pleasure; absque hoc*, that it was lent him for necessaries; and issue hereupon was found for the plaintiff, who had judgment in C. B., but was reversed in B. R. on a writ of error; for the issue only being, whether this money was lent the Infant for necessaries, not whether it was laid out in necessaries, it cannot bind the Infant whichever way it is found; for it might have been borrowed for necessaries, and laid out in a tavern: and the law will not intrust the Infant with the application and laying of it out. 1 *Salk.* 386. See, *contra*, as to a single bill given for necessaries, 1 *Lev.* 86. 1 *Keb.* 382. 416. 423. *S. C. Co. Lit.* 172. *S. P. Sed qu?* See *post.*

So if one *lends money* to an Infant, who actually lays it out in necessaries, yet this will not bind the Infant, nor subject him to an action; *for it is upon the lending that the contract must arise*, and after that time there could be no contract raised to bind the Infant, because after that he might waste the money, and the Infant's applying it afterwards for necessaries will not, by matter *ex post facto*, entitle the plaintiff to an action. 1 *Salk.* 279.

Although an Infant shall be liable for his necessaries, yet if he enters into an obligation with a penalty for payment thereof, this shall not bind him; for the entering into a penalty can be of no advantage to the Infant. *Cro. Eliz.* 290. *Moor*, 679. *pl.* 929. *Co. Lit.* 172. 1 *Rol. Abr.* 720. See *post.* But a bond or single bill for the exact amount of necessaries furnished will be valid. *Esp. N. P.* 164.

It is also said, that an Infant cannot either by parol-contract, or a deed, bind himself, even for necessaries, *in a sum certain*, and that should an Infant promise to give an unreasonable price for necessaries, that would not bind him; and that therefore it may be said that the contract of an Infant for necessaries, as a contract, does not bind him any more than his bond would; but only since an Infant must live as well as a man, the law gives a *reasonable price* to those who furnish him with necessaries. *Cases in Law and Equity*, 85. And in a case where a warrant of attorney was given by an Infant and another, and judgment entered up thereon, the court on motion ordered the name of the Infant to be struck out, and set aside the judgment as against him. 2 *Black. Rep.* 1133.

If an Infant becomes indebted for necessaries, and the party takes a bond from the Infant, this shall not drown the simple contract, because the bond has no force. *Cro. Eliz.* 920.

But it is agreed, that an action on an account stated will not lie against an Infant, though it be for necessaries; *for he not having discretion, is not to be liable to false accounts. Co. Lit.* 172. *Lamb.* 169. *Noy*, 87. 1 *Term Rep.* 40.

If an Infant comes to a stranger, who instructs him in learning, and boards him, there is an *implied contract in law*, that the party should be paid as much as his board and schooling are worth; but if the Infant at the time of his going thither was under the age of discretion, or if he were placed there upon a special agreement with some of the child's friends, the party that boards him has no remedy against the Infant, but must resort to them with whom he agreed for the Infant's board, &c. *Allen*, 94.

Necessaries for an Infant's wife are necessaries for him; but if provided only in order for the marriage, he is not chargeable, though she use them after. *Stra.* 168. An Infant shall be liable for the nursing his child. *Esp. N. P.* 161.

Debts contracted during infancy, form however a good consideration to support a promise made to pay them when a person is of full age. 2 *Lev.* 144. 2 *Leon.* 215. And where the defendant pleads infancy, and the plaintiff replies that the defendant confirmed the promise or contract when he was of age, the plaintiff need only prove the promise, and the defendant must discharge himself by proof of the infancy. 1 *Term Rep.* 648.

Though a promise by an infant will not bind him unless for necessaries, yet he shall take advantage of any promise made to him, though the consideration were his promise when an Infant. And an Infant plaintiff has been allowed to recover on mutual promises of marriage. *Stra.* 937.

As to *Judicial Acts*, and acts done by an Infant in a court of record, they regularly bind the Infant and his representatives, with the following savings and exceptions; as if an Infant levies a Fine, though the judges ought not to admit the acknowledgment of one under that disability, yet having once recorded his agreement as the judgment of the court, it shall for ever bind him and his representatives, unless he reverses it by writ of error, *which must be brought by him during his minority*, that the court by inspection may determine his age. *Co. Lit.* 380. *Moor*, 76. 2 *Rol. Abr.* 15. 2 *Inst.* 483. 2 *Bulst.* 320. 12 *Co.* 122. *Yelv.* 115. 3 *Mod.* 229.

So if an Infant levies a Fine, he is enabled by law to declare the uses thereof, and if he reverseth not the fine during his nonage, the declaration of uses will stand good for ever; for though *that* be a matter *in pais*, and all such acts an Infant may avoid at any time after his full age, if he do not consent, yet being made in pursuance of the fine levied, which fine must stand good for ever, (unless reversed in the manner as has been mentioned,) so will the declaration of uses too. 2 *Co.* 58, *a.* 10 *Co.* 42. *Moor*, 22. *Dal.* 47. 2 *Leon.* 159. *Gouls.* 13. 1 *Jones*, 390. *Winch.* 103.

If there be tenant for life, the remainder to an Infant in fee, and they two join in a fine, the Infant may bring a writ of error, and reverse the fine as to himself; but it shall stand good as to the tenant for life; for the disability of the Infant shall not render the contract of the tenant for life, who was of full age, ineffectual. 1 *Leon.* 115. 317. 2 *Sid.* 55. 2 *Jones*, 182.

If an Infant brings a writ of error to reverse a fine for his nonage, and his nonage, after inspection, is recorded by the court, but before the fine reversed he levies another fine to another, the second fine shall hinder him from reversing the first; because the second having entirely debarred him of any right to the land, must also deprive him of all remedies which would restore him to the land. 1 *Rol. Abr.* 788. See *Moor*, 74. and further this Dictionary, title *Fine of Lands*.

As to *Recoveries* suffered by Infants, when these were improved into a common way of conveyance, it was thought reasonable that those whom the law had judged incapable to act for their own interest, should not be bound by the judgment given in recoveries, though it was the solemn act of the court; for where the defendant gives way to the judgment it is as much his voluntary act and conveyance, as if he had transferred the land by livery, or any other act, *in pais*; therefore, if an Infant suffers a recovery, he may reverse it, as he may a fine, *by writ of error, during his minority*: and this was formerly taken to be law, as well where the Infant appeared, by guardian, as by his attorney, or in person: but now the distinction turns upon this point, that if an Infant suffers a recovery in person, it is erroneous, and he may reverse it by writ of error; but even in this case the writ of error must be brought during his minority, that his infancy may be tried by the inspection of the court; *for at his full age it becomes obligatory and unavoidable:* but in cases of necessity the court has admitted the Infant to appear by guardian, and to suffer a recovery, or come in as a vouchee; but this, too, is seldom allowed by the court, unless upon emergencies, when it tends to the improvement of the Infant's affairs, or when lands of equal value have been settled on him, and when he has had the king's privy seal for that purpose; and those recoveries have been allowed and supported by the Judges, and the Infant could not set them aside; besides, if such recoveries be to the prejudice of the Infant, he has his remedy for it against his guardian, and may reimburse himself out of his pocket to whom the law had committed the care of him. 1 *Rol. Abr.* 731. 742. *Co. Lit.* 381, *b.* 2 *Rol. Abr.* 395. 10 *Co.* 43, *a.* *Cro. El.* 471. *Hob.* 196. 197. *Cro. Car.* 307. 2 *Buls.* 235. 1 *Sid.* 321, 322. 1 *Lev.* 142. 2 *Saund.* 94. 1 *Vern.* 461. 2 *Salk.* 567. See further this Dictionary, title *Recovery*.

Partition, by writ *de partitione faciendâ*, binds Infants, because by judgment in a court of justice, to which no partiality can be imputed. *Co. Lit.* 171, *b.*

If an Infant acknowledge a recognizance or statute, it is *only voidable;* and the Infant at his peril must avoid them by *audita querela*, as he must a Fine or Recovery by writ of error, *during his minority;* for such conveyances or other acts of record become obligatory and unavoidable, if they be not set aside before the Infant comes of age, the reason is, because these contracts being entered into under the inspection of the Judge, (who is supposed to do right) the Infant cannot against them aver his disability, but must reverse them by a judgment of a superior court, who, by inspection has the same means to determine whether the inferior jurisdiction has done right, that first received the contract. *Moor, pl.* 206. 2 *Inst.* 483. 673. *Co. Lit.* 380. *Keilw.* 10. *Reg.* 149. 10 *Co.* 43, *a.*

If an Infant bargain and sell his land by deed indented and inrolled, yet he may plead nonage; for notwithstanding the statute 27 *Hen.* 8. *cap.* 16. makes the inrolment in a court of record necessary to complete the conveyance; yet the bargainee claims by the *deed* as at *common law*, which was, and therefore is, still defeasible by nonage. 2 *Inst.* 673.

An *Infant* confessed judgment in an action of debt brought against him; and it was held, *audita querela* did not lie upon this judgment, though it would on a statute or recognizance; but the party ought to bring a writ of error in the Exchequer Chamber, by virtue of the statute 27 *Eliz. Moor*, 460. See 3 *Salk.* 196. 1 *Inst.* 233. 380. *Moor*, 189. Where an *Infant* may levy a fine, he may declare the uses of it also by deed: and the *Infant's* declaration of uses shall be good and binding to the *Infant* and his heirs, so long as the fine continues unreversed. *Hob.* 224. 2 *Leon.* 193. 2 *Rep.* 58. 10 *Rep.* 42. It was formerly held, that an *Infant* appearing by guardian, could not suffer a Common Recovery, 10 *Rep.* 42. though it hath since been allowed in many cases, and by all the judges, that an *Infant* may suffer a common recovery by guardian, and he shall not avoid it; for by intendment he shall have recompence in value; and if it is not for the good of the *Infant*, he may have recompence over against his guardian. 2 *Danv. Abr.* 772. A common recovery may be had against an *Infant*, being examined *solely and secretly*; and he may suffer a recovery by guardian in open court. *Hob.* 169. 2 *Bulst.* 255. 2 *Nels. Abr.* 994. and see *Sid.* 321, 2 *Nels.* 995. and this Dictionary, title *Recovery*.

Debt on bond with a penalty; plea Infancy; replication that after making the bond, and before commencement of the suit, he attained his full age, and afterwards, and before the suit assented to, and ratified and confirmed the bond. Upon special demurrer the court of K. B. held the replication bad, for an infant cannot give a bond with a penalty for the payment of interest, and unless he be estopped by some act at full age of as high authority as the bond, he shall avoid it. *Baylis* v. *Dineley*, *Term Rep. Hil. K. B. 55 Geo.* 3. 477. and see *Fisher* v. *Mowbray*, 8 *East's Rep.* 330.

An Infant is to prosecute a suit by his guardian or best friend, though the term used is *prochein amy*; i. e. next friend; but he cannot defend by such next friend, but must defend only by guardian, because the law supposes, that where he demands or sues for any thing, it is for his benefit. The power for Infants to sue by *prochein amy*, was first introduced by the statute *West.* 2.

If an Infant be joined with others, in suing in the right of another, the action may be brought by attorney, for they all make but one person in law. 3 *Cro.* 377.

But in all cases where an Infant is defendant, though it be in another's right, and though joined with others, he must defend by guardian. 2 *Cro.* 289. 1 *Lev.* 294.

In all actions, real, personal, or mixed against an Infant, if he appears by attorney, it is error. 8 *Co.* 6. 9 *Co.* 30, *b.* and see 7 *W. P. Taunton*, 488.

If an attorney undertakes to appear for an Infant, and enters it *per attornatum* it may be amended and made *per guardianum*. *Str.* 114. 445.

The plaintiff's attorney should apply to the defendant to name a guardian; and if he does not, in six days, the plaintiff may apply to the court, who will oblige him to do it. 2 *Wils.* 50.

The Infant plaintiff, who sues by *prochein amy*, is not liable to costs, because he cannot, while under age, disavow the suit; but the *prochein amy* is liable. *Str.* 548. *James* v. *Hatfield*, *Barnes*, 128. And if it appears to the court that he is not of sufficient ability to pay the costs, the court will order another who is. But an Infant defendant (although he names a guardian,) is liable to costs if the verdict be against him. *Dyer*, 104. 1 *Bulst.* 109. *Str.* 708.

The Court of K. B. refused a motion to discharge an Infant who had sued without *prochein amy* or guardian and was in execution for the costs. *Finlay* v. *Jowle*, 13 *East's Rep.* 6.

If an *Infant* appearing by guardian comes of age pending the suit, he may then plead by attorney. *Moor*, 665.

If baron and feme, where the feme is an *Infant*, appear by attorney, it is error. 5 *Mod.* 209. When the defendant in an action is an *Infant*, the plaintiff shall have six years to bring his action in, after the defendant comes of age: and if the plaintiff be an *Infant*, he hath six years likewise after his age, to sue by the statute of limitations. *Lutw.* 243. See title *Limitation of Actions*.

As to Acts *in pais*, Infants are regularly allowed to rescind and break through all contracts *in pais* made during minority, except only for *schooling and necessaries*, be they never so much to their advantage; and the reason hereof is, the indulgence the law has thought fit to give Infants, who are supposed to want judgment and discretion in their contracts and transactions with others, and the care it takes of them in preventing their being imposed upon, or over-reached by persons of more years and experience. 39 *Ed.* 3. 20, *b.* 1 *Rol. Abr.* 729. *Co. Lit.* 172. 381.

And for the better security and protection of Infants herein, the law has made some of their contracts absolutely void; *i. e.* all such in which there is no apparent benefit, or semblance of benefit, to the Infant; but as to those from which the Infant may receive benefit, and which were entered into with more solemnity, they are only voidable; that is, the law allows them when they come of age, and are capable of considering over again what they have done, either to ratify and affirm such contracts, or to break through and avoid them. *Cro. Car.* 502. 1 *Jones*, 405. 3 *Mod.* 310.

Hence an infant may purchase, because it is intended for his benefit, and at his full age he may either agree or disagree to the same. *Co. Lit.* 2. 8. 2 *Vern.* 203.

The feoffment of an Infant is not void, but only voidable, not only because he is allowed to contract for his benefit, but because there ought to be some act of notoriety to restore the possession to him, equal to that which transferred it from him. *Co. Lit.* 380. *Dyer*, 104. 2 *Rol. Abr.* 572. 4 *Co.* 125, *a.*

Therefore if an Infant make a feoffment and livery in person, he shall have no assise, &c. but must avoid it by entry; for it is to be presumed in favour of such solemnity, that the assembly of the county then present would have prevented it, if they had perceived his nonage, and therefore the feoffment shall continue till defeated by entry, which is an act of equal notoriety. 8 *Co.* 42.

But if the Infant had made a letter of attorney to deliver seisin, he might have an assise, &c. because the letter of attorney, (like all other acts or agreements made by an Infant to his prejudice,) must be void; therefore whoever claims under it, or by virtue of its authority, must be a wrong doer. 2 *Rol. Abr.* 2. *Noy*, 130. *Palm.* 237.

The trading contract of an Infant is not void; but he may enforce it at his election. *Bruce* v. *Warwick*, 6 *W. P. Taunton*, 118.

Further as to the acts of Infants being void, or voidable, there is a diversity between an actual delivery of the thing contracted for, and a bare agreement to deliver it only; that the first is voidable, but the last absolutely void; as if an Infant deliver a horse, or a sum of money, with his own hands, this is only voidable, and to be recovered back in action of account. *Perk.* § 12. 19. 1 *Rol. Abr.* 730. 2 *Rol. Rep.* 408. *Latch.* 10. *Rol.* 736. 3 *Rep.* 13. *Hob.* 96.

In trespass, wherefore with force and arms the defendant made an assault, and cut off all the hair of the plaintiff, the defendant as to all the trespass, except cutting the hair, pleads not guilty, and as to that, pleads that the plaintiff was of the age of sixteen years, and for a certain sum of money gave licence to the defendant to cut off two ounces of hair; upon demurrer to this plea the court held, that the contract was absolutely void, and consequently the tonsure unlawful, and gave judgment accordingly for the plaintiff. 3 *Keb.* 369.

And as an Infant is not bound by his contract to deliver a thing; so if one deliver goods to an Infant upon a contract, &c. knowing him to be an Infant, he shall not be chargeable in trover and conversion, or any other action for them; for the Infant is not capable of any contract, but for necessaries; therefore such delivery is a gift to the Infant; but if an Infant without any contract wilfully takes away the goods of another, trover lies against him; also it is said, that if he take the goods under pretence that he is of full age, trover lies; because it is a wilful and fraudulent trespass. 1 *Sid.* 129. 1 *Lev.* 169. 1 *Keb.* 905. 913.

Also it seems, that if an Infant, being above the age of discretion, be guilty of any fraud in affirming himself to be of full age, or if, by combination with his guardian, &c. he make any contract or agreement with an intent afterwards to elude it, by reason of his privilege of infancy, that a court of equity will decree it good against him according to the circumstances of the fraud; but in what cases in particular a court of equity will thus exert itself, is not easy to determine. See 1 *Vern.* 132. 2 *Vern.* 224, 225.

But a plaintiff cannot convert an action founded on a contract into a tort, so as to charge an Infant defendant: therefore, where the plaintiff declared at defendant's request he had delivered a mare to defendant to be moderately ridden, and that defendant maliciously, &c. rode the said mare so that she was damaged, &c. the court of K. B. held that defendant might plead his infancy in bar; the action being founded on a contract. *Jennings* v. *Randall*, 8 *Term Rep.* 335.

All gifts, grants, &c. of an Infant, which do not take effect by delivery of his hand, are void; and if made to take effect by delivery of his own hand, are voidable by himself, and his heirs, and those which shall have his estate. And privies in blood (as the heir-general or special) may avoid a conveyance made by their ancestor during his infancy. But privies in estate, such as the donor of an estate-tail where the tenant in tail dies without issue; or privies in law, as the lord by escheat where there is no heir, shall not avoid a conveyance made by an Infant.

If a man within age, seised in right of his wife, makes a feoffment and dies, his heir cannot enter and avoid it; because no right descends to him; for the baron, if he had lived, could have entered only in right of his wife. And no person shall take advantage of the infancy of his ancestor, but he who hath a right descending to him from that ancestor, though the heir may take the benefit of a condition, notwithstanding no right descended to him from his ancestor. 8 *Rep.* 42, 43, 44. and see 3 *Rep.* 35.

If husband and wife are both within age, and they by indenture join in a feoffment, and the husband dies, the wife may enter and avoid the deed, or have a *dum fuit infra ætatem.* 1 *Inst.* 337. Though if there be two joint tenants within age, and one of them makes a feoffment in fee of the moiety during his infancy, and dies, the survivor cannot enter; but the heir of the feoffor may enter into the moiety, &c. 8 *Rep.* 43. If an *Infant* exchanges lands with another, and the other enters, the Infant may have assise. 18 *Ed.* 4. 2. And where an Infant leases for years, he may affirm the lease, or bring trespass against the lessee for the occupation. 18 *Ed.* 4. *Bro. Trespass,* 338.

A lease made by an Infant reserving rent is voidable; but if there be no rendering rent, it is absolutely void. *Latch.* 199. But if an Infant make a lease paying rent, and after his coming of age he accepts the rent, the voidable lease is made good; and an Infant's lease in ejectment is good. 2 *Lil. Abr.* 55. 3 *Salk.* 196. though in such case he must give a security for the costs. 1 *Wils. part* 1. *p.* 130. An Infant cannot surrender a future interest, by taking a new lease: his surrender by deed, and by acceptance of a second lease, are void, except there be an increase of the term, or a decrease of the rent; for where no benefit comes to him, his acts are merely void. *Cro. Car.* 502.

All acts of necessity bind Infants as presentations to benefices, admittances, and grants of copyhold estates, an assenting to legacies, &c. 3 *Salk.* 190. So dower is demandable of an Infant heir. *Bull. N. P.* 117. So an Infant is compellable to pay a copyhold fine. *Burr.* 1717. See title *Copyhold.* Conditions annexed to lands, whether the estate come by grant or descent, bind Infants; and where the estate of an Infant is upon condition to be performed by the Infant, if the condition is broken during the minority, the land is lost for ever. 1 *Inst.* 233. 380. Though a statute is not extendible against an Infant, yet Chancery will give relief against Infants. 1 *Lev.* 198.

An Infant is much favoured by law: therefore it gives him many privileges above others: if an Infant make default in a real action, he shall not lose his land as another man shall do; one who is an Infant shall not be amerced, nor find pledges like one of full age; and if he be bail, he may be discharged by *audita querela, &c.* 1 *Inst.* 272. 8 *Rep.* 61. On his default at the grand cape, the Infant by writ of error may reverse the judgment given against himself; unless it be in case of a judgment in dower. *Dyer,* 104. *Jenk. Cent.* 47. 319. But an Infant may be disseised of his lands, and a warranty that descendeth upon an Infant, may bar him of his entry; so a remitter upon him; *contra,* of a descent: and if an Infant hath franchises or liberties, and do abuse, or disuse them, he shall forfeit them as a man of full age may. 1 *Inst.* 3. 133. 1 *And.* 311. *Bro.* 48.

A person gave a note, a few days after he was of age, for things had during his infancy; on extraordinary circumstances, equity set it aside: though it is true, if an Infant takes up goods, or borrows money, and, after he comes to age, give his note or promise for the money, that is good at law; but to prevent the ruin of Infants, it may be convenient to give relief. *Barn. C.* 4. 6. If an Infant delivers money with his own hand, it is *voidable,* and to be recovered by action of account. The Infant sells goods to another; he may make the sale void, or have debt, &c. for the money. *Hob.* 77. 18 *Ed.* 4. 2.

If a trespass be done to an Infant, and he submits to an award, it is said the award shall not be binding on him. 2 *Danv.* 770. See title *Award.* An Infant is not bound by his consent not to bring a writ of error; for though the judgment binds him, yet it binds but as a judgment reversable. *Rep. Hardw.* 104. Agreements, &c. made by an Infant, although he be within a day of his full age, shall not bind him. *Plowd.* 364. Where an Infant enters into bond, pretending to be of full age, though he may avoid it by pleading his infancy, yet he may be indicted for a cheat. *Wood's Inst.* 585.

A warrant of attorney given by an Infant was declared by the Court of C. P. to be absolutely void, and that court refused to confirm it, though the Infant appeared to have given it, (knowing it was not valid) in collusion with another. *Saunderson* v. *Marr,* 1 *H. Blackst.* 75.

See further, as connected with this subject of Infancy, titles *Annuity, Age, Heir, Chancery, Rape, Trial, Will, &c.*

INFANCY OF CORPORATIONS. See title *Infant,* II.

INFECTIONS. By casting garbage and dung into ditches, &c. how punished. See *stat.* 12 *R.* 2. *c.* 13. and this Dictionary, title *Nusance.*

INFEFFMENT. The act or instrument of *Feoffment.* See that title. In modern language in Scotland, this term is synonymous with *Sasine,* meaning the instrument of possession: but it had anciently a more extended meaning, and was synonymous with Investiture. *Bell's Scotch Law Dict.*

INFEODATION OF TITHES. The granting of tithes to mere laymen. See 2 *Comm.* 27. and this Dictionary, title *Tithes.*

INFERIOR COURTS. The Courts of Judicature of this kingdom are classed in a general division of superior and inferior. The courts at Westminster are the superior, and in general have, (especially the court of King's Bench and Common Pleas) superindence over the inferior.

Lords or their bailiffs not to arrest on foreign pleas, on pain of double damages. *Stat. West.* 1. 3 *Ed.* 1. *c.* 35. See title *Arrest.*

By *stat.* 19 *Geo.* 3. *c.* 70. (see this Dictionary, title *Arrest*) where final judgment is obtained in any inferior courts of record, and the defendant cannot be found in their jurisdiction, the Superior Courts at Westminster may remove the record, and issue execution as in judgments in such superior court: and similar provisions are made by *stat.* 33 *Geo.* 3. *c.* 68. as to the courts of great sessions in Wales, and the courts for the counties-palatine of Chester, Lancaster, and Durham. See further this Dictionary, titles *County Court, Courts, Abatement, &c.*

INFIDELS, *infideles.*] Heathens; who may not be witnesses by the laws of this kingdom, because they believe neither the Old or New Testament to be the word of God, on one of which oaths must be taken. 1 *Inst.* 6.

The evidence of a *Gentoo* has however been admitted, sanctioned according to the ceremonies of his own religion. See further this Dictionary titles *Evidence, Witnesses.*

INFIRMARY, *infirmarius.*] In monasteries there was an apartment allowed for infirm or sick persons: and he who had the care of the infirmary, was called *infirmarius. Mat. Paris, anno* 1252.

There are now to the honour of the nation many hospitals, for the relief of diseased persons, in various parts of the kingdoms, called Infirmaries. See title *Hospitals.*

IN FORMA PAUPERIS. See title *Costs.*

## INFORMATION FOR THE KING.

*Informatio pro Rege.*] An accusation or complaint exhibited against a person for some criminal offence, either immediately against the King, or against a private person; which, from its enormity or dangerous tendency, the public good requires should be restrained and punished. It differs from an indictment principally in this, that an indictment is an accusation found by the oath of twelve men, whereas an Information is only the allegation of the officer who exhibits it. 3 *New. Abr.* 164.

I. *Of the various kinds of Informations generally; and the Antiquity of the Practice.*
II. *In what cases Information will lie.*
III. *Of the Practice as to filing and compounding Informations.*
IV. *How to be laid; the Proceedings and Provisions by Statute Law.*

I. INFORMATIONS are of two sorts: first, those which are partly at the suit of the King, and partly at that of a subject: and secondly, such as are only in the name of the King. The former are usually brought upon penal statutes, which inflict a penalty upon conviction of the offender, one part to the use of the King, and another to the use of the informer, and are a sort of *qui tam* actions, only carried on by a criminal instead of a civil process; upon which, therefore, it is sufficient in this place to observe, that by *stat.* 31 *Eliz. c.* 5. no prosecution upon any penal statute, the suit and benefit whereof are limited in part to the King and in part to the prosecutor, can be brought by any common informer after one year is expired since the commission of the offence; nor, on behalf of the Crown after the lapse of two years longer; nor where the forfeiture is originally given only to the King, can such prosecution be had after the expiration of two years from the commission of the offence. *Cro. Jac.* 366.

The informations that are exhibited, in the name of the King alone, are also of two kinds: first, those which are truly and properly his own suits, and filed *ex officio* by his own immediate officer, the Attorney-General; or during a vacancy of that office, by the Solicitor-General. *Wilkes's Ca. Bro. P. C.* Secondly, those in which, though the king is the nominal prosecutor, yet it is at the relation of some private person, or common informer, and they are filed by the king's coroner and attorney in the court of king's bench, usually called the Master of the crown-office, who is for this purpose the standing officer of the public. The object of the King's own prosecutions, filed *ex officio* by his own Attorney-General, are properly such enormous misdemesnors, as peculiarly tend to disturb or endanger his government, or to molest or affront him in the regular discharge of his royal functions. For offences so high and dangerous, in the punishment or prevention of which a moment's delay would be fatal, the law has given to the Crown the power of an immediate prosecution, without waiting for any previous application to any other tribunal; which power, thus necessary, not only to the ease and safety, but even to the very existence, of the executive magistrate, was originally reserved in the great plan of the English constitution; wherein provision is wisely made for the due preservation of all its parts. The objects of the other species of Informations, filed by the Master of the crown office upon the complaint or relation of a private subject, are any gross and notorious misdemesnors, riots, batteries, libels, and other immoralities of an atrocious kind, not peculiarly tending to disturb the government, (for those are left to the care of the Attorney-General,) but which, on account of their magnitude or pernicious example, deserve the most public animadversion. 2 *Hawk. P. C. c.* 26. And when an Information is filed, either thus, or by the Attorney-General, *ex officio*, it must be tried by a petit jury of the county where the offence arises: after which, if the defendant be found guilty, the court must be resorted to for his punishment. See *post*, II, III.

This mode of prosecution, by Information (or suggestion) filed on record by the king's Attorney-General,) or by his Coroner, or Master of the Crown-office in the court of King's Bench, seems to be as antient as the common-law itself, 1 *Show.* 118. For as the king was bound to prosecute, or at least to lend the sanction of his name to a prosecutor, whenever a grand jury informed him upon their oaths, that there was a sufficient ground for instituting a criminal suit; so, when these his immediate officers were otherwise sufficiently assured that a man had committed a gross misdemesnor, either personally against the king or his government, or against the public peace and good order, they were at liberty, without waiting for any farther intelligence, to convey that information to the court of King's Bench by a suggestion on record, and to carry on the prosecution in his majesty's name, But these informations (of every kind) are confined by the constitutional law to mere misdemesnors only: for, wherever any capital offence is charged, the same law requires that the accusation be warranted by the oath of twelve men, before the party shall be put to answer it. And as to those offences in which Informations were allowed as well as indictments, so long as they were confined to this high and respectable jurisdiction, were carried on in a legal and regular course in his majesty's court of King's Bench, the Subject had no reason to complain. The same notice was given, the same process was issued, the same pleas were allowed, the same trial by jury was had, the same judgment was given by the same judges, as if the prosecution had originally been by indictment. But when the *stat.* 3 *H.* 7. *c.* 1. had extended the jurisdiction of the court of Star Chamber, the members of which were the sole judges of the law, the fact, and the penalty, and when the *stat.* 11 *H.* 7. *c.* 3. had permitted Informations to be brought by any informer upon any penal statute, not extending to life or member, at the assizes, or before the justices of the peace, who were to hear and determine the same according to their own discretion; then it was, that the legal and orderly jurisdiction of the court of King's Bench fell into disuse and oblivion; and Empsom and Dudley, the wicked instruments of king Hen. VII. by hunting out obsolete penalties, and this tyrannical mode of prosecution, with other oppressive devices, continually harassed the subject, and shamefully enriched the crown. 1 *And.* 157. The latter of these acts was soon indeed repealed by *stat.* 1. *Hen.* 8. *c.* 6. but the court of Star-chamber continued in high vigour, and daily increasing its authority, till finally abolished by *stat.* 16 *Car.* 1. *c.* 10.

Upon this dissolution, the old common-law authority of the court of King's Bench, as the *Custos morum* of the nation, being found necessary to reside somewhere for the peace and good government of the kingdom, was again revived in practice. 5 *Mod.* 464. *Styl. Rep.* 217. 245. *Styl. Prac. Reg.* title *Information*, *p.* 187. (edit. 1657). 2 *Sid.* 71. 1 *Sid.* 152. And it is observable that, in the same act of parliament which abolished the court of Star-chamber, a conviction by Information is expressly reckoned up, as one of the legal modes of conviction of such persons as should offend a third time against the provisions of that statute. 16 *Car.* 1. *c.* 10. § 6. *Sir Matthew Hale*, who presided in this court soon after the time of such revival, is said to have been no friend to this mode of prosecution; most probably because the power of filing Informations without any control then resided in the breast of the Master; and, being filed in the name of the king, they subjected the prosecutor to no costs, though on

trial they proved to be groundless. *5 Mod.* 460. 1 *Saund.* 301. 1 *Sid.* 174. This oppressive use of them, in the times preceding the revolution, occasioned a struggle, soon after the accession of King William, to procure a declaration of their illegality by the judgment of the court of King's Bench; but *Sir John Holt*, who then presided there, and all the Judges, were clearly of opinion that this proceeding was grounded on the common law, and could not then be impeached. *5 Mod.* 459. *Comb.* 141. 7 *Mod.* 361. 1 *Show.* 106. In a few years afterwards a more temperate remedy was applied in parliament, by *stat.* 4 *& 5 W. & M. c.* 18. which enacts, that the clerk of the crown shall not file any Information without express direction from the court of King's Bench: and that every prosecutor, permitted to promote such Information, shall give security by a recognizance of twenty pounds (which now seems to be too small a sum) to prosecute the same with effect; and to pay costs to the defendant, in case he be acquitted thereon, unless the Judge, who tries the Information, shall certify there was reasonable cause for filing it; and at all events, to pay costs, unless the Information shall be tried within a year after issue joined. But there is a proviso in this act, that it shall not extend to any other Informations than those which are exhibited by the Master of the Crown Office; and, consequently, Informations at the King's own suit, filed by his Attorney-General, are no way restrained thereby. See *post*, IV.

There is one species of Informations, still farther regulated by *stat.* 2 *Ann. c.* 20. *viz.* those in the nature of a writ of *Quo warranto*, which are a remedy given to the Crown against such as may have usurped or intruded into any office or franchise. The modern Information tends to the same purpose as the antient writ, being generally made use of to try the civil rights to such franchises; though it is commenced in the same manner as other Informations are, by leave of the court, or at the will of the Attorney-General; being properly a criminal prosecution, in order to fine the defendant for his usurpation, as well as to oust him from his office; yet usually considered at present as merely a civil proceeding. See this Dictionary, title *Quo Warranto*, and 4 *Comm.* 308. 312. and *post*, IV.

An *Information* on behalf of the Crown filed in the Exchequer by the King's Attorney-General, is a method of suit for recovering money or other chattels, or for obtaining satisfaction in damages for any personal wrong committed in the lands or other possessions of the Crown. *Moor*, 375. It differs from an Information filed in the court of King's Bench, in that *this* is instituted to redress a private wrong, by which the property of the crown is affected; *that* is calculated to punish some public wrong or heinous misdemeanor in the defendant. It is grounded on no writ under seal, but merely on the intimation of the King's officer the Attorney-General, who "gives the court to understand and be informed of" the matter in question: upon which the party is put to answer, and trial is had, as in suits between subject and subject. The most usual Informations are those of *intrusion* and *debt*. *Intrusion* for any trespass committed on the lands of the crown, as by entering thereon without title; holding over after a lease is determined; taking the profits; cutting down timber; or the like. *Cro. Jac.* 212. 1 *Leon.* 48. *Savil.* 49. See title *Intrusion*. *Debt* upon any contract for monies due to the King, or for any forfeiture due to the Crown upon the breach of a penal statute. This latter is most commonly used to recover forfeitures occasioned by transgressing those laws which are enacted for the establishment and support of the Revenue; others, which regard mere matters of police and public convenience, being usually left to be inforced by common informers, in *qui tam* Informations or actions. But, after the Attorney-General has informed upon the breach of a penal law, no other information can be received. *Hardr.* 201.

When a statute creates a penalty, and gives one moiety to the use of the king and the other to the informer, the king may sue for the whole by Information filed in B. R. by the Attorney-General, unless a common informer have commenced a *qui tam* suit for the penalty. *R.* v. *Hymen*, 7 *Term Rep. K. B.* 536.

There is also an Information *in rem*, when any goods are supposed to become the property of the Crown, and no man appears to claim them, or to dispute the title of the King. As anciently in the case of treasure-trove, wrecks, waifs, and estrays seized by the King's officer for his use. Upon such seizure an Information was usually filed in the King's Exchequer, and thereupon a proclamation was made for the owner (if any) to come in and claim the effects; and at the same time there issued a commission of *appraisement* to value the goods in the officer's hands: after the return of which, and a second proclamation had, if no claimant appeared, the goods were supposed derelict, and condemned to the use of the Crown. And when in later times, forfeitures of the goods themselves, as well as personal penalties on the parties, were inflicted by act of parliament for transgressions against the laws of the customs and excise, the same process was adopted in order to secure such forfeited goods for the public use, though the offender himself had escaped the reach of justice. 3 *Comm.* 261, 262.

An Information is, in many respects, the same as what, for a common person, is called a declaration. It ought to be certain, that the party may perfectly know what he is to answer to, and the court what they are to give judgment on. *Plowd.* 329.

Informations *qui tam* will not lie on any statute, which prohibits a thing, as being an immediate offence against the public good in general, under a certain penalty, unless the whole or part of such penalty be expressly given to him who will sue for it, because otherwise it goes to the king, and nothing can be demanded by the party. 2 *Hawk. P. C. c.* 26.

It has been said, that the King shall put no one to answer for a wrong done principally to another, without indictment or presentment; but this does not seem a principle adhered to; and of common right, Informations, or actions in the nature thereof, may be brought for offences against statutes, whether mentioned or not in such statutes, where other methods of proceeding are not particularly appointed. 2 *Hawk. P. C. c.* 26. § 1, 2. And wherever a matter concerns the public government, and no particular person is entitled to an action, there an Information will lie. 1 *Salk.* 374.

II. It is every day's practice, agreeable to numberless precedents, either in the name of the King's Attorney-General, or master of the Crown-office, to exhibit Informations for batteries, cheats, seducing a young man or woman from their parents, in order to marry them against their consent, or for any other wicked purpose, spiriting away a child to the plantations, rescuing persons from legal arrests, perjuries, and subornations thereof, forgeries, conspiracies; (whether to accuse an innocent person, or to impoverish a certain set of lawful traders, &c. or to procure a verdict to be unlawfully given, by causing persons bribed for that purpose to be sworn on a *tales*;) and other such like crimes, done principally to a private person; as also for offences done principally to the King; as for libels, seditious words, riots, false news, extortions, nuisances; (as in not repairing highways, or obstructing them, or stopping a common river, &c.;) contempt, as in departing from the parliament without the King's licence, disobeying his writs, uttering money without his authority, escaping from legal imprisonment on a prosecution for contempt, neglecting to keep watch and ward, abusing the King's commission to the oppression of the subject, making a return to a *mandamus* of matters known to be false; and in

general any other offences against the public good, or against the first and obvious principles of justice and common honesty. 2 *Hawk. P. C. c.* 26. § 1, and the several authorities there cited; and see *Finch L.* 240. *Show.* 109.

The Court granted an Information against a person refusing to take on him the office of Sheriff; because the vacancy of the office occasioned a stop of public justice, and the year in which he was to exercise his office would expire, or nearly so, before an indictment could be brought to trial. 2 *Term Rep. K. B.* 371.

The Court will grant an Information for reproaching the office of magistracy, or defaming the character of magistrates. *Carth.* 14, 15. 1 *Wils.* 22. See 12 *Mod.* 514. For taking away a young woman from her guardian, although Chancery has committed the offender for a contempt. *Stra.* 1107. *Andr.* 310. Or from her putative father. *Stra.* 1162. For not examining evidence upon oath under a reference and a rule of court. 1 *Wils.* 7. Or for demanding a shilling by a justice to discharge his warrant, and committing the party for not paying it. 1 *Wils.* 7. For convicting a person unheard, and sending him to the house of correction. *Hard.* 124. 8 *Mod.* 45. For seducing a man to marry a pauper, in order to exonerate the parish. 1 *Wils.* 41. For endeavouring to procure the appointment of certain persons to be overseers of the poor for the private advantage of the party so endeavouring. *R.* v. *Jolliffe*, 32 *Geo.* 3. *cited* 1 *East's Rep.* 154. For seducing a woman, habituated to drinking, to make her will. 2 *Burr.* 1099. For voluntary absenting by a Justice, from sessions. *Stra.* 21. For refusing to put a statute in execution. *Stra.* 413. For bribing persons to vote at corporation elections. *Ld. Raym.* 1377. For publishing an obscene book. *Stra.* 788. For blasphemy. *Stra.* 834. For unduly discharging a debtor by judges of an inferior court. *Hard.* 135. For refusing, by the captain, to let the coroner come on board a man of war lying within the body of the county. *Andr.* 231. *Stra.* 1097. For keeping great quantities of gunpowder. *Stra.* 1167. For a Justice making order of removal, and not summoning the party. *Andr.* 238. 273. For impressing a captain as a common seaman maliciously. 1 *Black.* 19. For illegal impressing and confining a recruit. See *Stra.* 404. For speaking treasonable words, although the offender has been previously punished; *viz.* in an academical way, by the Vice Chancellor. 1 *Black.* 37. For contriving the escape of French prisoners. 1 *Black.* 286. For giving a ludicrous account of a marriage between an actress and a married man. 1 *Black.* 294. For contriving pretended conversations with a ghost, with intention to accuse another of having murdered the body of the disturbed spirit. 1 *Black.* 392. 401. For procuring a female apprentice to be assigned, though with her own consent, to another, for the purposes of prostitution. 1 *Black.* 439.

A criminal Information having been granted against the defendant, he, before the trial at the assizes, distributed hand bills in the assize town, vindicating his own conduct, and reflecting on the prosecutor's. This matter being disclosed to the Judge by affidavit, was held sufficient to put off the trial: and that affidavit being returned to the court of K. B., that court granted a further Information against the defendant from such criminal conduct; considering the affidavit taken at Nisi Prius as taken under the authority of the court. *R.* v. *Jolliffe*, 4 *Term Rep. K. B.* 285.

Information was granted against an attorney for examining persons on oath upon an arbitration, without putting the same in writing. Against one for practising as an attorney, while he was under-sheriff. 1 *Wils.* 93.—Against a gaoler for suffering one taken upon an *excom. capiend.* to go at large. 12 *Mod.* 434.—Against certain persons for that they as enemies, &c. to the government, hired a boat during a war with France, in order to go thither, intending to aid and assist the King's enemies, though they did not actually go thither, but only intended it. *Skin.* 637. *Pasch.* 8 *W.* 3. *B. R.* The *King* v. *Cooper and al'.*—Against one for building of locks in the river Thames to the obstruction of navigation. 12 *Mod.* 615.

An Information was exhibited by the Attorney-General for conspiring to destroy the King's revenue of the excise; that the defendants and others *ignot', &c. illicitè, factiosè, et seditiosè, consultaverunt et conspiraverunt ad destruend' et depauperand' fermarios excisæ prædict', &c.* and many other facts were laid in the Information tending to destroying the excise-men, depauperating them, destroying the King's revenue of excise, pulling down the excise-house, raising a tumult amongst the poor-people, &c. But the jury that were to try the issue were unwilling to find this matter, though expressly proved, fearing it might be construed no less than treason; and so would only find that such and such of the defendants *illicitè, factiosè, et seditiosè se assemblaverunt, et illicitè factiosè et seditiosè consultaverunt et conspiraverunt ad depauperand' fermarios Dom' Regis excisæ prædict', prout prædict' attornat' gen' Dom. Regis, &c. Et quoad totum aliam materiam in informatione contentam*, find them not guilty, and find J. S. not guilty of the whole. It was moved in arrest of judgment, that here is no offence found. The court unanimously concurred, that judgment ought to be given for the King, though as to the offence found there was some variety of opinion: *Twisden* held, that *vi et armis* was not necessary, and that they were found guilty of an unlawful assembly, and in that the Ld. Ch. Just. *Hyde* concurred; as also that the intention of defrauding and depriving the King of his said rent is implicitly found within the *modo et forma prout, &c.* for so shall the *machinantes*, be applied. *Twisden* and *Keeling* concurred, that for a conspiracy alone, without any prosecution, Information lay: and they all agreed that the King's revenue being concerned did highly aggravate the offence. 26 *Ass.* 44, was cited to prove, that whatever concerns the King's revenue is public; and for this reason (2 *H.* 4. 7. *pl.* 26,) it is determined that a monk by being farmer is made capable to sue. The Lord Ch. Just. cited old *Magna Charta*, where there is an article, to inquire of such as seek to diminish the King's revenue of wards and marriages, which shows it is a public treasure. Judgment was therefore given for the King. 1 *Lev.* 125. 1 *Sid.* 174. 1 *Keb.* 650. 665. 675. 682.

A Coroner having sworn the jury to inquire of the death of one supposed a *felo de se*, and finding the evidence very strong, took off some of the inquest; and though it was said, that this coroner was a weak silly man, yet *Holt* said there was no reason why an information should not be against him. 12 *Mod.* 493.

An Information was granted against one for counterfeiting and pretending himself to be bewitched by a poor woman, who was thereupon indicted for witchcraft and acquitted, and the whole discovered to be a cheat. 12 *Mod.* 556.

Information for a scandalous narrative licensed by the defendant, speaker of the House of Commons, being *Dangerfield's* narrative reflecting on a nobleman, (the E. of Peterborough): the defendant pleaded, that he did it by order of the House of Commons, and demanded judgment if this court will take conusance of it. The Attorney-General demurred, and afterwards the Defendant pleaded the common plea, *quod non vult contendere cum Domino Rege*, and was fined 10,000*l.* *Comb.* 18.

Leave was given to file an Information against the defendant by whom the plaintiff's wife was inveigled away, and who procured merchants and tradesmen to sell goods to her, in order to saddle the husband with the debt, he agreeing with the sellers to deliver the goods back again. 12 *Mod.* 154. For words spoken of a deceased King, which advance pernicious doctrines and evil tenets, and have an influence on the present government, &c. an Information lies, on which

the offender may be fined, and also corporally punished. 2 *Lord Raym.* 879. If the marshal of B. R. misdemeans himself in his office, he who is prejudiced by it may prefer an Information against him in that court, where he shall be fined and ordered to make satisfaction. *Hil.* 23 *Car. B. R.* If a person exhibits his Information only for vexation, the defendant may bring Information against the informer, upon the *stat.* 18 *Eliz. c. 5.* 2 *Bulst.* 18.

The Court will not grant an Information against a *private* person for reading a *pretended* proclamation. *Black.* 2. Nor against a husband for endeavouring to *retake* his wife contrary to articles of separation. *Black.* 18. Nor against persons who assemble with a lawful design, notwithstanding some unlawful and irregular acts ensue. *Black.* 48. Nor against Justices acting improperly in their public capacity, unless flagrant proof of corruption appears. *Stra.* 1181. *Bur.* 785. 1162. *Black.* 432. *Douglas* 589. Nor against ministers for converting brief-money. *Str.* 1130. *Black.* 443. Nor for bribing electors. *Black.* 541. Nor for a perjured intrusion to a living, upon an affidavit that it was simoniacal. *Stra.* 70. *Barnard, K. B.* 11. Nor for a libel, if it appears to be true. *Str.* 498. *Doug.* 284. 387. Nor for offences committed upon the high seas. *Stra.* 918. 2 *Keble*, 190. Nor against a dissenter for refusing the office of sheriff. *Str.* 1193. 1 *Wils.* 18. Nor against an offender, although the penalty for the offence is vested in the Crown. *Str.* 1234. Nor for *words spoken of a* justice in his public character. *Str.* 1157. Nor for attempting subornation of perjury. *Hardw.* 24. Nor for sending a challenge, if the informant had previously imparted a challenge. *Bur.* 316. 402. Nor in favour of one cheat against another cheat. *Bur.* 548. Nor on a general charge of extortion. *Str.* 999. Nor for striking a magistrate in the execution of his office, if the magistrate strike first. *Hard.* 240. Nor for an offence against a private statute. *Bur.* 385. Nor if a civil suit is depending upon the same subject. *Hardw.* 241. Nor for returning to a writ of certiorari, a conviction, in a more formal shape than first drawn up, if warranted by the facts. *R.* v. *Barker*, 1 *East's Rep.* 186. And in general the discretion of the court in granting Informations is guided by the merits of the person applying; by the time of the application; by the nature of the case; and by the consequences which may possibly result from the granting it. *Per Lord Mansfield, Black.* 542. Vide, also, *Com. Dig.* title *Information.*

III. It seems to be an established practice, not to admit the filing of an Information, (except those exhibited in the name of his Majesty's Attorney-General,) without first making a rule on the persons complained of, to show cause to the contrary; which rule is never granted but upon motion made in open court, and grounded upon affidavit of some misdemesnor, which, if true, doth either for its enormity or dangerous tendency, or other such like circumstances, seem proper for the most public prosecution; and, if the person, on whom such rule is made, having been personally served with it, do not, at the day given him for that purpose, give the court good satisfaction by affidavit, that there is no reasonable cause for the prosecution, the court generally grants the Information; and sometimes, upon special circumstances, will grant it against those who cannot be personally served with such rule; as if they purposely absent themselves, &c. 2 *Hawk. P. C. c.* 26.

If a defendant show good cause to the contrary, as that he has been indicted for the same cause, and acquitted, or that the intent is to try a civil right, which has not been yet determined, or that the complaint is trifling, or vexatious, &c. or where the motion is for an Information in the nature of a *quo warranto*, if he can show that his right hath been already determined on a *mandamus*, or that it hath been acquiesced in many years, or that it depends upon the right of his voters which hath not been tried, or that it doth not concern the public, but is wholly of a private nature, the court will not grant the Information without some particular circumstances, the judgment whereof lies in discretion. 2 *Hawk. P. C. c.* 26.

A party applying for an Information, must waive his right of action. But if the Court, on hearing the whole matter, are of opinion it is a proper subject for an action, they will give the party leave to bring it. *R.* v. *Sparrow*, 2 *Term Rep. K. B.* 198.

The Court will not grant an Information against a magistrate for having improperly convicted a person, unless the party complaining make an exculpatory affidavit denying the charge. *R.* v. *Webster*, 3 *Term Rep.* 383.

The Court of K. B. will grant a rule *Nisi, at the end of a Term*, for a criminal Information against a magistrate for malpractices, during the Term, but not for any misconduct before the Term in which the motion might have been made. *R.* v. *Smith*, 7 *Term Rep.* 80.

The *compounding of Informations* upon penal statutes is an offence, in *criminal* cases, equivalent to maintenance of barretry in civil cases; and is, besides, an additional misdemesnor against public justice, by contributing to make the law odious to the people. At once, therefore, to discourage malicious informers, and to provide that offences, when once discovered, shall be duly prosecuted, it is enacted by *stat.* 18 *Eliz. cap. 5*, that if any person informing under pretence of any penal law, make any composition without leave of the court, or take any money or promise from the defendant to excuse him, (which demonstrates his intent in commencing the prosecution to be merely to serve his own ends, and not for the public good), he shall forfeit 10*l.*, shall stand two hours on the pillory, and shall be for ever disabled to sue on any popular or penal statute. 4 *Comm.* 136.

IV. Regularly, the same certainty that is required in an Indictment, is required in an Information; but it has been held, not to be necessary to repeat the words, "gives the court here to understand, and be informed," in the beginning of every distinct clause, if the want of them may be supplied by a natural, and easy construction. See title *Indictment.* 1 *Salk.* 375. *Raym.* 34. 2 *Hawk. P. C. c.* 25.

In an Information against Roberts the ferryman over the river Mersey, which parts Anglesey from Caernarvonshire in Wales, it was moved in arrest of judgment, that the Information was too general and uncertain, because it did not allege that any particular person, or any certain number of cattle, were ferried over within the time laid in the Information; neither did it mention any particular person from whom the extorted rates were taken, which it ought to do, that the single offence might certainly appear to the court; after great deliberation, the whole court was of that opinion; and *per Holt*, Chief Justice, in every such information a single offence ought to be laid and ascertained, because every extortion from every particular person is a separate and distinct offence; therefore they ought not to be accumulated under a general charge, as in this case, because each offence requires a separate and distinct punishment, according to the quantity of the offence; and it is not possible for the court to proportion the fine or other punishment, unless it is singly and certainly laid. *Carth.* 226.

An Information upon a penal statute must be sued in one of the superior courts, and cannot be brought in any inferior court, because the King's attorney cannot be there to acknowledge or deny, as he can in a superior court. *Cro. Jac.* 538. All Informations on penal statutes, brought by an informer, where a sum certain is given to the prosecutor, must be brought in the proper county where the offence was

committed; and within a year after the same: but a party grieved, who is not a common informer, is not obliged to bring his Information in the proper county, but may inform in what county he pleases. *Stat.* 31 *Eliz. c.* 5. *Cro. Eliz.* 645.

Where an Information is given by statute, to be prosecuted at the assizes, &c. the informer, on filing his Information, must make oath before a judge, that the offence laid in the *Information* was not committed in any other county than that mentioned in the Information; and that he believes the offence was committed within a year next before the filing of the Information. *Stat.* 21 *Jac.* 1. *c.* 4. And when an Information is ordered to be filed, upon an affidavit made, the court will not suffer the prosecutor to put any more or other matter into the Information than what only is in his affidavit. *Mich.* 9 *W.* 3. *B. R.*

It has been resolved, that the *stat.* 21 *Jac.* 1. *c.* 4. restrains the jurisdiction of B. R. in actions of debt by common *informers*, and that they cannot bring debt upon the statute in that court, unless the cause of action arise in the county where the King's Bench sits; but must in other cases prosecute by Information before justices of assizes, &c. as the statute directs. 1 *Salk.* 373. *Sed qu.* as to this Doctrine, as the jurisdiction of the King's Bench extends over the greatest part of the kingdom in all cases where an action may be brought? *J. M.*

Offences created since the statute 21 *Jac.* 1. *cap.* 4. are not within that statute, to be prosecuted in the county where the fact was done; so that Informations on subsequent penal statutes are not restrained thereby. 1 *Salk.* 373.

The *stats.* 18 *Eliz. c.* 5. 21 *Jac.* 1. *c.* 4. do not extend to Informations of officers, nor on the statutes of maintenance, champerty, concerning concealments of customs, &c. nor to parties grieved, and those to whom any forfeiture is given in certain. 1 *Salk.* 373.

An Informer upon a popular statute shall never have costs, if not given by statute; but the party grieved in action on the statute shall, where a certain penalty is given. 2 *Hawk. P. C. c.* 26.

In an action *qui tam* on *stat.* 5 *Eliz. c.* 4. the plaintiff shall pay costs. Ld. *Raym.* 1333. But it seems unsettled whether an informer shall be obliged to give security for the payment of costs on account of his poverty. *Cowp.* 24. It has been refused, for the statute having given him a power to sue, it is a debt due to him; *Bull. N. P.* 197. but an informer who is gone abroad must give security, *Str.* 697. and it seems that a foreign informer must do the same. *Str.* 1206. *Vide* 1 *Wils.* 166. Also, if a prosecution is brought in a feigned name, the court will oblige the real prosecutor to give security. *Shinler* v. *Roberts*, *Easter* 12 *Geo.* 2. *C. B.* The defendant, on motion, may pay the costs and penalty into court. *Rex* v. *Walker*, *Trin.* 31 *Geo.* 2. *B. N. P.* Vide *Cowper*, 367.

If a prosecutor does not go on to trial, he shall pay costs. *Hardw.* 159. But if he gives notice of trial, and neither goes to trial, or countermands in time, unless the defendant draws him in to give notice, defendant shall pay costs. 3 *Bur.* 1304. So where a *qui tam* informer, in debt on *stat.* 21 *Hen.* 8. *c.* 13. is nonsuited, the defendant is entitled to costs. *Cowp.* 366. where 3 *Bur.* 1723. is denied to be law. But the court will not stay proceedings in a *qui tam* action, till costs in a *non pros* in a former action, by a different plaintiff against the same defendant, be paid. *Cowp.* 322. If prosecutor *qui tam*, for killing game, &c. does not reply, defendant shall have costs, for *stat.* 18 *Eliz. c.* 5. extends to informers on all penal statutes. 1 *Wils.* 177.

If an Informer dies, the Attorney-General may proceed in the Information for the King: nonsuit of an informer, is no bar against the King; and if the King's Attorney enter a *nolle prosequi*, it is not any bar *quoad* the informer. *Cro. El.* 583. 1 *Leon.* 119. If two Informations are had on the same day, they mutually abate one another: because there is no priority to attach the right of the suit in one informer, more than in the other. *Hob.* 138.

If an Information contain several offences against a statute, and be well laid as to some of them, but defective as to the rest, the informer may have judgment for such as are well laid. *Hob.* 266. After a plea pleaded to an Information for any crime, the defendant, by favour of the court, may appear by attorney; also the court may dispense with the personal appearance before plea pleaded, except in such cases where a personal appearance is required by some statute: and it is the same of Indictments for crimes under the degree of capital. *Hob.* 273.

If a defendant plead *nil debet* to an Information *qui tam*, &c. it is safest to say he owes nothing to the Informer, nor the King, which is an answer to the whole. On breach of a statute alleged from a matter *in pais*, the defendant may plead that he owes nothing, or not guilty, &c. And if there be more than one defendant, they ought to plead severally, and not jointly, not guilty: but if it be alleged from a matter of record, the record not being triable by the country, but by itself, such plea is not good. 2 *Hawk. P. C. c.* 26. § 66, &c. *Bro. Issues*, 23.

A replication to an Information on a special plea in the courts at Westminster, is to be made by the Attorney-General, and before Justices of Assise, by the Clerk of the Assise: though the replication to a general issue in an Information *qui tam* in the courts at Westminster, may be made in the name of the Attorney-General only; and in actions *qui tam*, most of the precedents are, that the replication is to be made by the plaintiff. A demurrer may be to an Information *qui tam*, without the Attorney-General. 2 *Hawk. P. C. c.* 26. § 72.

Informations are not quashed for insufficiency, like indictments; but the defendant must demur to them. 2 *Lill.* 59. Fines assessed in court by judgment on an Information, cannot afterwards be qualified or mitigated. *Cro. Car.* 251.

In the construction of *stat.* 4 & 5 *W. & M. c.* 18. (see ante, I.) it hath been holden,

1. That if process be issued on such Information before such recognizance is given as the statute directs, the same may be set aside and discharged on motion. 2 *Hawk. P. C. c.* 26.

2. That this statute extends to all Informations, except those exhibited in the name of his Majesty's Attorney-General; so that an Information in nature of a *quo warranto*, though a proper remedy to try a right, in respect of which it may not in strictness come within the words *trespasses*, &c. yet being also intended to punish a misdemeanor, and also as the proceedings therein may be as vexatious as in any other, the same is within the purview of the statute, which, being a remedial law, shall receive as large a construction as the words will bear. *Carth.* 503. 1 *Salk.* 376. *S. C.*

3. That no costs can be had on this statute on an acquittal by a trial at bar; not only because the clause that gives costs, unless the Judge certify a reasonable cause, seems only to have a view to trials at *nisi prius*, but also because a cause, which is of such consequence as to be thought proper for a trial at bar, cannot well be thought within the purview of the statute; which was chiefly designed against trifling and vexatious prosecutions. 2 *Hawk. P. C. c.* 26.

4. That if there be several defendants, and some of them acquitted, and others convicted, none of them can have costs. 1 *Salk.* 194.

5. That wherever a defendant's case is such as authorises the court to award him costs, he has a right to them *ex debito justiciæ*; for it seems a general rule, that where Judges

are empowered by statute to do a matter of justice, they ought to do it of course. 2 *Chan. Chas.* 191. 2 *Hawk. P. C. c.* 26.

By *stat.* 60 *Geo.* 3. *c.* 4. defendants are to plead to informations in the superior courts for misdemeanors within four days after their appearance, and are not to be allowed any imparlance. By the same act, in all prosecutions for misdemeanors, by the Attorney (or Solicitor) General, the Court if applied to, shall order a copy of the information (or indictment) to be delivered to the defendant free of expence. If the prosecution is not brought to trial within a year, after plea of not guilty, the Court may, on application of the defendant, and twelve days' notice to the Attorney General, make an order to authorise the defendant to bring on his trial, which he may do unless a *nolle prosequi* be entered. But this act does not extend to informations of *quo warranto*, or for repairing highways or bridges. See also title *Indictment*, I.

INFORMATION, In the Scotch law, is a written pleading ordered by the Lord Ordinary, when he takes a cause to report, to the junior house. See title *Session, Court of.*

INFORMATUS NON SUM, or more properly, *non sum informatus.* A formal answer made of course by an attorney who is authorised by his client to let judgment pass in that form against him. It is commonly used in warrants of attorney, given for the express purpose of confessing judgment.

INFORMER, *informator.*] The person who informs against, or prosecutes in any of the King's courts, those who offend against any law, or penal statute. No man may be an Informer who is disabled by any misdemeanor. *Stat.* 31 *Eliz. c.* 5. See titles *Information, Penal Actions.*

INFUGARE. To put to flight. *Leg. Canuti. c.* 32.

INFULA. Was anciently the garment of a priest, like that which we now call a cassock; sometimes it is taken for a coif.

INGE. This syllable, in the names of places, denotes meadow or pasture; and in the north, meadows are called the *Inges;* from the Saxon *ing*, i. e. *pratum.*

INGENIUM. Any instrument used in war, *arte* et ingenio *confectum;* from whence it is said we derive the word *engine.*

INGENUITAS. Liberty given to a servant by manumission. *Leg. H.* 1. *c.* 89.

INGENUITAS REGNI, *Ingenui, liberi et legales homines;* freeholders, and the commonalty of the kingdom; sometimes this title was given to the barons and lords of the King's council. *Eadmer. Hist.* 1 *Nov. fol.* 70.

INGRESS, EGRESS, AND REGRESS. Words in leases of lands, to signify a free entry into, going forth of, and returning from some part of, the lands let; as to get in a crop of corn, &c. after the term expired.

INGRESSU. A writ of entry, whereby a man seeks entry into lands or tenements; and lies in many cases, having many different forms: this writ it also called *præcipe quod reddat*, because these are formal words inserted in all writs of entry. See title *Entry.*

INGRESSUS. The relief which the heir at full age paid to the head lord, for entering upon the fee, or lands fallen by the death or forfeiture of the tenant, &c. *Blount.*

INGROSSATOR MAGNI ROTULI. See *Clerk of the Pipe.*

IN GROSS. Advowson in gross, villain in gross, &c. See *Advowson, Gross, Villain.*

INGROSSER. See *Forestaller.*

INGROSSING OF A FINE. The making of the indentures by the *Chirographer*, for delivery of them to the party to whom the fine is levied. *F. N. B.* 147. See title *Fine of Lands.*

INHABITANT. A dweller or householder in any place, as inhabitants in a vill, are the householders in the vill. 2 *Inst.* 702.

The word Inhabitants includes tenant in fee-simple, tenant for life, years, by *elegit*, &c. tenant at will, and he who has no interest but only his habitation and dwelling. 6 *Rep.* 60, *a.* He who hath a house in his hands in a town, may be said to be an Inhabitant. *Carth.* 119. Inhabitants have not capacity to take an inheritance, as in 11 *Ed.* 4. to have common. 12 *Rep.* 120. See title *Poor.*

INHERITANCE, *hæreditas.*] An estate in lands or tenements to a man and his heirs: and the word Inheritance is not only intended where a man hath lands or tenements by descent of heritage; but also every fee-simple or fee-tail, which a person hath by purchase, may be said to be an Inheritance, because his heirs may inherit it. *Lit.* § 9. And one may have Inheritance by creation; as in case of the King's grant of peerage, by letters patent, &c.

INHERITANCES; ARE CORPOREAL OR INCORPOREAL. Corporeal Inheritances relate to houses, lands, &c. which may be touched or handled; and incorporeal Inheritances are rights issuing out of, annexed to, or exercised with, corporeal Inheritances; as advowsons, tithes, annuities, offices, commons, franchises, privileges, services, &c. 1 *Inst.* 9. 49. See title *Hereditaments.*

There is also several Inheritance, which is where two or more hold lands severally; if two men have lands given to them and the heirs of their two bodies, these have a joint estate during their lives; but their heirs have several Inheritances. *Kitch.* 155. Without blood, none can inherit; therefore he who hath the whole and entire blood, shall have an Inheritance, before him who hath but part of the blood of his ancestor. 3 *Rep.* 41. The law of Inheritance prefers the first child before all others: the male before the female; and of males the first born, &c. And as to Inheritances, if a man purchases land in fee, and dies without issue, those of the blood of the father's side shall inherit, if there be any; and for want of such, the lands shall go to the heirs of the mother's side: but if it come to the son by descent from the father the heirs of the mother shall not inherit it. *Plowd.* 132. *Lit.* 4. 12. Goods and chattels cannot be turned into an Inheritance. 3 *Inst.* 19. 126. See more fully this Dict. titles *Descent, Estate.*

INHIBITION, *inhibitio.*] A writ to forbid a judge from further proceeding in a cause depending before him, being in nature of a prohibition. See *stats.* 9 *Ed.* 2. *c.* 1. 24 *Hen.* 8. *c.* 12. *F. N. B.* 39. An Inhibition is most commonly issued out of a higher court christian, to an inferior, upon an appeal. Inhibitions are likewise on the visitations of archbishops and bishops, &c. This Inhibition is either *hominis* or *juris;* It is *Ne visitationem facies, vel aliquam jurisdictionem ecclesiasticam vel contentionem voluntariam habeas:* thus when the archbishop visits, he inhibits the bishop; and when a bishop visits, he inhibits the archdeacon; this is to prevent confusion, and continues till the last parish is visited. Now after such Inhibition by an archbishop, if a lapse happens, the bishop cannot institute, because his power is suspended; but the archbishop is to do it, &c. 2 *Inst.* 601. 3 *Salk.* 201. See title *Prohibition.*

INHIBITION, [*Scotch Law.*] A process to restrain the party inhibited from disposing of his real estate, in prejudice of a debt insisted on. See *Bell's Scotch Law Dict.*

The term is also used in the Scotch law for a writ, whereby on the application of a husband, all persons are prohibited from giving credit to his wife. It is also applied to a proceeding, by the owner of tithes, against a lessee.

INHOC OR INHOKE, From *In*, within, and *hoke* a corner or nook.] Any corner or part of a common field plowed up and sowed with oats, &c. and sometimes fenced in with a

dry hedge, in that year wherein the rest of the same field lies fallow and common. It is called in the north of England an *intock*, and in Oxfordshire a *hitchen;* and no such *Inhoke* is now made without the joint consent of all the commoners, who in most places have their share by lot in the benefit of it, except in some manors, where the lord has a special privilege of so doing. *Kennett's Paroch. Antiq.* 297, &c. and his *Glossary*.

INITIALIA TESTIMONII. Before a witness in Scotland is allowed to be examined in chief, he is first examined with regard to his disposition, whether he bear ill will to either of the parties; whether he has been prompted what to say, or has received any bribe. It is in the nature of the *voire dire* in the English law. See that title.

INJUNCTION, *injunctio.*] A kind of prohibition granted by Courts of Equity in divers cases; it is generally grounded upon an interlocutory order or decree out of the court of Chancery, or Exchequer on the equity side, to stay proceedings in courts at law; and sometimes it is issued to the Spiritual Courts. *West. Synb. sect.* 25. It is likewise sometimes used to give possession to a plaintiff, for want of the defendant's appearance; and may be granted by the Chancery, or Exchequer, to quiet possession of lands.

An Injunction is usually granted for the purpose of preserving property in dispute pending a suit; as to restrain the defendant from proceeding at the common law against the plaintiff, or from committing waste, or doing any injurious act. *Mitford's Treatise on Chancery Pleadings.*

The writ of Injunction is directed to the party proceeding, and to all and singular their counsellors, attorneys, and solicitors whosoever; and concludes, *Injoining*, We command that you, and each of you, desist from all further prosecution whatever at common law, for or concerning any matters in the complaint contained, under pain, &c. See 3 *New. Abr.* 14 *Vin. Abr.* title *Injunction. Com. Dig.* title *Chancery* D. (8).

A Court of Equity will prevent the assertion of a doubtful right in a manner productive of irreparable injury. Therefore, where the tenants of a manor, claiming a right of estovers, cut down a great quantity of growing timber of great value, their title being doubtful, the court entertained a bill at the suit of the lord of the manor to restrain this assertion of it; and, indeed, the commission of waste of every kind, as the cutting of timber, pulling down of houses, ploughing of ancient pasture, working of mines, and the like, is a very frequent ground for the exercise of the jurisdiction of courts of equity, by restraining the waste till the rights of the parties are determined. The courts of equity seem to have proceeded upon a similar principle in the very common cases of persons claiming copy right of printed books, and of patentees of alleged inventions; in restraining the publication of the book at the suit of the owner of the copy, and the use of the supposed invention at the suit of the patentees. But in both these cases the bill usually seeks on account, in one of the books printed, and the other of the profits arisen from the use of the invention; and in all the cases alluded to, it is frequently, if not constantly, made a part of the prayer of the bill, that the right if disputed, and capable of trial in a court of common law, may be there tried and determined under the direction of the court of equity; the final object of the bill being a perpetual Injunction to restrain the infringement of the right claimed by the plaintiff. *Mitford's Treatise.*

A bill of interpleader generally prays an Injunction to restrain the proceedings of the claimants in some other court: and as this may be used to delay the payment of money by the plaintiff, if any is due from him, he ought by his bill to offer to pay the money into court. *Mitford's Treatise.*

In many cases, the courts of ordinary jurisdiction admit, at least for a certain time, of repeated attempts to litigate the same question. To put an end to the oppression occasioned by the abuse of this privilege, the courts of equity have assumed a jurisdiction. Thus actions of ejectment having become the usual mode of trying titles at the common law, and judgments in those actions not being in any degree conclusive, the courts of equity have interfered; and after repeated trials, and satisfactory determinations of questions, have granted perpetual Injunctions to restrain further litigation; and have thus, in some degree, imposed that restraint in personal, which is the policy of the common law in real, actions. *Bath* (E) v. *Sherwin. Leighton* v. *Leighton, Bro. P. C.* 1 *P. Wms.* 671. *Mitf.* 127. See this Dict. title *Electment.*

When a bill in chancery is filed in the office of the Six Clerks, if an Injunction be prayed therein, it may be had at various stages of the cause, according to the circumstances of the case. If the bill be to stay execution upon an oppressive judgment, and the defendant does not put in his answer within the stated time allowed by the rules of the court, an Injunction will issue of course; and when the answer comes in, the Injunction can only be continued upon a sufficient ground appearing from the answer itself. But if an Injunction be wanted to stay waste, or other injuries of an equally urgent nature, then upon the filing of the bill, and a proper case supported by *affidavits*, the court will grant an Injunction immediately, to continue till the defendant has put in his answer, and till the court shall make some further order concerning it: and when the answer comes in, whether it shall then be dissolved, or continued till the hearing of the cause, is determined by the court upon argument, drawn from considering the answer and affidavits together. 3 *Comm.* 443.

If an attorney proceeds at law, after he is served with an Injunction to stay proceedings, on affidavit made thereof, interrogatories are to be exhibited against him, to which he must answer on oath; and if it appears that he was duly served with the Injunction, and hath proceeded afterwards contrary thereto, the court of Chancery will commit the attorney to the Fleet for the contempt. 2 *Lill. Abr.* 64. But if an Injunction be granted by the Court of Chancery in a criminal matter, the court of *B. R.* may break it, and protect any that proceed in contempt of it. *Mod. Cas.* 16. But a court of law will take such notice of an Injunction, that the defendant shall have no advantage against the plaintiff for not proceeding within the time allowed by the rules of the court, if the delay was occasioned by the defendant's obtaining an injunction. 2 *Burr.* 660.

INJURY, *Injuria.*] A wrong or damage to a man's person or goods. The law punisheth Injuries; and so abhors them, that, in certain cases, it grants writs of anticipation for their prevention. But the law will suffer a private Injury rather than a public evil; and the act of God, or of the law doth Injury to none. 4 *Rep.* 124. 10 *Rep.* 148.

INLAGARE. To admit or restore to the benefit of the law. *Annal. Waverl. sub anno* 1074.

INLAGARY on INLAGATION, *Inlagatio*, from the Saxon *In lagian*, i. e. *Inlagare.*] A restitution of one outlawed, to the protection of the law, and benefit of a Subject. *Bract. lib.* 3. *tract.* 2. *c.* 14. *Leg. Canut. par.* 1. *c.* 2.

INLAGH, Inlagatus, *vel homo sub lege.*] He who was of some frank pledge, and not outlawed. It seems to be the contrary to *Utlagh. Bract. tract.* 2. *lib.* 3. *c.* 11.

INLAND. Is said to be *terra dominicalis, pars manerii dominica, terra* interior *vel inclusa;* for that which was let to tenants was called *Outland.* In an antient will there are these words; To *Wulfee* I give the Inlands or demeans, and to

*Elfey* the *utlands* or tenancy. *Testam. Britherico.* This word was in great use among the Saxons, and often occurs in *Domesday-book.* See *Inlantal.*

INLAND BILLS. See *Bills of Exchange.*

INLAND TRADE. A Trade wholly managed at home, in one country. *Merc. Dict.* It is properly used in contradistinction to *Commerce*, and so is the word Trade generally; though the words Trade and commerce are frequently confounded, especially with respect to the former being used for the latter.

INLANTAL, INLANTALE, Demesne or inland, to which was opposed *delantal*, land tenanted or outlawed. *Cowell.*

INLEACED, From Fr. *enlass.*] Intangled or insnared; the word we may read in the champion's oath. 2 *Inst.* 247.

INLEGIARE. When a delinquent has satisfied the law and is again *rectus in curiâ*, he is said *se inlegiare. Leg. Hen.* I. *cap.* 11. See *Inlagare.*

INMATES. Persons who are admitted to dwell with and in the house of another, and not able to maintain themselves, *Kitch.* 45. These Inmates are generally idle persons harboured in cottages; wherein it hath been common for several families to inhabit. by which the poor of parishes have been increased; but suffering this was made an offence by statute, 31 *Eliz. c.* 7. repealed by *stat.* 15 *Geo.* 3. *c.* 32. liable to a forfeiture of 10*s.* a month, inquirable of in the court leet, &c. If one have a house wherein he dwells, and lets part of it, so that there are several doors into the street, it is as two houses, and the under-tenant shall not be accounted an Inmate. But it is otherwise if there be but one outer door for both families, 2 *Co. Inst.* 378. A man keeps his daughter that is married, and her husband, &c. by covenant, and they have some rooms in his house, they are not Inmates; though if they live in one cottage, and part the house between them, and diet themselves severally, they will be Inmates within the statute. If a person take another to table with him; or let certain rooms to one to dwell in, if he be of ability, and not poor, he is no Inmate. *Kitch.* 45. See titles *Poor, Vagrants.*

INNAMIUM FOR NAMIUM. A pledge. *Du Cange.*

INNATURALITAS. Unnatural usage. *Hen. de Knyghton*, in *Edw.* 3. *p.* 2572.

INNINGS. Lands recovered from the sea in Romney Marsh, by draining: antient records mention the Innings of archbishops *Becket, Boniface*, and others; and at this day there is *Elderton's Innings*, &c. Where they are rendered profitable, and termed *Gainage* lands. *Law of Sewers.* 31.

INNONIA. From Sax. *innan*, i. e. *intus.*] An inclosure. *Spelm. Gloss.*

INNOTESCIMUS. The same as *videmus;* it signifies *letters patent*, so called, which are always of a charter of feoffment, or some other instrument, not of record, concluding *Innotescimus per præsentes, &c.*

INNOVATION. A technical expression in the Scotch law, implying the exchange of one obligation for another, so as to make the second come in place of the first. *Bell's Scotch Law Dict.*

As to the objection to any *Innovation* in the English Law, see 1 *Inst.* 379. In every inquiry with a view to any such Innovation, regard should be had to the nature and extent of such principles of adherence to, or deviation from, the existing state of the law, which may be most beneficially adopted by those, who are under no other influences than such as arise from the wish to preserve or promote the system of judicature and legislation, most conducive to the happiness and welfare of the community; to the discovery of a proper and middle course of procedure, avoiding equally the extreme of intemperate reform, or a servile adherence to existing institutions, in cases where a deviation would be attended with a decided benefit in the whole of its consequences and effects.

INNOXIARE. To purge one of a fault, and make him innocent. *Leg. Ethelred, c.* 10.

INNS AND INNKEEPERS. Common Inns are instituted for passengers; for the proper Latin word is *diversorium*, because he who lodgeth there is *quasi divertens se à viâ.* 8 *Rep. Cayle's case. Cowel.*

Inns were instituted for lodging and relief for travellers; and, at common law, any man might erect and keep an Inn, or alehouse, to receive travellers, but now they are to be licensed. See title *Alehouses.*

Every Inn is not an alehouse, nor every alehouse an Inn; but if an Inn uses common selling of ale, it is then also an alehouse; and if an alehouse lodges and entertains travellers, it is also an Inn. *Burn. J.*

If the keeper of an Inn harbours thieves, or persons of scandalous reputation, or suffers frequent disorders in his house; or sets up a new Inn, in a place where there is no manner of need of one, to the hindrance of other ancient and well-governed Inns, or keep it in a situation wholly unfit for such a purpose, he may by the common law be indicted and fined. *H. P. C.* 146. *Dalt.* 33, 34. 1 *Hawk. P. C. c.* 78.

Innkeepers not selling their hay, oats, beans, &c. and all kinds of victuals for man and beast, at reasonable prices, having respect to the price sold in the markets adjoining, without taking any thing for litter, they shall be fined for the first offence, and for the second be imprisoned for a month, and for the third stand on the pillory. Rates and prices may be set on all the commodities sold by Innkeepers; and if they extort any unreasonable rates, they may be indicted. 2 *Cro.* 609. *Carthew.* 150. See also *stats.* 12 *E.* 2. *c.* 6. 3 *Hen.* 8. *c.* 8. and this Dictionary, title *Victuallers.*

If any Innkeeper, alehouse-keeper, victualler, or sutler, in giving any account or reckoning in writing, or otherwise, shall refuse or deny, to give in the particular number of quarts or pints, or shall sell in measures unmarked, it shall not be lawful for him, for default of payment of such reckoning, to detain any goods, or other thing, belonging to the person or persons from whom such reckoning shall be due, but he shall be left to his action at law for the same, any custom or usage to the contrary notwithstanding. *Stats.* 11 *&* 12 *W.* 3. *c.* 15. § 2.

If one who keeps a common Inn, refuse to receive a traveller as guest into his house, or to find him victuals, or lodging, upon his tendering a reasonable price for the same; the Innkeeper is liable to render damages, in an action at the suit of the party grieved, and may also be indicted and fined at the suit of the King: it is said, he may be compelled by the constable of the town, to receive and entertain such a person as his guest; and that it is not material whether he have any sign before his door or not, if he make it his common business to entertain travellers. 1 *Hawk. P. C. c.* 78. 1 *Vent.* 329. *Dalt c.* 7.

Action on the case on an *implied assumpsit* will lie against the guests for things had, where the Innkeeper is obliged by law to furnish him with meat, drink, &c. And, when a guest calls for any thing at an Inn, the Inkeeper may justify detaining the person of the guest, or a horse, or other thing, till he is paid his just reckoning. *Dyer*, 30. *Bac. Abr.* title *Inns.* By the custom of the realm, if a man lies in an Inn one night, the Innkeeper may detain his horse until he is paid for the expences; but if he gives the party credit for that time, and lets him depart without payment, he hath waived the benefit of the custom, and must rely on his other agreement, having given credit to the person. 8 *Mod.* 172.

By the custom of London and Exeter, if a man commit a horse to an Innkeeper, and he eat out his price, the Innkeeper may take him as his own, upon the reasonable appraisement of four of his neighbours; which was, it seems, a custom arising from the abundance of traffick with strangers, that

could not be known to charge them with the action; but the Innkeeper hath no power to sell the horse by the general custom of the realm. *Bac. Abr.* title *Inns.*

A person brings his horse to an Inn, and leaves him in the stable there; the Innkeeper may keep him till the owner pay for the keeping: and, it is said, if he eat out as much as he is worth, the master of the Inn, after a reasonable appraisement, may sell the horse and pay himself. *Yelv.* 66. But if one bring several horses to an Inn, and afterwards takes them all away, but one; the Innkeeper may not sell this horse for payment of the debt for the others, but every horse is to be sold to satisfy what is due for his own meat. 1 *Bulst.* 207. 217.

If an Innkeeper receives a stage coach, and from time to time suffers the coach and horses to depart without payment, he gives credit to the owners, and cannot afterwards detain the coach and horses for what was formerly due. *Stra.* 556.

A guest in a common Inn arising in the night time, and carrying goods out of his chamber into another room, and from thence to the stable, intending to ride away with them, is guilty of felony, although there was no trespass in the taking of them; which is yet generally required in cases of felony. *Dalt. c.* 40. *Burn. J.* 1 *Hawk. P. C. c.* 33. § 18. So a guest who hath a piece of plate set before him in an Inn, may be guilty of felony in fradulently taking away the same. 1 *Hawk. P. C. c.* 33. § 6.

Inns were allowed for the benefit of travellers, who have certain privileges whilst they are in their journies, and are in a more peculiar manner protected by the law; it is for this reason that the Innkeeper shall answer for those things which are stolen within the Inn; though not delivered to him to keep, and though he was not acquainted that the guests brought the goods to the Inn; for it shall be intended to be through his negligence, or occasioned by the fault of him or his servants. 8 *Rep. Caley's case.* Soldiers billetted are guests. *Clayt.* 97.

If an attorney hires a chamber in an Inn for a whole term, the host is not chargeable with any robbery in it, because the party is, as it were, a lessee. *Mo.* 877.

If one comes to an Inn, and makes a previous contract for lodging for a set time, and doth not eat or drink there, he is no guest, but a lodger, and so not under the Innkeeper's protection; but if he eats and drinks, or pays for his diet, it is otherwise. 12 *Mod.* 255.

If any theft be committed on a guest that lodgeth in an Inn, by the servants of the Inn, or by any other persons (not the guest's servant or companion), the Innkeeper is answerable in action on the case: but if the guest be not a traveller, but one of the same town, the master of the Inn is not chargeable for his servant's theft; and if a man is robbed in a private tavern, the master is not chargeable. 8 *Rep.* 32, 33.

In this action the Innkeeper shall not answer for any thing that is out of his Inn, but only for such things as are *infra hospitium*, the words of the writ being *eorum bona et catalla infra hospitia illa existentia*, &c. But if the Innkeeper put the guest's horse to grass, without orders, and the horse is stolen, he shall make it good. 8 *Rep.* 34.

One came to an Innkeeper and requested him to take charge of goods till a future day, which the Innkeeper refused, because his house was full of parcels; the person bringing the goods then sat down in the Inn, had some liquor, and put the goods on the floor immediately behind him, when he got up the goods were missing. Held, that the Innkeeper was liable, the goods being lost during the time the plaintiff staid *as a guest. 5 Term Rep.* 273.

The Innkeeper shall not be charged, unless there shall be some default in him or his servant; for, if he that comes with the guest, or who desires to lodge with him, steal his goods, the host is not chargeable; though if an Innkeeper appoint one to lie with another, he shall answer for him. Although the guest deliver not his goods to the Innkeeper to keep, &c. if they be stolen, he shall be charged: but not where the hostler require his guest to put them in such a chamber under lock and key, if he suffers them to be in an outward court, &c. 2 *Shep. Abr.* 334.

An Innkeeper was held not to be answerable for the goods of a guest, which were lost through the guest's own negligence, out of a private room in the Inn, chosen by himself for the purpose of exhibiting goods for sale; the use of which room was granted by the Innkeeper, who at the same time told the guest that there was a key, and he might lock the door, which he neglected to do. *Burgess* v. *Clements, Trin.* 55 *Geo.* 3. 386. See further as to Inns this Dictionary, titles *Alehouses, Bailment, Drunkenness, Action, Gaming;* and 1 *Hawk. P. C. c.* 78. at length.

INNS OF COURT, *Hospitia Curiæ.*] Are so called, because the students therein, do not only study the law to enable them to practise in the Courts in Westminster, but also pursue such other studies, as may render them better qualified to serve the king in his Court. *Fortescue. c.* 49. Of these (says *Sir Edward Coke*) there are four well known *viz.* the *Inner Temple, Middle Temple, Lincoln's Inn,* and *Gray's Inn;* which, with the two *Serjeants' Inns,* and eight Inns of Chancery, *viz. Clifford's Inn, Symond's Inn, Clement's Inn, Lyon's Inn, Furnival's Inn, Staple's Inn, Bernard's Inn,* and *Thavei's Inn,* (to which is since added *New Inn,*) make the most famous university for profession of the Law, or of any one human science in the world.

Our Inns of Court, or Societies of the Law, which are famed for their production of learned men, are governed by Masters, Principals, Benchers, Stewards, and other proper officers; and the chief of them have chapels for divine service, and all of them public halls for exercises, readings, and arguments, which the students are [*were!*] obliged to perform and attend for a competent number of years, before admitted to speak at the bar, &c. The admission and forms for this purpose must be in one of the *Inns of Court,* not in the Inns of Chancery. These societies or colleges, nevertheless, are no corporation, nor have any judicial power over their members, but have certain orders among themselves, which, by consent, have the force of laws: for light offences, persons are only excommoned, or put out of commons; for greater, they lose their chambers, and are expelled; and when expelled out of one Society, shall never be received by any of the others. All the lesser Inns of Chancery are mostly inhabited by attorneys, solicitors, and clerks, and belong to some or other of the principal Inns of court, who have been used to send yearly some of their barristers to read to them. *Fortescue. Clifford's Inn, Clement's Inn,* and *Lyon's Inn* belong to *The Inner Temple; New Inn* to *The Middle Temple; Furnival's Inn* and *Thavei's Inn* to *Lincoln's Inn* and *Staple's Inn* and *Barnard's Inn* to *Gray's Inn. Dugd. Orig.* 320.

INNUENDO, From *innuo,* to nod or beckon with the head.] A word used in declarations, indictments, and other pleadings, to ascertain a person or thing which was named before; as to say, he (*innuendo,* i. e. *meaning,* the plaintiff) did so and so, when there was mention before of another person, 4 *Rep.* 17. An Innuendo is in effect no more than a *prædict'*, and cannot make that certain, which was uncertain before; and the law will not allow words to be enlarged by an Innuendo, so as to support an action on the case for speaking of them. *Hob.* 2. 6. 45. 5 *Mod.* 345. An Innuendo may not enlarge the sense of words, nor make supply, or alter the case where the words are defective. *Hut. Rep.* 44. In slander, both the person, and scandalous words ought to be certain, and not want an Innuendo to make them out: if a plaintiff declares that the defendant said these words, *Thou art a thief, and stolest a mare,* &c. (*Innuendo* the plaintiff),

without an averment that the words were spoken to the said plaintiff, this is not good; because it doth not certainly appear of whom they were spoken, and the Innuendo doth not help it. 1 *Danv. Abr.* 158. The usual method of declaring is, if the words were spoken to the plaintiff, the defendant said the words *to*, of, and concerning the plaintiff. If said to a third person, the word *to* is omitted. A man shall not be punished for perjury, by the help of an Innuendo. *5 Mod.* 344. An Innuendo will not make an action for a libel good; if the matter precedent imports not scandal, &c. to the damage of the party. *Mich. 5 Anne.* Where action lies without an Innuendo, an Innuendo shall be repugnant and void; see 1 *Danv.* 158. See titles *Indictment*, *Libel*, *Action*, *Perjury*.

INOPERATIO. Of the legal excuses to exempt a man from appearing in court, one is, *inoperationis causa*, viz. on the days in which all pleadings are to cease, or *in diebus non juridicis*. *Leg. H.* 1. *c.* 61.

INORDINATUS. One who died intestate. *Mat. Westm.* 1216.

INPENY AND OUTPENY. Money paid by the custom of some manors, on the alienations of tenants, &c. *Regist. Prior de Cokesford, p.* 25.

INPRISII. Adherents or accomplices. *Claus.* 18 *Hen.* 3. *in Brady Hist. Engl. Append. p.* 180.

INQUEST, *inquisitio.*] An inquisition of jurors, in causes civil and criminal, on proof made of the fact on either side, when it is referred to their trial, being impanelled by the sheriff for that purpose; and as they bring in their verdict, judgment passeth. *Staundf. P. C. lib.* 3. *c.* 12.

The term *Inquest* is used to signify the persons to whom the trial of any question civil or criminal is committed.

AN INQUEST OF OFFICE, or *Inquisition*, is an inquiry made by the King's officer, his sheriff, coroner, escheator, *virtute officii*, or by writ to them sent for that purpose; or by commissioners specially appointed, concerning any matter that entitles the King to the possession of lands or tenements, goods or chattels. *Finch, L.* 323, 4, 5. This is done by a jury of no determinate number, being either twelve, or less, or more. As, to inquire, whether the King's tenant for life died seised, whereby the reversion accrues to the King; whether A., who held immediately of the Crown, died without heirs, in which case the lands belong to the King by escheat; whether B. be attainted of treason, whereby his estate is forfeited to the Crown; whether C. who has purchased lands be an alien, which is another cause of forfeiture; whether D. be an idiot, *à nativitate*, and, therefore, together with his lands, appertains to the custody of the King; and other questions of like import, concerning both the circumstances of the tenant, and the value or identity of the lands. These Inquests of Office were more frequently in practice than at present during the continuance of the military tenures amongst us; when, upon the death of every one of the King's tenants, an Inquest of Office was held, called an *inquisitio post mortem*, to inquire of what lands he died seised, who was his heir, and of what age, in order to entitle the King to his marriage, wardship, relief, *primer seisin*, or other advantages, as the circumstances of the case might turn out. To superintend and regulate these inquiries the Court of wards and liveries was instituted by *stat.* 32 *Hen.* 8. *c.* 46. which was abolished at the Restoration, together with the tenures upon which it was found.

With regard to other matters, the Inquests of Office still remain in force, and are taken upon proper occasions, being extended not only to lands, but also to goods and chattels personal, as in the case of wreck, treasure-trove, and the like; and especially as to forfeitures for offences. For every jury which tries a man for treason or felony, every Coroner's Inquest that sits upon a *felo de se*, or one killed by chance medley, is, not only with regard to chattels, but also to real interests, in all respects an Inquest of Office; and if they find the treason or felony, or even the flight of the party accused, (though innocent,) the King is thereupon, by virtue on his *Office found*, entitled to have his forfeitures; and also, in the case of chance-medley, he or his grantees are entitled to such things by way of deodand, as have moved to the death of the party. See titles *Deodand*, *Forfeiture*.

Whether a criminal be a lunatick, or not, shall be tried by an Inquest of Office, returned by the sheriff of the county; and if it be found by the jury that he only feigns himself lunatick, and he refuses to plead, he shall be dealt with as one standing mute. *H. P. C.* 226. 1 *And.* 107. Where a person stands mute without making any answer, the court may take an Inquest of Office, by the oath of any twelve persons present, if he do so out of malice, from a perverse or obstinate disposition, &c. But after the issue is joined, when the jury are in court, if there be any need for such inquiry, it shall be made by them, and not by an Inquest of Office. 2 *Hawk. P. C. c.* 30. § 5. If a person attainted of felony escape, and, being retaken, denies he is the same man, Inquest is to be made of it by a jury before he is executed. 2 *Hawk. P. C. c.* 51. See 1 *Bur.* 18, 19. Inquisition on an untimely death, may be taken by Justices of gaol-delivery, oyer and terminer, or of the peace; if omitted by the Coroner. But it must be done publicly and openly, otherwise it shall be quashed. By *Magna Charta*, nothing is to be taken for Inquest of life or member. *Stat.* 9 *Hen.* 3. *c.* 26.

It is said, there are two sorts of Inquisitions, one to inform the King, the other to vest an interest in him; the one need not be certain, but the other must; and where an Inquisition finds some parts well, and nothing as to others, it may be helped by *melius inquirendum*. 2 *Salk.* 469.

There is also a judicial writ *ad inquirendum*, to inquire by a jury into any thing touching a cause depending in court; Inquisition may also be had upon extents of land, writs of *elegit*, where judgment is had by default, and damages and costs are recovered, &c. *Finch*, 484. 2 *Lil. Abr.* 65.

These *Inquests of Office* were devised by law, as an authentic means to give the King his right by solemn matter of record; without which he in general can neither take, nor part with any thing. *Finch. L.* 82. For it is a part of the liberties of England, and greatly for the safety of the subject, that the King may not enter upon or seise any man's possessions upon bare surmises without the intervention of a jury. *Gilb. Hist. Exch.* 132. *Hob.* 347. It is however particularly enacted by *stat.* 33 *Hen.* 8. *c.* 20. that, in case of attainder for high treason, the King shall have the forfeiture instantly without any Inquisition of Office. And, as the King hath in (in general) no title at all to any property of this sort before office found; therefore, by *stat.* 18 *Hen.* 6. *c.* 6. it was enacted, that all letters patent or grants of lands and tenements before office found or returned into the Exchequer, shall be void. And by the Bill of Rights at the Revolution, 1 *W. & M. stat.* 2. *c.* 2. it is declared, that all grants and promises of fines and forfeitures of particular persons before conviction (which is here the Inquest of Office,) are illegal and void: which indeed was the law of the land in the reign of Edward the Third. 2 *Inst.* 48. See title *Forfeiture*.

With regard to real property, if an office be found for the King, it puts him in immediate possession, without the trouble of a formal entry, provided the Subject in the like case would have had a right to enter; and the King shall receive all the mesne or intermediate profits from the time that his title accrued. *Finch. L.* 325, 326. As, on the other hand, by the *articuli super cartas*, 28 *Ed.* 1. *st.* 3. *c.* 19. if the King's escheater or sheriff seize lands into the King's hand, without cause, upon taking them out of the King's hand again, the party shall have the mesne profits restored to him.

There is not such nicety required in an Inquisition as in pleading; because an Inquisition is only to inform the court how process shall issue for the King, whose title accrues by the attainder, and not by the Inquisition; yet, in the cases of the King and a common person, Inquisitions have been held void for incertainty. *Lane*, 39. 2 *Nels. Abr.* 1008.

In order to avoid the possession of the Crown acquired by the finding of such office, the subject may not only have his *petition of right*, which discloses new facts not found by the office, and his *monstrans de droit*, which relies on the facts as found; but also he may (for the most part) traverse or deny the matter of fact itself, and put it in a course of trial by the common law process of the Court of Chancery; yet still, in some special cases, he hath no remedy left but a mere petition of right. *Finch, L.* 324. These *traverses*, as well as the *monstrans de droit*, were greatly enlarged and regulated for the benefit of the subject, by the statutes before-mentioned, and other *stats.* 34 *Ed.* 3. *c.* 13. 36 *Ed.* 4. *c.* 13. 2 & 3 *Ed.* 6. *c.* 8. And in the traverses thus given by statute, which came in the place of the old petition of right, the party traversing is considered as the plaintiff. *Law of Nisi Prius*, 201, 202. and must therefore make out his own title, as well as impeach that of the crown, and then shall have judgment *quod manus Domini Regis amoveantur*, &c. 3 *Comm.* 258. 260.

Some of these Inquisitions are in themselves convictions, and cannot afterwards be traversed or denied; and therefore the Inquest or Jury ought to hear all that can be alleged on both sides. Of this nature are all Inquisitions of *felo de se*; of flight in persons accused of felony; of deodands, and the like; and presentments of petty offences in the sheriff's tourn or court leet, whereupon the presiding officer may set a fine. Other Inquisitions may be afterwards traversed and examined; as particularly the Coroner's Inquisition of the death of a man, when it finds any one guilty of homicide; for in such cases the offender so presented must be arraigned upon this Inquisition, and may dispute the truth of it, which brings it to a kind of indictment, the most usual and effectual means of prosecution. 4 *Comm.* 301.

INQUIRENDO. An authority given in general to some person or persons, to inquire into something for the King's advantage. *Reg.* 72.

INQUIRY, WRIT OF. See *Writ*, title *Judgment*, I.

INQUISITION. See title *Inquest*.

INQUISITION, *Ex officio mero*. Is one way of proceeding in Ecclesiastical Courts. *Wood's Inst.* 596. And formerly the oath *ex officio* was a sort of Inquisition.

INQUISITORS, *inquisitores*.] Sheriffs, Coroners, *super visum corporis*, or the like, who have power to inquire in certain cases, and by the statute of *Westm.* 1. inquirors or Inquisitors are included under the name of *Ministri*. 2 *Inst.* 211.

INROLLMENT, *Irrotulatio*.] The registering or entering in the rolls of the Chancery, King's Bench, Common Pleas, or Exchequer, or by the Clerk of the Peace in the records of the Quarter Sessions, of any lawful act; as a statute or recognizance acknowledged, a deed of bargain and sale of lands, &c.

Inrollment is ordained in divers cases by statute; of bargains and sales by *stat.* 27 *H.* 8. *c.* 16.—Deeds in corporations, &c. *stat.* 34 & 35 *H.* 8. *c.* 22. Grants from the Crown of felon's goods, &c. *stat.* 4 & 5 *W. & M. c.* 22. Of deeds and wills made of lands of Papists. See title *Papists*. As to the general registry of Conveyances in Yorkshire and Middlesex, see title *Registry of Deeds*.

By *stat.* 27 *H.* 8. *c.* 16. No manors, lands, &c. shall pass from one to another whereby any estate of inheritance or freehold, shall be made or take effect by reason only of any bargain and sale thereof, unless such bargain and sale be made by deed, indented, and inrolled within 6 months after the date in one of the Courts of Record at Westminster, or with the Clerk of the Peace in the county where the lands lie. By 5 *Eliz. c.* 26. this act is extended to counties palatine.

By *stat.* 10 *Ann. c.* 18. where a bargain and sale inrolled shall be pleaded with a profert, a Copy of the Inrollment signed by the proper officer, and proved on oath to be a true copy, shall be of the same force as the deed itself.

An Inrollment of a deed, may be either by the common-law, or according to the statute: and Inrollment of deeds ought to be made in parchment, and recorded in court, for perpetuity's sake. *Trin.* 23 *Car. Pasch.* 24 *Car.* 1 *B. R.* But the inrolling a deed doth not make it a record, though it thereby becomes a deed recorded: for there is a difference between matter of record, and a thing recorded to be kept in memory; a record being the entry in parchment of judicial matters controverted in a court of record, and whereof the court takes notice; whereas an Inrollment of a deed is a private act of the parties, concerned of which the court takes no cognizance at the time of doing it, although the court permits it. 2 *Lil. Abr.* 69.

Every deed before it is enrolled, is to be acknowledged to be the deed of the party before a Master of the Court of Chancery, or a judge of the court, wherein inrolled; which is the officer's warrant for inrolling of the same; and the inrollment of a deed, if it be acknowledged by the grantor, will be good proof of the deed itself upon a trial. A deed may be inrolled without the examination of the party himself; for it is sufficient if oath is made of the execution. If two are parties, and the deed is acknowledged by one, the other is bound by it: and if a man lives in New York, &c. and would pass land in England a nominal person may be joined with him in the deed, who may acknowledge it here, and it will be binding. 1 *Salk.* 389.

If the party dies before it is inrolled, it may be inrolled afterwards; and Inrollments of deeds operate by virtue of the statute of Inrollments; but if livery and seisin, &c. be had before the inrolling, it prevents the operation of the Inrollment, and the party shall be in by that, as the more worthy ceremony to pass estates. 1 *Leon.* 5. 2 *Nels. Abr.* 1010. Although Inrollment, or matter of record, shall not be tried *per pais*, yet the time, when the Inrollment of a deed was made, shall. 2 *Lil.* 68.

An indorsement on the back of the deed by the proper officer is sufficient evidence of the Inrollment. *Doug.* 56. 58.

INSCRIPTIONES. Written instruments by which any thing was granted. *Blount.*

INSPECTATOR. A prosecutor or adversary at law. *Paroch. Antiq.* 388.

INSERVIRE. To reduce persons to servitude. *Du Cange.*

INSETENA, *Sax.*] An inditch. *Ordin. Romn. Maris. p.* 72.

INSISIDIÆ. The same with *Vigiliæ* or *Excubiæ*. *Fleta, lib.* 2. *cap.* 4. *par.* 3.

INSIDIATORES VIARUM. Way-layers; which words are not to be put in indictments, appeals, &c. by *stat.* 4 *H.* 4. *c.* 2. And before this statute, clergy might be denied felons charged generally as *Insidiatores Viarum*, &c. See *stat.* 23 *Car.* 2. *c.* 1. and title *Clergy, Benefit of.*

INSIGNIA. Ensigns or arms. See *Arms* and *Gentility*.

INSILIUM. Evil advice or council. Hence, *Insiliarius*, an evil counsellor. *Sim. Dunelm.*

INSIMUL COMPUTASSET. Is a writ or action of account, which lies not for things certain, but only for things uncertain. *Bro. Acco.* 81. Also, in *assumpsit*, a count is often added to the declaration, called an *Insimul computasset*, i. e. setting forth an *account stated*, wherein the defendant was found indebted to the plaintiff in so much as a consideration for the defendant's promise to pay the sum found in arrear. See this Dict. titles *Actions*, *Pleading*, *Assumpsit*.

INSIMUL TENUIT. One species of the writ of *formedon* brought against a stranger by a coparcener on the possession of the ancestor, &c. See *Formedon.*

INSINUATION, *insinuatio.*] A creeping into a man's mind or favour covertly; mentioned in the *stat.* 21 *H.* 8. *c.* 5. Insinuation of a Will, is, among the civilians, the first production of it; or leaving it in the hands of the Registrar, in order to its probate.

INSOLVENT. Till of late the Chancery would not put out an insolvent trustee; for that he was entrusted by the donor; an insolvent person made executor cannot be put out by the Ordinary; for he is intrusted by the testator. *Comb.* 185. *Carth.* 457. But Chancery granted an injunction against him, not to intermeddle with the assets, any further than to satisfy the legacy given to himself; for in equity he is but a trustee for the other legatees; (who in this case were infants;) and where a trustee is insolvent, the Court of Chancery will compel him to give security before he shall enter upon the trust. *Carth.* 458. See titles *Chancery, Trustees, Bankrupt, Executor.*

INSOLVENT DEBTORS.—Many acts have been from time to time made for the relief of these; the last before these leaves went through the press were *stats.* 53 *Geo.* 3. *c.* 102. amended by 54 *Geo.* 3. *c.* 23. and 56 *Geo.* 3. *c.* 102. and continued for a short time by 59 *Geo.* 3. *c.* 129. for England. Similar acts for Ireland were continued by 59 *Geo.* 3. *c.* 130.—It seems to be pretty universally agreed that the extensive provisions of such acts in favour of Insolvent Debtors were prejudicial to the interests of Creditors; and that more cautious legislative measures would be adopted in future. As to the act 32 *Geo.* 2. *c.* 28. usually called the Lords' Act, See title *Debtors;* and further title *Execution.*

INSPECTION. See *Age, Infancy, Trial.*

Trial by Inspection, or examination, is, when for the greater expedition of a cause, in some point or issue, being either the principal question, or arising collaterally out of it, but being evidently the object of sense, the Judges of the court, upon the testimony of their own senses, decide the point in dispute. See 3 *Comm.* 331.

INEXPEXIMUS, *We have inspected.* A word used in letters patent giving name to them, being the same with exemplification, and called *inspeximus*, because it begins, *Rex omnibus*, &c. *Inspeximus irrotulamentum quarand', literar', patent'*, &c. See *Patents.*

INSTALLMENT. A settlement, establishing, or sure placing in; as Installment into dignities, &c, see *stat.* 20 *Car.* 2. *c.* 2.

In ecclesiastical promotions, where the freehold passes to the persons promoted, corporal possession is required, to vest the property completely in the new proprietor; who, according to the distinction of the Canonists, acquires the *jus ad rem*, or inchoate and imperfect right, by nomination and institution; but not the *jus in re*, or complete and full right, unless by corporal possession. Therefore in dignities possession is given by Installment; in rectories and vicarages by induction, without which no temporal rights accrue to the minister, though every ecclesiastical power is vested in him by institution. 2 *Com.* 312.

Installment signifies also either the payment, or the time appointed for payment, of different portions of a sum of money; which, by agreement of the parties, instead of being payable in the gross, at one time, is to be paid in parts, at certain stated times; such as are frequently specified in conditions to bonds, &c. or defeasances, or warrants of attorney to confess judgments.

INSTANCE. Is that which may be insisted in at one diet or course of probation. *Scotch Dict.*

INSTANCE COURT of Admiralty. See title *Admiralty.*

INSTANT, Lat. *instans, instanter.*] An indivisible moment of time; which, though it cannot be actually divided, yet in intendment of law it may, and be applied to several purposes: he who lays violent hands upon himself commits no felony till he is dead, and when dead he is not in being so as to be termed a felon; but he is so adjudged in law, *eo instante*, at the very Instant of this fact done. See title *Forfeiture.* And there are many other like cases where the Instant of time that is not divisible in nature, in the consideration of the mind is divided. *Plowd.* 258, *b.* and vide *Co. Lit.* 185, *b. Vin. Abr.* title *Instant. A. pl.* 2.

An Instant is not to be considered in law, as in logick, as a point of time, and no parcel of time; but in our law, things which are to be done in an Instant, have in consideration of law a priority of time in them. Vide *Co. Lit.* and *Plowd.* as cited before. And in several cases, a difference is allowed in our law in an Instant, as *per mortem et post mortem*, &c. See *Show.* 415.

INSTANTER, *Lat.*] Instantly or presently. *Law Lat. Dict.*

Trial shall be had *instanter* where a prisoner between attainder and execution, pleads that he is not the same that was attainted. In such a case a jury is to be impannelled to try this collateral issue, *viz.* the identity of his person, and in such collateral issue, the trial shall be *instanter.* See *Staundf. P. C.* 163. *Co. Lit.* 157. 3 *Burr.* 1809—1812. where an issue on the identity of the person was joined, and the several points following were determined. First, it is to be tried *instanter*, unless the court (upon circumstances) give time, 2dly. The award of the execution is to be by the second judge, if the sentence before pronounced was for felony, 3dly. The defendant is not entitled to a copy of the record 4thly. The court will not name the day of execution, but leave it to the sheriff. See also this Dictionary, title *Execution of Criminals, Inquisition.*

INSTAURUM. Is used in ancient deeds for a stock of cattle; *Staurum* and *instauramentum* signify young beasts, store or breed. *Mon. Angl. tom.* 1. *p.* 548. *Instaurum* was commonly taken for the whole stock upon a farm, as cattle, waggons, ploughs, and all other implements of husbandry. *Fleta, lib.* 2. *cap.* 72. *Instaurum ecclesiæ* is applied to the books, vestments, and all other utensils belonging to a church. *Synod. Exet. ann.* 1287.

INSTIRPARE. To plant or establish. *Brompt.* 935.

INSTITOR. A person in the Roman law to whom the immediate management of any manufactory, ship, or undertaking was committed. A mercantile *Consignee* or *Factor* is in this sense an *Institor.*

INSTITUTE. The Scotch term for the person to whom an Estate is first given by destination or limitation.

Certain works of Lord Chief Justice Coke are cited as the first, second, and third *Institute.* See title *Law Books.*

INSTITUTION, *Institutio.*] Is when the bishop says to a clerk who is presented to a church living, *Instituo te rectorem talis ecclesiæ, cum curâ animarum, et accipe curam tuam et meam:* or it is a Faculty made by the Ordinary, whereby a Parson is approved to be inducted to a rectory or parsonage. If the bishop upon examination finds the Clerk presented capable of the benefice, he admits and institutes him; and Institution may be granted either by the bishop under his episcopal seal; or it may be done by the bishop's vicar general, chancellor or commissary: and if granted by the vicar-general, or any other substitute, their acts are taken to be the acts of the bishop: also the instrument or letters testimonial of Institution may be granted by the bishop, though he is not in his diocese; to which some witnesses should subscribe their names. 1 *Inst.* 344. The bishop by Institution transfers the cure of souls to the clerk; and if he refuseth to grant Institution, the party may have his remedy in the court of audience of the archbishop, by *duplex querela*, &c. for In-

stitution is properly cognizable in the Ecclesiastical Court: where Institution is granted, and suspected to be void for want of title in the patron, &c. a superinstitution hath been sometimes granted to another, to try the title of the present incumbent by ejectment. 2 *Rol. Abr.* 220. 4 *Rep.* 79.

Taking a reward for Institution incurs a forfeiture of double value of one year's profit of the benefice, and makes the living void. *Stat.* 31 *Eliz. c.* 6. On Institution the clerk hath a right to enter on the parsonage house and glebe, and take the tithes; but he cannot grant, let, or do any act to charge them, till he is inducted into the living: he is complete parson as to the spiritualty, by Institution; but not as to the temporalty, &c. By the Institution he is only admitted *ad officium*, to pray and preach; and is not entitled *ad beneficium*, until formal induction. *Plowd.* 528. See *Installment.* The church is full by Institution against all common persons, so that if another person be afterwards inducted, it is void, and he hath but a mere possession; but a church is not full against the King till induction. 2 *Inst.* 358. 1 *Rol. Rep.* 151. When a bishop hath given Institution to a clerk, he issues his mandate for induction; and if the archbishop should inhibit the archdeacon to induct the clerk thus instituted, he may do it notwithstanding. The first beginning of institutions to benefices was in a national synod held at Westminster, *anno* 1124. For patrons did originally fill all churches by collation and livery; till this power was taken from them by canons. *Seldon's Hist. of Tithes, c.* 6 & 9. *p.* 375. See further titles *Parson, Advowson, Simony,* &c.

INSTRUMENT. A term used for a deed, writ, or other legal proceeding or matter reduced to writing.

INSUCKEN MULTURES. Is the quantity of corn paid by those who are thirled to a mill. *Scotch Dict.* See title *Thirlage.*

INSUPER. Is used by auditors in their accounts in the Exchequer; as when so much is charged upon a person as due on his account, they say so much remains *insuper* to such an accountant. See titles *Accounts, Public.*

## INSURANCE OR ASSURANCE.

A CONTRACT, by which a person, (who thence is termed the INSURER, or, from the form of the instrument, which is signed by him alone, the UNDERWRITER,) in consideration of a sum of money, technically called the PREMIUM, becomes bound to secure a party against the risk of loss happening from certain events marked out by the contract. The party deriving security from the contract is called the INSURED, or more commonly ASSURED: and the contract itself is termed a POLICY OF INSURANCE.

It has been conceived, from a passage in Suetonius, that Claudius Cæsar was the first who invented this custom of Assurance; but with greater probability, Savary, in his *Dictionaire de Commerce*, title *Assurance*, thinks this custom was first introduced by the Jews in the year 1182; but whoever was the first contriver, or original inventor of this useful branch of business, it has been many ages practised in this kingdom, and is supposed to have been introduced here by some Italians from Lombardy, who at the same time came to settle at Antwerp, and among us; and this being prior to the building of the Royal Exchange, they used to meet in a place where Lombard-street now is, at a house they had called the Pawn House, or Lombard, for transacting business; and as they were then the sole negotiators in Insurance, the policies made by others in after-times had a clause inserted, that those latter ones should have as much force and effect as those formerly made in Lombard-street.

This latter opinion is adopted by *Mr. Park*, (now *Mr. Justice Park*) in his "System of the Law of Marine Insurances, &c." a book long wanted by the profession, and containing information the most necessary to the commercial part of the community. It is founded almost solely on the decisions of the late venerable *Chief Justice Mansfield*; a name that will ever be inestimably dear to all lovers of *Equity*, and to none more than to the merchants of London.

From this excellent Digest of the Law on this subject, the following abridgment was compiled; and is now continued by reference to such modern determinations as appear to ascertain any principle of the law, without entering too minutely into such nice distinctions as depend on the complicated facts of particular cases. Other valuable compilations have appeared on this subject.

Varying a little from the order in which the respected writer has disposed his matter, the subject may for the present purpose be aptly arranged as follows:

I. *Of* MARINE INSURANCES. First, considering,

1. *The* POLICY, *its Nature.*
2. *The Construction to be put upon it.*
3. *Warranties in Policies.*
4. *The Proceedings on Policies.*
5. *Of Re-assurances and Double Insurances.*

II. *Of* LOSSES *under such Policies.*

1. *Of total Losses, by Peril of the Sea.*
2. ——— *by Capture.*
3. *Detention.*
4. *Barratry.*
5. *Of general or gross Average; Average or partial Loss; and Adjustment and Stranding.*
6. *Of Salvage.*
7. *Of Abandonment.*

III. *Of* FRAUD, ILLEGALITY, *or* IRREGULARITY, *which either vitiate the Policy, or prevent a Recovery though a Loss happen.*

1. *Of direct Fraud in Policies.*
2. *Of changing the Ship.*
3. *Deviation in the Voyage.*
4. *Sea-worthiness.*
5. *Of Wager Policies and Valued Policies: and of Insurable Interests.*
6. *Of illegal Voyages, and Enemies' Ships, &c.*
7. *Of prohibited Goods.*
8. *Of the Return of Premium; in Cases of void or fraudulent Policies.*

IV. *Of* BOTTOMRY *and* RESPONDENTIA.

V. *Of* INSURANCES *on* LIVES.

VI. *Of* INSURANCES *against* FIRE.

Previous to entering into this detail, it may be proper to say a few words as to who may be Insurers or Underwriters; and what property may in general be insured.

At common law, and by the usage of merchants, any person whatever might be an Insurer: but this having led to dangerous confidence on the one hand, and unprincipled fraud on the other, the *stat.* 6 *Geo.* 1. *c.* 18. was passed, authorising his Majesty to grant charters to the *Royal Exchange Assurance Company*, and the *London Assurance Company*; and which statute prohibited any other Society or *Partnership* from underwriting policies of Insurance. Policies therefore are now either underwritten by those Companies, or individual underwriters; a policy subscribed by any Society or Partnership, being absolutely void. *Park*, 5, 9.

A Company of ship owners engaged to insure each other's ships, and covenanted *severally*, and not jointly, to pay a certain sum in case of loss, in proportion to their respective shares, but in case of the insolvency of any one of the members, all the others were to be responsible; held, that this contract was void by the *stat.* 6 *G.* 1. *c.* 18. § 12. *Lees* v. *Smith*, 7 *Term Rep.* 338.

If the credit of any Company (except the *Royal Exchange Assurance Company* and the *London Assurance Company*) be in any event pledged in a contract of Insurance, the contract is void by that statute. 7 *Term Rep.* 341.

As to the objections to the policy of this act, which in fact insures a monopoly to those companies to a certain extent, and the decisions, some of them contradictory, on the construction of the act, See *Evans's Collection of Statutes*, *Part* III. *Class* III. *nu.* 3., and the notes and observations there.

The most frequent subjects of Insurance are, 1st, Ships, goods, merchandizes; the freight or hire of ships. 2d. Houses, warehouses, and the goods in them from danger *by fire*. And 3d, Lives. (Of the two latter, see *post*, V. VI.) *Bottomry* and *Respondentia* are also particular species of property which may be insured; but which must be particularly expressed in the policy. 3 *Burr.* 1394. 1 *Black. Rep.* 405. unless by the usage of the trade it is understood. *Park*, 11. See *post*, IV. And the lien of a factor upon goods is included in the term *goods*. 1 *Burr.* 489. Insurance on seamen's wages is prohibited. *Park*, 12. A governor of a fort may insure it against the attacks of an enemy. 3 *Burr.* 1905. Insurance on enemies' property is prohibited by *stat.* 33 *Geo.* 3. *c.* 27. § 4. See *post*, III. 5. 7.

A trustee or consignee may insure in their own names, &c. while the ships, &c. are in *transitu* to this country. *Crawford* v. *Hunter*, 8 *Term Rep.* 13. So may a prize agent. *Ib.* So may the captors of a ship seized as prize. *Boem* v. *Bell*, *Ib.* 154. See *post*, III. 5.

All Insurances on Slaves, or relating to the Slave-trade, are declared void by *stat.* 47 *Geo.* 3. *st.* 1. *c.* 36. and by *stat.* 51 *Geo.* 3. *c.* 23, every Insurer underwriting a policy for that purpose, is declared guilty of a misdemeanor. See title *Slaves*.

I. 1. Of Policies there are two kinds, *valued* and *open*; the difference is, that, in the former, property insured is valued at prime cost at the time of effecting the policy; in the latter, the value is not mentioned. In the case of an open policy, the real value must be proved; in the other, it is *agreed*, and it is just as if the parties had admitted it at the trial. 2 *Burr.* 1117.

They are only simple contracts, but of great credit, and ought not to be altered when once they are signed; unless there be some written document to shew that the meaning of the parties was mistaken, or unless they be altered by *consent*. 1 *Vez.* 317. 1 *Atk.* 545. *Salk.* 444.

A Policy is a species of property for which *trover* will lie at the instance of the Insured, if it be wrongfully withheld from him. *Park*, 4.

The form of the policy now used, is two hundred years old, and is very irregular and confused, and often ambiguous. It is partly printed, to serve for general purposes common to all policies, and partly written, for the purpose of inserting the names of the parties, and to express their meaning; and the written clauses shall accordingly control the printed words. See 3 *Burr.* 1555. *Park*, 5. 15.

There are *nine* requisites of a policy. *First*, the name of the person Insured. It was formerly much the practice to effect policies of Insurance *in blank* without naming the persons on whose account they were made; this was found both mischievous and inconvenient: to remedy which, the *stat.* 25 *Geo.* 3. *c.* 44. directed the name of *all* persons interested, or if they resided abroad, the name of their agents in this kingdom to be inserted in the policy. The provisions of this act however, not being without their attendant evils, (see 1 *Term. Rep.* 313. 464.) it was repealed by *stat.* 28 *Geo.* 3. *c.* 56. which enacts, that it shall not be lawful for any person to make Assurance on ships or goods, without inserting the name or firm of *one* or more of the parties interested; *or* the name or firm of the consignor or consignee; *or*, of the person receiving the order for, or effecting, the policy; *or*, of the person giving directions to effect the same. All policies without one or other of these requisites to be null and void.

For the occasion and reason of passing these acts, see the observations of Buller, J. in *Wolfe* v. *Horncastle*, 1 *Bos. & Pull.* 316. *Bell* v. *Gibson*, *id.* 345. And further, as to the construction of the act, 28 *Geo.* 3. *c.* 56, see *Bell* v. *Johnson*, 1 *Maul. & Selw.* 201. *Hagedon* v. *Oliverson*, 2 *Maul. & Selw.* 485. See also *Mellish* v. *Bell*, 15 *East's Rep.* 4.

*Secondly*, The names of the ship and master; unless the Insurance be general, on any ship or ships. *Park*, 19.

*Thirdly*, Whether the Insurance be made on ships, goods, or merchandizes. We may here observe, that a policy *on goods* generally does not include goods lashed on deck, the captain's clothes, or the ship's provisions. *Park*, 21. But a policy on the ship and furniture includes provisions sent out in a ship for the use of the crew. 4 *Term. Rep.* 206. See *post*, II. 1. 5.

*Fourthly*, The name of the place at which the goods are laden, and to which they are bound. A policy, therefore, from London to ——— is void. *Moll. b*, 2. *c.* 7. § 14. It is also usual to state at what ports or places the ship may touch or stay; to avoid questions on deviation. *Park*, 22.

*Fifthly*, The time when the risk commences, and when it ends. On the goods it usually begins from the lading on board the ship, and continues till they are safely landed; on the ship, from her beginning to lade at A, and continues till she arrive at the port of destination, and be there moored in safety twenty-four hours. See *post* II.

*Sixthly*, The various perils against which the Underwriters insures. The words now used in policies are so comprehensive, that there is scarcely any event unprovided for. The Insurer undertakes to bear "all perils of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of Kings, Princes, and People of what nation, condition, or quality soever, barratry of the master and mariners; *and all other perils*, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandizes, and ship, or any part thereof."

The policy is frequently made with the words *lost or not lost* in it; which are peculiar to English policies, and add greatly to the risk: as though the ship be lost at the time of the Insurance made, the Underwriter is liable, if there be no fraud. *Park*, 24. See 5 *Burr.* 2083.

*Seventhly*, The *Premium* or consideration for the risk, which is always expressed in the policy to be received at the time of underwriting; but policies in general are effected by the intervention of a broker, between whom and the Insurers open accounts are kept by the usage of trade; and who are therefore, it seems, liable, in an action, to the Insurers, notwithstanding such admission by the words of the policy. *Park*, 26. But see *Edgar and another*, *Assignees of Carden*, *a Bankrupt*, v. *Fowler*, 3 *East.* 222.

*Eighthly*, The day, month, and year on which the policy was executed.

*Ninthly*, The policy must be duly stamped, *viz.* on a policy for 1000*l.* and under, with a 6*s.* stamp, and above that sum with a stamp of 11*s.* See 35 *Geo.* 3. *c.* 63. § 1 to 16. and 44 *Geo.* 3. *c.* 98, increasing stamp duty on *Policies*,

Where application was made to the Underwriters for liberty for a ship to go into port, to discharge part of her cargo, having being overladen, and leave was given, and a loss ensued: held, that the *Memorandum* giving such liberty, did not require a *new stamp*. *Weir* v. *Aberdeen*, *Term. Rep. K. B. H.* 59 *Geo.* 3. 320.

So where several Underwriters on the same policy all agree to refer the demand of the assured on that policy, one *stamp* for the agreement to refer, and one *stamp* for the award are sufficient; for the several Underwriters have a community of interest in the subject insured. *Goodson* v. *Forbes*, 6 *W. P. Taunton*, 171.

By *stat.* 11 *Geo.* 1. *c.* 30. When an insurance is made, a policy must be made out within three days under a penalty of 100*l.*; and by the same statute, promissory notes for Insurances are void.

It is stated above, that policies are generally effected by the intervention of a Broker, and that the name of the agent of an Insurer residing abroad must be mentioned in the policy. It seems, therefore, the proper place here to mention, that such agent or correspondent is liable to an action *for not insuring*, which is to be tried on the same principles as an action on a policy; and the defendant is entitled to every benefit of which the Underwriter might take advantage. The whole law on this subject is laid down in *Smith* v. *Lascelles*, where Buller, J. mentioned three instances in which such order to insure must be obeyed. 1. Where a merchant abroad has effects in the hands of his correspondent here. 2. Where, though the merchant has no effects in the hands of his correspondent, yet the course of dealing has been such, that the one has been used to send orders for Insurance, and the other to comply with them. 3. If the merchant abroad send bills of lading to his correspondents here, and ingrafts on them an order to insure, as the implied condition on which the bills of lading shall be accepted. 2 *Term Rep.* 187. and *note*.

2. A Policy being considered as a simple contract of indemnity, must always be construed, as nearly as possible, according to the intention of the contracting parties, and not according to the strict meaning of the words. And, in questions on such construction, no rule has been more frequently followed, than the usage of trade, with respect to the voyage insured. 1 *Burr.* 347, 348. See also 2 *Salk.* 443. 445. 2 *Str.* 1265, and *post*, III. 3.

A policy on a ship generally from A. to B. was construed to mean till the ship was unladen. *Skinn.* 243. But if it contain the usual words *till moored twenty-four hours in safety*, the Insurers shall be answerable for no loss, that does not actually happen before the expiration of the time. Even though the loss was occasioned by an act (of barratry by the master) committed during the voyage insured. 1 *Term Rep.* 232.

Under a policy containing those words, the Underwriters were held liable for a subsequent loss; because the Captain, the very day on which the ship arrived at her moorings, was served with an order from government to return in order to perform quarantine; and therefore the ship could not be said to have moored *twenty-four hours in safety*, although she did not go back for some days. 2 *Str.* 1243.

In a policy upon freight, if an accident prevent the ship from sailing, the Insured cannot recover the freight, which he would have earned if she had completed her voyage. 2 *Str.* 1251. But if the policy be a valued policy, and part of the cargo be on board, when such accident happens, the Insured may recover to the whole amount. 3 *Term Rep.* 362.

When an Insurance is *at and from* any place, the ship is protected, from her first arrival during her preparation for the voyage; but if all thoughts of the voyage be laid aside, the Insurer is discharged. 1 *Atk.* 548. 2 *Atk.* 359. and see 1 *Black. Rep.* 417, 418.

The great and leading cases on questions of construction are two, *Tiernay* v. *Etherington*, and *Pelly* v. *Royal Exchange Company*. See 1 *Burr.* 341. 348. In these cases, the principles to be observed in the construction of policies, are fully considered; and in the latter of them Lord Mansfield observed, that "the Insurer, at the time of underwriting has under his consideration the nature of the voyage, and the usual manner of doing it; and what is usually done by such a ship, with such a cargo, in such a voyage, is understood to be referred to by every policy." The same principles were adhered to in a subsequent case, where the same learned Judge remarked that every Underwriter is presumed to be acquainted with the practice of the trade he insures; and if he does not know it, he ought to inform himself. *Dougl.* 510—513. So in the construction of a policy upon time, the same liberality prevails as in other cases; and an attention to the meaning of the contracting parties has always been paid. *Dougl.* 527—531.

Policy on ship for four months, at and from a place *to any port or ports whatsoever*: held, that an open *roadsted* (being the usual place of lading and unlading) was a *port*, within the meaning of this policy. *Cookey* v. *Atkinson*, *Term Rep. K. B. E.* 59 *G.* 3. 460.

In an Insurance upon a voyage to the southern whale fishery, during the ship's stay and fishing, and at and from thence, back to London, *semble*, that if the ship send home by another vessel a part of what she has taken, and continue her fishing, the adventure is not *ended* by her shipping such part for England. And it clearly is not thereby *terminated*, if the part sent home consisted of damaged skins, which would, if kept on board, have damaged the residue of the cargo. *Philips* v. *Champion*, 6 *W. P. Taunton* 3.

A vessel chartered to an American port, laden with salt, to bring home a return cargo of timber, entered the port during an embargo, under which it was permitted her upon the notification of the embargo, to return with her cargo on board, or to discharge her cargo and return in ballast; discharged her cargo, remained eighteen months there till the embargo ceased, then shipped her homeward cargo, and was lost: held, that she was not bound, with relation to the Underwriters on ship, to have returned with her cargo of salt, or to have sailed in ballast, and that the underwriters on ship were *still liable*. *Schroder* v. *Thompson*, 7 *W. P. Taunton*, 462.

The usage of trade with respect to East-India voyages has been more notorious than in any other, the question having more frequently occurred. The charter-parties of the India company give leave to prolong the ship's stay in India for a year, and it is common by a new agreement to detain her a year longer. The words of the policy too are very general, without limitation of time or place. These charter-parties are so notorious, and the course of the trade is so well known, that the Underwriter is always liable for any intermediate voyage, upon which the ship might be sent while in India, though not expressly mentioned in the policy. These principles were fully laid down and settled in the nine causes tried upon the ship, Winchelsea, East Indiaman; the nine verdicts in which were ultimately uniform, for the plaintiffs the Insured, against the Underwriters. 3 *Burr.* 1707. *et. seq.* They have been since recognized and allowed in subsequent cases. See *Park*, 49. 51.

However, the parties may, by their own agreement, prevent such latitude of construction: nor need this be done by express words of exclusion; but if, *from the terms used*, it can be collected, that the parties meant so, that construction shall prevail. *Dougl.* 27. And the equitable principles of construction shall never be carried so far as that when a man has insured one species of property, he shall recover a damage which he has suffered by the loss of a different species. Thus, one who has insured a cargo of goods cannot, under that Insurance, recover the freight paid for the carriage; nor can an

owner who insures *the ship merely* demand satisfaction for the loss of merchandize laden thereon, or extraordinary wages paid to seamen, or the value of provisions by reason of *detention* of the ship at any port. *Park*, 52—61. See also 1 *Term Rep.* 127. 130. and *post*, II.

Insurances on goods from A. to B. "until they should be there discharged and safely landed," on their arrival at B. the merchant to whom the goods belonged employed and paid a public lighter to land them, and the goods being damaged in the lighter without negligence, the Underwriters were held liable for the loss. *Hurry* v. *the Royal Exch. Ass. Comp.* 2 *Bos. & Pul.* 430.

*S. P. Rucker* v. *London Ass. Comp.* 8 *June*, 1784, *coram Buller*, J. 432, *n.*

Policies of Insurance are to be construed by the same rules as other instruments, unless where, by the known usage of trade, or the like, certain words have acquired a peculiar sense distinct from their ordinary and popular sense. *Robertson* v. *French*, 4 *East.* 410.

A Policy on a foreign ship must be understood as containing an exception of all captures made by the authority of our own government. *Kellner* v. *Le Mesurier*, 4 *East.* 396.

Every Insurance on alien property by a British subject must be understood with this implied exception, that it shall not extend to cover *any* loss happening during the existence of *hostilities* between the respective countries of the Assured and Assurer. *Brandon* v. *Curling*, 4 *East.* 410.

3. *A Warranty*, in a policy of assurance, is a condition, or a contingency, that a certain thing shall be done or happen, and unless that is performed, there is no valid contract. 1 *Term Rep.* 345. It is immaterial for what end, if any, the warranty is inserted in the contract; but, being inserted, it becomes a binding condition upon the Insured, and he must shew a literal compliance with it. *Park*, 318. So on the contrary warranties shall be strictly construed in favour of the Insured. As where a ship is warranted well on any day certain, though she be lost by eight in the morning of the day when the policy was effected at noon, the Underwriter shall be liable. 3 *Term Rep.* 360. It is no matter whether the loss happened in consequence of the breach of warranty or not, for the very meaning of inserting a warranty is to preclude all inquiry about its materiality. 1 *Term Rep.* 346. It is also immaterial to what cause the non-compliance is to be attributed; for although it might be owing to the merest accident, or to the most wise and prudential reasons, the policy is avoided. *Cowp.* 607.

In this strict and literal compliance with the terms of a Warranty consists the difference between a Warranty and a Representation; the latter of which need only be performed *in substance*, while a Warranty must always be complied with strictly. In a Warranty the person making it takes the risk of its truth or falsehood on himself; in a Representation, if the Insured assert that to be true which he either knows to be false, or about which he knows nothing, the policy is void on account of fraud; but a Representation, made without fraud, if not false in a *material* point, does not vitiate the policy. *Cowp.* 787. *Park*, c. 18. See *post*, III. 1.

But where the assured had once provided a sufficient crew, the negligent absence of all the crew at the time of the loss, was *no breach of the implied Warranty* that the ship should be properly manned. *Busk* v. *Roy. Exch. Ass. Comp. Term Rep. K. B. M.* 59 *Geo.* 3. 73.

In order to make written instructions binding as a Warranty they must appear on the face of, and make a part of, the policy. *Cowp.* 790. For though a written paper be *wrapt up in the policy*, and shewn to the Underwriters at the time of subscribing, or even if it be *wafered to the policy*, it is not a Warranty, but a Representation. *Dougl. p.* 12. in *n.* But a Warranty written *in the margin* (transversely, or otherwise) of the policy is considered to be equally binding, and liable to the same strict construction as if written in the body of the policy. *Dougl.* 11, 12, *n.* 4. 13, *n.* If the Underwriter pay the loss on a policy, and after find that such Warranty was not strictly complied with, he may recover back the money again by action: See 1 *Term Rep.* 343. which was also a case arising on a Warranty in the margin of a policy.

The *various kinds* of Warranties are too numerous to be mentioned; depending generally upon the particular circumstances of each case. The three cases of Warranty, on which most questions have arisen, are, as to the *time* of sailing, *convoy*, and *neutrality* of property.

As to the first of these: if a man warrant to sail *on* a particular day, and be guilty of a breach of that Warranty, the Underwriter is no longer answerable. *Park.* 325. *c.* 18. And a detention by Government, previous to the proposed day of sailing, is no excuse for not complying with the Warranty, nor a peril within the terms of the policy. *Cowp.* 784. So if the Warranty be to sail *after* a specific day, and the ship sail before, the policy is equally avoided as in the former case. *Park*, 326. *c.* 18. But when a ship leaves her port of lading, having a full and complete cargo on board, and having no other view but the safest mode of sailing to her port of delivery, for which purpose she touches at any particular place of rendezvous for convoy, &c. her voyage must be said to commence from her departure from that port, and though she be detained at such place of rendezvous by an embargo, she has complied with the Warranty. *Cowp.* 601—608: and see *Thellusson* v. *Fergusson*, *Dougl.* 361. *acc.* What shall be a departure from the port of London, or rather what is the port of London, remains yet undecided. It seems, however, that Gravesend is the limit of that port, where vessels receive the Custom-house cocket, their final clearance, on board, and from whence they must depart on the day mentioned in the Warranty. *Park*, *c.* 18.

The *warranty* "to depart," before a certain day, which is used by the *Royal Exchange Assurance Company* in their policies, does not mean merely to break ground, but fairly to set forward upon the voyage. 6 *W. P. Taunton*, 241.

A licence to export to an hostile country was to continue in force for exporting until the 10th of September. The ship cleared at the Custom House in London, on the 9th of September, and on the 12th received her clearing note at Gravesend. No evidence being given by the assured to account for the delay, held, that the ship had not exported the cargo before the 10th, *and that the Insurance was void. Williams* v. *Marshall*, 6 *W. P. Taunton*, 390.

A policy of assurance on freight and goods per ship named, at and from Portneuf to London, *warranted to sail on or before the* 28th of October, and on the 26th the ship dropped down from Portneuf, with an incomplete crew for the voyage, and on the 28th reached Quebec, which was the nearest place where she could obtain a clearance, and there completed her crew, and on the 29th obtained her clearance, and sailed the next day: held, that the dropping down from Portneuf to Quebec on the 26th was not a compliance with the warranty. *Ridsdale* v. *Newnham*, *Term Rep. K. B. H.* 55 *Geo.* 3. 456.

Policy of assurance on ship at and from Memel to the ship's port of discharge in England, *warranted to depart on or before a particular day*: held, that this warranty required not only that the ship should set sail on the voyage, but that she should be out of the port on or before the day; and therefore where she set sail on the voyage before the day, but was detained within the harbour by adverse winds until after the day, this was not a compliance with the *Warranty*. *More* v. *Royal Exch. Ass. Comp. Term Rep. K. B. H.* 55 *G.* 3. 461.

As to Warranty of sailing with convey. If the Insured warrant that the vessel *shall depart with convoy*, and it do not,

the policy is defeated, and the Underwriter is not responsible. *A convoy* means a naval force under the command of that person whom Government, or any authorized by them, may happen to appoint. *Park, c.* 18.

A sailing with convoy from the usual place of rendezvous, as Spithead for the port of London, is *a departure* with convoy within the meaning of such a Warranty. 2 *Salk.* 443. 2 *Str.* 1263. 5. And although the words used are generally *to depart with convoy*, or to *sail with convoy*, yet they extend to sailing with convoy throughout the voyage. 3 *Lev.* 320. And this point was unanimously confirmed by the whole Court in more modern times. *Dougl.* 72. *Lilly* v. *Ewer.*

Sailing orders are necessary to the performance of a Warranty to depart with convoy, unless particular circumstances exempt the Insured from the general rule. *Webb* v. *Thompson*, 1 *Bos. & Pul.* 5. *Anderson* v. *Pitcher*, 2 *Bos. & Pul.* 164.

But an unforeseen separation from convoy is a peril to which the Underwriter is liable. 3 *Lev.* 320. 2 *Salk.* 443. *Carth.* 216. 1 *Show.* 320. 4 *Mod.* 58. *S. C.* And even where the ship has without any neglect, by tempestuous weather, been prevented from joining the convoy at all: at least, so as to receive the orders of the commander of the ships of war; if she do every thing in her power to effect it, it shall be deemed a satisfaction of the Warranty to sail with convoy. 2 *Str.* 1250. The duty of officers appointed for convoy to merchant ships is prescribed by *stat.* 13 *Car.* 2. *st.* 1. *c.* 9. *art.* 17. confirmed by *stat.* 22 *Geo.* 2. *c.* 33. § 2. *art.* 17. *Park.* 350, *n.* See *post*, II. 4.

Ships not to sail without convoy, 38 *G.* 3. *c.* 76—43 *G.* 3. *c.* 57.

But see 39 *Geo.* 3. *c.* 32. which permits vessels laden with the produce of the fishery, &c. of Newfoundland or Labrador to sail without convoy or licence, notwithstanding the 38 *Geo.* 3. *c.* 76. § 1. *&c.*

The last species of Warranty above mentioned is that of *neutrality*; or that the ship and goods insured are neutral property. This is different from the two former; for if this Warranty be not complied with, the contract is not merely voided as for a breach, but it is absolutely void, *ab initio*, on account of fraud, being a fact at the time of insuring within the knowledge of the Insurer; an error in which must therefore arise from a deliberate falsehood on his part. 4 *Burr.* 1419. 1 *Black Rep.* 427. And see *post*, III. But if the ship, &c. is neutral at the time the risk commences, the Insurer takes upon himself the chance of war and peace during the continuance of the policy. *Dougl.* 732. *Eden* v. *Parkinson.*

A Warranty in a policy of Insurance that the ship is American property, means that the ship is entitled to all the privileges of an American flag: and if she have no passport on board (which is required by treaty between France and America) the Warranty is not complied with, and the Assured cannot recover against the Underwriter, though in fact the ship suffer no inconvenience in the voyage from the want of the passport. *Rich* v. *Parker*, 7 *Term Rep.* 705.

Any forfeiture of neutrality by the wilful act of the assured, or of the Master, &c. after the commencement of the voyage insured, is a breach of Warranty of such neutrality. *Garrels* v. *Kensington*, 8 *Term Rep.* 230.

A Warranty of neutrality in a policy of Insurance is not falsified by a sentence in a foreign Court of Admiralty, condemning a ship for navigating contrary to the ordinances of that belligerent state to which the neutral country had not assented. *Pollard* v. *Bell*, 8 *Term Rep.* 434.

Nor does the seizure and sale of a vessel by a *neutral* State, (no sentence of condemnation being shewn,) change the property. *Wilson* v. *Forster*, 6 *W. P. Taunton*, 25.

Where a foreign Court of Prize professes to condemn a ship and cargo on the ground of an *infraction of treaty*, in not being properly documented, &c. as required by the treaty between the Captors and Captured; such sentence is conclusive in our courts against a *Warranty of neutrality* of such ship and cargo in an action upon a policy of Insurance against the Underwriters, although inferences were drawn in such sentence from *ex parte* ordinances in aid of the conclusion of such infraction of treaty. *Baring* v. *The Royal Exch. Ass. Comp.* 5 *East*, 99.

4. The oldest case in the books on a marine policy of Insurance is in 7 *Rep.* 47, *b.* which only serves however to shew that this contract was at that time very little understood. In the reign of Queen Elizabeth, a statute was passed, (43 *Eliz. c.* 12.) to erect a particular court for the trial of Insurance causes in a summary way, by a commission to the Judge of the Admiralty, the Recorder of London, two Doctors of the civil law, two common Lawyers, and eight Merchants, with an appeal by bill to the Court of Chancery. This statute was explained by *stat.* 13 & 14 *Car.* 2. *c.* 23. but the court erected by them is now entirely disused; for this, among many other reasons, that its jurisdiction was not sufficiently extensive. See *Str.* 166. 1 *Show.* 396. 2 *Sid.* 121. Insurance causes are now therefore decided, like all other questions of property, by a trial by jury in a court of common law; and which, on due consideration, will appear the most safe, eligible, and (as now regulated) expeditious, mode that could be adopted. *Park. Introd.*

Some excellent suggestions, however, have been made as to the benefit of reviving, under proper modifications, an institution similar in its principles to that of the court established by the statute of Elizabeth. Unquestionable and unquestioned as the rectitude and justice of the *Decisions* of the existing tribunals assuredly are, it cannot be denied that in the previous machinery of *litigation* there are great opportunities for chicanery and vexation; and there is perhaps no class of cases coming under the public examination of courts of judicature, furnishing so many instances of contest, in opposition to the plain and manifest dictates of common integrity. When the great increase which has taken place in the matters of inquiry submitted to courts of justice is recollected, together with the number of arrangements and expedients resorted to for dispatch, and the probability of a still continuing increase is contemplated, the arrival of a period may be anticipated, when it will be beyond the power of mere arrangement, with all possible exertion of assiduity and ability, to meet the exigencies of public justice, with the existing judicial establishment; and some alteration of system must take place: and in such cases the revival of the court of policies of assurance will be found an object worthy of regard. See *Evans's Statutes, Pt.* III. *Class* III. *nu.* 2 *and the notes there.*

Courts of Equity have no jurisdiction over such questions, because the demand is plainly a demand at law, and the damage as much the object of proof by witnesses, as any other species of damage whatever. *De Ghetoff* v. *London Assur. Comp. Bro. P. C.* If, indeed, the trustee in a policy of Insurance actually refuse his name to the *Cestuy que trust*, in an action, or a commission is necessary to examine witnesses residing abroad; or where fraud is suspected, and a disclosure of circumstances is to be procured upon the oath of the Insured; in these cases, application may be to a Court of Equity. But, in all other cases, a court of common law is the proper forum. See 1 *Atk.* 547. 2 *Atk.* 359. *Park, c.* 20. And even if the parties, by a clause in the policy, should agree to refer any dispute to arbitration, that will not be a sufficient bar to an action at law, unless a reference is in fact made, or is depending. 1 *Wils.* 129.

In order to recover upon a policy against either of the Insurance Companies, (the *Royal Exchange*, or *London Assurance*,) the action must be *Debt*, or *Covenant*, as their policies

are under seal; from hence arose an inconvenience, as under the plea of a general issue in those actions the true merits of the case could seldom come in question; to remedy this, the *stat.* 11 *Geo.* 1. *c.* 30. § 43. enables the jury to give such part only of the sum demanded in debt, or so much damages in covenant, as on the evidence it appears the plaintiff in justice ought to have.

In order to recover against a private Underwriter upon the policy, who merely subscribes his name without any seal, the form of action is a special *Indebitatus assumpsit*, founded upon the express contract, which action may be brought in the name of the broker, effecting the policy; and by *stat.* 19 *G.* 2. *c.* 37. § 6. within fifteen days after action brought, the plaintiff, on request in writing, must declare the amount of all Insurances on the same ship. *Park*, *c.* 20.

It was formerly usual for the Insured to bring separate actions against each of the Underwriters (how many soever) on a policy, and proceed to trial on all. This was found to be expensive, and, in fact, unjust; and the Court of King's Bench intimated, that in such a case they would grant imparlances in all the actions but one, till that could be tried. 2 *Barn. B. R.* 103. At length Lord Mansfield introduced the present *Consolidation-Rule*, which is now admitted in general practice, by which the proceedings in all the actions but one are staid: and in consequence of this convenience the defendant undertakes not to file any bill in equity, or bring a writ of error for delay, and to produce all books and papers material to the point in issue. *Park*, *Introd.*

The *stat.* 19 *Geo.* 2. *c.* 37. § 7. also enables defendants to pay money into court in all such actions; after which, if the plaintiff proceeds, and has not a verdict for more than the money paid in, he shall pay costs to the defendant.

When money has been paid by mistake to the Insured, or where the Insured wishes to recover back the premium, the proper remedy is by action for money had and received to the plaintiff's use. 1 *Salk.* 22. *Skinn.* 412. 1 *Show.* 156.

Where an Insurance broker debits the underwriter with a loss, and takes his acceptance for the balance of account between broker and underwriter, payable at a later date than the time when the *loss* would be payable in cash, the Assured may maintain an action against the broker for money had and received, though the acceptance was dishonoured, and the broker never received any money. *Wilkinson* v. *Clay*, 6 *W. P. Taunton*, 110.

The declaration on a policy of Insurance must set out the policy, and aver that it was signed by the defendant, and, that in consideration of the premium, he undertook to indemnify the Insured: it must then state the interest of the Insured, and shew the loss to have happened by one of the perils mentioned in the policy, which must always be stated according to the truth of the fact. *Park*, *c.* 20.

But a declaration on a policy of Insurance on a *foreign* Ship need not aver any interest in the Assured, though there be no such words as "interest or no interest" in the policy. *Nantes* v. *Thompson*, 2 *East*, 385.

In a declaration on a policy of Insurance, the plaintiff averred that Messrs. H. at the time of effecting the policy, and at the time of the loss, were interested in the cargo, which was the subject of the Insurance, "to a large amount, to wit, to the amount of all the money insured thereon;" at the trial it appeared, that previous to effecting the policy, Messrs. H. had admitted another mercantile house to a joint concern in the cargo insured: held, that the averment was supported by the evidence. *Page* v. *Fry*, 2 *Bos.* and *Pul.* 240.

A. having consigned a cargo to B. and drawn bills on him to the amount of it in favour of C. his general agent sends these bills together with the bills of lading to C. desiring him to transmit them to B. "that B. may have an opportunity of insuring;" he also draws a bill for 300*l.* on C. which is accepted: B. refuses to take the cargo or accept the bill drawn on him. C. then effects a policy in his own name, and informs A. thereof, who approves of his conduct; in an action by C. stating himself in the first count agent of A. and averring Interest in him, and in the second, averring Interest in himself: held, first, that the policy was good within the 28 *Geo.* 3. *c.* 56. Secondly, that C. had an insurable interest to the amount of 300*l.*

More particularly as to the manner of alledging the loss to have happened within the perils of the policy.—To aver that the loss happened by the fraud and negligence of the master, has been held a sufficient averment of barratry, 2 *Ld. Raym.* 1349. 1 *Str.* 581.; though it is now usual to aver precisely, in terms, that the loss happened by the barratry of the master or mariners. *Park*, *c.* 20. Though the declaration alledge a total loss, the Insured may recover for a partial one; for in actions for damages merely, the plaintiff may always recover *less* but not *more*, than the sum laid in the declaration. 2 *Burr.* 904. 1 *Black. Rep.* 198. So though the plaintiff appear in proof to have a larger interest than is averred in the declaration, yet he is entitled to recover to the amount alledged. *Park*, 402. *c.* 20.

But under an *averment* that after lading the *cargo* the ship sailed on the voyage and was lost, the plaintiff cannot recover on proof that the ship before she had *half* her cargo on board, was driven from her moorings and lost. *Abithol* v. *Bristow*, 6 *W. P. Taunton*, 464.

In order to entitle the Insured to recover expences of salvage, it is not necessary to state them in the declaration, as a special breach of the policy. They may be given in evidence, because an Insurance is against all accidents, and salvage is an immediate and necessary consequence of some of those stated in a policy. *Hardw.* 304.

The general issue, *non assumpsit*, is the usual plea to a declaration upon a policy against private persons; and under this plea and the general issue, pleadable by corporations, the defendant has a right to take advantage of all those circumstances which either render the policy void, or make it of no effect; such as fraud, want of interest, not being sea worthy, deviation, non-performance of Warranties, &c. *Park*, 404. *c.* 20.

The evidence to be given, and the proof necessary in actions on policies of Insurance, may be collected from the statement of the allegations requisite in the plaintiff's declaration. It may, in addition, be shortly observed on this part of the subject, that the first piece of evidence is proof of the defendant's hand-writing to the policy, which, however, is most generally admitted. Though the general usage of trade is allowed to be given in evidence to control, or extend the words, yet no parol evidence shall be given which directly tends to contradict the terms, of a policy. *Skinn.* 54. In an action against the Underwriter, the policy is evidence that the premium was paid: the Insured however must prove his *interest* by a production of all the usual documents, bills of sale, bills of parcels, of lading, &c. See 2 *Str.* 1127. But in a *valued policy*, it is only necessary to prove, that the goods were on board at the time of the loss; unless the defendant can shew that the plaintiff had only a colourable interest, or has greatly overvalued the goods. But it is only in cases of *total loss*, that any difference consists between a valued policy, and an open policy; in the former case, the value is ascertained: in the latter, it must be proved. But where the loss is partial, the value in the policy can be no guide to ascertain the damage; which then becomes a subject of proof, as much as an open policy. *Park*, 103. 111. 2 *Term Rep.* 187. And, in the last place, the plaintiff must prove that the loss happened by the very means stated in the declaration. 1 *Term. Rep.* 304. See *Hardw.* 304.

Sentences of foreign Courts of Admiralty are frequently brought forward in Insurance causes. It may be requisite therefore, to remark, that wherever the ground of such sentence is manifest, and it appears to have proceeded expressly upon the point in issue between the parties, or wherever the sentence is general, and no special ground is stated, there it shall be conclusive and binding; and the Courts here will not take upon themselves, in a collateral way, to review the proceedings of a forum, having competent jurisdiction of the subject-matter. But if the sentence be so ambiguous and doubtful, that it is difficult to say on what ground the decision turned, or if there be colour to suppose, that the Court abroad proceeded upon matter not relevant to the matter in issue, their evidence will be allowed in order to explain; and if the sentence upon the face of it be manifestly against law and justice, or be contradictory, the Insured shall not be deprived of his indemnity; because any detention, by condemnation under particular ordinances or decrees, which contravene or do not form a part of the law of nations, is a risk within a policy of Insurance. *Park, c.* 18. *ad fin.* And see *Dougl.* 554 (574.) *Bernardi* v. *Motteux.* See *post*, II, 3.

5. *Re-assurance* is a contract, which the first Underwriter enters into, in order to relieve himself from those risks which he has previously undertaken; by throwing them upon other Underwriters, who are called Re-assurers. It is a species of contract still countenanced in most parts of Europe, and which was admitted in England till it was found productive of glaring and enormous frauds, which rendered it destructive of the benefits it was originally intended to promote. The Legislature, therefore, found it necessary to interpose, by an act which permitted only such contracts of Re-assurance as tended to the advancement of commerce, or the real benefit of an individual. For this purpose the *stat.* 19 *Geo.* 2. *c.* 37. § 4. declares it to be unlawful to make Re-assurance, "unless the Assurer or Underwriter should be *insolvent*, become a *bankrupt*, or *die*; in either of which cases such Assurer, his executors, administrators, or assigns, may make Re-assurance to the amount before by him assured, expressing in the policy that it is a Re-assurance;" which statute extends to Re-assurances on *foreign* ships previously insured by foreign Underwriters. 2 *Term Rep.* 161.

In France, as in other countries, it was formerly allowed to the Insured to insure the solvency of the Underwriter; but this practice is not allowed in England; and, though no express notice is taken of it in the above statute, it seems that such a policy would be looked on as a wager policy, and treated accordingly. See *post*, III, 5.

*Double Insurance* is totally different from Re-assurance. It is where the same man is to receive two sums instead of one, or the same sum twice over, for the same loss, by reason of his having made two Insurances upon the same property. 1 *Burr.* 496. It makes no difference whether such Insurances are both or either made in the name of the Insurer, or of another person, if actually made on his account. *Park*, 285.

These double Insurances are not void, but are considered as being made by the assured, to increase his security; the assured, therefore, shall receive only one satisfaction to the real amount of his loss, and no more, which he may recover against which set of Underwriters he pleases. And when one set of Underwriters pay the loss, they may call upon the other Underwriters to contribute in proportion to the sums they have insured. 1 *Black. Rep.* 416. 1 *Burr.* 492. But though a double Insurance cannot be wholly supported, so as to enable a man to recover a two-fold satisfaction; yet various persons may insure various interests on the same thing, and each to the whole value, as the master for wages, the owner for freight, one person for goods, and another for bottomry, &c. See *Godin* v. *London Assur. Comp.* 1 *Burr.* 489. 1 *Black. Rep.* 103. In which case the defendants were expressly apprised that there might probably be another Insurance than that which they underwrote.

II. 1. The Loss must always be a *direct and immediate consequence* of the peril insured, and not a remote one, in order to entitle the Insured to recover. 1 *Term Rep.* 130. *n. a.*

A total loss in Insurances does not always mean that the property insured is irrecoverably lost or gone; but that, by some of the perils mentioned in the policy, it is in such a condition as to be of little use or value to the Insured, and to justify him in abandoning his right to the Insurer, and calling upon him to pay the whole of his Insurance. *Park*, 98. 143.

A ship received considerable damage from tempestuous weather, and the crew completely exhausted, deserted the ship on the high seas for the mere preservation of their lives; and the ship was then taken possession of by a fresh crew, who succeeded in conducting her safely into port. Held that such desertion of the crew did not of itself amount to *a total loss. Thornely* v. *Hebson, Term Rep. K. B. E.* 59 *Geo.* 3. 513.

So upon a policy on hogsheads of sugar, warranted against particular average, some part of the sugar in every hogshead being preserved, though less than *three per cent.* on the cargo, it was held that this could not be a *total loss. Hedburg* v. *Pearson*, 7 *W. P. Taunton*, 154.

The Insured may call upon the Underwriter for a total loss, if the voyage be absolutely lost, or not worth pursuing; if the salvage be high, as half the value; or if further expence be necessary, and the Underwriter will not engage at all events to bear that expence. See *Hamilton* v. *Mendes*, 2 *Burr.* 1198. 1 *Black. Rep.* 276. and *post*, 7.

But where a ship having been sold under the decree of the admiralty court to pay the *salvage*, and it not appearing that the assured had taken any means to prevent such sale, held that they had no right to abandon, and that there was no more than a *partial loss. Thornely* v. *Hebson, Term Rep. K. B. E.* 59 *Geo.* 3. 513.

In a total loss, properly so called, the prime cost of the property insured, or the value in the policy, must be paid by the Underwriter, according to his proportion of the Insurance. See *ante*, I. 4. Where the policy is a valued one, it is only necessary to prove that the goods were on board at the time of the loss; unless the defendant can shew that the plaintiff had only a colourable interest, or has greatly overvalued the goods; but where it is an open policy, the value must also be proved. *Park*, 103. 111.

Questions as to losses by *Perils of the Sea* have very seldom arisen; the general rule is, that every accident happening by the force of wind or waves, by thunder and lightning, by driving against rocks, or by the stranding of the ship, or any other violence that human prudence could not foresee, nor human strength resist, is to be considered as a peril of the sea; and for such losses the Underwriter is answerable. *Park*, 61. 1 *Show.* 323. 2 *Rolle's Abr.* 248. *p.* 10. *Comb.* 56.

An action was brought to recover the value of certain slaves insured by the policy; the facts were, that the captain of the ship missed the island, for which he was bound, (Jamaica,) and their water running short, some of the slaves were thrown overboard to preserve the rest, and the declaration stated the loss to have happened by perils of the sea. But it was held, the mistake of the captain cannot be called a peril of the sea. *Gregson* v. *Gilbert, Pasch.* 23 *Geo.* 3. *Park c.* 3.

Upon an Insurance on slaves against perils of the sea, their death by failure of sufficient and suitable provision occasioned by extraordinary delay in the voyage, from bad weather, is not a loss within the policy, but a loss by natural death, which cannot be insured against, since the 30 *Geo.* 3. *c.* 33. § 8. and 34 *Geo.* 3. *c.* 80. *Tatham* v. *Hodgson*, 6 *Term Rep.* 656.

On an Insurance on ship and goods, valued at so much on a voyage to Africa and the West Indies, the assured is entitled to recover the whole sum on a total loss, which happened in the latest period of the voyage; although a considerable part of the estimated value consisted originally in stores and provisions for the purchase and sustenance of slaves during the voyage, and the slaves were brought to a profitable market at the first place of the ship's destination, where she arrived a mere wreck, and soon after foundered. *Shaw* v. *Felton*, 2 *East*, 109.

And where a ship insured, arrived in port a mere wreck, and was obliged to be lashed to a hulk to avoid sinking, and in attempting to remove her to the shore, a few days afterwards she sunk; held, that the assured might recover as for a total loss, though her cargo was saved, and brought to a profitable market. *Ibid.*

A transport in government service was insured for twelve months during which she was ordered into a dry harbour, the bed of which was uneven, and on the tide having left her, she received damage by taking the ground: held, that this was a loss by a peril of the sea. *Fletcher* v. *Inglis, Term Rep. K. B. H.* 59 *Geo.* 3. 315.

A ship which is never heard of after her departure, shall be presumed to have perished at sea. See 2 *Stra.* 1199. *Park*, 63. In England no time is fixed within which payment of a loss may be demanded from the Underwriter, in case the ship is not heard of. But a practice prevails among merchants that a ship shall be deemed lost, if not heard of within six months after her departure for any port of Europe, or within twelve, if for a greater distance. This latter term, however, seems too short with respect to India voyages, and is extended in Spain to a year and a half, and formerly in France to *two* years; and in case of an adjustment on such supposed loss, if the ship arrives, the Underwriter may recover back the money paid by him. *Park*, 63—65.

2. *Capture*, as applied to the subject of Marine Insurances, is a taking of the ships or goods belonging to the Subjects of one country, by those of another, when in a state of public war. *Park, c.* 4. As, between the Underwriter and the Insured, a ship is to be considered as lost by the *Capture*, though she be never condemned at all, nor carried into any port or fleet of the enemy; and the Underwriter must pay the loss actually sustained. If, therefore, either before or after condemnation she be retaken, and the owner have paid salvage, the Insurer must pay the loss sustained in consequence. 2 *Burr.* 694. 696.

An abandonment offered to be made by the Assured to the Underwriter, upon intelligence brought of the capture of the goods insured which the underwriter refused to accept, was held not to entitle the assured to recover as for a *total loss*, where, before action brought, the goods were re-captured, and arrived at the place of destination, by which a partial loss only was sustained, for the assured can only recover an indemnity for *such loss* as he has sustained at the time of action brought. *Patterson* v. *Ritchie, Term Rep. K. B. M.* 56 *Geo.* 3. 393.

So where a master had re-purchased the vessel, (a seizure and sale having been made by a *neutral* state, and no condemnation being shown), he having acted without the authority from the assured, who refused to accept the ship, or repay him the price, the assured who had not abandoned, were not permitted to recover for a *total loss*, for the property is not changed. *Wilson* v. *Forster*, 6 *W. P. Taunton*, 25.

Where a ship insured from Liverpool to Sierra Leone was captured, plundered, her guns, stores, papers, and instruments taken away, and the voyage lost, and was carried to Fayal, where proceedings were instituted in the Admiralty Court, and sentence was pronounced in favour of the assured; but appeal was made against such sentence, and the assured abandoned, which abandonment the underwriter refused to accept, and afterwards, the remainder of her cargo was sold at Fayal, and the law expenses paid thereout, and the rest left as a deposit to answer the event of the appeal in order to obtain the release of the ship, and afterwards the ship returned to Liverpool: held, that the assured might recover for a *total loss* in an action brought after the ship's return to Liverpool. *M'Iver* v. *Henderson, Term Rep. K. B. H.* 56 *Geo.* 3. 576.

No Capture by the enemy can be so total a loss as to leave no possibility of recovery. If the owner himself should retake at any time he will be entitled: and by *stat.* 29 *Geo.* 2. *c.* 34. § 24, if an English ship retake the vessel captured, either before or after condemnation, the owner is entitled to restitution on stated salvage. See *post*, 6. In all such cases, if the loss be paid by the Underwriter before the recovery, he stands in the place of the Insured, and will be entitled to the benefits of the restitution. *Park.* 66. 2 *Burr.* 683.

Before the *stat.* 19 *Geo.* 2. *c.* 37, which abolished wager-policies, the recapture had a considerable effect upon the contract of Insurance, and several cases were determined on that question. See 10 *Mod.* 77. 2 *Bur.* 695. *Com.* 360. 1 *Wils.* 191. 2 *Stra.* 1250. *Park.* 73—77. But now the contract is not at all altered between the Underwriter and the Insured by such event. 2 *Burr.* 695. 1198.

By the marine law of England, as practised in the Court of Admiralty, it was formerly held, that the property was not changed so as to bar the original owner in favour of a vendee or re-captor, till there had been a sentence of condemnation. 2 *Burr.* 694. And now by *stat.* 29 *Geo.* 2. *c.* 34. already mentioned, this right of the original owner, in case of a re-capture, is preserved to him *for ever*, upon payment of certain salvage, from one-eighth to half the value, to the re-captors. See *post*, 6.

A Capture having been illegal, but the charges and delay being great, the Insured made a compromise *bonâ fide* for the liberation of the ship; the Underwriters were held to be answerable for the charges of that compromise. *Bereus* v. *Rucker*, 1 *Black. Rep.* 313. *Park*, 67. See *Ransom.*

On this head it may also be proper to state the following act of parliament, against *ransoming* captured ships; previous to its passing, it seems, from the above case, that the Insurers would have been liable to make good, sums, paid by the master for ransom, and that the Insurers were liable for the charges of such compromise made, *bonâ fide*, whether the capture was legal or not. And in the case of *Yates* v. *Hall*, the circumstances of which took place before the passing of the act, the Court of B. R. determined, that a promise by a captain of a ship on behalf of his owners to pay monthly wages to a sailor, in order to induce him to become a hostage, was binding on the owners, although they abandoned the ship and cargo. 1 *Term Rep.* 73. 80.

By *stat.* 22 *Geo.* 3. *c.* 25, it is made unlawful for any Subject to ransom, or to enter into any contract for ransoming any ship belonging to any Subjects, or any goods on board the same, which shall be captured by the Subjects of any State at war with his Majesty, or by any persons committing hostilities against his Subjects. § 1.

All contracts which shall be entered into, and all bills, notes, and other securities which shall be given by any person for ransom of any ship, or of any goods on board the same, shall be absolutely void. § 2.

If any person shall ransom or enter into any contract for ransoming any such ship, or any goods on board the same, such person shall forfeit 500*l.*, which may be sued for by any one. § 3.

Clauses exactly similar to those were inserted in the Prize

*Act.* 33 *Geo.* 3. *c.* 66, the continuance of which was limited by the duration of the then war with France. Commanders of British Privateers were also by that act prohibited from ransoming prizes taken by them from the enemy, under forfeiture of their Letter of Marque and Imprisonment in the discretion of the Court of Admiralty. Continued by 43 *Geo.* 3. *cap.* 160. § 33. (during the then war) and by 45 *Geo.* 3. *cap.* 72. § 19. continued to the end of the war.

3. On questions of *Detention* not much difficulty has arisen: the Underwriter, by express words, undertakes to indemnify against all damages arising from the arrests, restraints, and detainments of Kings, Princes, or People. *Park*, 78.

Under these terms, in a policy, *Detention* is said to be an arrest or embargo in time of war, or peace, laid on by the public authority of a State. And, therefore, in case of an arrest, or embargo by a prince, though not an enemy, the Insured is entitled to recover against the Underwriter. 2 *Bur.* 696. See this Dict. title *Embargo*.

In case of Detention by a foreign power, which in time of war may have seized a neutral ship, in order to be searched for enemy's property, the costs and charges consequent thereon must be borne by the Underwriter. *Saloucci* v. *Johnson*, *B. R. Hil.* 25 *Geo.* 3. *Park*, 79. But a detention for non-payment of customs, or for navigating against the laws of those countries where the ship happens to be, shall not fall upon the Underwriter. 2 *Vern.* 176.

A detention by particular ordinances which do not form a part of the general law of nations, is a risk within a policy of Insurance. *Per Buller*, J. *Park*, 365. It is an undecided question, whether a detention by the governing power of the country to which the ship belongs, is a peril within the policy; though it seems that it is. See 2 *Ld. Raym.* 840. 2 *Salk.* 444. *Park*, 80. A policy of Assurance on a ship and stores, "at, and from a Port" in a foreign country, in the common form against arrests of Princes, People, &c. extends to an embargo laid on by the government of that country, in the leading port. *Rotch* v. *Edie*, 6 *Term Rep.* 413. And if the embargo continue, the assured may abandon, and recover as for a total loss. *Ibid.*

*Sed Qu.* The effect of an embargo by this country laid on a ship Insured here? *ib.* 422. But if an armed force board a ship, and take part of the cargo, the Underwriters are not liable, on a count stating the loss to be by *people* to the plaintiffs unknown; for *people* in the policy means the governing power of the country. 4 *Term Rep.* 783.

In all cases of losses by detention before the Insured can recover, he must abandon to the Underwriter whatever claims he may have to the property Insured. *Park*, 82. See *post*, 7.

In *Hadley* v. *Clarke*, (8 *Term Rep.* 259) it was held by the Court of K. B. that an embargo only suspends, but does not dissolve, the contract between the parties.

4. The derivation of the word *Barratry* is very doubtful; it comes most probably from the Italian *Barratrare*, to cheat. *Cowp.* 154. It may be thus defined: any act of the master or mariners, of a criminal nature, or which is grossly negligent, tending to their own benefit, to the prejudice of the *owners of the ship*, and without their consent or privity. See 1 *Stra.* 581. 2 *Stra.* 1173. *Cowp.* 143. 1 *Term Rep.* 323.

It is Barratry in the master to smuggle on his own account. *Cowp.* 143. 1 *Term Rep.* 252. 3 *Term Rep.* 277. And in *Robertson* v. *Ewer*, (1 *Term Rep.* 127.) *Buller*, J. seemed to think the breach of an embargo was an act of Barratry in the master. But if the act of the captain be done for the benefit of his owners, and not with a view to his own interest, it is not Barratry. Some question has been made in certain cases, Who shall be considered as owner? and it has been determined, that if the owner of the ship freight it out for a specific voyage, the freighter is to be considered as owner *pro hac vice*; and if the master commit a criminal act, without *his* privity, though with the knowledge of the original owner, it is Barratry. *Cowp.* 143. 154.

But pending an Insurance on freight and a cargo shipped, the vessel becomes incapable of bringing the cargo home, the *master* is bound or not bound to repair her, and earn what he can on the homeward voyage as a salvage for the Underwriters on freight according as a prudent owner having regard to the state of his ship. *Green* v. *Royal Exch. Ass. Comp.* 6 *W. P. Taunton*, 68.

An act of the captain, *with the knowledge of the owners of the ship*, though without the privity of the owner of the goods who happened to be the person insured, is not Barratry, as that crime can only be committed *against the owner of the ship*, and without his consent. 1 *Term Rep.* 323. And if the master of the ship be also the owner, he cannot be guilty of Barratry. *Park*, 94.

Where the master of a vessel condemned for breach of blockade, swore he was bound for another destination: held, that this did not so disaffirm his owner's privity and consent to the breach of blockade, as to enable the plaintiff to recover as for loss by *Barratry*. *Everth* v. *Hannam*, 6 *W. P. Taunton*, 375.

In an action by the Assured of goods, against the Underwriters for a loss by the Barratry of the master, proof that the person described in the policy as master, and who was treated with, and acted as such, carried the ship out of her course, for fraudulent purposes of his own, is *primâ facie* sufficient to entitle the plaintiff to recover, without showing negatively that he was not the owner, or affirmatively that any other person was. 4 *Term Rep.* 33.

It is not necessary, in order to make the Underwriters liable, that the loss should happen *in the very act of Barratry*, for, in case of a deceitful deviation, the moment the ship is carried from its proper track with an evil intent, Barratry is committed; but the loss, in consequence of the act of Barratry, must happen *during the voyage insured*, and within the time limited for the expiration of the policy. 1 *Term Rep.* 252. 4 *Term Rep.* 33. *Cowp.* 143. *Park*, 84—90.

The Underwriters, by express words, undertake generally for the Barratry of the master and mariners, even though the master is appointed by the Insured himself; a circumstance peculiar to the Insurance Law of England. *Park*, 85.

In an action on a policy on ship, by which, amongst other risks, the Underwriters insured against *Fire* and *Barratry* of the master and mariners; they are liable for a loss by fire occasioned by the *neglect of the master and mariners*. *Busk* v. *Royal Exchange Assurance Company*, *Term Rep. K. B. Mic.* 59 *Geo.* 3. 73.

If a ship take a prize, and, instead of proceeding on her voyage, the captain is forced by the mariners to return to port with the prize, against the orders of his owners, the captain is justified by necessity, and it is not Barratry, because not done to defraud the owners. 2 *Stra.* 1264.

Barratry in the master is severely punished by the laws of foreign nations; and several statutes have been passed to prevent these crimes in our own country. The *stat.* 1 *Ann*, *stat.* 2. *c.* 9. inflicted the penalty of felony, without benefit of clergy, on any captain, master, mariner, or officer belonging to any ship, who should wilfully burn or destroy her, to the prejudice of the owner or any merchant lading goods thereon. See *stat.* 12 *Ann*, *stat.* 2. *cap.* 18. This was extended by *stat.* 4 *Geo.* 1. *c.* 12. to owners and others guilty of those acts, to the prejudice of *Underwriters*, as well as merchants: and the *stat.* 11 *Geo.* 1. *cap.* 29. still further enlarges it to all such persons guilty *with intent* to prejudice Underwriters, merchants, or owners. The *stat.* 29 *Geo.* 3. *cap.* 46. enforces the above acts in Scotland. Provisions are made, that, if the offence be committed within the body of a county, the

offender shall be tried in a court of common law; if upon the high seas, he shall be tried according to the directions of *stat.* 28 *Hen.* 8. *cap.* 15.

But in consequence of a recent occurrence, it was determined by all the Judges of England that the Admiralty have no jurisdiction to try offenders, on the *stat.* 11 *Geo.* 1. *c.* 29. for procuring the destruction of a Ship, of which they were owners, "there being no evidence of any act of procurement done upon the high seas, within the admiralty jurisdiction, but only on shore within the body of a County." (Case of *Easterby and Macfarlane*, tried at the Admiralty Sessions, 1802. See Addenda *to East's Pl.* of the Crown, XXVI.) Wherefore the provisions of the 11 *G.* 1. *c.* 29. § 5, 6, 7. respecting the casting away or destroying ships, or procuring the same to be cast away or destroyed, &c. are by statute 43 *G.* 3. *c.* 113. made felony without benefit of clergy; and offences, if committed within the body of a county, shall be tried as other felonies, and if on the high seas, as under 28 *H.* 8. *c.* 15.

To this head may also be referred the provision in *stat.* 33 *Geo.* 3. *c.* 66. § 8. which subjects the captain of any merchant-ship under convoy, who shall wilfully disobey the signals or instructions of the commander of the convoy, or deserting the convoy without notice or leave, to prosecution in the Admiralty court, there to be sentenced to a fine not exceeding 500*l.* and imprisonment for not more than one year. See *ante*, I, 3.

5. The word *Average* is applied in various senses in policies of Insurance, which in this, above all other particulars, are indistinct and confused. It is used as well for a contribution to a general loss as for a particular partial loss. On the present occasion we shall consider the term of *general* or *gross average*, in the former sense, and average *loss* in the latter. *Park*, 99. 3 *Burr.* 1555.

*Small or Petty Average* consists of such charges as the master is obliged to pay, by custom, for the benefit of the ship and cargo; such as pilotage, beaconage, &c. The term is also used for a small duty paid by merchants, who send goods in the ships of other men, to the master, over and above the freight for his care and attention; none of these charges ever falls upon the Underwriter. *Park*, 100. See this Dictionary, title *Average*.

When goods are thrown overboard in a storm to lighten the ship, for the general safety of the ship and cargo, the owners of the ship and of goods saved are to contribute for the relief of those whose goods are ejected; this is called contribution, or general average; and was first used by the Rhodians, and introduced into England by William the Conqueror; against all losses arising from hence, the Underwriter by his contract expressly undertakes to indemnify the Insured. *Park*, 99. 121. 129. 3 *Burr.* 1555. *Lex Merc.*

Three things, it has been said, must concur to make the act of throwing goods overboard legal. 1st. That what is so condemned to destruction, be in consequence of a deliberate and voluntary consultation, between the master and men. 2d. That the ship be in distress, and that sacrificing a part be necessary for the preservation of the rest. 3d. That the saving of the ship and cargo be owing to the means used with that view. But the second seems to be the only material one: if, therefore, this jettison (the throwing over of the goods,) do not save the ship, but she perish in the storm, there shall be no contribution of such goods as may happen to be saved; but if the ship, being once preserved by such means, be afterwards lost, the property, (if any) saved from the second accident, shall contribute to the loss occasioned by the former jettison. *Park*, 123. And see 12 *Co.* 63.

The various accidents and charges, which will entitle the suffering party to call for a contribution, cannot easily be enumerated, but it may be laid down as a general principle, that all losses sustained and expences incurred voluntarily and deliberately, with a view to prevent the total loss of the ship and cargo, ought to be equally borne by the ship and her remaining lading. See *Park*, 124. 126. *Lex Merc.* 2 *Term Rep.* 407.

The French Ordinance, (Liv. 3. tit. Du. Jet. art. 13.) in express terms excludes from the benefit of general average goods stowed upon deck: and the same rule prevails in practice in this country; *Myer* v. *Vander Deyl*, *coram Lord Ellenborough*, sittings after Michaelmas, 1803. *Backhouse*, v. *Ripley*, *coram Chambre*, *J.* *Abbot* on Merchant ships, &c. part. iii. *c.* viii. 323.: for goods so stowed may in many cases obstruct the management of the vessel; and except in cases where usage may have sanctioned the practice, the master ought not to stow them there without the consent of the merchant.

If goods be put on board a lighter to enable the ship to sail into harbour, and the lighter perish, the owners of the ship and remaining cargo are to contribute; but if the ship be lost, and the lighter saved, the owners of the goods preserved are not to contribute; the lightening of the ship being an act of deliberation for the general benefit, but the saving the lighter being accidental, and no way proceeding from a regard for the whole. *Park*, 124.

An action upon promises lies by a ship owner to recover from the owner of the cargo his proportion of general average loss, incurred by sacrificing the tackle belonging to a ship for an unusual purpose, or an extraordinary occasion of danger for the benefit of the whole concern. *Bikley* v. *Presgrave*, 1 *East*, 220.

Diamonds and jewels, when a part of the cargo, must contribute according to their value; but ship provisions, the persons of the passengers, wearing apparel, and such jewels as merely belong to the person, Bottomry or *respondentia* bonds, and the wages of the sailors, shall not any of them contribute. *Park*, 126, 127. 129. 422. See also this Dict. title *Carrier*.

In order to fix a right sum on which the average or contribution may be computed, and which in general is not made till the ship's arrival at her port of discharge, it is to be considered, what the whole ship, freight, and cargo would have produced net, if no jettison had been made; and then the ship, freight, and cargo are to bear an equal and proportionable part of the loss. According to the custom of merchants in England, the goods thrown overboard are to be estimated at the price for which the goods saved were sold, freight and all other charges being first deducted. *Park*, 127, 128.

The general rules as to a *partial loss*, and its consequences, were settled in the case of *Lewis* v. *Rucker*, 2 *Burr.* 1167. *et seq.* from whence much of the subsequent information is drawn; but the whole of the law on this part of the subject is more intricate and perplexed than on any other question of Insurance.

*Partial Loss* then, when applied to the ship, means a damage, which she may have sustained in the course of her voyage, from some of the perils mentioned in the policy: when to the cargo, it means the damage which the goods have suffered from storm, &c. though the whole or greater part thereof may arrive in port. By express stipulation in the terms of the London policies these losses do not fall upon the Underwriters, unless they amount to 3*l. per cent.* but if a loss, arising from a *general average*, (*i. e.* a contribution to a general loss,) should be under 3*l. per cent.* the Underwriter is liable. And in all cases of a partial loss, the value in the policy can be no guide to ascertain the damage; but it becomes the subject of proof as in case of an open policy, *Park*, 101—110.

When goods are partially damaged, the Underwriter must pay the owner such proportion of the *prime cost* or value, in the policy, (or if no value is stated in the policy, then of the invoice price, with all charges and premium of Insurance,) as corresponds to the proportion of diminution in value occasioned by the damage. Where an entire thing, as one hogshead of sugar happens to be spoiled, if you can fix whether it be a third or fourth worse, then the damage is ascertained; but this can only be done at the port of delivery, where the whole damage is known, and the voyage is completed; and whether the price of the commodity be high or low, it equally ascertains the proportion of damage; though no regard is to be paid to the rise or fall of the market, as to the sum to be paid by the Insurer, which is, in either case, to be regulated only by the prime cost or invoice price. *Park*, 103, *&c.* 2 *Burr.* 1167.

The rule by which to calculate a partial loss, on a policy on goods by reason of sea damage, is the difference between the respective *gross* proceeds of the same goods when found and when damaged, and not the *net* proceeds; it being settled, that the Underwriter is not to bear any loss from fluctuation of market or port duties or charges after the arrival of the goods at their port of destination. *Johnson* v. *Sheddon*, 2 *East.* 581.

These rules can only apply to cases where there is a specific description of goods, but where the property is of various kinds, an account must be taken of the value of the whole, and a proportion of that as the amount of the goods lost. *Park*, 111.

Some goods are of a perishable nature, and, against the losses arising from the principle of corruption inherent in such, the Underwriters of London have exempted themselves, by declaring in a memorandum contained in all their policies, that they will not be answerable for any partial loss happening to corn, fish, salt, fruit, flour, or seed, unless it arise by way of general average, or in consequence of the ship being stranded; against a loss by which latter event, however, in cases of these perishable commodities, the two Insurance Companies already mentioned do not undertake to be answerable. See 3 *Burr.* 1553.

On this clause it has in several cases been uniformly held that no loss shall be deemed total so as to charge the Insurers in case of such perishable commodities, as long as the commodity specifically remains, though perhaps wholly unfit for use. 3 *Burr.* 1550. The case in 2 *Stra.* 1065. to the contrary, has been since over-ruled by that of *Mason* v. *Skurray*, *Park*, 116. in which it was also held, that the term Corn included peas and beans, and other particulars. See *Park*, 112—117.

Where, after seizure by an armed mob, the vessel was stranded, and part of the cargo (consisting of corn) taken by the mob at their own price, the loss cannot be recovered as for a general average; but for such part as, in consequence of the stranding, was damaged and thrown overboard, the Insured may recover, on a count, stating the loss to be by stranding. 4 *Term Rep.* 783.

The usual memorandum "Corn, fruit, &c. warranted free from average, unless general or the ship be stranded," and the ship be in fact stranded in the course of the voyage, the Underwriters are liable for an average loss arising from the perils of the seas, though no part of the loss arise from the act of stranding. *Burnett* v. *Kensington*, 7 *Term Rep.* 210.

And in a case of a ship running on some wooden piles four feet under water erected in Wisbeach river about nine yards from the shore, but placed there to keep up the banks of the shore, and lying on such piles till they were cut away, was a stranding within the meaning of the memorandum in the policy so as to subject the Underwriters to an average loss on *Corn*, and the jury found accordingly. *Dobson* v. *Bolton*, sittings after *Easter T.* 1799, *Park*, 4th *edit.* 111, *a.* See also *Bowring* v. *Elmslie*, *Park*, *5th edit. p.* 115, *b.*

So where a ship being under conduct of a pilot in her course up the river to Liverpool, was, against the advice of the master, fastened at the pier of the dock bason by a rope to the shore, and left there, and she took the ground, and when the tide left her, fell over on her side and bilged, in consequence of which, when the tide rose, she filled with water, and the goods were wetted and damaged: held, that this was a *stranding* to entitle the assured to recover for an *average loss* upon the goods. *Carruthers* v. *Sydebotham*, *Term Rep. K. B. E. 55 Geo.* 3. 77.

But the striking of a ship on a rock, where she remained a minute and a half, and was laid on her beam ends was held not to constitute a *stranding* within the meaning of that term in a policy of assurance. *M'Dougal* v. *Royal Exch. Ass. Comp. Term Rep. K. B. H.* 56 *Geo.* 3. 503.

The wages and provisions of the crew, while a ship remained in port, whither she was compelled to go for the safety of ship and cargo in order to repair a damage occasioned by tempest, were held not to be the subject of *general average*; nor the expenses of such repair, nor the wages and provision of the crew during her detention in port to which she returned, and was detained there on account of adverse winds and tempest; nor the damage occasioned to the ship and tackle by standing out to sea with a press of sail in tempestuous weather, which press of sail was necessary for that purpose in order to avoid an impending peril of being driven on shore and stranded. *Power* v. *Whitmore*, *Term Rep. K. B. E. 55 Geo.* 3. 141.

The Insurer of goods to a foreign country is not liable to indemnify the assured, (a subject of that country,) who is obliged by the decree of a court there to pay contribution to a *general average*, which, by the law of this country could not have been demanded, where it does not appear that the parties contracted upon the footing of some usage among merchants obtaining in the foreign country, to be at the same as *general average*, but such usage is to be collected merely from the recitals and assumption made in the decree. *Ibid.*

When the quantity of damage, sustained in the course of the voyage is known, and the amount, which each Insurer is to pay is settled, it is usual for the Underwriter to indorse on the policy, "Adjusted this loss at so much *per cent.*" This is called an adjustment; after which, if the Underwriter refuse to pay, the owner has no occasion to go into the proof of his loss, or any of the circumstances, the adjustment being considered as a note of hand. *Park*, 117, 118. So after judgment by default upon a valued policy, the plaintiff's title to recover is confessed, and the amount of the damage is fixed by the policy. *Dougl.* 315. *Thellusson* v. *Fletcher.* And if a loss be total at the time of the adjustment, and the Insurer pay for a total loss, the Insured is not obliged to refund, if it should afterwards turn out to be partial, but the Insurer will stand in the place of the Insured. 4 *Burr.* 1966.

6. *Salvage* is an allowance made for saving a ship or goods, or both from the danger of the seas, fire, pirates, or enemies; in which sense it is there used, though it is also sometimes incorrectly applied to signify the thing itself which is saved. *Park*, 131. And the Saver has such a property in the goods, saved by his own exertions and danger, that in an action of trover, it has been held the defendants might retain the goods till payment of the salvage. 1 *Lord Raym.* 393. 2 *Salk.* 654.

When a ship has been wrecked, the law of England, by various statutes declares, that *reasonable* salvage only shall be allowed to those who save the ship or any of the goods; and what shall be a reasonable allowance must be ascertained by three Justices of the Peace. See *stat.* 12 *Ann. st.* 2. *c.* 18. (made perpetual by *stat.* 4 *Geo.* 1. *c.* 12.) *stat.* 26 *Geo.* 2. *c.* 19. and this Dictionary, title *Wreck.*

The right of owners on re-capture has been already noticed, (*ante*, 2.) The salvage in this case is regulated by *stats.* 13 *Geo.* 2. *c.* 4. § 18. 29 *Geo.* 2. *c.* 34. § 24. which enact, that if any prize taken from the enemy, shall appear to have belonged to any of his Majesty's subjects, it shall be restored to the former owner, upon his paying, in lieu of salvage, one eighth of the value, if retaken at any time by one of his Majesty's ships. If retaken by a privateer, before it has been twenty-four hours in the possession of the enemy, the salvage paid to be one-eighth of the value; if above twenty-four and under forty-eight hours, one-fifth; if above forty-eight and under ninety-six hours, one-third part thereof: and if above ninety-six hours, a moiety or one-half part thereof; or, if the ship so retaken have been fitted out by the enemy as a ship of war, the salvage is in all cases settled at a moiety. See 43 *G.* 3. *c.* 160. § 39. and 45 *G.* 3. *c.* 72. § 7.

Wearing apparel of the master and seamen is always excepted from the allowance of salvage. The valuation of a ship and cargo, in order to ascertain the rate of salvage, may be determined by the policies of Insurance made on them respectively; if there be no reason to suspect they are undervalued. If there be no policy, the real value must be proved by invoices, &c. *Park*, 140. *Lex Merc.*

Underwriters by their policy, expressly undertake to bear all expences of salvage. It is therefore not necessary to state them in a declaration as a special breach of the policy. *Hard.* 304. See *ante*, I. 4. But if the Insurer pay to the Insured such expences, and from particular circumstances the loss be repaired by unexpected means, the Insurer shall stand in the place of the Insured, and receive the sum thus paid to atone for the loss. 1 *Ves.* 98.

Where the Salvage is high, and the other expences are great, and the object of the voyage is defeated, the Insured is allowed to *abandon* to the Insurer, and call upon him to contribute for a total loss; which brings us to the subject of,

7. *Abandonment.*—Before a person insured can demand from the Underwriter a recompence for a total loss, he must *abandon* to him whatever claims he may have to the property insured; and when the Underwriter has discharged his Insurance, and the abandonment is made, he stands in the place of the Insured, and is entitled to all the advantages resulting from that situation, in case the ship or property, &c. is not totally lost, or is afterwards restored by re-capture, &c. See *Park*, *c.* 9. 1 *Ves.* 98.

Abandonment is as ancient as the Contract of Insurance itself: the time, within which it must be made, was not however, fixed in England till lately. It is now held, that as soon as the Insured receive accounts of such a loss as entitles them to abandon, they must in the first instance, make their election whether they will abandon or not; and if they abandon, they must give the Underwriters notice in a reasonable time, otherwise they waive their right to abandon, and can never after recover for a total loss. 1 *Term Rep.* 608. But if the Insured, hearing that the ship is disabled and has put into port to repair, express his desire to the Underwriters to abandon, and be dissuaded from it by them, and they order the repairs to be made, they are liable to the Owner for all the subsequent damage occasioned by that refusal, though it should amount to the whole sum insured. 2 *Term Rep.* 407.

An assured however is entitled to a *reasonable time* for acquiring a full knowledge of the state of a damaged cargo, before he is bound to elect, whether he shall *abandon* to the Underwriters as for a total loss. *Gernon* v. *Roy. Exch. Ass. Comp.* 6 *W. P. Taunton*, 383.

When an abandonment is made, it must be total and not partial. And though the Insured may in all cases choose not to abandon, yet he cannot at his pleasure abandon, and thereby turn a partial into a total loss. 2 *Burr.* 697.

We have already seen (*ante*, II, 1.) that the Insured may abandon to the Underwriter, and call upon him for a total loss, if the damage exceed half the value; if the voyage be absolutely lost, or not worth pursuing; if further expence be necessary, and the Insurer will not engage, at all events, to bear that expence, though it should exceed the value, or fail of success. But he cannot abandon unless at some period or other of the voyage there has been a total loss. 1 *Term Rep.* 187. *Park*, *c.* 9. *p.* 166. Also, if neither the thing insured, nor the voyage be lost, and the damage does not amount to a moiety of the value, he shall not be allowed to abandon. See 2 *Burr.* 1211. 3 *Atk.* 195. and *Goss* v. *Withers*, 2 *Burr.* 683. Which latter was the first case in which the doctrine of abandonment was gone into at large, and the above principles fully settled; which have ever since been strictly adhered to, and were particularly recognized in *Milles* v. *Fletcher*, *Dougl.* (219) 231.—And in *Hamilton* v. *Mendes*, it was solemnly determined that the right to abandon must depend on the nature of the case at the time of the action brought, or at the time of the offer to abandon; in that case, therefore, where there was a capture and re-capture, and it was stated, that at the time of the offer to abandon, the peril was over, as the ship was safe in port, and had suffered no damage; the Court held that the Insured had no right to abandon. 2 *Burr.* 1198. 1 *Black. Rep.* 276. See also, *Park*, *c.* 9.

A loss of voyage for the season by perils of the sea, is not a ground of *abandonment* upon a policy on goods with a clause of warranty, free from average, &c. where the cargo is in in safety, and not of such a perishable nature as to make the loss of voyage a loss of the commodity, although the ship is rendered incapable of proceeding in the voyage.—The assured are bound to give notice of *abandonment* at the earliest opportunity; notice given five days after they received intelligence of the loss was held too late.—If one of several jointly interested in the cargo, effects an insurance for the benefit of all, he may give notice of *abandonment* for all. *Hunt* v. *Royal Exch. Assurance Comp. Term Rep. K. B. E.* 56 *Geo.* 3. 47.

But where ship and freight were insured by separate sets of Underwriters, and the ship being a general ship, was captured, and ship and freight were *abandoned* to the respective Underwriters, who paid each a total loss; and the ship being re-captured performed her voyage and earned freight; which was received by the defendant for the use of those who were legally entitled thereto: held, that the Underwriter on the ship was entitled to recover. *Case* v. *Davidson*, *Term Rep. K. B. E.* 56 *G.* 3. 79.

An *abandonment* made after capture under circumstances which would entitle the assured at the time to recover as for a total loss is not defeated so as to become an average loss only, by the mere restitution and return of the ship's hull, before action brought, if the restitution be under such condition as to make it uncertain whether the Assured may not have to pay more than its worth. *M'Iver* v. *Henderson*, *Term Rep. K. B. H.* 56 *Geo.* 3. 576.

A ship having been sold under a decree of the Admiralty Court to pay the salvage, and it not appearing that the Assured had taken any means to prevent such sale, held, they had no right to *abandon*. *Thorndy* v. *Hebson*, *Term Rep. K. B. E.* 59 *Geo.* 3. 513.

*Semble*, that an *abandonment* of freight to the Underwriters on Freight is impossible and unnecessary. *Green* v. *Royal Exch. Ass. Comp.* 6 *W. P. Taunton*, 68.

III. 1. POLICIES are annulled by the least shadow of *Fraud*, or undue concealment of facts; both parties are therefore equally bound to disclose circumstances within their knowledge. And if the Underwriter, at the time he underwrote, knew that the ship was safe arrived, the contract will be equally void, as if the Insured had concealed any

accident that had befallen the ship. *Park, c.* 10. 2 *Comm.* 460. 1 *Black. Rep.* 594. 3 *Burr.* 909.

Cases of fraud upon this subject are liable to a threefold division: 1st, The *allegatio falsi:* 2d, The *suppressio veri;* 3d, *Misrepresentation.* The latter is made a separate head; as though, if wilful, it is a direct fraud, yet if it happen by mistake, if in a material point, it will equally vitiate the policy. *Park, c.* 10. See *Dougl.* (247.) 260.

As to the first point, several cases have determined that the policy shall be void, where goods, &c. are insured as the property of an ally, or as neutral property, when in fact they are the goods of an enemy: and such false assertions in a Policy will vitiate the contract, though the loss happen in a mode not affected by that falsity. *Park, c.* 10. *Skin.* 327. 3 *Burr.* 1419. 1 *Black. Rep.* 427.

The second species of fraud, concealment of circumstances, vitiates all contracts of Insurance. The facts upon which the risk is to be computed lie, for the most part, within the knowledge of the Insured only. The Underwriter relies upon him for all necessary information; and must trust to him that he will conceal nothing, so as to make him form a wrong estimate; on this ground, where one having an account that a ship, described like his, was taken, insured his own ship, without giving any notice to the Insurers of what he had heard, the Policy was decreed in equity to be delivered up. 2 *P. Wms.* 173. See 1 *Black. Rep.* 463. 594. 2 *Stra.* 1183. *Park, c.* 10. But there are many matters as to which the Insured may be innocently silent; 1st, As to what the Insurer knows; however he came by that knowledge; 2d, As to what he ought to know; 3d, As to what lessens the risk. And it may here be remarked, that an Underwriter is bound to know political perils, as to the state of war or peace: He also ought to be acquainted with the nature and danger of every voyage, which may be called natural perils; if he insure a privateer, it is understood that he is not to be informed of its destination; and, as men reason differently from different facts, he needs not be told another's conclusion from known facts. In short, the question, in cases of concealment, must always be, "Whether there was, under all the circumstances, at the time the policy was underwritten, a fair statement or concealment; fraudulent, if designed, or, if not designed, varying *materially* the object of the Policy, and changing the risk understood to be run."—The above rules, and the whole doctrine of concealment were laid down in *Carter* v. *Boehm*, which was an Insurance by the Governor of Fort Marlborough in Bencoolen, against the event of the fort being taken by an European Power in the course of a year. 3 *Burr.* 1905. 1 *Black.* 593. And the rules there advanced and illustrated have been confirmed in subsequent cases. *Planche* v. *Fletcher, Dougl.* (238.) 251. and see *Park, c.* 10.

*A Representation* is a state of the case, not forming a part of the written instrument or Policy, as a Warranty does. Therefore if there be a misrepresentation it will avoid the Policy, as a fraud, but not as a part of the agreement, as in the case of Warranty. And if a Representation be false in any *material* point, even through mistake, it will avoid the Policy, because the Underwriter has computed the risk upon circumstances which did not exist. *Park, c.* 10. In the case of *Pawson* v. *Watson*, Lord Mansfield stated, that "there cannot be a clearer distinction than that which exists between a Warranty, which makes part of the written Policy, and a Collateral Representation which, if false in a point of materiality, makes the Policy void; but if not material it can hardly ever be fraudulent." *Cowp.* 785. And in *Mackdowal* v. *Frazer*, the same learned Judge laid down, that "a Representation must be fair and true. It should be true as to all the Insured knows; and if he represents facts to the Underwriter, without knowing the truth, he takes the risk upon himself." But the difference between the fact, as it turns out, and as represented, must be material. *Dougl.* (247.) 260. See also *Bize* v. *Fletcher*, or *Lavabre* v. *Wilson*, *Dougl.* (271.) 284. and *ante*, I, 3.

The Policy is void if the Broker conceal any *material* circumstances, though the only ground for not mentioning them should be that the facts concealed appeared immaterial to him. *Shirley* v. *Wilkinson*, *Dougl.* (293.) 306, *n.* But the thing concealed must be some *fact*, *not a mere speculation or expectation* of the Insured. *Barber* v. *Fletcher*, *Dougl.* (292.) 305.

In all these cases of fraud, wherever there has been an allegation of falsehood, a concealment of circumstances, or a misrepresentation, it is immaterial whether it be the act of the person himself who is interested, *or of his agent;* for in either place the contract is founded in deception, and the policy is consequently void. And this rule prevails, even though the act cannot be at all traced to the owner of the property insured. *Stewart* v. *Dunlop*, in *Dom. Proc.* 1785. *Fitzherbert* v. *Mather*, 1 *Term Rep.* 12. *Park, c.* 10.

Where a ship had sailed from Elsineur on her voyage home *six hours* before the owner, who had followed in another vessel on the same day, and having met with *rough weather* in his passage, arrived first, and then caused an Insurance to be effected on his own ship: held, that these circumstances were material to be communicated to the Underwriter, and that it was not sufficient to state merely, that the ship Insured, was "all well at E. on the 26th July," the day of her sailing. *Kirby* v. *Smith*, *Term Rep. K. B. T.* 58 *Geo.* 3. 672.

But where a vessel having sailed, put back to the Downs, and then sailed again, and laboured and strained much from being over laden, and then put back a second time; and upon an application to the Underwriters for liberty, for the ship to go into port, to discharge part of the cargo, it was only *communicated to them that the ship was too deep in the water:* held that as the subsequent loss had not in any degree arisen from her having so strained and laboured, the communication of that fact was *immaterial*, and that the communication made was quite sufficient. *Weir* v. *Aberdeen*, *Term Rep. K. B. II.* 59 *Geo.* 3. 320.

Where a trader shipped goods for Cagliari, on board a general ship, *represented* as sailing with licence and without convoy, and bound for Gibraltar, Cagliari, and Majorca, which had a licence to sail without convoy to Gibraltar only, and sailed from Gibraltar without convoy or licence, an officer being appointed there, to grant licences under certain circumstances: held, that an Insurance of such goods by the shipper was void. *Darby* v. *Newton*, 6 *W. P. Taunton*, 544.

If the Assured after subscription by the Underwriter, strike out with a pen, the time of warranty of sailing, which stood in the body of the Policy, and inserts in a memorandum in the margin, a different time for sailing, which the Underwriter does not sign, he destroys the policy, and the Underwriter is discharged from the original contract. *Fairlie* v. *Christie*, 7 *W. P. Taunton*, 412.

A Policy will not however be set aside on the ground of fraud, unless it be *fully* and *satisfactorily* proved: and the burden of proof lies on the person wishing to take advantage of the fraud. At the same time, positive and direct proof of fraud is not to be expected, and from the nature of the thing circumstantial evidence is all that can be given. *Park,* 214. As to the return of premium in cases of fraud, see *post,* 8.

2. It being necessary, except in some special cases, to insert the name of the ship, on which the risk is to be run, in the Policy; it follows as an implied condition, that the Insured shall neither substitute another ship for that mentioned in the Policy before the voyage commences, in which case there would be no contract at all; nor, during the voyage,

remove the property insured from one ship to another, without consent of the Insurer, or without an *unavoidable necessity*, under which every thing possible must be done for the benefit of all concerned; if he do, the implied condition is broken, and he cannot, in case of loss, recover against the Underwriter. *Park, c.* 16. See 2 *Stra.* 1248. 1 *Burr.* 351. 1 *Term Rep.* 611, *note.*

3. *Deviation* is understood to mean a voluntary departure, without necessity or any reasonable cause, from the regular and usual course of the specific voyage insured. Whenever this happens, the voyage is determined; and the Insurers are discharged from any responsibility: because the ship goes upon a different voyage from that against which the Insurer undertook to indemnify. And it is not material in this case whether the loss be or be not an actual consequence of the deviation: for the Insurers are in no case answerable for a subsequent loss, in whatever place it happen, or to whatever cause it may be attributed. Neither does it make any difference whether the Insured was or was not consenting to the deviation. *Park, c.* 17. *p.* 294. and see *Elliot* v. *Wilson, Bro. P. C.*—If therefore the Master of a vessel put into a port not usual, or stay an unusual time, it is a deviation. And if the deviation be but for a single night, or for an hour, it is fatal. But if a merchant ship carry letters of Marque she may *chase* an enemy, though she may not cruize without being deemed guilty of a deviation. *Park*, 295—299.

Wherever the deviation is occasioned by absolute necessity; as where the crew force the captain to deviate, the Underwriters continue liable. 2 *Stra.* 1264. And the general justifications for a deviation seem to be these: to repair the vessel, to avoid an impending storm, to escape from an enemy, or to seek for convoy.

If therefore a ship is decayed, or hurt by a storm, and goes to the nearest port to refit, it is no deviation, because it is for the general interest of all concerned. 1 *Atk.* 545. *Park, c.* 17. So, whenever a ship, in order to escape a storm, goes out of the direct course, or, when in the due course of the voyage, is driven out of it by stress of weather, this is no deviation. And if a storm drive a ship out of the course of her voyage, and she do the best she can to get to her port of destination, she is not obliged to return to the point from which she was driven. 1 *Term Rep.* 22. *Park, c.* 17.

A deviation may also be justified, if done to avoid an enemy, or seek for convoy; because it is in truth no deviation to go out of the course of a voyage, in order to avoid a danger, or to obtain a protection against it: if in all cases the master of a ship act fairly and *bonâ fide* according to the best of his judgment. 2 *Salk.* 445. 2 *Stra.* 1265. *Park, c.* 17.

In all cases of deviation, it may be laid down as a general rule, that, wherever a ship does that which is for the general benefit of all parties concerned, the act is as much within the spirit of the policy as if it had been expressed: and, in order to say whether a deviation be justifiable or not, it will be proper to attend to the motives, end, and consequence, of the act as the true ground of judgment. *Cowp.* 601. But to avoid as much as possible any additional risk, in case of a deviation from necessity, the ship must pursue such *voyage of necessity*, in the direct course, and in the shortest time possible, as nothing more must be done than the necessity requires, otherwise the Underwriters will be discharged. *Lavabre* v. *Walter, Dougl.* (271.) 284.

If the voyage described in the Policy be from "A. to B. and C." and the Ship go to C. before B, (though C. be nearer to A. than B. is) it is a deviation, if it be not the regular and settled course of the voyage to go to C. first. *Beatson* v. *Haworth*, 6 *Term Rep.* 531.

Whether such a regular and settled voyage will control such a policy, *Qu. ib?*

A deviation of a vessel from the voyage insured through the ignorance of the Captain, or from any other motive not fraudulent, though it avoids the policy, does not constitute an act of barratry. *Phyn* v. *Royal Exch. Ass. Comp.* 7 *Term Rep.* 505.

Policy on goods, on board a particular ship, from A. to B. "against sea risk and fire only" in the course of the voyage from A. to B. the ship was carried out of the course of the voyage insured, and while so proceeding, the goods insured sustained Sea damage: held, the Underwriters were liable for this loss. *Scott* and *another* v. *Thompson*, 1 *Bos. & Pull. N. R.* 181.

A Policy of insurance on a ship on a certain commercial voyage, with or without Letters of Marque, giving leave to the Assured to *chase*, *capture*, and *man Prizes*, however it may warrant him in weighing anchor, while waiting at a place in the course of the commercial voyage insured for the purpose of chasing the enemy who had before anchored at the same place in sight of him: and was then endeavouring to escape, will not warrant him after the capture, and in the course of the further prosecution of the voyage, in shortening sail and laying to in order to let the prize keep up with him for the purpose of protecting her as a convoy into port in order to have her condemned; though such port were within the voyage insured. *Lawrence* and *others* v. *Sydebotham*, 6 *East.* 45.

The words in a policy of Insurance "with or without letter of marque" do not appear to authorize direct cruising out of the course of the voyage insured in search of prize. *Parr* v. *Anderson*, *ib.* 202.

The Assured upon a trading voyage taking out a letter of marque (but without a certificate, which is necessary to its validity) unknown to the Underwriters, solely with a view to encourage seamen to enter and without any intention of using it for the purpose of cruizing, though the vessel was armed for self-defence, is not such an alteration of circumstances as will avoid the Policy. *Moss* v. *Byrom*, 6 *Term Rep.* 379.

And if a captain contrary to the instructions of his owner cruise for and take a prize, and the vessel be afterwards lost in consequence of it, it is an act of barratry, although the captain libelled the prize for the benefit of his owner as well as himself. *Ib.*

If a ship mean to go to more than one of the places named in a Policy, she must visit them in the order in which they stand in such Policy. *Marsden* v. *Reid*, 3 *East.* 572.

A ship was permitted by licence, to proceed from D. to L. and thence to B. there to lade, to the destination of the port, from which she departed. The vessel proceeded on her voyage from D. to L. and from L. to B.: held, that she was not protected by the licence *on a further voyage*, from B. to L. *Everth* v. *Tunno, Term Rep. K. B. M.* 58 *Geo.* 3. 142.

A Deviation *merely intended*, but never carried into effect, does not discharge the Insurers, and whatever loss happens before actual deviation, or the dividing-point of the voyage, falls upon the Underwriters. 2 *Stra.* 1249. *Thellusson* v. *Fergusson, Dougl.* (346.) 361. See also 2 *Ld. Raym.* 840. 2 *Salk.* 444. But if it can be shewn that the parties never intended to sail upon the voyage insured, if all the ship's papers be made out from a different place from that described in the policy, the Insurer is discharged, though the loss should happen before the dividing-point of the two voyages. *Wooldridge* v. *Boydell, Dougl.* 16. And, in all cases, Deviation or not is a question of fact to be decided, subject to the above rules, according to the circumstances of the case. *Dougl.* 781. Changing the voyage by a memorandum on the policy. See *Laird* v. *Robertson*, 4 *Bro. P. C.* 488.

4. Every ship insured must, by a tacit and implied Warranty at the time of the insurance, be able to perform the voyage, unless some external accident should happen; and if she have a latent defect, wholly unknown to the parties, that

will vacate the contract, and the Insurers are discharged. But though the Insured ought to know whether she was *Sea-worthy* or not at the time she set out upon her voyage, yet he cannot tell how long she will remain so; and if it can be shewn that the decay, to which the loss is attributable, did not commence till a period subsequent to the Insurance, the Underwriter will be liable though she should even be lost a few days after her departure. *Park, c.* 11. *5 Burr.* 2804. *Dougl.* (708.) 735.

The whole doctrine of *Sea-worthiness* was settled in the case of the Mills Frigate, where the Insurance was upon a ship which had a latent defect totally unknown to the parties; and it was held, that the Insurers were not liable, because the ship was not sea-worthy; and that however innocent or unfortunate the Insured might be, yet if the ship be not sea-worthy at the time of insuring, there is no *contract at all* between the parties; because the very foundation of the contract, the ship, was in the same condition as if it did not exist; and the doctrine is the same in Insurance upon goods, as when it is upon the ship itself. See *Park, c.* 11.

As an assured impliedly warrants the ship Insured to be sea-worthy; whatever forms an ingredient in sea-worthiness is not necessary to be disclosed by the assured to the Underwriter in the first instance, unless information upon the subject be particularly called for, and then the assured must disclose truly what he knows in the respect required: therefore where the assured of a ship had received a letter from the Captain, informing him that he had been obliged to have a survey on the ship at Trinidad on account of her bad character: but the survey which accompanied the letter, gave the ship a good character: held, that the nondisclosure of such letter and survey to the Underwriters did not vacate the Policy; though it appeared in evidence that such circumstance, if known, would have enhanced the premium of Insurance. *Hayward* and *another* v. *Rodgers*, 4 *East.* 590.

A ship insured at and from a port, sailed on her voyage in an *unseaworthy state*, in consequence of having a greater cargo, than she could safely carry. The defect was discovered before any loss occurred, and part of the cargo was discharged; but a loss subsequently accrued in no degree attributable to her having been overladen in the early part of her voyage: held, that the Underwriters were liable for such loss. *Weir* v. *Aberdeen, Term Rep. K. B. H.* 59 *Geo.* 3. 320.

The assured cannot recover upon a Policy of Assurance unless they equip the ship with every thing necessary in her navigation during the voyage, and therefore they cannot recover if there be no pilot on board. *Law* v. *Hollingworth*, 7 *T. R.* 160.

Whether it be necessary to the right of the assured to recover that, in navigation up the Thames, there should be a pilot on board qualified according to the direction of the *stat.* 5 *G.* 2. *c.* 20. *Qu. ib?*

By *stat.* 31 *Geo.* 3. *c.* 54. § 7. (32 *G.* 3. *c.* 52) for regulating the African slave trade, it is necessary that the certificate of the Captain's having served as the act requires should be attested by the owner or owners of the ship or ships in which the service was performed: and the assured cannot recover on a Policy on a ship whose captain has not such a certificate. *Farmer* v. *Legg*, 7 *Term Rep.* 186.

See also *Christie* v. *Secretain*, 8 *Term Rep.* 192. and *Forbes* and *another* v. *Wilson, Park*, 5th *edit.* in *no.* (*a*) *p.* 228, *b.*

5. In *Wager-Policies*, or Policies upon *Interest or no Interest*, the performance of the voyage in a reasonable time and manner, and not the bare existence of the ship or cargo, is the object of Insurance. But such Policies being contradictory to the real nature of an Insurance, which is a contract of indemnity, seem to have been originally bad, because Insurances were invented for the benefit of trade, and not that persons unconcerned or uninterested should profit by them. Indeed these Wager-Policies were not introduced into England, till after the Revolution, and the Courts of Law looked upon them with a jealous eye; while the Courts of Equity considered them as absolutely void. *Park, c.* 14. See 10 *Mod.* 77. *Com. Rep.* 360. 2 *Vern.* 269. 716.

The great distinction between *Interest*, and *Wager, Policies* was, that in the former the Insured recovered for the loss actually sustained, whether it was a total or partial loss; in the latter he never could recover but for a total loss. 2 *Burr.* 683. At length it was found that the indulgence given to these fictitious, or to speak more plainly, gambling Policies, had increased to such an alarming degree as to threaten the very annihilation of that security, which it was the original intent of Insurances to introduce. It was, therefore, enacted by *stat.* 19 *Geo.* 2. *c.* 37. that Insurances made on ships or goods, *Interest or no Interest*, or without further proof of interest than the Policy, or by way of gaming or wagering, or without benefit of salvage to the Insurer, should be null and void. The statute, however, contains an exception for Insurances on private ships of war fitted out solely to cruize against his Majesty's enemies. See *Fizgerald* v. *Pole*, 4 *Bro. P. C.* 439. and also provides, that any merchandizes or effects from any ports or places in Europe or America, in the possession of the crowns of Spain or Portugal, may be insured in such way or manner, as if the statute had not been made. And it has been decided, that the statute does not extend to Insurances of foreign property, on foreign ships. *Thellusson* v. *Fletcher, Dougl.* (301) 315.

The above provision of the statute relative to Insurances from any ports or places in Europe or America, in the possession of Spain or Portugal, is founded on the regulations of those States to prohibit illicit trade; it is loosely worded, and admits of some latitude of intrepretation, perhaps more than the Legislature meant to allow. See *Park, c.* 14. *ad fin.*

A *Valued Policy* is not a Wager-Policy; it originates from the circumstances of its being sometimes troublesome to the trader to prove the value of his interest, or to ascertain the quantity of his loss: he therefore gives the insurer a higher premium to agree to estimate his interest at a sum certain. In this case the plaintiff must prove some interest, although he need not prove the value of his interest. But if a Valued Policy were used merely as a cover to a wager in order to evade the statute, it would be void. 2 *Burr.* 1167. 4 *Burr.* 1966. *Park, c.* 14. The valuation does not raise a mere presumption which may be repelled by evidence, but the Insurers are liable to the full amount, in a case, not being actually a colourable wager, although they may prove an over valuation.

On an insurance on ship and goods, valued at so much on a voyage to Africa, and the West Indies, the assured is entitled to recover the whole sum on a total loss, which happened in the latest period of the voyage; although a considerable part of the estimated value consisted originally in stores and provisions for the voyage, and the slaves were brought to a profitable market at the first place of the ship's destination, where she arrived a mere wreck, and soon after foundered. *Shaw* v. *Felton*, 2 *East.* 109.

Upon a joint capture by the army and navy, the officers and crew of the ships, before condemnation, have an insurable interest, by virtue of the prize-act, which usually passes at the commencement of a war. *Park, c.* 14. cites *Le Cras* v. *Hughes.* See also *Boehm* v. *Bell*, 8 *Term Rep.* 154. *Sterling* v. *Vaughan*, 11 *East's Rep.* 619.

In *Routh* v. *Thompson*, 11 *East's Rep.* 428. an armed ship having taken into Lisbon a Danish vessel, after a proclamation requiring such vessel to be brought into port, and having taken a freight to England, with which the vessel captured sailed on the day of issuing letters of marque, it was held that an Insurance made on behalf of the captors could not be sustained.

The profits of a Cargo, employed in trade on the coast of Africa, are an insurable interest. *Barclay* v. *Cousins*, 2 *East*. 544. So is an Insurance on imaginary profit. *Hendrickson* v. *Margetson*, *B. R.* 1776. cited in the above case.

In *Eyre* v. *Glover*, 16 *East's Rep.* 218. the Insurance was on *profits*, without further description, and held good.—A mariner cannot insure his wages or commissions. *Webster* v. *De Tastet*, 7 *Term Rep. K. B.* 157.—But the master may insure his commission, privileges, and, as it seems, his wages. *King* v. *Glover*, 1 *New Rep. C. P.* 206.

All contracts of Insurance made by persons having no interest in the event about which they insure, or without reference to any property on board, are merely wagers, and as such void. *Cowp.* 583. And wherever the court can see upon the face of the Policy that it is merely a contract of gaming, where indemnity is not the object in view, they are bound to declare such Policy void. *Lowry* v. *Bourdieu*, *Dougl.* (151.) 468. See *Allston* v. *Campbell*, 4 *Bro. P. C.* 476.

It is observed in *Miller's* Treatise on Insurance, that the object of Insurance strictly speaking is, not to make a positive gain, but to avoid actual damage and harm from the event provided against. The assured must not only have an interest in the subject, but he must be seeking Indemnification in case that subject should be lost or impaired: but although an Insurance, actually speaking, seems to relate to positive loss merely in opposition to expected profit, yet this distinction is not generally attended to. The failure of an advantage, of which we have formed a strong expectation, does not appear very different from actual damage sustained; between a *wager* therefore, and a legal Insurance, the material difference seems to be the circumstance of the assured having a pecuniary interest in the subject.

Great discussion respecting the nature of insurable interest took place in respect of insurances effected by the commissioners for disposing of Dutch ships seized, and detained by the crown; these commissioners were appointed by *stat.* 35 *Geo.* 3. *c.* 80. § 21. and it was determined that the commissioners had such an interest as entitled them to insure. See *Crawford* v. *Hunter*, 8 *Term Rep. K. B.* 13. and more fully *Lucena* v. *Crawford*, (in Error,) 3 *Bos. and Pull.* 75, *&c. Dom. Proc.* 2 *New Rep.* 313. In this latter case it was admitted that a mere expectation without interest cannot be the subject of Insurance.

With respect to the degree and kind of interest which are requisite when the subject is in its nature insurable, see *Hibbert* v. *Carter*, 1 *Term Rep. K. B.* 745. *Hill.* v. *Secretan*, *Wolfe* v. *Horncastle*, 1 *Bos. & Pull.* 315, 316.

Where an assured, licensed to export 150 barrels of gunpowder, which was prohibited by proclamation under a statute, exported 300 barrels: held, that *he might recover the value of the* 150 *barrels licensed.* *Keir* v. *Andrade*, 6 *W. P. Taunton*, 493.

The master of ship drew a bill on his owners for supplies for the ship, and wrote on the bill "if this be not honoured the holder will insure the amount, and place the premium to the drawer's account." The bill being dishonoured, the holder insured the ship for three months, and averred interest in the bill which was to be sufficient proof of *Interest.* The ship was lost after the three months: held, that the holder of the bill *was authorised to insure* for his own benefit, and was warranted in insuring for three months, and that he might recover the premium again of the drawer. *Tasker* v. *Scott*, 6 *W. P. Taunton*, 234.

A person who has *several interests* in a cargo, viz. as partner in 7—16ths. as a cognisee of the whole, and as having a lien on the whole for advances, may protect them all by one Insurance, without expressing in the Policy the *number* or *nature of his Interests.* *Caruthers* v. *Sheddon*, 6 *W. P Taunton*, 14.

6. Whenever an Insurance is made on a *voyage* expressly prohibited by the common statute, or maritime law of this country, the Policy is void. And in such a case it is immaterial whether the Underwriter did or did not know that the voyage was illegal; for the Court cannot substantiate a contract in direct contradiction to law. *Johnston* v. *Sutton*, *Dougl.* (241.) 254. See *Camden* v. *Anderson*, 6 *Term Rep.* 723. 1 *Bos. & Pull.* 273. *Wilson* v. *Marryat*, 8 *Term Rep.* 31. and 1 *Bos. & Pull.* 430. in which reports the judgment in the K. B. and, *Exchequer Chamb.* are fully and accurately given. See also *Bird.* v. *Appleton*, 8 *Term Rep.* 562. In like manner, if a ship, though neutral, be insured on a voyage prohibited by an embargo, such an Insurance is void, *Park*, *c.* 12. An Insurance upon a smuggling voyage, prohibited by the revenue laws of this country, is void: but the rule has never been extended to cases against the revenue laws of a foreign State, as no country pays attention to the revenue laws of another. *Park*, *c.* 12. *Dougl.* 251.

The questions how far trading with an enemy in time of actual war, and how far Insurances upon the goods of an enemy are legal, expedient, or political, have been frequently considered. As to the first, it was expressly prohibited, by the laws of ancient France, to the subjects of that country, and it appears scarcely to admit of a doubt in England, though the cases on the subject are very few. See 2 *Rol. Ab.* 173. 1 *Vez.* 317. In a very modern case, Lord Mansfield said, that by the maritime law, trading with an enemy is cause of confiscation, provided you take him in the fact. But this does not extend to neutral vessels. The common law, however, does not seem directly to forbid such trading; and one argument to shew that it does not, is, that several statutes have been *specially* passed, in order to make such trading illegal. 1 *Term Rep.* 84. As to the second question, the Insurance of Enemies' property; under the common law it has been sanctioned; and *Lord Hardwick*, in a case before him, observed, that there had been no determination that Insurances on Enemies' ships during the war is unlawful, and that there had been several Insurances of this sort during the (then) war, which a determination on the legality of trading with an enemy might hurt. 1 *Vez.* 319. The Legislature have, however, repeatedly thought it necessary to interfere to prevent these Insurances; and in the war which commenced in 1793, to prevent also all kind of trading with the enemy (France,) whose proceedings, indeed, were then such as to threaten the dissolution of all civil society. See *stat.* 21 *Geo.* 2. *c.* 4. which expired about a twelvemonth after the (then) war; and *stat.* 33 *Geo.* 3. *c.* 27. which not only renders Insurances on French property void during the war, but also subjects the offender to three months' imprisonment, and imposes the penalties of treason on all persons trading with so perfidious a foe. Many strong and ingenious arguments have, however, been urged against what is termed the impolicy of preventing such Insurances. The most forcible arise from the assertions that the balance of that trade has always been found in favour of England, and that it has been the means of detecting many of the enemy's plans. But as even the advocates for this measure allow that no Insurance can be made upon a voyage to a besieged fort or garrison, with a view of carrying assistance to them; or upon ammunition, warlike stores, or provisions; surely the admitting of any sort of Insurance, is affording a tempting opening to this which is acknowledged to be dangerous; and it may be worthy the consideration of the Legislature to settle both these points in a permanent manner. See at length on this subject, *Park*, *c.* 12.

After the above was written, the cases of *Brandon* v. *Nesbitt* and *Bristow* v. *Towers* were determined. See 6 *Term Rep.* 23. 25. By the first of these, the Court of B. R. declared that no action could be maintained either by *or in favour o*

an alien enemy; and as a consequence of that determination, the latter case was decided; after a long argument by the positive opinion of the Court in a very few words, that the Insurance of an enemy's property is illegal, and no action can be maintained thereon.

This question is now for ever at rest in the Law of England, by the decision of the Court of K. B., upon a writ of error from the Common Pleas, in which it was held by *Lord Kenyon*, *Grose*, *Lawrence*, and *Le Blanc*, Justices, that it was a principle of the common law, that trading with an enemy, *without* the King's licence, is illegal in British subjects. *Potts* v. *Bell*, 8 *Term Rep.* 548.

Therefore, where the licence to trade was on the express condition that bond be given, in such penalty, by such persons, and in such manner as the Commissioners of the Customs, shall direct, that the goods shall be exported to the places proposed and to no other; and that a certificate shall be produced within six months from the British consul, or other person there described, that the goods have been landed: if the bond be not given, the licence is void, the voyage illegal, and cannot be insured. *Vandyck* v. *Whitmore*, 1 *East*, 475.

A licence having been obtained for two vessels, sailing under any flag, to proceed from England to Holland, with specified goods, to cruise from one port of Holland to another, to land or lade part of their cargoes at one or more places, as might be more suitable, and having completed their cargoes of specified goods to proceed with the same to England, the licence to be renewed on application by the parties at the return from each voyage during six months; the exporter fearing the vigilance of the Dutch government where his trade was contraband, delayed to export until after the expiration of six months, and then sailed and was lost: held, that the parties being in this country, and not applying for a renewed licence, the adventure was not *legalized* by the original licence, and an Assurance thereon was *void*. *Tullock* v. *Boyd*, 7 *W. P. Taunton*, 468.

7. All Insurances upon *commodities*, the importation or exportation of which is prohibited by law, are void; and the rule prevails in this instance also, whether the Underwriter did or did not know that the subject of the Insurance was a prohibited commodity. *Park*, *c.* 13. And to prevent all such Insurances, the *stat.* 4 & 5 *W. & M. c.* 15. inflicts a penalty of 500*l.* on any person who, by way of Insurance, shall procure the importation of any uncustomed or prohibited goods, with a like penalty on the Insured. Also by the *stat.* 8 & 9 *W.* 3. *c.* 36. for the protection of the *Royal Lustring Company*, the importation of any foreign alamodes or lustrings, by way of Insurance, or otherwise, without paying the duties, &c. is expressly prohibited. *Wool* being the staple manufacture of this kingdom, it was always deemed a heinous offence to transport it out of the realm; (see this Dictionary, title *Wool*); and as the practice of insuring it tended only to encourage such illicit commerce, it has been restrained by divers statutes; one of which enacts, that whoever, by way of Insurance, undertakes to export *Wool* from England to parts beyond the seas, shall be liable to pay 500*l.*; the like penalty is also inflicted on the Insured; and all Insurances on wool, woolfells, &c. are declared void. *Stat.* 12 *Geo.* 2. *c.* 21. § 29—33. And a subsequent statute declares, that both the Insurer and Insured shall be considered as exporters of Wool, &c. and liable to the penalties inflicted by that statute, *viz.* 3*l. per* sheep, and three months' solitary imprisonment; and 3*s. per lb.* of wool, or 50*l.* in the whole at the election of the offender, and the like imprisonment, and the wool, &c. to be forfeited: *Stat.* 28 *Geo.* 3. *c.* 38. § 2. 9. 45. *& seq.*

Upon the same principle that *voyages* prohibited by the common, statute, or maritime law, may not be the subject of Insurance (see *ante*, 6.) it is, that Insurances are also void, on prohibited or uncustomed goods; or if made in any way to protect smuggling, or to defraud the British revenue laws; to obstruct the effect of the Navigation Acts; or to import or export goods prohibited by Royal Proclamation in time of war; and goods, which, from their nature, are contraband, as arms or ammunition to an enemy, or money, provisions, or ships, according to peculiar circumstances. But Insurances on goods, the exportation or importation of which are forbidden by the laws of other countries, are valid. On the whole of this part of the subject, see *Park*, *c.* 13. and this Dictionary, titles *Navigation Acts*, *Customs*.

8. It is a question not decided, whether in cases of fraudulent Insurance, where the Underwriter has run no risk, he shall be liable to return the premium: In some equitable cases, where the Underwriters have been relieved on account of fraud, it has been decreed, that the *premium* should be returned. 2 *Vern.* 206. 2 *P. Wms.* 170. and see *Burr.* 1361. And it has been laid down as clear law, that if the Underwriter has been guilty of fraud, an action lies against him, to recover the premium. 3 *Burr.* 1909. On the other hand, if the fraud be on the part of the Insured, and is notoriously palpable and gross in its nature, the Court of B. R. will order the Underwriter to retain the premium. *Park*, *c.* 10. cites *Tyler* v. *Horn*. By the *stat.* 28 *Geo.* 3. *c.* 38. § 47. to prevent Insurance on exported wool, if the Underwriter informs against the party insuring, he may retain the premium: but if the Insurer inform he shall be entitled to recover it back. When a Policy is void as a Wager Policy under *stat.* 19 *G.* 2. *c.* 37. though the ship arrive safe, the Underwriter may retain the premium. *Lowry* v. *Bourdieu*, *Dougl.* 468. And so he may in the case of a Re-assurance void, by the same statute, 3 *Term Rep.* 266. And see *Routh* v. *Thompson*, 11 *East. Rep.* 428.

In general, when property has been insured to a larger amount than the real value, the overplus premium, or if goods are insured to come in certain ships from abroad, but are not in fact shipped, the whole premium shall be returned. If the ship be arrived before the Policy is made, the Insurer being apprized of it, and the Insured being ignorant of it, he is entitled to have his premium restored on the ground of fraud; but if both parties are ignorant of the arrival, and the Policy *be lost or not lost*, it seems the Underwriter ought to retain it, as if the ship had been lost at the time of underwriting, he would have been liable to pay the amount of his subscription. Clauses are frequently inserted by the parties, that upon the happening of a certain event there shall be a return of premium. These clauses have a binding operation on the parties, and the construction of them is a matter for the Court and not for the Jury to determine. In short, if the ship or property insured was never brought within the terms of the contract, so that the Insurer never ran any risk, the premium must be returned. *Park*, *c.* 19. see 3 *Burr.* 1240. *Cowp.* 668. 1 *Show.* 156. *Dougl.* (255) 268. *Simon* v. *Boydell.*

Two rules are solemnly established, 1st, That whether the cause of the risk not being run is attributable to the fault, will, or pleasure of the Insured, the premium is to be returned. *Cowp.* 668. And, 2dly, Where the contract is entire, whether for a specified time, or for a voyage, and the risk is once commenced, and there is no contingency on which the risk is to end at any immediate period, there shall be no apportionment or return of premium afterwards. Hence, in cases of deviation, though the Underwriter is discharged, he shall retain the premium. So in cases of Insurance for twelve months, where the loss happens in two; even though the premium is calculated at so much *per* month; likewise where different ports are mentioned in the course of an outward or homeward bound voyage, and the ship is lost before setting out on her return; in all these cases also the premium shall

be retained. See *Cowp.* 666. *Loraine* v. *Thomlinson, Doug.* (561) 584. *Bermon* v. *Woodbridge, Dougl.* (751) 780. But it is otherwise if the Jury find an express usage upon the subject of return of premium; and, indeed, it seems that there never has been an apportionment, unless there be something like an usage found to direct the judgment of the Court. But if there are two distinct points of time, or in effect, two voyages, either in the contemplation of the parties, or by the usage of trade, and only one of the two voyages was made, the premium shall be returned on the other, though both are contained in one Policy. 3 *Burr.* 1237. 1 *Black. Rep.* 318. See *Park, c.* 19. for a fuller discussion of the subject.

Policy on the *Ceres* "at and from Oporto to Lynn, with liberty to touch any ports on the coast of Portugal to join convoy, particularly at lisbon, at 12 guineas *per cent.* to return 6*l. if she sail with convoy from the coast of* Portugal, and arrive:" the Ceres sailed from Oporto with a sloop and cutter appointed to protect the trade of that place to Lisbon, from whence it was to proceed with the Lisbon trade, under a larger convoy for England; in the way from Oporto to Lisbon the fleet was dispersed by a storm, and the Ceres, judging it for the best, run for England, and arrived: held, that the Insured was entitled to a return of premium. *Audley* v. *Duff*, 2 *Bos. & Pull.* 111. See also *Aguilar and others* v. *Rodgers*, in B. R. 7 *Term Rep.* 421.

So where the words were "if she depart with convoy from Portugal, and arrive. *Everard* v. *Hollingworth*, *ib. in notes.*

If a Policy be effected on a foreign built ship, British owned, (which not being required to be registered, may sail without convoy,) it is not incumbent on the assured to communicate to the Underwriter, at the time of making the Policy, the circumstance of her being foreign built. *Long* v. *Duff*, 2 *Bos. & Pull.* 209.

In an action on a Policy of Insurance with a count for money had and received, if the Defendant pay no money into Court, but establish, as a defence, that the risk never commenced, the Plaintiff is entitled to a verdict for the premium, though no demand of premium was made by his Counsel in opening his case. *Penson* v. *Lee*, 2 *Bos. & Pull.* 330.

The captors of a ship, seized as prize, are not entitled to a return of premium (paid for Insurance) although it be afterwards adjudged to be no prize, and restitution be awarded to the owners by the Court of Admiralty. *Bochm* v. *Bell*, 8 *Term Rep.* 154.

The premium paid on an illegal Insurance, to cover a trading with an enemy, cannot be recovered back, though the Underwriter cannot be compelled to make good the loss. *Vandyck* v. *Hewitt*, 1 *East.* 96.

The assured were held not entitled to a *return of premium*, upon a Policy at and from a place within the limits of the South Sea Company Charter, the ship being without a licence from the South Sea Company at the commencement of the risk, and up to the time of her loss, although the assured procured a licence as soon as they could and before they knew of her loss, and the licence was made to relate to a time antecedent to the loss. *Cowie et al.* v. *Barber*, *Term Rep. Easter*, 55 *Geo.* 3. 16.

Where a licence was obtained and Insurance effected from Riga to Hull, on goods the produce of Russia, on board a Swedish ship, but the ship sailed three days before the letter directing the licence to be obtained reached the agent, the letter having been delayed by contrary winds beyond the usual time, and the licence was obtained two days afterwards, and the Insurance effected subsequently to that: held, that though the voyage was in its inception illegal, being contrary to 12 *Car.* 2. *c.* 18. § 8. nevertheless the assured might *recover back the premium*, *Hentig* v. *Staniforth*, *Term Rep. E.* 56 *Geo.* 3. 122.

IV. BOTTOMRY (or *Bottomree*) is a contract by which the owner of a ship borrows money to enable him to carry on the voyage, and pledges the keel or *bottom* of the ship, as a security for the repayment. In which case it is understood, that if the ship be lost the lender loses all his whole money; but if it return in safety, then he shall receive back his principal, and also the premium or interest agreed upon, however it may exceed the legal rate of interest. And this is allowed to be a valid contract in all trading nations for the benefit of commerce, and by reason of the extraordinary hazard run by the lender: and in this case the ship and tackle, if brought home, are answerable (as well as the person of the borrower) for the money lent. But if the loan is not upon the vessel, but upon the goods and merchandize, which must necessarily be sold or exchanged in the course of the voyage, then only the borrower, personally, is bound to answer the contract; who therefore, in this case, is said to take up money at RESPONDENTIA. It may be added, that in a loan upon Bottomry, the lender runs no risk though the *goods* should be lost; and on *Respondentia*, the lender must be paid his principal and interest, though the *ship* perish, provided the goods are safe. In this consists the chief difference between *Bottomry* and *Respondentia*; in most other respects they are the same. 2 *Comm.* 457, 458. *Park, c.* 21.

There is a third kind of contract, included in these terms, for the repayment of money borrowed, not on the ship and goods only, but on the mere hazard of the voyage itself: as when a man lends a merchant 1000*l.* to be employed in a beneficial trade, with condition to be repaid with extraordinary interest, in case a certain voyage be safely performed: which kind of agreement is sometimes called *fœnus nauticum*; and sometimes *usura maritima*. But as this gave an opening for usurious and gaming contracts, especially upon long voyages, it was enacted, by *stat.* 19 *Geo.* 2. *c.* 37. that all monies lent on *Bottomry*, or at *Respondentia*, on vessels bound to or from the East Indies, shall be expressly lent only upon the ship, or upon the merchandize; that the lender shall have the benefit of salvage; and that if the borrower has not on board effects to the value of the sum borrowed, he shall be responsible to the lender, for so much of the principal as hath not been laid out, with legal interest, and all other charges, though the ship and merchandize be totally lost. See *Park, c.* 21.

This statute has entirely put an end to that species of contract which arose from a loan upon the mere voyage itself, as far only as relates to India voyages; but these loans may still be made in all other cases, as at the common law, except in the following instance, which is another statute prohibition. The *stat.* 7 *Geo.* 1. *c.* 21. § 2. declares, that all contracts made or entered into by any of his Majesty's subjects, or any person in trust for them, for or upon the loan of any monies by way of Bottomry, on any ship or ships in the service of foreigners, and bound or designed to trade in the East Indies, or places beyond the Cape of Good Hope, (mentioned in the statutes relating to the English East India Company,) shall be null and void.—This act, it should seem, does not prevent the lending money on Bottomry, on foreign ships trading, from their own country, to *their* settlements in the East Indies. The purpose of the statute was only to prevent the people of this country from trading to the British settlements in India under foreign commissions; and to encourage the lawful trade thereto. It seems to be allowed that an American ship, since the declaration of American independency, is a foreign ship within the meaning of this statute. See *Sumner* 3 *Green*, *Park, c.* 21.

*Bottomry* is a contract of more antiquity than that of Insurance, and arose from the power given to the master of a ship, to hypothecate the ship and goods for necessaries in a foreign country. But the ship must be abroad, and in a state

of necessity, to justify such an act of the master. See *Moor*, 918. *Hob.* 11. See *Justin* v. *Ballam*, and case of the ship *Gratitude*, 3 *vol. Rob. Ad. Rep. p.* 240. *Salk.* 34. *Park, cap.* 21.

The *principle* upon which Bottomry is allowed, is, that the lender runs the risk of losing his principal and interest: and therefore it is not usury to take more than the legal rate. See 2 *Vez.* 148. 154. *Cro. Jac.* 208. 508. *Hardr.* 418. 1 *Sid.* 27. 1 *Lev.* 54. 1 *Eq. Ab.* 372. But if a contract were made by colour of Bottomry, in order to evade the statute against usury, it would then be usurious. 2 *Vez.* 146. And as the hazard to be run is the very basis and foundation of this contract, it follows, that if the risk be not run, the lender is not entitled to the extraordinary premium. 1 *Vern.* 263.

The risks to which the lender exposes himself are generally mentioned in the condition of the bond, and are nearly the same as those against which the Underwriter, in a Policy of Insurance, undertakes to indemnify. It has been determined, that *piracy* is one of these risks. *Comb.* 56. And if a loss by *capture* happen, the lender cannot recover against the borrower: but this does not mean a temporary taking, but such as occasions a total loss. Therefore, where a ship was taken and detained for a short time, and yet arrived at the port of destination within the time limited, it was held, that the bond was not forfeited, and the obligee may recover. *Joyce* v. *Williamson*, *Park*, *c.* 21. In the same case it was also settled, that a lender on *Bottomry*, or at *Respondentia*, is neither entitled to the benefit of salvage, nor liable to contribute in case of a general average; for which reason the *stat.* 19 *Geo.* 2. *c.* 37, above mentioned, contains a positive provision to allow the benefit of salvage, in the cases there mentioned. If, however, a man insure *Respondentia* interest on a foreign ship, and be obliged to contribute to an average loss, by the laws of her country, English Underwrites are bound to indemnify. *Walpole* v. *Ewer*, *Park*, *c.* 21.

If the ship be lost by a wilful deviation from the track of the voyage, the event has not happened, upon which the borrower was to be discharged from his obligation; as she was not lost by a peril to which the lender agreed to make himself liable. *Skin.* 152. 345. *Holt.* 126. 1 *Eq. Ab.* 372. 2 *Ch. Ca.* 130. And, indeed, it is generally expressly provided against in the bond.

If the borrower becomes bankrupt after the loan of the money, and before the event happens which entitles the lender to repayment, the lender may prove his debt under the commission, after the contingency shall have happened; as if the event had actually happened before the Commission of Bankruptcy issued. *Stat.* 19 *Geo.* 2. *c.* 32. § 2. See this Dict., title *Bankrupt*.

*Bottomry* and *Respondentia* may be insured, provided it be specified in the Policy to be such interest. And by *stat.* 19 *Geo.* 2. *c.* 37, the *Lender* alone can make such Insurance; and the Borrower can only insure the surplus value of the goods over and above the money borrowed. But money expended by the Captain for the use of the ship, and for which *Respondentia*-interest is charged, may be recovered under an Insurance on *goods*, *specie*, and *effects*, provided it is sanctioned by the usage of trade. See *Glover* v. *Black*, 3 *Burr.* 1394. 1 *Black. Rep.* 405. and *Gregory* v. *Christie*, *Park*, *c.* 1. *p.* 11.—Finally, where a person insures a Bottomry Interest, and recovers upon the Bond, he cannot also recover upon the Policy. *Park. c.* 21. *p.* 428.

FORM OF A RESPONDENTIA BOND.

*KNOW All Men by these presents, that I A. B. of, &c. am held and firmly bound to C. D. of, &c. in the sum or penalty of* 1000*l. of good and lawful money of Great Britain, to be paid to the said C. D. or to his certain Attorney, Executors, Administrators, or Assigns; for which payment, well and truly to be made, I bind myself, my Heirs, Executors, and Administrators, firmly by these presents, sealed with my seal. Dated this day of in the year of the reign of our Sovereign Lord George the Third, by the Grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth, and in the year of our Lord one thousand seven hundred and ninety-four.*

THE CONDITION *of the above-written obligation is such, that whereas the above-named C. D. hath, on the day of the date above-written, lent unto the above-bounden A. B. the sum of* 500*l. upon merchandizes and effects, to that value, laden or to be laden on board the good ship or vessel, called the of the burden of tons, or thereabouts, now in the river Thames, whereof E. F. is Commander: If the said ship or vessel do and shall, with all convenient speed, proceed and sail from, and out of the said river of Thames, on a voyage to any ports or places in the East Indies, China, Persia, or elsewhere beyond the Cape of Good Hope, and from thence do and shall sail and return unto the said river of Thames, at or before the end and expiration of thirty-six Calendar months, to be accounted from the day of the date above-written, and that without deviation (the dangers and casualties of the seas excepted): And if the above-bounden A. B. his heirs, executors, or administrators, do and shall within — days next after the said ship or vessel shall be arrived in the said river of Thames, from the said voyage, or at the end and expiration of the said thirty-six Calendar months, to be accounted as aforesaid (which of the said times shall first and next happen), well and truly pay, or cause to be paid, unto the above-named C. D. his executors, administrators, or assigns, the sum of* 500*l. of lawful money of Great Britain, together with — pounds of like money, by the Calendar month, and so proportionably for a greater or lesser time than a Calendar month, for all such time, and so many Calendar months, as shall be elapsed and run out of the said thirty-six Calendar months, over and above twenty Calendar months, to be accounted from the day of the date above-written; or, if in the said voyage, and within the said thirty-six Calendar months, to be accounted as aforesaid, an utter loss of the said ship or vessel, by fire, enemies, men of war, or any other casualties, shall unavoidably happen; and the above-bound A. B. his heirs, executors, or administrators, do and shall, within six months next after the loss, pay and satisfy to the said C. D. his executors, administrators, or assigns, a just and proportional average on all goods and effects which the said A. B. carried from England on board the said ship or vessel, and on all other the goods and effects of the said A. B. which he shall acquire during the said voyage, and which shall not be unavoidably lost: Then the above-written obligation to be void, and of no effect, or else to stand in full force and virtue.*

*Sealed and delivered (being first duly stamped) in the presence of* } *A. B.*

V. INSURANCE UPON LIFE, is a contract by which the Underwriter, for a certain sum, proportioned to the age, health, and profession of the person whose life is the object of the Insurance, engages that that person shall not die within the time limited in the Policy; or if he do, that he (the Underwriter) will pay a sum of money to the person in whose favour the policy is granted. *Park*, *c.* 22.

These contracts have been found to be attended with so many advantages, to persons whose incomes might otherwise determine with their own lives, or those of others, that a Society obtained a charter from Queen *Anne* for the purpose of granting such annuities, and still subsists, under the name of *The Amicable Society for a Perpetual Assurance Office*. A

similar Society is established, by deed inrolled in the Court of King's Bench, at Westminster, called *A Society for Equitable Assurances on Lives and Survivorships.* The two Companies of *The Royal Exchange* and *London Assurance* also obtained a charter for the same purpose: and by *stat.* 33 *Geo.* 3, *c.* 14, the two Companies of *The Royal Exchange Assurance* for insuring of ships, and for insuring houses, &c. against fire, are authorised to grant annuities for lives or on survivorship; and are incorporated, for that purpose, by the name of *The Royal Exchange Assurance Annuity Company.* Private Underwriters may also enter into policies of this nature, if an Insured chooses to trust to their single security.

To avoid the iniquitous gambling which had begun to take place upon this, as well as on other Insurances, the *stat.* 14 *Geo.* 3. *c.* 48, provides, that "No Insurance shall be made on the life or lives of any person or persons, wherein the person for whose use the policy is made, shall have no interest, or by way of gaming, or wagering, but such Insurance shall be null and void." And, in order more effectually to guard against any imposition or fraud, and to be the better able to ascertain what the interest of the person entitled to the benefit of the Insurance really is, it is further enacted, by the same statute, "That it shall not be lawful to make any policy or policies, on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies, the person's name interested therein, or for whose use or benefit, or on whose account such policy is so made or under-written. And that in all cases where the Insured has an interest in such life or lives, event or events, no greater sum shall be recovered or received from the Insurer, than the amount or value of the interest of the Insured in such life or other event."

On this statute it has been determined, that the holder of a note for money won at play, has not an insurable interest in the life of the maker of the note. *Dwyer* v. *Edie, Park*, 432.

But a creditor has such an interest in the life of his debtor, that he may insure it, and recover upon the policy. See *Anderson* v. *Edie*, *B. R.* sittings in *Trinity Term*, 1795, *Park*, 432; whereon Lord *Kenyon* said, "that it was singular that this question had never been *directly* decided before. That a creditor had certainly an interest in the life of his debtor, the means by which he was to be satisfied may materially depend upon it, and at all events the death must in all cases in some degree lessen the security." See also *Tidswell* v. *Angerstein*, *Peake's N. P. Cases*, 151.

But this being a contract of indemnity, if the debt is in any way paid, the assured cannot recover on the policy: resolved in a case of Insurance on the life of Mr. *Pitt*, whose debts were paid by parliament. *Godsal* v. *Boldero*, 9 *East's Rep.* 72.

The general rules and maxims which govern Insurances in general, and on which so much has already been said, apply also to this species of them. The following are such as relate more directly to the contract now immediately in question:

As to the *Risk.*—In a Life-Insurance the Insurer undertakes to answer for all those accidents to which the life of man is exposed, except suicide, or the hands of justice. The death must happen within the time limited by the policy, otherwise the Insurers are discharged: and though a man receives a mortal wound during the existence of the policy, if he does not in fact die till after the expiration of it, the Insurers are not liable. See *Willes J.'s* opinion in *Lockyer* v. *Offley*, 1 *Term Rep.* 252. but if a man whose life is insured goes to sea, and the ship in which he sailed is never heard of afterwards, the question whether he did or did not die within the time insured, is a fact for the Jury to ascertain from the circumstances. *Patterson* v. *Black*, *Park*, 433.

With respect to the *Loss*—This sort of policy being on the life or death of a man, does not admit of the distinction between total and partial losses. *Park*, 434.—If the Insurer become bankrupt before the loss happens, the person interested may prove the debt, under the commission, as if the loss had happened before it issued, by virtue of the *stat.* 19 *Geo.* 2. *c.* 32. (See *ante*, IV.). *Cox* v. *Loitard*, *Dougl.* (160) 166, *n.*—A policy was made for one year *from the day of the date* thereof: the policy was dated September 3, 1697. The person died *on* September 3, 1698, about one o'clock in the morning, and the Insurer was held liable. 2 *Salk.* 625. 1 *Ld. Raym.* 480. To prevent disputes, it is now usual to insert in the policy the words, *the first and last days included.* *Park*, 436.

*Fraud* equally vitiates policies on lives, as it does those in Marine Insurances. *Pre. Ch.* 20. 2 *Vern.* 206. But where there is a warranty that the person is in good health, it is sufficient that he be in a reasonable good state of health; for it can never mean that he is free from the seeds of disorder. And even if the person, whose life was insured, laboured under a particular infirmity; if it be proved by medical men, that, in their judgment, it did not at all contribute to his death, the warranty of health has been fully complied with, and the Insurer is liable. 1 *Black. Rep.* 312. *Park*, 438, 439.

The conditions of a life Insurance required a declaration of the state of the health of the assured, and the policy was to be *valid, only* if the statement were free from *misrepresentation* and *reservation:* the declaration described the assured as resident at Fisherton Anger; she was then a prisoner in the county gaol there: held, that it was a question for the jury, whether the imprisonment were a material fact and ought to be communicated. *Huguenin* v. *Rayley*, 6 *W. P. Taunton*, 186.

We have already seen (*ante*, III, 8.) that when the risk is entire, and is once begun, there shall be no apportionment of premium: if, therefore, the person whose life was insured, should commit suicide, or be put to death by the hands of justice, the next day after the risk commenced, there would be no return of premium. See *Tyrie* v. *Fletcher*, *Cowp.* 669.

VI. INSURANCE AGAINST FIRE is a contract by which the Insurer undertakes, in consideration of the premium, to indemnify the Insured against all losses, which he may sustain in his house, or goods, by means of fire, within the time limited in the policy. Various offices have been instituted for these kind of Insurances: some established by Royal Charter, others by deed inrolled; and others which give security on land for the payment of losses. The rules by which these Societies are governed, are established by their own managers, and a copy given to every person at the time he insures; so that by his acquiescence, he submits to their proposals, and is fully apprised of those rules, upon the compliance or non-compliance, with which he will or will not be entitled to an indemnity. There are not, therefore, many cases on the subject, in our law-books. The following are the most requisite to be noticed:

*The London Assurance Company* insert a clause in their proposals, by which they declare, that they will not hold themselves liable for any damage by fire occasioned by any invasion, foreign enemy, or any *military or usurped power* whatever. Under this proviso it has been held, that the Insurers were not exempted from, but liable to make good, a loss by fire occasioned by a mob, which arose under pretext of the high price of provisions, and burned down the plaintiff's malting house. 2 *Wils.* 363.

The *Sun Fire Office*, in addition to the above words, adds, *civil commotion.* It was held, that under these latter words the Company were exempt from, and not liable to satisfy, losses occasioned by rioters, who rose in the year 1780, to compel the repeal of a statute which had passed in favour of the Roman Catholicks. *Langdale* v. *Mason*, *Park*, *c.* 23.

When a *loss* happens, the Insured is bound by the proposals of most of the Societies, and ought, in all cases, to give immediate notice of the loss, and as particular an account of the value, &c. as the nature of the case will admit. He must also produce a certificate of the Minister and Church-wardens as to his character, and their belief of the loss sustained, and the truth of what he advances. *Park*, 448.

If a policy of Insurance from fire refer to certain printed proposals, the proposals will be considered as part of the policy. *Worsley* v. *Wood and others in Error*, *T.* 36 *Geo.* 3. 6 *Term Rep.* 710.

Insurance "against all the damages which the plaintiffs should suffer by *Fire*, on stock and utensils in their regular built sugar house," does not extend to damage done to the sugar by the heat of the usual fires employed in refining, being accumulated by the mismanagement of plaintiffs, who inadvertently kept the top of their chimney closed. *Austin* v. *Drewe*, 6 *W. P. Taunton*, 436.

By the proposals of the *Phœnix* Company it is stipulated, that "persons insured shall give notice of the loss forthwith, deliver in an account, and procure a certificate of the Minister and Churchwardens, and some reputable householders of the parish, importing that they know the character, &c. of the assured, and believe that they really sustained the loss, and without fraud: the procuring of such a certificate is a condition precedent to the right of the assured to recover on the policy; and it is immaterial that the Minister, &c. wrongfully refused to sign the certificate. *Ib.*

A certificate of some reputable householders alone is not sufficient. *Ib.*

In these Insurances against fire, the loss may be either partial or total, and some of the offices, if not all, expressly undertake to allow all reasonable charges, attending the removal of goods in cases of fire, and to pay the sufferer's loss, whether the goods are destroyed, lost, or damaged, by such removal. *Park*, 449.

In a policy against fire from half year to half year, the assured agreed to pay the premium half yearly, "as long as the insurers should agree to accept the same," within fifteen days after the expiration of the former half year, and it was also stipulated that no Insurance should take place till the premium was actually paid; a loss happened within fifteen days after the end of one half year, but before the premium for the next was paid: held, that the insurers were not liable though the assured tendered the premium before the end of fifteen days, but after the loss. *Torleton* v. *Stanniforth in Error*, *E.* 36 *Geo.* 3. 1 *Bos. & Pull.* 471.

The plaintiff having one of several warehouses next but one to a boat-builder's shop which took *fire*; on the same evening after that fire was apparently extinguished, gave instructions by an extraordinary conveyance for insuring *that warehouse*, then having others uninsured, but without apprising the Insurers of the neighbouring fire. Though the terms of Insurance did not expressly require the communication, held, that the concealment of this fact avoided the Policy. *Bufe* v. *Turner*, 6 *W. P. Taunton*, 338.

These policies are not, in their nature, assignable, nor can the interest in them be transferred without the consent of the Office; contrary to what has been expressly determined in cases of Marine Insurances. 1 *Term Rep.* 26. It is provided, however, that when any person dies, the interest shall remain to his heir, executor, or administrator, respectively, to whom the property insured belongs; provided they procure their right to be indorsed on the policy, or the premium be paid in their name. *Park*, 549.

It is necessary that the party injured should have an interest or property in the house insured, at the time the policy is made out, and at the time the fire happens: and therefore, after the lease of the house is expired, the Insured's assigning the policy does not oblige the insurers to make good the loss to the assignee. *Lynch* v. *Dalzell*, *Bro. P. C.* and see 2 *Atk.* 554.

The *Premium* upon common Insurances is 2*s. per cent.* for any sum not exceeding 1000*l.*; and 2*s.* 6*d.* from 1000*l.* upwards. Besides which there is a duty to Government under *stat.* 22 *Geo.* 3. *c.* 48. of 1*s.* 6*d. per cent.* but which latter does not extend to Insurances upon public hospitals.

By *stat.* 17 *Geo.* 3. *c.* 50. § 24. if any person sign a policy of Insurance against fire, not being duly stamped, he shall forfeit 10*l.* and must also pay 5*l.* over and above the usual stamp-duties, (see *ante*, I. 1.) before it can be received in evidence.

The same principles as to *fraud*, and the *return of premium*, apply to cases in Insurance against fire as to all other contracts of Insurance.

INTAKERS. A kind of thieves in the northern parts of England, so called, because they did take in and receive such booties as their confederates, the outpartners, brought to them from the borders of Scotland; they are mentioned in *stat.* 9 *H.* 5. *c.* 7.

INTASSARE. See *Tassum*.

INTENDMENT OF LAW, *intellectus legis.*] The understanding, intention, and true meaning of law. *Lord Coke* says, the judges ought to judge according to the common Intendment of law. 1 *Inst.* 78.

*Intendment* shall sometimes supply that which is not fully expressed or apparent, and when a thing is doubtful, in some cases, Intendment may make it out; also many things shall be intended after verdict, in a cause, to make a good judgment: but Intendment cannot supply the want of certainty in a charge in an indictment for any crime, &c. 5 *Rep.* 121.

Sometimes a thing is necessarily *intended* by what precedes or follows it; and where an indifferent construction may have two Intendments, the rule is to take it most strongly against the plaintiff. *Show.* 162. Though if a plaintiff declares, that the defendant is bound to him by obligation, it shall be intended that the obligation was sealed and delivered: if one is bound in a bond, and in the *solvend'* of the bond it is not expressed unto whom the money shall be paid, or if paid to the obligor, the law will intend it is to be paid to the obligee; and where no time is limited for payment of the money, it shall be intended to be presently paid. 2 *Lill. Abr.* 71.

The intent of parties in deeds, contracts, &c. is much regarded by the law: though it shall not take place against the direct rules of law: the law doth not in conveyances of estates admit them regularly to pass by Intendment and implication; in devises of lands they are allowed, with due restrictions. *Vaugh.* 261, 262. Where seisin of an inheritance is once alleged, it shall be intended to continue till the contrary is shewn. *Jones*, 181. A court pleaded generally to be held *secund' consuetud'* shall be intended held according to the common law. *Goldsb.* 111.

By Intendment of law every parson, or rector of a church, is supposed to be resident in his benefice, unless the contrary be proved. *Co. Lit.* 78, *b.*

One part of a manor by common Intendment shall not be of another nature than the rest. *Co. Lit.* 73, *b.*

Of common Intendment a will shall not be supposed to be made by collusion. *Co. Lit.* 78, *b.* The law presumes that every one will act for his best advantage; therefore credits the party in whatever is to his own prejudice. *Fin. Law.* 10. *Max.* 54. Usury shall not be intended, unless expressly found by the jury. *Bridgm.* 112. 10 *Rep.* 59. Covin shall not be intended or presumed in law, unless expressed or averred. *Bridgm.* 112. When one word may have a double Intendment, one according to the law, and another against the law, that Intendment shall be taken which is according to law, and this by a reasonable Intendment. 3 *Bulst.* 306. *Yelv.* 50. See further titles *Implication*, *Indictment*, *Deed*, and such other titles as are applicable to this subject.

INTENDMENT OF CRIMES. In ancient times felonious attempts, intending the death of another, were adjudged felony; for the will was taken for the fact. *Bract.* 1 *E.* 3. But at this day, the law does not generally punish Intendments to do ill, if the intent be not executed; except in case of treason, where intention proved by circumstances shall be punished as if put in execution. 3 *Inst.* 108. And if a person enter a house in the night, with intent to commit burglary, it is felony: and by statute 22 & 23 *C.* 2. *c.* 1. maliciously cutting off or disabling any limb or member, with an intent to disfigure, &c. is felony. See also *Plowd.* 474. Assault, with intent to commit robbery on the highway, is made felony punishable by transportation. *Stat.* 27 *Geo.* 2. *c.* 21.—Intention of force and violence makes riots criminal. 3 *Inst.* 9. Where men do evil, and say they intend none; or if the intention be only to beat, and they kill a person, they are to be punished for the crime done. *Plowd.* 355. If a man entering a tavern, &c. commit a trespass, the law will judge that he originally intended it. 8 *Rep.* 147. See this Dictionary, titles *Homicide*, *Treason*, *&c.*

INTENT, OR INTENTION. The words of deeds shall be construed according to the Intent of the parties, and not otherwise. The Intent shall be destroyed where it does not agree with the law. *Pl. C.* 160, *b.* 162, *b.*

In every agreement the Intent is the chief thing that is to be considered; and if by the act of God, or other means not arising from the party himself, the agreement cannot be performed according to the words, yet the party shall perform it as near the Intent as he may. *Pl. C.* 290.

Common usage and reputation frequently govern the matter, and direct the Intention of the parties; as upon sale of a barrel of beer the barrel is not sold, but upon sale of a hogshead of wine it is otherwise. *Savil*, 124. *Hardr.* 3. The Intention of a man is not always to be pursued in equity; as if a man settles a term in trust for one and his heirs, yet it shall go to the executor. 1 *Vern.* 164.

All deeds are but in nature of contracts, and the Intent of the parties reduced into writing, and the Intention is to be chiefly regarded. In an act of parliament the Intention appearing in the preamble shall controul the letter of the law, and from the regard which the law itself gives to the Intention of the party, it is, that where there is fine by render, there shall be no dower; and so a rent or recognizance shall not be extinguished by levying a fine to the party. *Vern.* 58. See 14 *Vin. Abr.* tit. *Intent*, and this Dictionary, titles *Deed*, *Limitation*, *Agreement*, *Statute*, *&c.*

INTENTIONE. A writ that lies against him who enters into lands after the death of tenant in dower or for life, &c. and holds out to him in reversion or remainder. *F. N. B.* 203.

INTER CANEM ET LUPUM. Words formerly used in appeals to signify the crime being done in the twilight. *Inter Placita de Trin.* 7 *Ed.* 1. *Rot.* 12. *Glouc. Plac. Cor. apud Novum Castrum.* 24 *Ed.* 6. *Rot.* 6. This in Herefordshire, they call the *mock-shadow*, corruptly the *mock-shade*, and in the north, *daylight's gate*; others *betwixt hawk and buzzard. Cowell.*

INTERCOMMONING. Is where the commons of two manors lie together, and the inhabitants of both have time out of mind depastered their cattle promiscuously in each. *Cowell.* See title *Common.*

INTERDICT OR INTERDICTION, *interdictio*, *interdictum.*] An ecclesiastical censure, prohibiting the administration of divine ceremonies. See *Wals. Hist. an.* 1357. It is a general excommunication of a whole country or province: it is mentioned in some of our historians, *viz* Knighton tells us, *anno* 1208, that the Pope excommunicated King John, and all his adherents, *Et totam terram Anglicanum supposuit interdicto*, which began the first Sunday after Easter, and continued six years and one month; during all which time nothing was done in the churches besides baptism and confessions of dying people.

THE ANCIENT FORM OF AN INTERDICT.

IN the name of Christ, *We the Bishop, in behalf of the Father, Son, and Holy Ghost, and of St. Peter, the chief of the apostles, and in our own behalf, do excommunicate and interdict this church, and all the chapels thereunto belonging, that no man from henceforth may have leave to say* mass, *or to hear it, or in any wise to administer any divine office, nor to receive God's tithes without our leave; and whosoever shall presume to sing or hear mass, or perform any divine office, or to receive any tithes, contrary to this* interdict, *on the part of God the Father Almighty, and of the Son, and of the Holy Ghost, and on the behalf of St. Peter, and all the saints, let him be accursed and separated from all Christian society, and from entering into Holy Mother Church, where there is forgiveness of sins; and let him be* Anathema, Maranatha, *for ever with the devils in* hell. Fiat. fiat. fiat. *Amen.*—DU CANGE.

This severe church-censure has been long disused. See further titles *Papist*, *Rome.*

INTERDICT. In the civil law, and law of Scotland, a prohibition nearly equivalent to the *injunction* of our Court of Chancery. See title *Injunction.*

INTERDICTED OF WATER AND FIRE. Were anciently those persons who suffered banishment for some crime; by which judgment, order was given that no man should receive them into his house, but deny them fire and water, the two necessary elements of life, which amounted as it were to a civil death; and this was called *legitium exilium* says Livy.

INTEREST, *interesse.*] Is commonly taken for a chattel real, as a lease for years, &c. and more particularly for a future term; in which case it is said in pleading, that one is possessed *de interesse termini.* Therefore an estate in lands is better than a right or interest in them; though, in legal understanding, an interest extends to estates, rights, and titles that a man hath in, or out of lands, &c, so as by grant of his whole interest in such land, a reversion therein, as well as possession in fee-simple, shall pass. *Co. Lit.* 345. Because no livery of seisin is necessary to a lease for years, such lessee is not said to be seised, or to have true legal seisin of the land. Nor indeed does the bare lease vest any *estate* in the lessee, but only gives him a right of entry, on the tenement, which right is called his interest in the term, or *interesse termini:* but when he has actually so entered, and thereby accepted the grant, the estate is then and not before vested in him, and he is *possessed* not properly of the land but of the term of years; the possession or seisin of the *land* remaining still in him who hath the freehold. 1 *Inst.* 46. See 2 *Comm.* 144, *b*, 2. *c*, 9. I. and this Dictionary titles *Lease*, *Term*, *Estate.*

A mortgage is an interest in land, and on non-payment, the estate is absolute in law, and his interest is good in equity to entitle him to receive and enjoy the profits till redemption or satisfaction; and on a fore-closure, he hath the absolute estate both in law and equity. 9 *Mod.* 196. See title *Mortgage.*

INTEREST OF MONEY. The legal profit or recompence allowed, on loans of money, to be taken from the borrower by the lender. The rate of legal Interest has varied and decreased, according as the quantity of specie in this kingdom has increased by accessions of trade, the introduction of paper credit, and other circumstances. The *stat.* 37 *H.* 8. *c.* 9. confined Interest to *ten per cent.* and so did the *stat.* 13 *Eliz. c.* 8. The *stat.* 21 *Jac.* 1. *c.* 17. reduced it to *eight per cent.* and the *stat.* 12 *Car.* 2. *c.* 13. to *six*: and lastly, by *stat.* 12 *Ann. st.* 2. *c.* 16. it was brought down to *five per cent. per annum:* which is now the extremity of legal

Interest that can be taken on a loan of money. But yet if a contract which carries Interest be made in a foreign country, our courts will direct the payment of Interest, according to the law of the country in which the contract was made. 1 *Eq. Ab.* 289. 1 *P. Wms.* 395. (See 2 *Bro. C. R.* 2.) Thus, Irish, American, Turkish, and Indian, Interest have been allowed in our courts to the amount of even 10 or 12 *per cent.* for Interest depends on local circumstances, and the refusal to enforce such contracts would put a stop to all foreign trade. And by *stat.* 14 *Geo.* 3. *c.* 79. all *bonâ fide* mortgages and securities on estates or property in Ireland, or the plantations, bearing Interest not exceeding *six per cent.* shall be legal, though executed in Great Britain. 2 *Comm.* 465. *c.* 30. IX. 4. See further this Dictionary, title *Usury.*

Where an estate is devised for payment of debts, Chancery will not allow Interest for book debts. 3 *Ch. Rep.* 94. Where lands are charged with payment of a sum in gross, they are also chargeable in equity with payment of Interest for such sum. *Fin. R.* 286. Interest is recovered by way of damages, where damages are recovered *ratione detentionis debiti:* but not where damages only are recovered, for interest is not recovered *occasione dampnorum; per Powel, J.* 2 *Salk.* 623. No Interest to be allowed for costs, 14 *Vin. Abr.* title *Interest.* In a long unsettled partnership account, rendered intricate by the neglect of a party, *he* shall have no Interest on the balance when settled. 1 *Bro. C. R.* 239. See further titles *Bankrupt, Account, Damages, Mortgage, &c.*

INTEREST ON LEGACIES. In case of a vested Legacy, due immediately, and charged on land, or money in the funds, which yield an immediate profit, Interest shall be payable thereon from the testator's death; but if charged only on the personal estate, which cannot be immediately got in, it shall carry Interest only from the end of the year after the death of the testator. 2 *P. Wms.* 26, 27. See title *Legacy, Executor.*

INTEREST, OR NO INTEREST. See title *Insurance.*

INTERESTED WITNESS. Interested Witnesses may be examined upon a *voir dire*, if suspected to be secretly concerned in the event; or their interest may be proved in court. 3 *Comm.* 370. See titles *Evidence, Witness.*

INTERLINEATION IN A DEED. See tit. *Deed*, III.

INTERLOCUTORY DECREE IN CHANCERY. See titles *Chancery, Injunction, Decree.*

INTERLOCUTORY JUDGMENT. Interlocutory judgments are such as are given in the middle of a cause, upon some plea, proceeding on default, which is only intermediate, and does not finally determine or complete the suit. As judgment for the plaintiff in abatement, of *respondeat ouster*, i. e. that defendant shall answer over, or farther, plead in chief, or put in a more substantial plea.

But the Interlocutory judgments, most usually spoken of, are those incomplete judgments, whereby the right of the plaintiff is indeed established, but the *quantum* of damages sustained by him is not ascertained, which is the province of a jury. In such case a writ of enquiry issues to the sheriff, who summons a jury, enquires of the damages, and returns to the court the inquisition so taken, whereupon the plaintiff's attorney taxes costs, and signs final judgment. 3 *Comm.* 396, 397. See title *Judgment*, I.

In Scotch practice the term Interlocutor is applied to the judgment of the Court of Session, or of the Lord Ordinary, which exhausts the points at issue, and which, if allowed to become final, will have the effect of deciding the case.

INTERLOCUTORY ORDER. See this Dict. titles *Chancery, Injunction.*

INTERLOPERS. Persons who intercept the trade of a company of merchants. *Merc. Dict.* Applied principally to those who infringe the charters of the *East India Company.* See that title.

INTERPLEADER, Fr. *enterplaider*, Lat. *interplacitare.*] To discuss or try a point incidentally happening as it were between, before the principal cause can be determined. Interpleader is allowed, that the defendant may not be charged to two severally, where no default is in him: as if one brings detinue against the defendant upon a bailment of goods, and another against him upon a trover, there shall be Interpleader, to ascertain who hath right to his action. 2 *Danv. Abr.* 779. If two bring several detinues against A. B. for the same thing, and the defendant acknowledges the action of one of them, without a prayer of Interpleader, they shall not interplead on the request of the other; for the Interpleader is given for the security of the defendant, that he may not be twice charged, and he hath waived that benefit. 18 *Ed.* 3. 22.

If one brings detinue against B. and counts upon a delivery of goods, &c. to re-deliver to him, and another brings detinue against him also, and counts so likewise; if there be not any privity of bailment between them, yet they shall interplead, to avoid the double charge of the defendant; and also because the court cannot know to whom to deliver the thing detained, if both should recover. *Br. Enterplead*, 8. And upon such several detinues, if the defendant says that he found it, and traverses the bailment, they shall interplead; for then he is chargeable as well to the one as the other; so if he says that they delivered jointly *absque hoc*, that they delivered it as they have counted; but it is otherwise, if the defendant doth not traverse the bailment, because if there was a bailment, he is chargeable only to the bailor, and may plead in bar against the others. 2 *Danv.* 782.

Where two bring several detinues for one thing, and the defendant prays that he may interplead, and delivers the thing to the court, and before the award of the Interpleader, one discontinues the suit, the other shall not have judgment; but if he discontinue his suit after the Interpleader, the other may have judgment. 11 *H.* 6. 19.

If a recovery be had upon an Interpleader, judgment shall be given to recover the thing demanded against the defendant; and not against the garnishee, in case of garnishment, &c. 2 *Danv.* 783. When two have interpleaded in detinue, he that recovers shall recover damage against the other. *Br. Damage*, 68.

There was formerly Interpleader relating to delivery of lands by the King to the right heir, where two persons out of wardship were found heirs, &c. 7 *Rep.* 45. *Staund. Prer. cap.* 17. *Bro.* title *Enterplead.* And anciently this head, (spelt Enterpleader) made a great title in the law.

There are also *Bills of Interpleader* in a Court of Equity. Thus, where two or more persons claim the same thing by different or separate interests, and another person not knowing to which of the claimants he ought of right to render a debt or duty, or to deliver property in his custody, fears he may be hurt by some of them, he may exhibit a bill of Interpleader against them. In this bill he must state his own rights, and their several claims; and pray that they may interplead, so that the court may adjudge to whom the thing belongs, and he may be indemnified. *Milford's Treat.* 47. See *Bunb.* 303. 1 *Eq. Ab.* 80. *Eq. Ab.* 173. 1 *Burr.* 37. *Pract. Reg.* 38.

The principles upon which courts of equity proceed in these cases, are similar to those by which the courts of law are guided in the case of *bailment:* the courts of law compelling Interpleader between persons claiming property, for the indemnity of a third person in whose hands the property is, in those cases only where, by agreement of both claimants, the property has been bailed to a third person; and the courts of equity extending the remedy to all *other* cases (leaving those of bailment to the common law) to which in conscience it ought to extend. *Milford's Treat.* 125.

If a bill of Interpleader does not show that each of the defendants, whom it seeks to compel to interplead, claims a right, both the defendants may demur; one because the bill shows no claim of right in him; the other, because (for that very reason) the bill shows no cause of Interpleader. 1 *Vez.* 248. Or if the bill shows no right to compel the defendants to interplead, whatever rights they may claim, each defendant may demur. As the court will not permit such a bill to be brought in collusion with either claimant, the plaintiff must annex to his bill an affidavit that it is not exhibited in collusion with any of the parties; the want of which affidavit is a cause of demurrer. 1 *Vez.* 218. A bill of this nature generally prays an injunction to restrain the proceedings of the claimants in some other court; and as this may be used to delay the payment of money by the plaintiff, if any is due from him, he ought by his bill to offer to pay the money due into court. *Mitf. Treat.* 126.

After a decree on a bill of Interpleader, there is generally an end of the suit as to the plaintiff; and if he dies, the cause may proceed without revivor. 1 *Vern.* 351. See further titles *Chancery, Injunction, &c.*

INTERPRETATION of STATUTES, DEEDS, WILLS, &c. It has been well observed that in respect of *Laws*, it is scarcely possible to express them in such terms as shall be free from all ambiguity. Such a degree of precision is perhaps unattainable; and the want of a clear and distinct idea of the object, or the want of views sufficiently comprehensive, or the defect of language, will constantly either incumber the regulation, or leave some part of the rules to be enforced: and the same inaccuracy must almost inevitably prevail, even in the framing of private deeds; and hence rules of interpretation are required in order to insure just and uniform decisions; these rules are drawn from the general scope and intention of the instrument, from the nature of the transaction or circumstances, from the legal rights of the parties independent of the instrument or law in question, and from many other particulars; and a thorugh knowledge of those rules of interpretation is the first ground of science in framing the laws or deeds required for each occasion. See further titles *Statutes, Deeds, Wills, Agreements, &c.*

INTERREGNUM. There cannot be any *Interregnum* in this country, by the policy of the Constitution; for the right of sovereignty is fully vested in the successor to the throne by the very descent of the crown. See title *King*, I.

INTERROGATORIES. Are particular questions in writing, demanded of witnesses brought in to be examined in a cause, especially in the Court of Chancery. These Interrogatories must be exhibited by the parties in the suit on each side; which are either direct for the party that produces them, or counter on behalf of the adverse party: and generally both Plaintiff and Defendant may exhibit direct, and counter, or cross Interrogatories. See title *Deposition, Practice.*

They are to be pertinent and only to the points necessary, and either drawn or perused by council, and must be signed by them: if they are leading, *viz.* such as these, *Did not you do or see such a thing, &c.* the depositions on them will be suppressed; for they should be drawn, *Did you see, or did you not see,* &c. without leaning to either side; and not only where they point more to one side of the question than the other; but if they are too particular, they will likewise be suppressed. The Commissioners, &c. who examine witnesses on Interrogatories, must examine to one Interrogatory only at a time; they are to hold the witnesses to every point interrogated; and take what comes from them on their examination, without asking any idle questions, or putting down any impertinent answers not relating to the Interrogatories, *&c.* See titles *Depositions, Equity.*

If a contempt be committed in the face of the Court, the offender may be instantly apprehended and imprisoned at the discretion of the Judges, without any farther proof or examination. *Staundf. P. C.* 73. *b.* In matters arising at a distance, the court generally grant a rule to shew cause why an attachment should not issue, or in very flagrant instances of contempt, an attachment issues in the first instance. *Salk.* 84. *Stra.* 185. 564. This process is intended to bring the party into Court, and when there he must either stand committed or put in bail, in order to answer such *Interrogatories* as shall be administered to him for the information of the Court. These *Interrogatories* are in the nature of a charge or accusation; and if any of them are improper, the defendant may refuse to answer it, and move the court to have it struck out. *Stra.* 444. If the party can clear himself upon oath, he is discharged; but if perjured, may be prosecuted for the perjury. 6 *Mod.* 73. If the contempt be of such a nature, that, when the fact is once acknowledged, the Court can receive no farther information by Interrogatories than is already possessed of (as in case of a rescue): the defendant may be admitted to make such simple acknowledgment, and receive his judgment without answering to any Interrogatories; but refusing to answer or answering evasively is punishable as a high and repeated contempt. 4 *Comm.* 287. *c.* 20.

With regard to this singular mode of trial, thus admitted in this *one* particular instance, and so contrary to the genius of the common law in any other, it may be sufficient to observe, that as the process by attachment in general appears to be extremely ancient; (*Y. B.* 20 *H.* 6. 37. 22 *E.* 4. 29) and has, in more modern times, been recognised, approved, and confirmed by several express acts of parliament; (*Statutes* 43 *Eliz. c.* 6. § 3. 13 *Car.* 2. *st.* 2. *c.* 2. § 4. 9 & 10 *W.* 3. *c.* 15. 12 *An. st.* 2. *c.* 15. § 5.) so the method of examining the delinquent upon oath with regard to the contempt alleged, is at least of as high antiquity, and, by long and immemorial usage, is now become the law of the land. *M.* 5. *E.* 4. *rot.* 75. cited *Rast. Ent.* 268. *pl.* 5. 4 *Comm.* 288. *c.* 20.

It has been remarked, that the admission of the party to purge himself by oath is more favourable to his liberty, though perhaps not less dangerous to his conscience. Some declamation has also been used against the temptation to perjury afforded by this proceeding; this latter, however, is an argument which can never affect the case of any honest man.

INTERRUPTION. Is when, during the course of prescription, the true proprietor claims his right. *Scotch Dict.*

INTESTATE, *Intestati.*] There are two kinds of Intestates; one who makes no will; another who makes a will, and nominates executors, but they refuse; in which case he dies an Intestate, and the Ordinary commits administration. 2 *Par. Inst. fol.* 397. In former times, he who died Intestate, was accounted damned, because (as *Mat. Par.* tells us) he was obliged by the canons to leave at least a tenth part of his goods to pious uses, for the redemption of his soul; therefore, whoever neglected so to do, took no care of his own salvation. They made no difference between a suicide and an Intestate; for as, in one case, the goods were forfeited to the King, so in the other they were forfeited to the chief Lord. But because it was accounted a very wicked thing to die without making any distribution of his goods to pious uses, and such cases often happen by sudden deaths, therefore, by subsequent constitutions, the Bishops had power to make such distribution as the Intestate himself was bound to do; and this was called *Eleemosyna rationabilis.* And it was by this means that the spiritual courts came first to have jurisdiction in testamentary cases. See this Dict. titles *Executors, Will.*

INTESTATES' ESTATES. The goods and chattels of persons dying intestate. 2 *Lil. Abr.* 73. See this Dict. title *Executor*, I, 1. V, 7, 8.

INTOL AND UTTOL. Toll or custom paid for things imported or exported, or brought in and sold out. *Cowell.*

INTRARE MARISCUM. To drain any low ground, and by dykes, walls, &c. take in, and reduce it to herbage or pasture; whence comes the word *Innings*. *Will. Thorn.*

INTROMISSION. The assuming possession of property belonging to another either on legal grounds, or without any authority: the latter is termed *Vitious* Intromission. *Bell's Scotch Law Dict.*

INTRUSION, *Intrusio.*] Is when the ancestor dies seised of any estate of inheritance, expectant upon an estate for life, and then tenant for life dies, between whose death and entry of the heir, a stranger intrudes. *Co. Lit.* 277. *Bract. lib.* 4. *cap.* 2. Intrusion, therefore, signifieth an unlawful entry into lands and tenements void of a possessor, by him who hath no right to the same: and the difference between an Intruder and an Abator is this, that an *Abator* entereth into lands void by the death of a tenant in fee; and an intruder enters into land void by the death of tenant for life or years. *F. N. B.* 203.

*Blackstone* ranks Intrusion as a species of injury by ouster, or amotion of possession from the freehold, and states it to be, The entry of a stranger, after a particular estate of freehold is determined, before him in remainder or reversion. It happens, says he, where a tenant for a term of life dieth seised of lands and tenements, and a stranger entereth thereon, after such death of the tenant, and before any entry of him in remainder or reversion. The difference between Intrusion and Abatement is always to the prejudice of the heir, or immediate devisee; an Intrusion is always to the prejudice of him in remainder or reversion. So that an Intrusion is always immediately consequent upon the determination of a particular estate: an Abatement is always consequent upon the descent or devise of an estate in fee-simple. 3 *Comm. c.* 10.

There is a writ of Intrusion, which lies where the tenant for life, &c. dies; but if a man doth intrude after the death of such a tenant, he in reversion *in tail* shall not have this writ, but is put to his *formedon:* for it lieth only for him who hath the reversion in fee-simple, &c. after the death of tenant for life, or in dower, &c. *New Nat. Br.* 509. It is said that one having a fee-estate in remainder, shall have writ of Intrusion; and that the assignee of the remainder may bring it, as well as an heir, &c. *New N. B.* 509.

But whether a devisee in remainder can maintain a writ of Intrusion; or whether a writ can be framed on the stat. *West.* 2. *c.* 24. in the nature of a writ of Intrusion, seems doubtful. See *Romilly* v. *James*, 6 *W. P. Taunton*, 263.

As he who enters and keeps the right heir from the possession of his ancestor is an Intruder punishable by common law; so he who enters on the King's land and takes the profits, is an Intruder against the King. *Co. Lit.* 277. For this Intrusion information may be brought; but before office found, he who occupies the land shall not be said to be an Intruder, for Intrusion cannot be but where the King is actually possessed, which is not before office; though the King is entitled to the mesne profits after the tenant's estate ended. *Moor*, 295. See title *Information*, I.

By *stat.* 21 *Jac.* 1. *cap.* 14. the defendants may plead the general issue in informations of Intrusion, brought on behalf of the King, and retain their possession till trial, where the King hath been out of possession, and not received the profits for twenty years; and no *scire facias* shall issue, whereupon the subject shall be forced to special pleading, &c.

INTRUSION DE GARD. A writ that lay where the infant within age entered into his lands, and held out his Lord. *Old Nat. Br.* 90.

INTRUSIONE. Is the writ brought against an Intruder, by him that hath fee-simple, &c. *New Nat. Br.* 453.

INVADIARE. To engage or mortgage lands; *Invadiationes*, mortgages of land. *Mon. Angl. tom.* 1. p. 478.

INVADIATUS. One, who having been accused of some crime, not fully proved, is put *sub debita fidejussione.*

INVASION. See *Defence of the Realm.*

INVASIONES. In the Inquisition of serjeancies and knights' fees; *anno* 12 and 13 of King John, there are some titles called *Invasiones; et Invasiones super regem.*

INVECTA ET ILLATA. Terms applied in the Scotch law, to articles subject to certain liens or services.

INVENTIONES. Is used in ancient charters for *treasure-trove;* money or goods found by any person, and not challenged by the owner; which by the common law, is due to the King, who grants the privilege or benefit to some particular subjects. *Chart. K. Ed.* I. *to the Barons of the Cinque Ports: Placit. temp. Edw.* I & *Ed.* II. MS. *f.* 89.

INVENTORY, *Inventorium.*] A list or schedule containing a true description of all the goods and chattles of a person deceased at the time of his death, with their value appraised by indifferent persons; which every executor or administrator ought to exhibit to the Bishop or Ordinary at such time as he shall appoint. *West. Symb. lib.* 2. *pag.* 696. By *stat.* 21 *Hen.* 8. *c.* 5. executors and administrators are required to make and deliver in upon oath to the Ordinary, inventories indented, of which one part shall remain with the Ordinary, and the other part with the executor or administrator. The intention of this statute was for the benefit of the creditors and legatees, that the executor or administrator might not conceal any part of the personal estate from them: though as to the valuation it is not conclusive, but the real value must be found by a jury; if they are under-valued the creditors may take them as appraised; and if over-valued it shall not be prejudicial to the executor.

But though generally all the personal estate of the deceased, of what nature or quality soever, ought to be put into the Inventory; yet goods given away in the life-time of the deceased, and actually in the possession of the party to whom given, and the goods to which a husband is entitled as administrator to his wife, are not to be included. 2 *Bulst.* 355.—Notwithstanding the law requires that the Inventory be exhibited within three months after the death of the person, if it is done afterwards, it is good, for the Ordinary may dispense with the time, and even in some cases, whether it shall be exhibited, or not; as where creditors are paid, and the will performed, &c. *Raym.* 470. These Inventories proceed from the civil law; and as, by the old Roman law, the heir was obliged to answer all the testator's debts, Justinian ordained, that Inventories should be made of the substance of the deceased, and he should be no further charged. *Justin. Inst.*

In common parlance, &c. the term Inventory is applied on other and more frequent occasions, as on the sale of goods; by agreement between parties, accounts of the goods sold (supposing them passing with the possession of an house, &c.) are called Inventories. So the accounts taken by sheriffs of goods levied and sold under executions, under distresses of the goods destrained for rent, are called Inventories, &c. See this Dict. title *Executor*, V, 4. *Distress.*

IN VENTRE SA MERE, *Fr.*] In the mother's belly, relating to which there is a writ mentioned in the register of writs; and in *stat.* 12. *Car.* 2. *cap.* 24. an infant *in ventre sa mere*, is applied to the case where a woman is with child at the time of her husband's death; which child, if he had been born, would have been heir to the land of the husband; and this is sometimes privily, and sometimes open and visible. 1 *Shep. Abr.* 142. The law hath consideration of such a child, on account of the apparent expectation of his birth. He may be vouched in his mother's belly; and action lies for detainment of charters from him as heir, &c. *Hob.* 222. *Dyer*, 186. When a female comes into land by descent, there the son born after, shall oust her and have the land.

3 *Rep.* 61. *Plowd.* 375. But if the daughter and female heir cometh to land in nature of a purchaser; as on a will of lands given to J. S. and his heirs, and he hath a daughter when the devisor dies, his wife being then with child of a son; in this case the daughter shall enjoy the land, and not the after-born son. 3 *Rep.* 61. 5 *Ed.* 4. 6. 9 *Hen.* 7. 24. See this Dict. titles *Infant*, II. *Posthumous Children*, *Descent*, *Limitation*.

INVERITARE. To verify or make proof of a thing. *Leg. Inæ. c.* 16.

To INVEST; INVESTITURE, from the Fr. *investir.*] The giving possession: some define it thus, *Investitura, est alicujus in suum jus introductio;* a giving livery of seisin or possession.—Investitures in their original rise were probably intended to demonstrate in conquered countries the actual possession of the lord; and that he did not grant a bare litigious right which the soldier was ill qualified to prosecute, but a peaceable and firm possession. And after conveyance by deed came into use, these Investitures were retained as a public and notorious act, that the country might take notice of and testify the transfer of the estate, and that such as claimed title by other means, might know against whom to bring their actions. 2 *Comm.* 311. *c.* 20. And see *pp.* 23. 53. 209. and this Dictionary, titles *Feoffment*, *Conveyance*, *Tenure*, as also titles *Advowson*, *Institution*, *&c.*

The customs and ceremonies of Investiture or giving possession, were long practised with great variety; at first Investitures were made by a form of words; afterwards by such things as had most resemblance to what was to be transferred; as lands passed by the delivery of a turf, &c. which was done, by the grantor, to the person to whom the lands were granted: but in after-ages, the things by which Investitures were made were not so exactly observed. *Ingulph. p.* 901. In the church, it was the custom of old, for princes to promote such as they liked to ecclesiastical benefices, and declare their choice and promotion, by delivery, to the persons chosen, of a pastoral staff and ring; the one a symbolical representation of their spiritual marriage with the church; and the other of their pastoral care and charge, which was termed Investiture; after which they were consecrated by ecclesiastical persons. Hoveden tells us, that King Richard, being taken by the Emperor, gave this kingdom to him, *et investitavit eum inde per pileum suum;* and that the Emperor immediately afterwards returned the gift: *et investitavit eum per duplicem crucem de auro. Hoved.* 724. Walsingham says, that John Duke of Lancaster was invested Duke of Aquitaine, *per vigam et pileum, p.* 343. See *Symbols*.

INVITATORIA *et* VENITARIUM. Those hymns and psalms that were sung in the church to invite the people to prayer: they are mentioned in the statutes of St Paul's Church. MS.

INVOICE, a particular account of merchandize, with its value, custom, and charges, &c. sent by a merchant to his factor or correspondent in another country. See *stat.* 12. *Car.* 2. *c.* 34.

INVOLUNTARY MANSLAUGHTER. Differs from homicide excusable by disadventure in this; that misadventure always happen in consequence of some lawful act, but this species of manslaughter in consequence of an unlawful act. Yet, in general, when an Involuntary killing happens in consequence of an unlawful act, it will be either murder or Manslaughter, according to the nature of the act which occasioned it. 4 *Comm.* 192, 193. See title *Homicide*.

To INURE. To take effect; as the pardon *inureth. Staund. Prær. fol.* 40. See *Enure*.

JOBBER. One who buys or sells cattle for others. There are also stock-jobbers, who buy and sell stocks for other persons, and gamble in the funds for themselves. See titles *National Debt*, *Stock-jobbers*.

JOCALIA, Fr. *joyaux.*] Jewels; derived from the Lat. *jocus*, *joculus*, and *jocula*, which comprehend every thing that delighteth; but, in a special and more restrained sense, it signifies those things which are ornaments to women, and which in France they call their own; as diamonds, ear-rings, bracelets, &c. But in this kingdom a wife shall not be entitled to jewels, diamonds, &c. on the death of her husband, unless they are suitable to her quality, and the husband leaves assets to pay debts, &c. 1 *Roll. Abr.* 911. See title *Baron and Feme*, IV, *ad fin.*

JOCARI. To contend with pikes. *Mat. Paris, anno* 1252.

JOCARIUS. A jester. In an ancient deed of Richard, abbot of Berney, to Henry Lovet, among the witnesses to it was *Willielmo tunc jocario Domini Abbatis.* In Domesday it is said Berdic was *Joculator Regis*, the King's Jester.

JOCELET, Sax. *Prædiolum, agri colendi portiuncula.*] A little farm or manor; in some parts of Kent a *yoklet*, as requiring but a small yoke of oxen to till it. *Sax. Dict.*

JOCULATOR. See *Jocarius*.

JOCUS PARTITUS. It is so called when two proposals are made, and a man hath liberty to choose which he will. *Brocton, lib.* 4. *tract.* 1. *c.* 32. *p.* 2. *Hengham Mag. c.* 4.

JOINDER IN ACTION. The coupling or joining of two in a suit or action. *F. N. B. fol.* 218. 201. 221. In all personal things, where two are chargeable to two, the one may satisfy it, and accept of satisfaction, and bind his companion; and yet one cannot have an action without his companion, nor both only against one. 2 *Leon.* 77. In joint personal actions against two defendants, if they plead severally, and the plaintiff is nonsuit by one before he hath judgment against the other, he is barred (in that suit) against both. *Hob.* 180. A person, in consideration of a sum of money paid to him by A. and B. promises to procure their cattle distrained to be delivered; if they are not delivered, one joint action lies by the parties; for the consideration cannot be divided. *Style*, 156, 203. 1 *Danv. Abr.* 5. And where two joint owners of a sum of money are robbed upon the highway, they are to join in one action against the Hundred. It is otherwise if they have several properties. *Latch.* 127. *Dy.* 307.

Upon a joint grievance all parties may join; as the inhabitants of a Hundred, &c. And an action brought against owners of a ship, in case of goods damaged, &c. *quasi ex contractu*, must be brought against all of them. 3 *Lev.* 355. 3 *Mod.* 321. 2 *Salk.* 440. Though one partner acts in trade, where there are many partners, actions are to be brought against all the partners jointly for his acts. 1 *Salk.* 292. If two men are partners, and one of them sells goods in partnership, action for the money must be brought in both their names. *Godb.* 244. But where there are two partners in merchandize, and one of them appoints a factor, they may have several writs of account against him, or they may join. *Moor*, 188. And if one of the merchants dies, the survivor is to bring the action. 2 *Salk.* 444.

Where several persons, called *Dippers* at Tunbridge Wells, joined in an action against a person who exercised the business of a dipper, not being duly appointed, and disturbed plaintiffs therein. These dippers were twelve in number, all women, chosen by the freeholders of the manor, within which the wells lay, and approved of by the lord of the manor, and the employment was attended with profits which arose merely from the voluntary contributions of the company; and defendant having acted as dipper without a proper appointment, the dippers joined in an action against her.—Held by the court to be well brought, because, although the dippers were *severally* entitled to receive for their own several use, such

JOINDER.

voluntaries gratuities as the company were pleased to give them respectively, yet, with regard to a stranger's disturbing them in their *employment*, they were all *jointly* concerned in point of interest; and that it was a hurt done to them all. See 1 *Saund.* 153. *Eccleston* v. *Clipsham*, *ib.* 191. (*b*) *note to Cabell* v. *Vaughan*.

Two counts may be joined in the same declaration, where the same judgment may be given in both. 2 *Wils.* 321. (See also 3 *Wils.* 354.) It has been adjudged, that debt on an obligation, and on a *mutuatus*, may be joined in the same action, though the former is a contract under seal, and the other only a simple contract, and the plea to the one is *non est factum*, and the other *nil debet*, but the judgment is the same in both. 1 *Vent.* 366. *Cro. Car.* 366. So debt and detinue may be joined in the same action, for they are of the same nature; but debt and trespass or debt and account cannot be joined, for they are of different natures. *Bro. Joinder in Action*, 97. but in 5 *Mod.* 92. it is said by the count that it seems strange that debt and detinue should be joined because these actions have different judgments; so debt for rent upon a lease, either by parol or indenture, and for goods sold and delivered, may be joined in the same action. *Bro. Joinder in Action*, 90. *Gilb. C. P.* 5. 4 *Bac. Abr.* 11. So several trespasses, committed on several days, and in several places, though separate wrongs, and several causes of action may be joined in the same action. 8 *Rep.* 876. *Buckner's Case.* So an action against a common carrier upon the custom of the realm for a misfeazance and trover may be joined. 4 *Bac. Abr.* 11. 2 *Wils.* 319. 1 *Vent.* 223. 1 *T. R.* 277. So an action on the case for immoderately riding a horse, and trover may be joined. 1 *Lutw.* 98—101. *Cro. Car.* 20. So an action on the case for disturbing the plaintiff in his right of common, and of cutting and taking rushes upon the common for litter for his cattle, and trover may be joined. 3 *Wils.* 456. But detinue and trover cannot be joined. *Willis's Rep.* 118. So debt upon a bond, and upon a judgment, may be joined in the same action. 1 *Lutw.* 43. 1 *Wils.* 248. 2 *Brown. Ent.* 83, 84. 2 *Salk.* 772. So an action on the case for wrongfully and injuriously obstructing and hindering the plaintiff from landing his goods upon a yard of the defendant, contrary to a written agreement between them, and trover may be joined. 3 *Wils.* 348. 354. 1 *T. R.* 274. There held, that wherever the *same plea* may be pleaded, and the *same judgment* given on two counts, *they may be joined* in the same declaration. See further 2 *Saund.* 117, *note* (2.)

But actions founded upon a *tort*, and upon a *contract*, cannot be joined in the same declaration, as *assumpsit* and action upon the case for a tort, because the pleas are different. 1 *T. R.* 276. 1 *Vent.* 366. So assumpsit and trover cannot be joined; and though this is a verdict for the defendant on the count for the trover, yet it is said, that it does not cure the declaration, but it is bad *ab initio*. 2 *Lev.* 101. 3 *Lev.* 99. 1 *Salk.* 10. 3 *Wils.* 354. So assumpsit and an action upon the case founded upon fraud or deceit, cannot be joined, because they require different pleas. *Carth.* 189. So a count by the plaintiff, as on a contract made with his testator, and a count in his own right cannot be joined. *Hob.* 88. 1 *Salk.* 10. 3 *T. R.* 659, 660. 1 *L. Raym.* 1215. 10 *Mod.* 316. It should seem that an executor cannot join an *insimul computassit* for money *due from the defendant to him as executor*, to account on a promise made to the testator; the executor on such a count being liable to costs. 1 *L. Raym.* 437. for the old notion, that the money recovered will be assets, and therefore, the executor is not subject to costs which was the ground of the decision in Sir *T. Jones*, 47. 2 *Lev.* 165. *S. C.* seems now to be exploded. 7 *T. R.* 358, 359. but, perhaps, an *insimul computassit* with the plaintiff as executor *for money due to the testator*, may be joined to a count on a promise made to the testator; for the accounting with the executor does not give a new duty, but only ascertains that which was due before, and, therefore, the duty to the testator is not altered thereby. See 2 *Saund.* 47, *k. note* (1). So a plaintiff shall not have an action *against* another to charge him as executor, and also in his own right; for the judgment in the one case is *de bonis testatoris*, and in the other *de bonis propriis*. *Hob.* 88. 2 *Lev.* 228. Therefore a count for money had and received by the defendant as executor for the plaintiff's use, or for money lent him *as such*, or on an *insimul computassit* of money due from him *as such*, cannot be joined to a count on a promise made to the testator. And such mis-joinder of action, either by or against an executor, is a defect in substance, and, therefore, had on a general demurrer, or in arrest of judgment, or an error. 4 *T. R.* 347. 1 *H. B.* 108. 2 *Bos. & Pull.* 424. But a count on an account stated with an executor *for money due from the testator*, may be joined to a count on a promise made by the testator. 1 *H. B.* 102. this being the common mode of declaring against executors to save the *stat. of Limit.*: so a man cannot join *trespass*, and *trespass on the case* in the same action, for they are two distinct things and of different natures, and the judgments are different; for in trespass the judgment is *quod capiatur*, and in trespass on the case, *quod sit in misericordia*. 1 *L. Raym.* 273—274. The result of all these cases seems to be, that wherever the same plea may be pleaded, and the same judgment given in all the counts of the declaration; and wherever the counts are of the *same nature*, and the same judgment is given on them all, though the pleas be different, as in the case of debt upon bond, and on a *mutuatus* already mentioned, they may well be joined. 2 *Saund.* 117, *d. note* (2). (The edition of Saunders above referred to, is that by Serjeant Williams.)

If one man call two other men thieves, they shall not join in an action against him; and one joint action will not lie for, or against several persons for speaking the same words; for the wrong done to one is no wrong to the other; and the words of the one are not the words of the other. 1 *Danv.* 5. *Palm.* 313.

So, in assault and battery, on a joint trespass, the plaintiff may declare severally; but it remains joint till severed by the declaration. 2 *Salk.* 454. A man cannot declare in an action against one defendant for an assault and battery, and against another for taking away his goods; because the trespasses are of several natures. But where they are done by two persons jointly at one time, they may be both guilty of the whole. *Style*, 153. 10 *Rep.* 66. If two men procure another to be indicted falsely of barratry, he may have an action against them both jointly; and it is the same if two conspire to maintain a suit, though one only gives money, &c. *Latch.* 226.

Tenants in common cannot join in an action of waste against their lessee; but it is otherwise in the case of Coparceners, or Joint-tenants. *Moor*, 34. See those titles; and further on this subject, this Dict. title *Action*.

JOINDER OF COUNTIES. There can be no Joinder of Counties for the finding of an indictment: though in appeal of death, where a wound was given in one county, and the party died in another, the jury were to be returned jointly from each county, before the statute 2 & 3 *Ed.* 6. *c.* 24. but by that statute the law is altered; for now the whole may be tried either on an Indictment or appeal, in the county wherein the death is. See titles *Indictment*, *Homicide*, *Trial*.—Where several persons are arraigned upon the same indictment and appeal, and severally plead not guilty, the prosecutor may either take out a *joint venire* or several. But after a *joint venire*, several ones cannot be taken out, *H. P. C.* 256.

JOINDER IN DEMURRER. See title *Demurrer*.

JOINDURE IN BATTLE. See title *Battle*.

JOINDURE OF ISSUE. When one party denies the fact pleaded by his antagonist who has tendered the issue thus, "And this he prays may be inquired of by the country," or, "And of this he puts himself upon the country," the party denying the fact, may immediately subjoin, "And the said A. B. doth the like." Which done the Issue is said to be joined. See title *Issue*.

JOINT ACTIONS. See titles *Action*, *Joinder in Action*.

JOINT AND SEVERAL. An interest cannot be granted jointly and severally; as if a man grants the next advowson, or makes a lease for years, to two jointly and severally, those words (severally) are void, and they are Joint-tenants. A power or authority may be joint and several. 5 *Rep.* 19. Joint words of parties shall, by construction of law, be taken respectively and severally. 5 *Rep.* 7, *b*.

When it appears by the count, that the several covenantees have, or are to have, several interests or estates, there, when the covenant is made with the covenantees, and each of them, these words make the covenant several, in respect of their several interests. 5 *Rep.* 19. And see *Jenk.* 262, 263. *pl.* 63. Grant of the next avoidance to two, and each of them, to present A. to the said church, is good; for the contention is avoided by restraining both to present A. *Jenk.* 263. *pl.* 63. See 14 *Vin. Abr.* 48. 469. and this Dict. titles *Covenant*, *Estate*.

JOINT EXECUTORS. See title *Executor*, II. V. 3. 5.

JOINT FINES. If a whole vill is to be fined, a Joint Fine may be laid, and it will be good for the necessity of it; but in other cases, fines for offences are to be severally imposed on each particular offender, and not jointly upon all of them. 1 *Roll. Rep.* 33. 11 *Rep.* 42. *Dyer*, 211. See title *Fines for Offences*.

JOINT INDICTMENTS. See title *Indictment*.

JOINT LIVES. A bond was made to a woman *dum sola*, to pay her so much yearly as long as she and the obligor should live together, &c. Afterwards the woman married, and debt being brought on this bond by husband and wife, the defendant pleaded, that he and the plaintiff's wife did not live together; but it was adjudged, that the money should be paid during their Joint Lives, so long as they were living at the same time, &c. 1 *Lutw.* 555. Where a person, in consideration of receiving profits, of the wife's lands on marriage, during their Joint Lives, was to pay a sum of money yearly, in trust for the wife, though it was not said every year during, &c. it was held, that the payment shall be intended to continue every year also during their Joint Lives. 1 *Lutw.* 459. Lease for years to husband and wife, if they, or any issue of their bodies should so long live, has been adjudged so long as either the husband, wife, or any of their issue should live; and not only so long as the husband and wife, &c. should jointly live. *Moor*, 339. See titles *Agreement*, *Covenant*, &c.

JOINTENANTS. As it is frequently written, or rather, as seems most consistent,

## JOINT-TENANTS,

*simul tenentes*, or *qui conjunctim tenent*.] They who hold lands or tenements by joint-tenancy.

AN ESTATE IN JOINT-TENANCY is where lands or tenements are granted to two or more persons, to hold in fee-simple, fee-tail, for life, for years, or at will. In consequence of such grants an estate is called an estate in Joint-tenancy: *Lit.* § 27. and sometimes an estate in *Jointure*, which word, as well as the other, signifies an union or conjunction of interest; though in common speech the term *Jointure* is now usually confined to that Joint estate, which by virtue of the statute 27 *Hen.* 8. *c.* 10. is frequently vested in the husband and wife before marriage, as a full satisfaction and bar of the woman's dower. See title *Jointure*.

I. *Of the Nature of an Estate in Joint-tenancy, and how created.*

II. *The Consequences and Incidents of such Estate; and of the Acts of Joint-tenants to alienate or incumber the same.*

III. *How it may be severed or destroyed.*

I. THE CREATION of an estate in Joint-tenancy depends on the wording of the deed or devise, by which the tenant claims title; for this estate can only arise by purchase or grant, that is, by the act of the parties; and never by the mere act of law. Now if an estate be given to a plurality of persons, without adding any restrictive, exclusive, or explanatory words, as if an estate be granted to A. and B. and their heirs, this makes them immediately Joint-tenants in fee of the lands; for the law interprets the grant so as to make all parts of it take effect, which can only be done by creating an equal estate in them both. As therefore the grantor has thus united their names, the law gives them a thorough union in all other respects. 2 *Comm.* 180. *c.* 12.

The essential difference between Joint-tenants and tenants in common is, that Joint-tenants have the lands by one joint title, and in one right, and tenants in common by several titles, or by one title and by several rights; this is the reason, says Lord Coke, that Joint-tenants have one joint freehold, and tenants in common have several freeholds, though this property is common to them both, *viz.* that their occupation is undivided, and neither of them knoweth his part in several. *Co. Lit.* 189, *a*.

The properties of a joint estate are derived from its unity, which is fourfold; the unity of *interest*, of *title*, of *time*, and of *possession*; or in other words, Joint-tenants have one and the same interest accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.

*First*, They must have one and the same *interest*. One Joint-tenant cannot be entitled to one period of duration or quantity of interest in lands, and the other to a different. One cannot be tenant for life, and the other for years; one cannot be tenant in fee, and the other in tail. 1 *Inst.* 188. But if land be limited to A. and B. for their lives, this makes them Joint-tenants of the freehold; if to A. and B. and their heirs, it makes them Joint-tenants of the inheritance. *Litt.* § 277. If land be granted to A. and B. for their lives, and to the heirs of A. here A. and B. are Joint-tenants of the freehold during their respective lives, and A. has the remainder of the fee in severalty; or if land be given to A. and B. and the heirs of the body of A. here both have a joint estate for life, and A. hath a several remainder in tail. *Litt.* § 285.

In the creation of a Joint-tenancy in fee, particular care must be taken not to insert the words, *and the survivor of them*. For the grant of an estate to two and the survivor of them, and the heirs of the survivor, does not make them joint-tenants in fee, but gives them an estate of freehold during their joint lives, with a contingent remainder in fee to the survivor. Whether during their joint lives the fee continues in the grantor or remains in abeyance, and whether they can convey their estate, and what is the proper mode of conveyance to be used, are points which have been much agitated, and which, perhaps, are not yet quite settled: they were all mentioned in the case of *Vick* v. *Edwards*, 3 *P. Wms.* 372. In that case lands were devised to B. and C. and the survivor of them, and the heirs of such survivor in trust to sell. *Lord Talbot* held, that the fee was in abeyance, that the trustees joining in a fine of the premises might make a title to a

purchaser by way of *estoppel*, and that the heirs joining might be of use, as it would supply the want of proving the will; but that in every other respect it would be void. In this case the word *estoppel* must not be understood in its strict technical sense; all that is meant by it is, that the fine operates by way of conclusion upon, or bar to the vendors, till the contingency happens upon which the fee is to arise, and then it passes to the purchaser. This doctrine is open to objection: (see 1 *P. Wms.* 505. 2 *Saund.* 380.) but it seems to be generally acquiesced in, and perhaps the liberality of succeeding times may think a common conveyance, by lease and release, or bargain and sale, sufficient in these cases to pass the fee, without either fine or a common recovery. 1 *Inst.* 191. *a. in. n.*

*Secondly*, Joint.tenants must also have a *unity of title;* their estate must be created by one and the same act, whether legal or illegal; as by one and the same grant, or by one and the same disseisin. *Litt.* § 278. Joint-tenancy cannot arise by descent or act of law; but, as has been already said, merely by purchase or acquisition, by act of the party, and unless that act be one and the same, the two tenants would have different titles; and if they had different titles, one might prove good, and the other bad, which would absolutely destroy the Joint-tenancy. 2 *Comm.*

*Thirdly*, There must also be an *unity of time;* their estates must be vested at one and the same period, as well as by one and the same title. As in case of a present estate made to A. and B. or a remainder in fee to A. and B. after a particular estate; in either case A. and B. are Joint tenants of this present estate, or this vested remainder. But if after a lease for life, the remainder be limited to the heirs of A. and B. and during the continuance of the particular estate, A. dies, which vests the remainder of one moiety in his heir; and then B. dies, whereby the other moiety becomes vested in the heir of B,; now A.'s heir and B.'s heir are not Joint-tenants of this remainder, but tenants in common; for one moiety vested at one time, and the other at another. 1 *Inst.* 188. Yet where a feoffment was made to the use of a man and such wife as he should afterwards marry, for term of their lives, and he afterwards married; in this case it seems to have been held, that the husband and wife had a joint estate, though vested at different times; because the *use* of the wife's estate was in abeyance, and dormant till the inter-marriage, and on that event had relation back, and took effect from the time of creation. *Dy.* 340. 1 *Rep.* 101.

*Lastly*, In Joint-tenancy there must be an *unity of possession.* Joint-tenants are said to be seised *per my et per tout*, by the half or moiety, and by all: that is, they each of them have the entire possession, as well of every parcel as of the whole. They have not one of them a seisin of one half or moiety, and the other of the other moiety, neither can one be exclusively seised of one acre, and his companion of another; but each has an undivided moiety of the whole, and not the whole of an undivided moiety. *Litt.* § 288. 5 *Rep.* 10. *Bract. l.* 5. *tr.* 5. *c.* 26. And, therefore, if an estate in fee be given to a man and his wife, they are neither properly Joint-tenants, nor tenants in common; for husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seised of the entirety *per tout et non per my;* the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor. *Litt.* § 665. 1 *Inst.* 187. 4 *Bro. Ab. t. Cui in vita.* 8. 2 *Vern.* 120. 2 *Lev.* 39.

If a father makes a deed of bargain and sale of lands to his son, to hold to him and his heirs, &c. to the use of the father and son, and their heirs and assigns for ever, they are Joint-tenants. 2 *Cro.* 83. And if the father devises lands to his eldest and other sons, they are Joint-tenants, and not tenants in common. *Goldsh.* 28. *Poph.* 52.

A man devised lands to his wife for life, and after her death to his three daughters, and the heirs male of their bodies, &c. The wife and the two eldest daughters died; and it was held that the surviving daughter should have the whole for life, the three sisters being Joint-tenants for life, and several tenants in tail in the inheritance. *Leon.* 47.

Two or more purchase land, and advance the money in equal parts, and take a conveyance to them and their heirs; this makes a Joint-tenancy with the chance of survivorship: But where the proportions of money are not equal, they are in nature of partners; and though the legal estates survives, the survivor shall be as a trustee for the others, in respect of the sums paid by each. So, if where two having purchased jointly, afterwards one lays out a considerable sum on improvements, &c. and dies, in equity it shall be a lien on the lands, and a trust for the representative of him who advanced it. 1 *Eq. Ab.* 291.

A rent of 10*l.* a year is granted to A. and B. to hold to one until he marry, and to the other till he is presented to such a church; it was holden they were Joint-tenants, and that if either of them die before marriage or presentment, the rent shall survive. *Co. Litt.* 180.

If lands are given to two men, and the heirs of their bodies, the remainder to them and their heirs; they shall be Joint-tenants for life, tenants in common of the estate-tail, and Joint-tenants of the fee-simple. *Ibid.* 183. But where a remainder is limited to the right heirs of two persons, in this case they shall take severally, though the words be joint. 5 *Rep.* 8. Land is granted to a man, and such woman as shall be his wife: here is no Joint-tenancy, but the man will have the whole: Though if one make a feoffment in fee to the use of himself, and of such wife as he shall after marry, for their lives; when he takes a wife, they are Joint-tenants. *Co. Litt.* 188. 1 *Rep.* 101.

Lands are settled to the use of husband and wife for their lives, remainder to the heirs of both their bodies. The children of this marriage are Joint-tenants. *Staples* v. *Maurice, Bro. P. C.* tit. *Joint-tenants, Ca.* 3.

One person is in by the common law, and another by limitation of use, yet they may be Joint-tenants by virtue of a deed of grant, &c. *Jenk. Cent.* 330. Lands given in the premises of a deed to three, to hold one for life, remainder to another for life, remainder to the third for life, they are not Joint-tenants, but shall take successively. *Dyer*, 160.

In a case in the King's Bench during Lord Holt's time, the question was, how the surrender of a copyhold to the use of three sons and two daughters, *equally to be divided*, and their *respective* heirs, ought to be construed; and the following passage in 1 *Inst.* 190, *b.* was much relied upon, by two of the judges, as an authority to show, that the words *equally to be divided*, imply a *tenancy in common.* "If a verdict find that a man hath *duas partes manerii, &c. in tres partes divisas*, this shall not be intended to be in common; but if verdict be, *in tres partes dividendas*, then it seemeth that they are tenants in common by the intendment of the verdict." But *Lord Holt*, who was for a Joint-tenancy, observed, that no such matter appears in the case of 21 *E.* 4. there cited by *Lord Coke* in the margin as his authority, and that he was not positive therein, but only wrote it as his conjecture. *Fisher* v. *Wigg*, 1 *P. Wms.* 14, *&c.* and *Mr. Cox's* notes there: *Salk.* 391. *Com. Rep.* 88. 92. 12 *Mod.* 296. 1 *Ld. Raym.* 622. In the two latter books, and in *P. Wms.* the case is reported very much at large; and as the arguments on each side are very elaborate, it is an authority fit to be resorted to wherever the doubt is, whether there shall be a tenancy in common or Joint-tenancy; and seems an acknowledged authority in cases of surrenders of copyholds. 1 *Wils* 341. See also *Anglesey (E.)* v. *Ram, Dom. Pro.* September 1727. *Barker* v. *Gyles*, 2 *P. Wms.* 280. *Bro. P. C. Hall* v. *Digby et al. Bro. P. C. Hawes* v. *Hawes*, 1 *Wils.* 165. *Gaskin* v. *Gaskin*, or

*Denn* v. *Gaskin*, *Cowp.* 660. In this last case the word *equally* was deemed sufficient to create a tenancy in common in a will; and Lord Mansfield declared the opinion of the two Judges, who differed from Holt, to be the better and more liberal one; and Aston, J. noticed, that *equally to be divided* had been adjudged a tenancy in common, even in a deed. See 1 *Inst.* 190, *b.* in *n;* and further, title *Tenants in Common.*

II. Upon the principles of a thorough and intimate union of interest and possession, depend many other *consequences* and *incidents* to the Joint-tenant's estate, besides those already casually noticed. If two Joint-tenants let a verbal lease of their land, reserving rent to be paid to one of them, it shall enure to both, in respect of the joint-reversion. *Co. Lit.* 214. If their lessee surrenders his lease to one of them, it shall also enure to both, because of the privity or relation of their estate. *Ibid.* 192. On the same reason, livery of seisin, made to one Joint-tenant, shall enure to both of them. *Ibid.* 49. and the entry, or re-entry, of one Joint-tenant is as effectual in law as if it were the act of both. *Ibid.* 319. 364. In all actions also relating to their joint estate, one Joint-tenant cannot sue or be sued without joining the other. *Ibid.* 195. But if two or more Joint-tenants be seised of an advowson, and they present different clerks, the bishop may refuse either, because neither Joint-tenant hath a several right of patronage, but each is seised of the whole: and, if they do not both agree within six months, the right of presentation shall lapse. But the Ordinary may, if he pleases, admit a clerk presented by either, for the good of the church, that divine service may be regularly performed; which is no more than he otherwise would be entitled to do, in case their disagreement continued, so as to incur a lapse: and, if the clerk of one Joint-tenant be so admitted, this shall keep up the title of both of them, in respect of the privity and union of their estate. *Co. Lit.* 185. Upon the same ground it is held, that one Joint-tenant cannot have an action against another for trespass, in respect of his land, for each has an equal right to enter on any part of it. 3 *Leon.* 262. But one Joint-tenant is not capable by himself to do any act, which may tend to defeat or injure the estate of the other; as to let leases, or to grant copyholds. 1 *Leon.* 234. And, if any waste be done, which tends to the destruction of the inheritance, one Joint-tenant may have an action of waste against the other, by construction of the stat. *West.* 2. *c.* 22. 2 *Inst.* 403. So too, though at common law no action of account lay for one Joint-tenant against another, unless he had constituted him his bailiff or receiver. 1 *Inst.* 200, yet now by the *stat.* 4 *Ann. c.* 16. Joint-tenants may have actions of account against each other, for receiving more than their due share of profits of the tenements held in Joint-tenancy. This action is however seldom brought; but the practice is, to apply to a court of equity to compel an account. 2 *Comm. c.* 12. See *post*, III, 2.

From the same principle also arises the remaining grand incident of joint-estates, *viz.* the doctrine of *Survivorship;* by which, when two or more persons are seised of a joint-estate of inheritance, for their own lives, or *pour autre vie*, or are jointly possessed of any chattel-interest, the entire tenancy, upon the decease of any of them, remains to the survivors, and at length to the last survivor; and he shall be entitled to the whole estate, whatever it be, whether an inheritance or a common freehold only, or even a less estate. *Litt.* § 280, 281. This is the natural and regular consequence of the union and entierty of their interest. The interest of two Joint-tenants is not only equal or similar, but also is one and the same. One has not originally a distinct moiety from the other; but, if by any subsequent act (as by alienation or forfeiture of either) the interest becomes separate and distinct, the Joint-tenancy instantly ceases. But, while it continues, each of the two Joint-tenants has a concurrent interest in the whole; and therefore, on the death of his companion, the sole interest in the whole remains to the survivor. For the interest which the survivor originally had, is clearly not divested by the death of his companion; and no other person can now claim to have a *joint*-estate with him, for no one can now have an interest in the whole, accruing by the same title, and taking effect at the same time with his own: neither can any one claim a *separate* interest in any part of the tenements; for that would be to deprive the survivor of the right which he has in all and every part. As therefore the survivor's original interest in the whole still remains: and as no one can now be admitted, either jointly or severally, to any share with him therein; it follows, that his own interest must now be entire and several, and that he shall alone be entitled to the whole estate (whatever it be) that was created by the original grant. 2 *Comm. c.* 12.

The right of survivorship is called by our ancient authors the *jus accrescendi*, because the right, upon the death of one Joint-tenant, accumulates and encreases to the survivors. *Brac. l.* 4. *tr.* 3. *c.* 9. § 3. *Fleta. l.* 3. *c.* 4. And this *jus accrescendi* ought to be mutual; which seems to be one reason why neither the King, nor any Corporation, can be a Joint-tenant with a private person. For here is no mutuality: the private person has not even the remotest chance of being seised of the entierty by benefit of survivorship; for the King and Corporation can never die. 2 *Comm. c.* 12. cites 1 *Inst.* 190. *Finch, L.* 83. 2 *Lev.* 12.

But Lord Coke expressly says "there may be Joint-tenants though there be not *an equal* benefit of survivorship: as if a man let lands to A. and B. during the life of A. if B. die, A shall have all by survivorship: but if A. die, B. shall have nothing." 1 *Inst.* 181. The *mutuality* of survivorship does not therefore appear to be the reason, why a Corporation cannot be a Joint-tenant with a private person: for two Corporations cannot be Joint-tenants together: but whenever a joint-estate is granted to them, they take as tenants in common. *Co. Lit.* 190.—The above is Mr. Christian's observation on the preceding passage in the Commentaries.—It may however be remarked, that *Blackstone* merely states this as *one* reason, against the King or a Corporation being a Joint-tenant with a private person. In the passage cited from 1 *Inst.* 181. the assertion that Joint-tenancy may be without *equal benefit* of survivorship, and the case put by *Lord Coke*, do not extend to instances where no benefit of survivorship can possibly arise to either party; as must be the case between two Corporations.

If there are two Joint-tenants for life, it is said each of them hath an estate for life, and for the life of his companion; and for that reason, if one of them make a lease, it shall continue not only during the life of the lessor, but after his death during the life of his companion, as long as the original estate out of which it was derived: Though it hath been resolved, that such a Joint-tenant hath only an estate for his own life, and a possibility of surviving his companion to be entitled to his part; therefore if he grants over his estate, that possibility is gone; and if he dies, the estate of the grantee shall revert to him in reversion. 1 *Roll.* 441. *Jones*, 55. 4 *Salk.* 204, 205.

If one Joint-tenant grants a rent charge, &c. out of his part, and dies, the survivor shall have the whole land discharged: For he hath the land by survivorship, and not by descent from his companion. *Lit.* 286. 1 *Co. Inst.* 184. And if one Joint-tenant in fee makes a lease for years, reserving a rent, and dieth; the survivor shall have the reversion, but not the rent, because he claims by title paramount. *Co. Lit.* 18.

Joint-tenants, as to the possession of lands in jointure, are seised by entierties of the whole, and of every part equally; (and the possession of any Joint-tenant is the possession of

both;) but as to the right of lands, they are seized only of moieties; therefore if one grant the whole, a moiety only passeth. 1 *Bulst.* 3. *Cro. Eliz.* 809. If there be two Joint-tenants, and each make a several lease of the whole, their several moieties only shall pass, by each lease. 1 *Wils.* 1. Joint-tenants cannot singly dispose of more than the part that belongs to them; where they join in a feoffment, in judgment of law each of them gives but his respective part; so it is of a gift in tail, lease for life, &c. And for a condition broken they shall only enter on a moiety of the lands. 1 *Inst.* 186.

Every Joint-tenant hath a right, as to his own share, to several purposes, as to give, lease, forfeit, &c. 1 *Inst.* 186. *Lit.* 257. One Joint-tenant may lease to his companion: But one Joint-tenant cannot make a feoffment, or grant to another Joint-tenant, though he may release. 1 *Vent.* 78. *Raym.* 187. By whatever means a Joint-tenant comes to the estate of his companion, by conveyance, &c. from him, it may enure by way of release. 2 *Cro.* 649.

Action of trespass or trover may not be brought by one Joint-tenant against his companion, because the possession of one is the possession of the other. 1 *Salk.* 290. One Joint-tenant may distrain for rent alone; and he may avow in his own right, and as bailiff to the others, but he cannot avow solely; and he may not bring debt alone. 5 *Mod.* 73. 150.

If a Joint-tenant in fee-simple is indebted to the King, and dieth; the lands cannot be extended in the hands of the survivor; who claimeth not from his companion, but from the feoffer, &c. 1 *Inst.* 185. Where there are two Joint-tenants, and one is indebted to the King, and dieth, the other shall hold the land discharged of the debt: But if the husband and wife have a term jointly, and the husband is indebted to the King, and dieth, in such case the term shall be subject to the debt, because the husband might have disposed of the whole estate. *Plowd.* 321.

Judgment in action of debt, is had against one Joint-tenant for life, who, before execution, releases to his companion; adjudged that the moiety is still liable to the judgment during the life of the releasor; but, if he had died before execution, the survivor should have had the land discharged of the debts and judgment. 6 *Rep.* 78. Husband and wife were Joint-tenants, and action was brought against the husband alone, who made default, thereupon the wife prayed to be received; but it was not allowed, because she was not a party to the writ; but he in reversion may be received, and plead Joint-tenancy in abatement of the writ. *Moor.* 242.

If a feme sole and A. B. purchase a term for years jointly, and afterwards intermarry, the Joint-tenancy continues. *Dyer*, 318. 2 *Nels. Abr.* 1335. But where there are two women Joint-tenants of a lease for years, and one taketh husband, and dies, the term shall survive; if the husband hath not alienated her part, and severed the jointure: But it is otherwise in case of goods, vested in the husband by marriage. 1 *Inst.* 185.

If there be two Joint-tenants, and one releaseth to the other, this passeth a fee without the word heirs, because it refers to the whole fee, which they jointly took, and are possessed of, by force of the first conveyance; but tenants in common cannot release to each other; for a release supposeth the party to have the thing in demand; but tenants in common have several distinct freeholds, which they cannot transfer, otherwise than as persons who are sole seised *Co. Lit.* 9. 200, *b.*

III. An Estate in Joint-tenancy may be *severed* and *destroyed*, by destroying any of its constituent unities. That of *time*, which respects only the original commencement of the joint-estate, cannot indeed (being now past) be affected by any subsequent transactions. But, the Joint-tenant's estate may be destroyed, without any alienation, by merely disuniting their *possession*. For Joint-tenants being seised *per my et per tout*, every thing that tends to narrow that interest, so that they shall not be seised throughout the whole, and throughout every part, is a severance or destruction of the jointure. And therefore, if two Joint-tenants agree to part their lands, and hold them in severalty, they are no longer Joint-tenants; for they have now no joint interest in the whole, but only a several interest respectively in the several parts. And for that reason also, the right of survivorship is by such separation destroyed. *Co. Lit.* 188. 193. By common law all the Joint-tenants might agree to make partition of the lands, but one of them could not compel the other, so to do. *Lit.* § 290. for this being an estate originally created by the act and agreement of the parties, the law would not permit any one or more of them to destroy the united possession without a similar universal consent. But now by the *stats.* 31 *Hen.* 8. *c.* 1. 32 *Hen.* 8. *c.* 32. Joint-tenants and tenants in common either of inheritances or other less estates, are compellable by writ of partition to divide their lands. And the *stat.* 8 & 9 *W.* 3. *c.* 31. made perpetual by *stat.* 3 & 4 *Ann. c.* 18. directs the manner of proceeding upon such writs.

In this case of Partition of estates, as also in settling accounts between the parties, resort is often had to Courts of Equity. For though accounts may be taken before auditors in an action of account in the courts of common law, (see this Dictionary, title *Account*) yet a court of equity, by its modes of proceeding, is enabled to investigate, more effectually, long and intricate accounts in an adverse way, and to compel payment of the balance. In the case of partition, if the titles of the parties are in any degree complicated, it is extremely difficult to proceed in the courts of common law; and where the tenants in possession are seised of particular estates only, the persons entitled in remainder cannot be bound by the judgment in a writ of partition. The courts of equity having thus assumed the jurisdiction in complicated cases, seem by degrees to have been considered, as having on these subjects a concurring jurisdiction with the courts of common law, in cases where no difficulty could have attended the proceeding in those courts. *Milf. Treat.* 109—111.

*In Parks* v. *Gerard*, *Ambl.* 236. it was held, that the partition must be at the equal expence of the parties, however unequal their shares, and although one party offered to relinquish his share rather than incur the expence: but this opinion has not been followed. See *Calmady* v. *Calmady*, 2 *Ves. jun.* 568, and a full discussion of the subject in a very complicated case, *Agar* v. *Fairfax*, 17 *Ves.* 533. In *Barry* v. *Nash*, 1 *Ves. & B.* 351, it is stated, that upon a Bill for partition there are no costs to the hearing, and that the costs of the partition and conveyances are to be borne in proportion to the Interests. In the same case it was held, that partition cannot be objected to from the minuteness of the interest, or the inconvenience, difficulty, or reluctance of the Joint-tenants. It has been suggested as important that Courts of Equity should be authorised to effect partitions, which should be binding upon the legal estates of infants and absentees, and to decree the sale of Interests not conveniently susceptible of division.

Although proceedings for partition in Courts of Equity, were for a considerable time the most usual course, yet the proceeding by writ of partition under *stat.* 8, 9 *W.* 3. *c.* 31. has of late become frequent, and is attended with the advantage of operating upon the estate itself, whereas a Court of Equity can only direct conveyances.

The Irish act 9 *W.* 3. *c.* 12. contains provisions nearly similar to those of the English act, 8, 9 *W.* 3. *c.* 31. with the addition of some useful provisions respecting the boundaries and fences of the lands allotted in partition: and by Irish acts, 8 *Geo.* 1. *c.* 5, and 40 *Geo.* 3. *c.* 71, general regulations

are made as to fences of lands of adjoining proprietors or tenants; and by 5 *Geo.* 2. *c.* 9, *Ir.* provisions are made for ascertaining the boundaries, and draining of bogs. By *stat.* 7 *An. c.* 18. (and a similar Irish act, 1 *Geo.* 2. *c.* 23.) it is provided, that, if coparcenors, joint-tenants, or tenants in common, are seized of advowsons, &c. and a partition is made between them to present by turns, every one shall thereupon be seized of his separate part of the advowson to present in his turn.

For proceedings under *stat.* 8, 9 *W.* 3. *c.* 31. see *Halton* v. *Thanet* (E.) 2 *Blackst. Rep.* 1134. 1159.

In general, it is advantageous for the Joint-tenants to dissolve the jointure, since thereby the right of survivorship is taken away, and each may transmit his own part to his own heirs. Sometimes, however, it is disadvantageous to dissolve the joint-estate: as if there be Joint-tenants for life, and they make partition, this dissolves the jointure; and though before they each of them had an estate in the whole for their own lives and the life of their companion, now they have an estate in the moiety only for their own lives merely; and, on the death of either, the reversioner shall enter on his moiety. 1 *Jon.* 55. And therefore if there be two Joint-tenants for life, and one grants away his part for the life of his companion, it is a forfeiture; for, in the first place, by the severance of the jointure, he has given himself in his own moiety only an estate for his own life; and then he grants the same land for the life of another; which grant, by a tenant for his own life merely, is a forfeiture of his estate; for it is creating an estate which may, by possibility, last longer than that which he is legally entitled to. 4 *Leon.* 237. 1 *Inst.* 252. 2 *Comm.* 187. *c.* 12.

The joint-tenancy may be severed by destroying the unity of *title*. As if one Joint-tenant aliens and conveys his estate to a third person, here the Joint-tenancy is severed, and turned into a tenancy in common; for the grantee and remaining Joint-tenant hold by different titles; (one derived from the original, the other from the subsequent, grantor;) though till partition made the unity of possession continues. *Litt.* § 292. 319. 321. But a devise of one's share by will is no severance of the jointure: for no testament takes effect till after the death of the testator; and by such death the right of the survivor, which accrued at the original creation of the estate, and has therefore a priority of the other, is already vested. 1 *Inst.* 185. *Lit.* § 287. and see 3 *Burr.* 1488. and this Dictionary, title *Will*. And it has been determined that articles of marriage entered into by a female infant Joint-tenant, who died before attaining her age of twenty-one years, were not in equity a severance of Joint-tenancy. *May* v. *Hook, in Canc.* 1 *Inst.* 246. *a. in n.*

It may be also destroyed by destroying the unity of *interest*. If therefore there be two Joint-tenants for life, and the inheritance is purchased by, or descends upon either, it is a severance of the jointure. *Cro. Eliz.* 470. Though if an estate is originally limited to two for life, and after to the heirs of one of them, the freehold shall remain in jointure, without merging in the inheritance: because being created by one and the same conveyance, they are not separate estates, (which is requisite in order to a *merger*,) but branches of one entire estate. 2 *Rep.* 60. 1 *Inst.* 182. If a Joint-tenant in fee makes a lease for life of his share, this defeats the jointure, for it destroys the unity both of title and interest. *Lit.* § 302, 303. And wherever, or by whatever means, the jointure ceases or is severed, the right of survivorship, or *jus accrescendi*, the same instant, ceases with it. 1 *Inst.* 188. Yet if one of three Joint-tenants aliens his share, the two remaining tenants still hold their parts by Joint-tenancy and survivorship. *Litt.* § 294. And if one of three Joint-tenants releases his share to one of his companions, though the Joint-tenancy is destroyed with regard to that part, yet the two remaining parts are still held in jointure: for they still preserve their original constituent unities. *Lit.* § 304.

Whenever, therefore, by any act or *event*, different *interests* are created in the several parts of the estate, or they are held by different *titles*, or if merely the *possession* is separated, so that the tenants have no longer these four indispensable properties, a sameness of interest and undivided possession, title vesting at one and the same time, and by one and the same act or grant; the Joint-tenancy is instantly dissolved. 2 *Comm.* 186. *c.* 12.—Of this proposition the following cases may afford some further illustration.

When a fee-simple estate is limited by a new conveyance, there one may have the fee, and another an estate for life; but when two persons are tenants for life first, and one of them gets the fee-simple, there the jointure is severed. 2 *Rep.* 6. If a reversion descend upon one Joint-tenant, the jointure is severed, and by operation of law they are then tenants in common. 1 *Bulst.* 113. And a diversity has been taken, that where the reversion comes to the freehold, the jointure is destroyed; but when the freehold comes to him in reversion, and to another, it is otherwise. *Cro. Eliz.* 470. 473.

Two infants are Joint-tenants, and one of them makes a feoffment of his moiety: this will be a severance of the Joint-tenancy. *Bro. Jointen.* 13. A Joint-tenant in fee grants a lease for life, and then dies; it severs the jointure; though, if the tenant for life die before either of the Joint-tenants, then it is *in statu quo prius*. *Co. Lit.* 193. If there be two Joint-tenants in fee, and one makes a lease for life to a stranger, the freehold and reversion is severed from the jointure: but in case one such Joint-tenant leases for years, the jointure of inheritance is not severed; and the other Joint-tenant shall have the reversion by survivorship. *Lut.* 729. 1173. Two Joint-tenants are of a lease for twenty-one years, and one lets his part but for three years, the jointure is severed, so that survivorship shall not take place. 1 *Inst.* 188. 192. In case three persons are jointly interested in a term, and one of them mortgages his third part; by this it has been held, the Joint-tenancy was severed. 1 *Salk.* 158. But where one Joint-tenant of lands, in order to sever the Joint-tenancy, and provide for his wife, makes a deed of gift of his moiety to her; this being made to the wife, and so void in law, cannot be made good. *Preced. Canc.* 124.

If two Joint-tenants be of a term, and one commits felony, or is out-lawed, &c. the jointure will be severed; for the King shall have the moiety by the forfeiture: and if the Joint-tenancy is of personal things, all will be forfeited. *Plowd.* 410.

Where there are several Joint-tenants in fee-tail, and some of them suffer a common recovery of the whole, the estate of the others is turned to a right; and contingent remainders may be destroyed, and a new estate gained thereby. *Sid.* 241. And if one Joint-tenant levies a fine, it severs the Joint-tenancy; but it doth not amount to an actual turning out of his companion. 1 *Salk.* 286. A Joint-tenant in fee makes a lease for years, of the land, to begin presently or *in futuro*, and dies, it is a severance of the Joint-tenancy, and cannot be avoided by the survivor; because immediately, by force of the lease, the lessee hath a right in the same land, of all that to the lessor belongs. *Lit.* 286.

JOINT-TENANCY in THINGS PERSONAL.—Goods and chattels may belong to their owners in Joint-tenancy, and in common, as well as real estates. They cannot indeed be vested in coparcenery, because they do not descend from the ancestor to the heir, which is necessary to constitute coparceners; but if a horse, or other personal chattel, be given to two or more absolutely, they are Joint-tenants thereof; and unless the jointure be severed, the same doctrine of survivorship shall take place as in estates of lands and tenements,

*Lit.* § 282. 1 *Vern.* 482. And in like manner if the jointure be severed, as by either of them selling his share, the vendee and the remaining part-owner shall be tenants in common without any *jus accrescendi* or survivorship. *Lit.* § 321. So also if 100*l.* be given by will to two or more, *equally to be divided* between them, and the survivor and survivors of them, this has been held to make them tenants in common, as the same words would have done in regard to real estates, the words *survivors*, &c. being to be understood of such of them as shall be living at the testator's death. 1 *Eq. Ab.* 292. But in case of the devise of a debt to two or more share and share alike, equally to be divided between them, and if either of them die, to the survivors or survivor of them; it was determined in *Dom. Proc.* that they were Joint-tenants; and the decree of *Cowper, Ld. C.* declaring them tenants in common reversed. See Cox's *P. Wms.* i. 91. and *n.* there and *Bro. P. C.* title *Joint-tenants, Case* 1. Residuary legatees and executors are also Joint-tenants, unless the testator uses some expression which converts their interest into a tenancy in common: and if one dies before a division or severance of the surplus, the whole that is undivided will pass to the survivor or survivors. 2 *P. Wms.* 347. 529. and see 3 *Bro. C. R.* 455. *Hall* v. *Digby*, *Bro. P. C.* title *Joint-tenants, Case* 2. *and note there.* But for the encouragement of husbandry it is held, that a stock on a farm, though occupied jointly, shall always be considered as common, and not as joint, property, and there shall be no survivorship therein. 1 *Vern.* 217. So, for the encouragement of trade, there is no survivorship of a capital or stock in trade among merchants and traders: for this would be ruinous to the family of the deceased partner; and it is a legal maxim, *jus accrescendi inter mercatores, pro beneficio commercii, locum non habet.* 1 *Inst.* 182.

JOINTURE OF LANDS. A Jointure is A Settlement of lands and tenements made to a woman in consideration of marriage; or it is a Covenant, whereby the husband, or some friend of his, assureth to the wife, lands or tenements, for term of her life: it is so called, either because it is granted *ratione juncturæ in matrimonio*, or for that land in frank-marriage was given jointly to husband and wife, and after to the heirs of their bodies, whereby the husband and wife were made as it were joint-tenants during the coverture. 3 *Rep.* 27. By some, a Jointure is defined to be a Bargain and Contract of livelihood, adjoined to the contract of marriage; being a competent provision of freehold lands or tenements, &c. for the wife, to take effect after the death of the husband, if she herself is not the cause of the determination or forfeiture of it. 1 *Inst.* 36. 4 *Rep.* 2, 3. See this Dict. title *Dower*, IV.

It hath been often ruled in Chancery, that if lands, money, goods, &c. are devised to a woman, without saying in lieu or satisfaction of dower, &c. the wife shall have both; because a devise is to be considered as a bounty, and implies a consideration in itself; but if it be said in lieu or recompence of dower, there the wife cannot have both, but may waive which she pleases. 2 *Chan. Cases*, 24. 2 *Vern.* 365. *Preced. Chan.* 133. Also, *vide Bro. Dow.* 69. 4 *Rep.* 4. *Dyer*, 220. 2 *Vent.* 365. 1 *Eq. Ab.* 218. 1 *Vern.* 463.

A devise by will cannot be averred to be in satisfaction of dower, unless it be so expressed in the will. 1 *Inst.* 36, *b.* 3 *Rep.* 1.

But though a devise cannot at law be averred to be in satisfaction of dower, if the will is silent, yet sometimes the Courts of Equity have been induced, by special circumstances, to consider such devises as a satisfaction; and it has therefore been decreed, that the wife should make her election to waive her dower and accept under the will, or to waive the will and take her dower. In *Laurence* v. *Laurence*, 1 *Vern.* 463, *Somers*, C. made such a decree; because he inferred an intention to give in bar of dower, from the testator's having devised the residue of his *whole* estate to another. But this decree was reversed by Lord Keeper *Wright*; and the reversal was afterwards affirmed in the House of Lords. 2 *Bro. P. C.* 483. And this is said to have settled the doctrine. 1 *Eq. Ab. Dower B. pl.* 2.; and see *acc. Pre. Ch.* 133. *Vin.* title *Devise* T. c. *pl.* 45. 2 *Atk.* 427. 3 *Atk.* 8. 436. See also *Broughton* v. *Errington*, 7 *Br. P. C.* 12.

However, notwithstanding the doctrine on which the case of *Laurence* v. *Laurence* was finally decided, and the frequent recognition of that case, devises have been frequently deemed a satisfaction of dower, on account of very strong and special circumstances; as where allowing the wife to take a double provision would have been quite inconsistent with the dispositions of the will. On this latter principle *Northington*, C. is said to have decided for a satisfaction of dower in *Arnold* v. *Kempstead*, July 1764: and *Camden*, C. in *Villareal* v. *Galway*. See 1 *Inst.* 36, *b, in n.*

If a Jointure be made to a woman, during coverture, in satisfaction of dower, she may waive it after her husband's death; but if she enters and agrees thereto, she is concluded; for though a woman is not bound by any act when she is not at her own disposal, yet if she agrees to it when she is at liberty, it is her own act, and she cannot avoid it. 4 *Co.* 3. Also, *vide Co. Lit.* 29, *b.* 36, *b.* 348, *a.* 357. 1 *Bulst.* 163. *Moor*, 717. *pl.* 1002. *Park*, 352, 353. 3 *Co.* 273. *Leon.* 272. *Cro. Jac.* 490. *Dyer*, 351. *Hob.* 72. 2 *Rol. Abr.* 422.

All other settlements in lieu of dower, not made according to the statute, are Jointures at common law, and no bars to claim of dower: and a Jointure was no bar of dower before this statute; as a right or title to a freehold cannot be barred, [at law,] by acceptance of a collateral satisfaction. *Co. Lit.* 36. A father made a settlement to the use of himself for life, and afterwards to the use of his son and his wife, for their lives, for the Jointure of the wife; this was adjudged no Jointure to bar the wife of her dower, because it might not commence immediately after the death of the husband, who might die in the life-time of the father. So, if a feoffment be made to the use of the husband for life, remainder to another for years, remainder to the wife for life for her Jointure. 2 *Cro.* 489. But a feoffment in fee, upon condition that the feoffee shall make another feoffment to the use of the son of the feoffor, and to his son's wife in tail, remainder to the right heirs of the feoffor, which feoffment is made accordingly; is a good Jointure within the statute, and bar to the dower of the wife. *Moor*, 28.

An estate settled in Jointure, coming from the ancestors of the wife, and not of the purchase of the husband or his ancestors, is not within the *stat.* 11 *Hen.* 7. *cap.* 20. as to discontinuances, alienations, &c. by the wife. Where a father of the intended wife, in consideration of marriage, &c. covenanted to assure lands to the husband and wife, his (the covenantor's) daughter, and the heirs of her body, &c. this was held no Jointure, within the meaning of the *stat.* 11 *H.* 7. *c.* 20. being an advancement of the woman by her own father. 2 *Cro.* 264. 2 *Lill. Abr.* 80. And an estate in fee-simple conveyed to a woman for her Jointure, was held not to be any Jointure within the statute; which never extended to lands granted to women in fee: but an estate in fee, conveyed to a woman for her Jointure, and in satisfaction of her dower, is a Jointure within the *stat.* 27 *H.* 8. *c.* 10. 4 *Rep.* 3.

An estate for life is the usual Jointure; and an estate for life upon condition, may bar the wife if she accepts it; as a Jointure to a woman on condition to perform the husband's will was judged good, where the wife entered and agreed to the estate. 3 *Rep.* 1, 2, &c. If no inheritance is reserved to the husband and his heirs, but the estate is limited to the wife for life, or in tail, the remainder to a stranger; it is not a Jointure within the *stat.* 11 *H.* 7. *c.* 20, though made by the

husband or his ancestor. *Cro. Eliz.* 2. A husband covenanted to stand seised of lands, to the use of himself and his heirs, till the marriage should take effect; and afterwards to himself, his wife, and their heirs; and it was adjudged a good Jointure within this *stat.* 27 *Hen.* 8. *cap.* 10. *Dyer*, 248.

A man makes his wife a Jointure after marriage; and afterwards by will devises, that she shall have a third part of all his lands, with her Jointure; here the wife will have the third part of all as a legacy, and if she waives her Jointure, she may have a third part of the residue for dower. *Dyer*, 62. If a master, in consideration of service done by his servant, grants lands to the servant and a woman he intends to marry, and the heirs of their bodies, creating an estate-tail; this is not a Jointure; not being a gift of the husband, or any of his ancestors, but of his master, and in consideration of service, which will not make the husband such a purchaser as the law requires. *Moor*, 683. But as to considerations, if an estate is settled in Jointure upon a woman, in consideration of money paid, and also of a marriage to be had; the marriage shall be looked upon to be the consideration. *Cro. Jac.* 474. A husband, tenant in tail, remainder to his wife for life, makes a feoffment in fee to the use of himself and wife for life, for her Jointure: it is no bar to the wife's dower, because it may be avoided by a remitter to her first estate for life. *Moor*, 872. If lands are conveyed to a woman before marriage, in part of her Jointure only, and after marriage, other lands are granted in full; it is said she may waive and refuse the lands conveyed to her after coverture, and retain her first Jointure-lands and dower also. 3 *Rep.* 1. 5. 4 *Co.* 5.

Where a Jointure is made of lands, (according to the direction of the statute of 27 *H.* 8. *c.* 10,) before coverture, and after the husband and wife alien them by fine, she shall not have dower in any other lands of her husband; but it is otherwise where the Jointure is made after marriage, when the wife's estate is waivable, and her election of choosing comes not till the death of the husband. 1 *Inst.* 36.

The important question, whether a Jointure on an Infant, before marriage, may be waived, was not quite settled till the case of *Drury* v. *Drury*, which was heard before Ld. *Northington*, C. *Hil. T.* 1 *Geo.* 3. The points determined by Ld. *Northington*, in that case were; first, That the *stat.* of 27 *H.* 8. *c.* 10, which introduced Jointures, extends to adult women only; Infants not being particularly named; and therefore that, notwithstanding a Jointure on an Infant, she may waive the Jointure, and elect to take dower; secondly, That a covenant by the husband, that his heirs, executors, or administrators shall pay the wife an annuity for her life, in full for her *Jointure*, and in bar of dower, without expressing that it shall be charged on any particular lands, or be secured out of lands generally, is not a good equitable Jointure within the statute; thirdly, That a woman, being an infant, cannot, by any contract previous to her marriage, bar herself of a distributive share of her husband's personalty, in case of his dying intestate.

But from this decree there was an appeal to the House of Lords; and, after hearing the Judges *seriatim* on the question, whether a Jointure on an Infant could be waived, on which they were divided in opinion, the *decree* was *reversed* as to all the above points. See *Bro. P. C.* title *Dower*, *ca.* 4. *Buckingham* (Earl) v. *Drury*; where it appears that, by the decree of the Lords, it was DECLARED, "that the respondent (the widow,) is bound by the agreement entered into in consideration of, and previous to, her marriage; and that the same ought to be performed and carried into execution; and that the respondent *is thereby barred of her dower*, and of any share of her husband's personal estate, under the statute of Distributions."

Before the above decision, the only judicial opinions, as to the effect of a Jointure on an Infant, were Sir J. Jekyll's in *Cray* v. *Willis*, 1 *Eq. Ab.* 389. *c.* 17, against its barring; and Ld. *Hardwicke's* in *Seys* v. *Price*, *Barn. C.* 117. and in *Harvey* v. *Ashley*, 3 *Atk.* 607. to the contrary. See *Vin.* title *Dower*, Q. 3. *pl.* 18.

In equity, any provision, however precarious, and whether secured out of realty or personalty, which an adult, previously to marriage, accepts in lieu of dower, is sufficient to bar the dower. *Jordan* v. *Savage*, *Bac. Abr. Jointure*, *B.* 5. *Charles* v *Andrews*, 9 *Mod.* 152. *Williams* v. *Chitty*, 3 *Ves. jun.* 545. *Bro. C. C.* 513. By analogy to the determination in *Drury* v. *Drury*, Infants may be barred by an equitable Jointure, but not, like adults, by a precarious provision. It must, to be effectual, be, although an equitable provision, as certain as is required to operate as a legal bar. *Carruthers* v. *Carruthers*, 4 *Bro. C. C.* 500. *Smith* v. *Smith*, 5 *Ves.* 189.

A man levies a fine of his land, and it is granted back again to him and his wife, for her Jointure, and to the heirs of the husband; then he and his wife levy a fine to another use; the wife, if she survive her husband, will have dower notwithstanding the fine. 1 *And.* 350. If the husband make a lease of lands to his friends for any number of years, in trust for his wife and children, that she shall have 100*l.* a-year out of it, or in any such manner: by this she may have the provision, which is no Jointure, and likewise her dower. By *Bridgman*, Ch. J. an estate is made to husband in tail, with remainder to the wife for life, and remainder to others; this is not such a Jointure, as, with her acceptance, within the statute will hinder her from dower; and though the husband die without issue, it will not help it, but the wife shall be endowed in his other land: but if the estate were made to the husband and wife for their lives, it would be otherwise. 13 *Jac.* 1. *B. R.* 2 *Shep. Abr.* 74.

After the death of the husband, the wife may enter into her Jointure, and is not driven to a real action, as she is to recover dower by the common law; and upon a lawful eviction of her Jointure, she shall be endowed according to the rate of her husband's land, whereof she was dowable at common law. *Co. Lit.* 37. *Stat.* 27 *H.* 8. *c.* 10. If she be evicted of part of her Jointure, she shall have dower *pro tanto*. A wife's Jointure shall not be forfeited by the treason of the husband: but feme-coverts, committing treason or felony, may forfeit their Jointures; and being convict of recusancy, they shall forfeit two parts in three of their Jointures and dower, by *stat.* 3 *Jac.* 1. *c.* 4. If a woman conceals her Jointure, and brings dower and recovers it, and then sets up her Jointure, she is barred of her Jointure; and by bringing a writ of dower for her thirds, the wife waives the benefit of entry into lands, so as to hold them in Jointure. *Cro. Eliz.* 128. 137. 3 *Rep.* 5. *Stat.* 3 *Jac.* 1. *c.* 5. § 13. See further, titles *Baron and Feme*, *Dower*, II. IV., *Forfeiture*, *Marriage*, &c.

JOINTRESS, or JOINTURESS. She who hath an estate settled on her by the husband, to hold during her life, if she survive him. *Stat.* 17 *H.* 8. *c.* 10. 1 *Inst.* 46. When estates settled on a wife are a Jointure, if the Jointress makes any alienation of them by fine, feoffment, &c. with another husband, it is a forfeiture of the same; but if they are not a jointure by law, it is otherwise. 2 *Nels.* 1040. A Jointress within the statute may make a lease for forty years, &c. if she so long live; and also for life, and be no forfeiture, though she levies a fine *sur cognisance de droit*, &c. *Cro. Jac.* 688. 3 *Rep.* 50. 1 *Lill.* 81. In other cases, if she levies a fine, it is a forfeiture; and if a Jointress, within the statute 11 *H.* 7. *c.* 20, suffer a recovery covinously to bar the heir, the heir may enter presently, &c. 2 *Leon.* 206. 1 *Plowd.* 42.

With respect to the acts of a Jointress, or those of her husband defeating her of her jointure, and how far equity will relieve her, *vide Co. Lit.* 36. *Dyer*, 358. 2 *Inst.* 673. *Hob.* 225. 1 *Chan. Cas.* 119, 120. 2 *Chan. Car.* 162.

2 *Vent.* 343. 1 *Vern.* 427. 479. 1 *Eq. Abr.* 18. 221, 222. 2 *Vern.* 701. and 14 *Vin. Abr.* title *Jointress* and *Jointure*; and this Dict. titles *Baron and Feme. Dower.*

JOUR, Fr.] A day, used in heads of our old law; *tout jours*, for ever. *Law Fr. Dict.*

JOURNAL, Is a day-book or diary of transactions used in many cases: as by merchants and other tradesmen in their accounts; by mariners in observations at sea, &c.

JOURNALS OF PARLIAMENT. Are not records but remembrances, and have been of no long continuance. *Hob. Rep.* 109. See title *Evidence.*

JOURNEYHOPPERS. Regrators of yarn, which formerly perhaps was called *journ.* They are mentioned in the *stat.* 8 *H.* 6. *c.* 5.

JOURNEYMAN, from the Fr. *journée, i. e.* A day, or day's work.] Was properly one who wrought with another by the day; though it is extended by statute to those also who covenant to work with others in their trades or occupation by the year. *Stat.* 5 *Eliz. c.* 4. See title *Labourers, Servants.*

JOURNEYS ACCOUNTS, *dietæ computatæ, journées accompts.*] Was a term in our old law thus understood: If a writ abated by the death of the plaintiff or defendant, or for false Latin, want of form, &c. the plaintiff might have a new writ by *Journeys Accounts, i. e.* within as little time as he possibly could after the abatement of the first writ; and this second writ was a continuance of the cause, as if the first writ had not abated. *Terms of the Law.* See 6 *Rep.* 10. 1 *Lut.* 297. *Cro. Jac.* 590.

This learning is now of little use, it being customary to enter a judgment that the writ be quashed, and then to sue forth another.

And by *stat.* 8 & 9 *W.* 3. *c.* 11. § 7. the death of one plaintiff or defendant, where there is another surviving, shall not abate the suit. The death to be suggested on the roll. And by § 6, death of the party after interlocutory judgment shall not abate the suit. See title *Abatement.*

IPSO FACTO, *by the very act.*] The expression is used where any forfeiture or invalidity is incurred; and the meaning of it is, that it shall not be necessary to declare such forfeiture or invalidity in a court of law, but that, by the very doing of the act prohibited, the penalty shall be thereby instantly and completely incurred. Thus, where the same person obtains two or more preferments in the church with cure, not qualified by dispensation, &c. the first living is void *ipso Facto, viz.* without any declaratory sentence, and the patron may present to it. *Dyer*, 275. An estate or lease may be *ipso Facto* void by condition, &c. 1 *Inst.* 45. 215.

In many cases, estates and property are vested in trustees, &c. by act of parliament, *ipso facto*, without conveyance: as the property of the suitors in the court of chancery, standing in the name of the accountant-general, vests in his successor, *ipso facto*, by the very act of his appointment, without any conveyance from the preceding accountant-general or his representatives. *Stat.* 54 *G.* 3. *c* 14.

IRE AD LARGUM. To go at large, to escape, or be set at liberty. *Blount.*

## IRELAND,

Was a distinct kingdom until the 1st January, 1801, when an union of Great Britain and Ireland took place under the provision of an act passed in the British parliament 39, 40 *Geo.* 3. *c.* 67. and of a similar act passed in the Irish parliament, 40 *Geo.* 3. *c.* 38. by which the kingdoms were united into one by the name of THE UNITED KINGDOM OF GREAT BRITAIN AND IRELAND.

Ireland was anciently only entitled the Dominion or Lordship of Ireland, and the king's style was no other than *Dominus Hiberniæ* till the 33 *H.* 8. when the title of King was expressly conferred on him by an Irish act, 33 *H.* 8. *c.* 1. and which title is recognised by the English act, 35 *H.* 8. *c.* 3. As Scotland and England are now one and the same kingdom, and yet differ in their municipal laws; so England and Ireland are on the other hand distinct kingdoms, and yet in general agree in their laws. The inhabitants of Ireland are for the most part descended from the English, who planted it as a kind of a colony, after the conquest of it by *Hen.* II. and the laws of England were then received and sworn to by the Irish nation assembled at the council of Lismore. *Pryn* on 4 *Inst.* 249.

At the time of this conquest, the Irish were governed by what they call the *Brehon* law, so stiled from the Irish name of judges, who were denominated *Brehons.* 4 *Inst.* 358. But king John, in the 12th year of his reign, went into Ireland, and carried over with him many able sages of the law; and there, by his letters patent, in right of the dominion of conquest, is said to have ordained and established, that Ireland should be governed by the laws of England; (*Vaugh.* 294. 2 *Pryn. Rec.* 85. 7 *Rep.* 23.) which letters patent, *Sir Ed. Coke* apprehends to have been there confirmed in parliament. 1 *Inst.* 141. But to this ordinance many of the Irish were averse to conform, and still stuck to their Brehon law; so that both *H.* III. and *Ed.* I. were obliged to renew the injunction; and at length, at a parliament holden at Kilkenny, 40 *E.* III. under Lionel, Duke of Clarence, the then lieutenant of Ireland, the *Brehon* law was formally abolished, it being unanimously declared to be indeed no law, but a lewd custom crept in of later times. 1 *Comm.* 100.

But as Ireland was a distinct dominion, and had parliaments of its own, though the immemorial customs or common law of England were made the rule of justice in Ireland also, yet no acts of the English parliament, after the 12 John, extended into that kingdom, unless it were specially named, or included under general words, as within any of the king's dominions. See 1 *Comm.* 100.

The original method of passing statutes in Ireland was nearly the same as in England; the chief governor holding parliaments at his pleasure, which enacted such laws as they thought proper. But an ill use having been made of this liberty, a set of statutes were there enacted in the 10th *H.* VII. (Sir Ed. Poynings being then lord deputy, from whence they were called Poynings' laws,) which restrained the power as well of the deputy as the Irish Parliament; and, in time, there was nothing left to the Parliament in Ireland but a bare negative or power of rejecting, not of proposing or altering any law. With regard to Poynings' law in particular, it could not be repealed or suspended, unless the bill for that purpose, before it should be certified to England, were approved by both Houses.

But the Irish nation being excluded from the benefit of the English statutes, were deprived of many good and profitable laws, made for the improvement of the common law; and the measure of justice in both kingdoms becoming thence no longer uniform, it was therefore enacted, by another of Poynings' laws, that all acts of Parliament, before that time, made in England, should be of force within the realm of Ireland. 4 *Inst.* 351. After this Ireland continued to be bound by all *English* acts of Parliament, in which it was specially named or included under general words. See 1 *Comm.* 103.

This state of dependance being disputed by the Irish nation, it was, by the British act 6 *Geo.* 1. *c.* 5. expressly declared, that the Kingdom of Ireland ought to be subordinate to and dependant on the Imperial Crown of Great Britain, as being inseparably united thereto; and that the King's Majesty, with the consent of the Lords and Commons of Great Britain in Parliament, had power to make laws to bind the people of Ireland. The same statute also expressly "declared that the Peers of Ireland had no jurisdiction to affirm or reverse any judgments or decrees whatsoever." And a writ of error, in the nature of an appeal, lay from K. B. in Ireland to K. B. in England, as the appeal from Chancery in Ireland lay immediately to the House of Lords in England

Thus stood the matter, till the 22d year of King Geo. III. when, on some further struggles by the Irish, the above *stat.* 6 *Geo.* 1. *c.* 5. was simply *repealed* in the British Parliament, by *stat.* 22 *Geo.* 3. *c.* 53. And in the Irish Parliament acts were passed to regulate the manner of passing Bills, to declare which English or British acts should be accepted and used in Ireland, and to regulate Appeals and Writs of Error. See Irish acts 21, 22 *Geo.* 3. *c.* 47, 48, 49.

*Lord Mountmorris*, in his *History of the Proceedings of the Irish Parliament*, observes that as to repeal Poynings' law it required the consent of *the greater number of the Lords and Commons*; (which, if it meant any thing, must signify a majority not of those who happened to be present, but of the whole number summoned to parliament;) the requisition, in that sense, was strictly complied with in 1782, when Poynings' law was repealed by the Irish act 21, 22 *G.* 3. *c.* 47. *Hist.* 1 *vol. p.* 53.

As however the British statute of *Geo.* 1. was thought to be merely declaratory of the former law, the repeal of it could produce no further operation, than to render the law in some degree less clear than that statute had made it. Therefore, to produce the effect earnestly contended for by the Irish, it required another statute, which was accordingly passed in the British Parliament, *viz. stat.* 23 *Geo.* 3. *c.* 28. by which, "The *Right* claimed by the people of Ireland, to be bound *only* by laws enacted by *his Majesty and the Parliament of that kingdom*, in all cases whatever, and to have all actions and suits, instituted in that kingdom, decided in his Majesty's courts there *finally*, and *without appeal from thence*, is *established* and ascertained *for ever*; and at no time to be questioned or questionable: and all Writs of Error, and Appeals in the English Courts shall be null and void."

After this period, till the year 1800, several acts were passed in the Irish parliament for the establishing and regulating the various Departments of Government there, as in a separate kingdom. In that year, after great debate, on the principle, and even on the moral competence of the Parliament of Ireland to consent to such a proceeding, the Union of the two kingdoms was ratified by the acts of both Parliaments, *viz.* 39, 40 *Geo.* 3. *c.* 67. of the British acts, and 40 *Geo.* 3. *c.* 38. of the Irish acts. The following is the substance of the eight Articles of Union:—

Art. 1. That the Kingdoms of Great Britain and Ireland shall, after 1st January, 1801, *and for ever*, be united into one kingdom, by the name of *The United Kingdom of Great Britain and Ireland.*

Art. II. That the succession to the Crown of the said United Kingdom shall continue limited and settled in the same manner as the succession to the Crown of Great Britain and Ireland stands limited and settled according to the existing laws, and to the Term of Union between Great Britain and Scotland.

Art. III. That the said United Kingdom be represented in one Parliament.

Art. IV. That four Lords Spiritual of Ireland, by rotation of Sessions, *viz.* One of the four Archbishops, and three of the eighteen bishops; (See 40 *Geo.* 3. (I.) *c.* 29. § 1.) and 28 Lords Temporal of Ireland, (elected for life, subject to forfeiture by attainder, 40 *Geo.* 3. (I) *c.* 29. § 4. by the Peers of Ireland:) shall sit in the House of Lords of the Parliament of the United Kingdom; and in the House of Commons, 100 Commoners; two for each of the 32 counties in Ireland; two for Dublin, two for Cork, one for Trinity College, Dublin; and one for each of the 31 most considerable cities, towns, and boroughs; viz. Waterford, Limerick, Belfast, Drogheda, Carrickfergus, Newry, Kilkenny, Londonderry, Galway, Clonmel, Wexford, Youghal, Bandonbridge, Armagh, Dundalk, Kinsale, Lisburn, Sligo, Catherlough, Ennis, Dungarvon, Downpatrick, Coleraine, Mallow, Athlone, New Ross, Tralee, Cashel, Dungannon, Portarlington, Enniskillen. 40 *Geo.* 3. (I.) *c.* 29. § 2.

That the Irish Act, 40 *Geo.* 3. *c.* 29. for regulating the election of the said Lords and Commons shall be part of the Treaty of Union, and incorporated in the Union Act. [*which it accordingly is.*]

Questions respecting the rotation or election of the Peers shall be determined by the House of Lords of the United Kingdom.

Irish Peers not being elected to sit in the House of Lords, may be elected as members of the Commons House for any place in Great Britain. In which case they shall be considered merely as Commoners.

His Majesty may create peers of Ireland, under certain restrictions, viz. whenever three such peerages of Ireland become extinct, one new peerage may be created; and when the whole of such peerage is reduced to 100, then, on the extinction of any peerage, another may be created; so that the peerage of Ireland may be kept up to 100, over and above such peers of Ireland as may be entitled by descent or creation to an hereditary seat in the House of Lords of the United Kingdom.

Questions touching the elections of Commoners, or their qualifications, shall be decided by the Laws of Great Britain.

The temporary regulations respecting Commoners holding places under Government were superseded by 41 *Geo.* 3. *c.* 52. by which all persons disabled from sitting in the British Parliament are declared disabled from sitting in the United Parliament as Members for Great Britain, and so for Ireland. See this Dict. tit. *Parliament*, 6. B. 2.

As to the privileges, rights, and rank of the Irish Spiritual and Temporal Peers in Parliament, see this Dict. title *Parliament*, III.

Art. V. The Churches of England and Ireland shall be united into one Protestant Episcopal Church to be called *The United Church of England and Ireland*, according to the doctrine, worship, discipline, and government of the Church of England. The Church of Scotland to remain as under the Union of that Kingdom.

Art. VI. The subjects of Great Britain and Ireland shall be entitled to the same privileges, and be on the same footing as to encouragements and bounties on the like articles, the growth, produce, or manufacture of either country respectively, and generally in respect of trade and navigation in the ports and places in the United Kingdom, and its dependencies; and in all foreign treaties Irish subjects shall be put on the same footing as subjects of Great Britain.

All prohibitions and bounties on the export of articles, the growth, produce, or manufacture of either country to the other, shall cease and determine.

That all articles, the growth, produce, or manufacture of either country, (not enumerated and subjected by the act, to specific duties) shall be imported into each country from the other free of duty, except countervailing duties. See *post.*

For 20 years from the Union (*i. e.* until 1 January, 1821.) certain manufactured articles, *viz.* apparel, cabinet-ware, pottery, sadlery, &c. are subjected to a duty of 10*l. per cent.* Salt, hops, coals, callicoes, and muslins, &c. to certain duties specified.

Articles, the growth, produce, or manufacture of either country, subject to internal duty, or to duty on the materials of which they are composed, are made subject, by certain schedules in the acts to the countervailing duties, there specified; and it is provided, that all articles subject to such internal duty, shall, from time to time be subjected on their importation into each country respectively, for the other, to such duty as shall be sufficient to countervail such internal duty in the country from which they are exported; and that, upon the export of the like articles from one coun-

try to the other, a drawback shall be given equal in amount to the countervailing duty payable on such articles, if it had been imported into the county from whence it is exported.

All articles, the growth, produce, or manufacture of either country, when exported through the other, are made subject to the like charges, as on exportation directly from their own country.

All duty on the import of foreign or colonial articles into either country, shall, on their export to the other, be drawn back; and this is confirmed by 59 *G.* 3. *c.* 52. § 8. and *c.* 83 § 9.

By *stats.* 55 *Geo.* 3. *c.* 83. 59 *Geo.* 3. *cc.* 52. and 83, foreign or colonial goods, imported into Great Britain or Ireland from each other, shall pay such duties as on their first importation, according as they were imported, either British or foreign ships, or directly or not directly from the place of their growth; and for this purpose the clearances on the exportation of such goods from either country to the other, shall state whether the original importation into the exporting country was in a British or foreign vessel, or directly from the place of growth, or not; the purpose of these acts is to prevent the evasion of the *higher* duties, payable on the original importation, if made in foreign vessels, &c.

Corn, meal, malt, flour, and biscuit, are exempted from the operation of the Union acts; so that all these, except malt, were declared free between Great Britain and Ireland, under 46 *Geo.* 3. *c.* 97.—See title *Corn*. The intercourse of Malt between the two countries is regulated by *stat.* 50 *Geo.* 3. *cc.* 34. 53. and the countervailing duties are ascertained by the several acts imposing the internal duties.

Art. VII. By this article it was provided that the charge of the separate national debt of either country before the Union should continue to be separately defrayed by the respective countries. That for 20 years after the Union the contribution of Great Britain and Ireland towards the annual expenditure of the United Kingdom, should be 15 parts for Great Britain and two parts for Ireland.—That after such twenty years the future expenditure of the United Kingdom (except the interest and charges of their separate debts) should be defrayed according to a proportion to be settled by Parliament for a subsequent period of not more than twenty, nor less than seven years: and so from time to time, unless the Parliament of the United Kingdom should declare that the expenditure of the United Kingdom should be defrayed indiscriminately by equal taxes imposed on the like articles in both countries.—For defraying her national debt, and the proportion of her expenditure, the revenue of Ireland was by the same article, constituted a consolidated fund. —It was declared that the proportion of contribution of each county should be raised by taxes in each country repectively; provided that in regulating such taxes, no article in Ireland should be made liable to any new duty, so as to make the amount exceed the amount of duty payable on the like article in England.—That any surplus of Irish revenue should be applied to local purposes in Ireland.—That all future loans should be considered as a joint debt to be discharged by each country in their respective proportions, unless particular provisions were made in any particular year.—That if at any future day the separate debt of each country should have been liquidated, or if the values of their respctive debts should be in the same proportions as the contributions (*viz.* as 15-17ths are to 2-17ths), or within 100th part thereof, and if the parliament should think that the respective circumstances of the two countries would admit of their contributing indiscriminately by equal taxes, the parliament might declare that all future expense, and all joint debts then contracted, should be defrayed indiscriminately by equal taxes on the same articles in each country, subject to any requisite exemption in Ireland or Scotland.—That after such declaration, the contribution of England and Ireland respectively should cease to be regulated by the proportions before-mentioned: but that the charges of the separate debts should be defrayed separately by each country.—That sums granted by the Irish Parliament for encouraging agriculture, manufactures, charities, &c. in Ireland, should continue to be granted for 20 years; and finally, that the revenue from territorial dependences should be applied to expenditure of the United Kingdom in the foregoing proportions.

The effect of this Article VII. may be considered as almost wholly superseded by the provisions of *stat.* 56 *Geo.* 3. *c.* 98. (amended by 57 *Geo.* 3. *c.* 48.) by which it is enacted, that the Consolidated Funds of Great Britain and Ireland shall become one *General Consolidated Fund* of the *United Kingdom*, charged indiscriminately, whether in the Exchequer of Great Britain or Ireland, with the whole of the interest, and sinking funds of the National Debts of Great Britain and Ireland, as one joint consolidated National Debt, interest, and sinking fund; with the civil list establishments in Great Britain and Ireland; with all other charges on the former separate consolidated funds; and, subject to such charges, to be indiscriminately applied to the service of the United Kingdom. The offices of Lord High Treasurer of Great Britain and Ireland are united, and the office of Lord High Treasurer of the United Kingdom may be executed by Commissioners of the Treasury. A Vice-treasurer for Ireland is to be appointed for the issue of money out of the Irish Exchequer; and regulations are made for directing such issues, under warrant of the Lord Lieutenant of Ireland, and the issues out of the Treasury of Great Britain, from the growing produce of the consolidated fund. The British Commissioners for reduction of the National Debt are declared Commissioners for reducing the debt of the United Kingdom. Two additional Commissioners of the Treasury are to be appointed for Irish business; and the balance of joint contributions between Great Britain and Ireland are declared to be cancelled.

Art. VIII. All laws in force at the time of the Union, and all courts, civil and ecclesiastical, within the respective kingdoms, shall remain as established; subject to future alterations by the United Parliament. All writs of error and appeals (determinable in the House of Lords of either kingdom) shall be decided by the House of Lords of the United Kingdom. The Instance Court of Admiralty in Ireland shall continue, with appeals to the delegates in Chancery there. All laws contrary to the provisions enacted for carrying the articles of Union into effect shall be repealed.

By 44 *Geo.* 3. *c.* 92. it is enacted, "That where persons, against whom warrants have been issued by judges, &c. in Ireland for any crime or offence against the laws of Ireland, shall "escape, go into, reside, or be," in England or Scotland; or where any persons, against whom warrants have been issued, in England or Scotland for any offence against the laws of England and Scotland respectively, shall escape, &c. into Ireland, any justice of peace of the county, or place, whither or where such person shall escape, &c. shall indorse the warrant, and the person charged may be apprehended in the place where such warrant is so indorsed, and carried into England, Scotland, or Ireland, as the case may require, to be then proceeded against according to law. By 45 *Geo.* 3. *c.* 92. if the offence is not bailable, the original warrant shall be so indorsed; but if it is bailable, the party shall be bailed in the place where he is apprehended, by duplicate bonds, one to be transmitted to the proper officer of the place where the warrant was issued, and the other to the Court of Exchequer in the county where the party is bailed; and the penalty may be levied in the county where the bond is taken, on certificate of the breach thereof to the Exchequer there.

By 45 *Geo.* 3. *c.* 92. § 3, 4. subpœnas in criminal prosecutions may be served in England to compel appearance in Ireland, and so *vice versâ*,

By *stat.* 54 *Geo.* 2. *c.* 186. § 2, 3. All warrants signed in England, Scotland, or Ireland, may be indorsed and acted upon in any part of the United Kingdom, in like manner as is directed by *stat.* 13 *Geo.* 3. *c.* 31. as to warrants in England and Scotland, and Judges in Ireland may indorse Scotch letters of second deliverance for compelling attendance in Scotland, of witnesses in criminal cases, resident in Ireland.

It has been determined, that in the case of a libel written in Ireland, but published in England, (being sent thither by the post by the writer,) the writer, residing in Ireland, and not having been in England, either at or after the time of writing the libel, is subject to the provision of the act, 44 *Geo.* 3. *c.* 92. and must abide his trial in England. *Rex* v. *Johnson.*

IRON. Made in this kingdom, or brought into England and sold, shall not be exported, on pain of forfeiting the value; and justices assigned by the King have power to inquire of such as sell Iron at too dear a price, and punish them. 28 *Ed.* 3. *c.* 5. None shall convert to coal, or other fuel, for the making of Iron metal, any trees of such a size; or within a certain compass of London, under penalties by statute: nor shall any new Iron mills be set up in Sussex, Surry, or Kent. *Stats.* 1. *Eliz. c.* 15. 23 *Eliz. c.* 5. 27 *Eliz. c.* 19. See title *Woods.*

By *stat.* 4 *Geo.* 2. *c.* 32. to steal, or sever with intent to steal, any lead or iron, fixed to a house, or in any court or garden thereunto belonging, is made felony, liable to transportation for seven years. See titles *Felony, Larceny, Robbery.* As to the importing and exporting Bar Iron, see title *Navigation Acts.*

IRONS, *to secure prisoners.* See titles *Gaol* and *Gaolers, Trial, Indictment, False Imprisonment, Arraignment,* &c. and 4 *Comm. c.* 22. *ad fin. c.* 25.

IRON WIRE. See *Wire.*

IRONY. In libels, makes them as properly libels as what is expressed in direct terms. *Hob.* 215. See title *Libel.*

IRREGULARITY, *Irregularitas.*] Disorder, or going out of rule. In the canon law, it is used for an impediment to the taking holy orders; as where a man is base born, notoriously defamed of any crime, maimed, or much deformed in body, &c. In common speech, in our law, it means a transgressing of form in point of practice, &c.

IRREPLEVIABLE, or IRREPLEVISABLE. That neither may nor ought to be replevied, or delivered on sureties. *Stat.* 13 *Ed.* 1. *st.* 1. *c.* 2. It is against the nature of a distress for rent to be irreplevisable. 1 *Inst.* 145. See titles *Distress, Replevin.*

IRRITANCY. The becoming void. *Irritant clause* is a clause by which certain acts specified in a deed are declared to be null and void: and by another clause, called a *resolutive clause,* the right of the proprietor is dissolved and put an end to, on his committing the acts so declared void. *Bell's Scotch Law Dict.*

ISELAND. Composition fish to be taken as usual of subjects travelling into Iseland. *Stat.* 5 *El. c.* 5. § 5. Fishing vessels not to proceed on their voyage to Westmony and Iseland, till the 10th of March, yearly. 15 *Car.* 2. *c.* 16. See titles *Fish, Navigation Acts.*

ISH. The period of the termination of a tack or lease. *Scotch Dict.*

ISINGLASS. A kind of fish glue, brought from Iseland, used by some persons in the adulterating of wine; but for that prohibited by *stat.* 12 *Car.* 2. *c.* 25.

ISLE, *Insula.*] Land inclosed in, and environed with the sea or fresh water. There are several islands belonging to England; as the isles of Jersey and Guernsey, Man, &c. See titles *Jersey, Man.*

As to islands arising in rivers, or the sea, see titles *Occupancy, Plantations.*

ISLE OF ELY. See *Ely.*

ISLE OF MAN. See *Man.*

ISLE OF WIGHT. See *Wight.*

ISLET. A small island. See *Ilet.*

ISSUABLE PLEA. See *Pleading,* I. 4.

ISSUABLE TERMS. Hilary and Trinity terms are usually called issuable terms, from the making up of the issues therein. Though for causes tried in Middlesex and London, many issues are made up in Easter and Michaelmas terms. See titles *Terms, Judges.*

ISSUE, *Exitus,* from the Fr. *Issuer,* i. e. *Emanare.*] Hath divers significations in law: sometimes it is taken for the children begotten between a man and his wife; sometimes for the profits growing from amerciaments and fines; sometimes for the profits of lands and tenements; but it generally signifies the point of matter, issuing out of the allegations and pleas of the plaintiff and defendant in a cause. 1 *Inst.* 126. 11 *Rep.* 10.

*Issues* is the term applied to the profits on land, which the sheriff is directed to take by a writ of *distringas,* in order to compel the appearance of a party in court, and which, by the common law, he forfeits to the King, if he does not appear. *Finch. L.* 352. But now, by *stat.* 10 *Geo.* 3. *c.* 50. the Issues may be sold, if the Court shall so direct, in order to defray the reasonable costs of the plaintiff. See titles *Process, Attachment, Distringas, Appearance,* &c.

As to Issue, in the sense of children or heirs, see titles *Estate, Limitation, Executory Devise, Remainder, Will,* &c.

When, in the course of pleading, the parties in a cause come to a point, which is affirmed on one side and denied on the other, they are then said to be at Issue; all their debates being at last contracted into a single point, which must be determined either in favour of the plaintiff or the defendant. 3 *Comm.* 313.

The Issues concerning causes are of two kinds: upon matter of fact, and matter of law.

An Issue in fact is where the plaintiff and defendant have agreed upon a point to be tried by a jury; an issue in law is where there is demurrer to a declaration, plea, &c. and a joinder in a demurrer, which is to be determined by the judges. 1 *Inst.* 71, 72. See this Dict. title *Demurrer.*

As to Issues of fact, *viz.* whether the fact is true or false, which are triable by the jury, they are either general or special.

General, when it is left to the jury to try, whether the defendant hath done any such thing as the plaintiff lays to his charge; as when he pleads not guilty to a trespass, &c. *Non assumpsit,* or that he made no promise, in an action of *assumpsit. Not guilty* is the General Issue in all criminal cases.

Special, is when some special matter, or material point alleged by the defendant in his defence, is to be tried; as in assault and battery where the defendant pleads that the plaintiff struck first, &c. 1 *Inst.* 126.

There is also a General Issue, wherein the defendant may give the special matter in evidence, for excuse or justification, by virtue of several statutes made for avoiding prolixity of pleading; and upon the General Issue in such cases, the defendant may give any thing in evidence, which proves the plaintiff hath no cause of action. 1 *Inst.* 283. Matter amounting to the General Issue, and special matter of justification, have been joined in one entire plea, and held good. 3 *Lev.* 41. And where there is an Issue upon not guilty, and there are other Issues upon justifications, the trial of the General Issue of not guilty is but matter of form, and the substance is upon the special matter. *Cro. Jac.* 599. But the General Issue is pleaded, to put the plaintiff on proof of the fact.

In real actions, causes grown to Issue are tried by a jury of twelve men of the county where the cause of action arises; and in criminal cases, Issues ought to be tried in the county where the offence was committed; but this hath admitted of some alteration by statute. 3 *Inst.* 80. 135. 1 *Rep.* 93. See titles *Indictment, Trial.*

The place ought not to be made part of the Issue, in a transitory action; it is not material, as it is in real and mixed actions. *Trin.* 24 *Car. B. R.* If the place is material, and make a part of the Issue, there the jury cannot find the fact in another place, because, by the special pleading, the point in Issue is restrained to a certain place; but upon the General Issue pleaded, the jury may find all local things in another county, and where the subtance of the Issue is found, it is good, and the finding more may be surplusage. 6 *Rep.* 46. If an Issue is of two matters in two counties, trial may be in one county, by *stat.* 21 *Jac.* 1. *c.* 4. for that statute extends to cases where the matter in Issue arises in two counties, and the trial is by one only, as well as where the matter in Issue arises in two places in one county, and the trial is by one. 2 *Lev.* 121. Every Issue is to be joined in such a court that hath power to try it, otherwise the Issue is not well joined; for if the cause cannot be tried, the Issue is fruitless, and if it be tried, the trial is *coram non judice*, 2 *Lil. Abr.* 84.

Where an issue is not joined, there cannot be a good trial, nor ought judgment to be given. 2 *Nels. Abr.* 1042. All Issues are to be certain and single, and joined upon the most material thing in the cause; that all the matter in question between the parties may be tried. 2 *Lil.* 85. An immaterial Issue joined, which will not bring the matter in question to be tried, is not helped after verdict by the statute of jeofails; but there must be a repleader: but an informal Issue is helped. 18 *Car.* 2. *B. R.*

A repleader may be awarded after verdict, for the badness and incertainty of the Issue: and a judgment may be reversed in error, being on an immaterial Issue. 2 *Lutw.* 1608. 2 *Lev.* 191. On a joint trespass by many persons, there must be only one Issue in each plea joined: and if several offences are alleged against the defendant, he ought to take all but one by protestation, and offer an Issue upon that one, and no more. *Moor*, 80. But in action for damages, according to the loss which the plaintiff hath sustained, every part ought to be put in Issue. 1 *Saund.* 269. In action upon the case for service done for a time certain, the defendant ought to put in Issue all the time alleged in the declaration. *Lutw.* 1268. And upon a General Issue in waste, the plaintiff must shew his title. *Ibid.* 1547. Though when any special point is in Issue, the plaintiff is not obliged to set forth any other matter. *Cro. Eliz.* 320. If there are several things in a declaration, upon which an Issue may be joined, and it is joined on any of them, it is good; and an affirmative and an implied negative will make a good Issue. *Style*, 151. 210.

There must be in every Issue an affirmation on the one part, as that the defendant owes such a debt, &c. and a denial on the other part, as that he oweth not the debt, &c. And though the matter contradicts, yet there must be a negative and affirmative of it, to make a right Issue. 1 *Ventr.* 213.

An Issue may be of two affirmatives. 1 *Wils.* 6. A negative should be as full as the affirmative, or it is no negative to make an Issue; as if a defendant pleads a grant of four acres, and two acres only are denied, &c. 1 *Rol. Rep.* 86. It has been held, that Issue ought not to be joined on a traverse only, without answering in the affirmative, &c. 2 *And.* 6. 102. But where the matter, which is the gist or cause of the action, is found, it has been adjudged good after verdict, though there was no negative and affirmative to make the Issue; as where in debt upon bond the defendant pleads payment, and concludes to the country, without giving the plaintiff opportunity to deny the payment, if the jury in such case find the money paid, it is good after verdict. *Sid.* 341..

Where there are two Issues joined, one good and the other bad, if entire damages are given upon the trial on both Issues, it will be error; but if several damages are found, the plaintiff may release the damages on the bad issue, and have judgment for the rest. 2 *Lil. Abr.* 87, 88. See title *Damages.* And it is said, judgment may be entered as to one part of the Issue; and a *nolle prosequi* to another part of the same Issue, where it may be divided. *Pasch.* 23 *Car. B. R.* Where two Issues are joined, and a verdict only on one of them, it is a mistrial, and the judgment may be arrested, and a *venire facias de novo* awarded; if error brought, the judgment must be arrested. *Annaly*, 246.

There may be a plea to Issue to part, and a demurrer to part, which have no dependence on each other. 1 *Saund.* 338. Where the declaration of the plaintiff is good, and the plea of the defendant is ill; if the plaintiff in his replication tender an Issue upon such ill plea, and a trial is had, and it is found for the plaintiff, he shall have judgment. *Cro. Car.* 18. And generally, when a plea is bad, that the plaintiff might have demurrer upon it, and he doth not, but takes Issue, and it is found for the defendant; this is aided by the statute of jeofails, and the defendant shall have judgment: so likewise where the replication is bad, and Issue is taken upon it, and found for the plaintiff, he shall have judgment. *Cro. Eliz.* 455. *Cro. Jac.* 312. But there are many cases where, if the plea or replication is bad in substance, it is not aided by the statute of jeofails. See title *Amendment.*

If Issue be taken on a dilatory plea, &c. and found against the defendant, final and peremptory judgment shall be given; but it is otherwise on a demurrer. *Raym.* 118. In such case there must be a *respondeat ouster.* A good Issue is offered to the defendant, he ought not to plead over; and if he plead over, the plaintiff shall have judgment. 1 *Saund.* 318. 338. If he does not join Issue, but demurs, it is the same.

When Issue is joined between the parties, it cannot be afterwards waived, if it be a good Issue, without consent of both parties: but where defendant pleads the General Issue, and it is not entered, he may, within four days of the term, waive that Issue, and plead specially; and when the defendant pleads in abatement, he may at any time after waive his plea of special matter, and plead the General Issue, unless there be a rule made for him to plead as he will stand by it. 3 *Salk.* 211.

If the plaintiff will not try the Issue after joined, in such time as he ought by the course of the court, the defendant may give him a rule to enter it: which if he does not, he shall be nonsuit, &c. 2 *Lil.* 84. If the tender of the Issue comes on the part of the plaintiff, the form of it is; *And this he prays may be inquired by the record*, or *by the country*; and when on the part of the defendant; *And of this he puts himself upon the country*; and *The plaintiff doth the like*, &c.

What is here stated on the subject of Issues and pleadings, is but immethodical. For more complete and useful information, see this Dictionary, titles *Pleadings*, *Practice*, and the various titles of subjects on which points of pleading arise.

There are many acts of parliament, that enable the defendant to plead the general Issue, and give the special matter in evidence.

ISSUE, FEIGNED. See *Feigned Issue.*

ISSUES ON SHERIFFS, Are for neglects and defaults, by amercement and fine to the King, levied out of the Issues and profits of their lands; and double or treble Issues may be laid on a Sheriff for not returning writs, &c. But they may be taken off before estreated into the Exchequer, by rule of court, on good reason shewn. 2 *Lil. Abr.* 89. Issues shall be levied on jurors, for non-appearance; though on reasonable excuse, proved by two witnesses, the justices may

discharge the Issues. *Stat.* 35 *Hen.* 8. *c.* 6. See 1 *Keb.* 475. and this Dict. title *Jury*.

ITINERANT, *Itinerans.*] Travelling or taking a journey: and those were anciently called *Justices Itinerant*, who were sent with commission into divers counties to hear causes.

The King's courts were formerly Itinerant, being kept in the King's palace, and removing with his household. The Common Pleas is now fixed by *Magna Charta*; but though the court of King's Bench is constantly held in Westminster-Hall, yet there is nothing but custom to fix it there, as it is supposed to be before the King, and if actually so, must be Itinerant. See titles *Judges*, *Justices*, *Common Pleas*, *King's Bench*, &c.

ITINERARY, *Itinerarium.*] A commentary concerning things falling out in journies. *Law Lat. Dict.*

JUBILEE, *Annus Jubilæus.*] The most solemn time of festival at Rome, when the pope gives his blessing and remission of sins. It was first instituted by Boniface the 8th, in the year 1300, who granted a plenary indulgence and remission of sins to all who should visit the churches of St. Peter and St. Paul at Rome in that year, and stay there fifteen days; and this he ordered to be observed once in every hundred years; which Pope Clement the 6th reduced to fifty years, *anno* 1350, and to be held upon the day of the circumcision of our Saviour: and Urban IV. in the year 1389, ordained it to be kept every thirty-three years, that being the age of our Saviour; after which, Pope Sixtus the 6th, reduced it to twenty-five years. In imitation of the grand Jubilee of Rome, the Monks of Christ-Church in Canterbury, every fiftieth year invited a great concourse of people to come thither, and visit the tomb of Thomas Becket. And Kind Edw. III. in the fiftieth year of his age, which was 1362, caused his birth-day to be observed at court, in the name of a Jubilee; giving pardons, privileges, and other civil indulgencies.—JUBILÆUS signified afterwards a man one hundred years old, and likewise a possession or prescription for fifty years. *Du Fresne. J. U. D.* 1 *Comm.* 393. *Canon Law.*

JUDAISM, *Judaismus.*] The customs, religion, or rites of the Jews: also the income heretofore accruing from the Jews to the King: and the word *Judaism* was formerly used for a mortgage; and sometimes taken for usury. *Ex Magno Rot. Pipæ, de anno*, 9 *Ed.* 2.

*Judaismus* is also taken for the mansion or dwelling-place of the Jews in any town. And it sometimes signifies usury. *Mon.* 1 *tom. p.* 834.

JUDGES, *Judices.*] Chief magistrates in the law, to try civil and criminal causes, and punish offences. Of these in England, it is commonly said that there are *twelve*; *viz.* the *Lord Chief Justices* of the Courts of King's Bench and Common Pleas; the *Lord Chief Baron* of the Exchequer; the three *Puisne* (*i. e.* younger, or rather inferior) *Judges* of the two former courts; and the three *Puisne Barons* of the latter. To whom may be added, the *Lord Chancellor*, and the *Master of the Rolls*.

The Chief Justice of the King's Bench is called *Capitalis Justiciarius Banci Regis vel ad placita coram rege tenenda*; he hath the title of Lord, whilst he enjoys his office; and is styled *Capitalis Justiciarius*, because he is chief of the rest; and for this reason he hath usually the title of Lord Chief Justice of England. This Judge was antiently created by letters patent under the great seal, but is now made by writ, in a very short form.

The antient dignity of this supreme Magistrate was very great; he had the prerogative of the Vicegerent of the kingdom, when any of our kings went beyond sea, being chosen to this office out of the greatest of the nobility; and had the power alone, which was afterwards distributed to three other great Magistrates; that is, he had the power of the Chief Justice of the *Common Pleas*, of the Chief Baron of the *Exchequer*, and the Master of the *Court of Wards; and he commonly sat in the King's Palace*, and there executed that authority which was formerly performed *per comitem palatii*, in determining differences which happened between the barons and other great persons of the kingdom, as well as causes criminal and civil between other men: but King Richard I. first diminished his power, by appointing two other Justices, to each whereof he assigned a distinct jurisdiction; *viz.* to one the *North* parts of England, to the other the *South*: and in the reign of King Edward I. they were reduced to one court, with a further abridgment of their authority, both as to the dignity of their persons and extent of their jurisdiction; for no more were chosen out of the nobility, as antiently, but out of the commons, who were men of integrity, and skilful in the laws of the land; whence, it is said, the study of the law dates its beginning. *Orig. Jud.*

In the time of King John, and other of our antient Kings, it often occurs in Charters of Privilege, *Quod non ponatur respondere, nisi coram nobis*, vel *Capitali Justitiâ nostrâ*: and this high officer hath, at this time, a very extensive power and jurisdiction in pleas of the crown, and is particularly entrusted, not only with the prerogative of the King, but the liberty of the Subject.

The Chief Justice of the *Common Pleas* hath also the title of Lord, whilst he is in office, and is called *Dominus Justiciarius Communium Placitorum; vel Dominus Justiciarius de Banco*; who, with his assistants, did originally, and doth yet, hear and determine *Common Pleas* in civil causes, as distinguished from the King's Pleas, or Pleas of the Crown. *Bract. lib.* 3. The Chief Justices are installed or placed on the bench by the Lord *Chancellor*; and the other Judges by the Lord *Chancellor* and the Lords Chief Justices.

Besides the Lords Chief Justices, and the other Judges of the courts at Westminster, there are many other Justices commissioned by the King to execute the laws: as *Justices of Assize*, of the *Forest*, of *Nisi Prius*, *Oyer* and *Terminer*, *Justices of the Peace*, &c. See those several titles.

The Judges of the Court of K. B. are sovereign Justices of oyer and terminer, goal-delivery, and of eyre; conservators of the peace, and sovereign coroners of the land. 4 *Inst.* 73. 9 *Co.* 118, *b.*

By 39 *Geo.* 3. *c.* 110. certain Judges' salaries were made up to the following amount in the whole, *viz.* Master of the Rolls and Chief Baron to 4000*l.* Puisne Judges and Barons 3000*l.*

By *stat.* 49 *Geo.* 3. *c.* 127. the salary of the Chief Baron was increased to 5000*l.*: and that of the Puisne Judges and Barons to 4000*l.*

Pensions may be granted by his Majesty to the Judges in England on resignation. To the Lord Chancellor 4000*l.* Chief Justice of K. B. 3000*l.* Master of the Rolls, Chief Justice of C. P. and Chief Baron, 2500. Puisne Judges 2000*l.* 39 *Geo.* 3. *c.* 110. §§ 6, 7.

By 53 *Geo.* 3. *c.* 153. 800*l.* a year additional, may be granted to the Chief Justices and Chief Barons, and Master of the Rolls: and 600*l.* additional to the Puisne Judges and Barons.

Such Judges (except the Chancellor) must have continued in office 15 years, unless prevented by ill health. 39 *Geo.* 3. *c.* 110. § 7.

By 50 *Geo.* 3. *c.* 31. the salaries of the Scotch Judges were increased to the following amount, *viz.* The Lord President of the Court of Session 4300*l.* Lords of Session 2000*l.* Lord Justice Clerk 4000*l.* Lords of Session, being Commissioners of Justiciary, 2600*l.* Lord Chief Baron 4000*l.* Puisne Barons 2000*l.*

By 48 *Geo.* 3. *c.* 145. 54 *Geo.* 3. *c.* 94, annuities to the amount of 3-4ths of their salaries may be granted to those Judges in Scotland, on resignation of their offices.

The salaries and allowances of the Judges in Ireland, are ascertained by the Irish acts. 36 *Geo.* 3. *c.* 26. & 40 *Geo.* 3. *c.* 69. And by statutes 41 *Geo.* 3. *c.* 25. 42 *Geo.* 3. *c.* 105. 50 *Geo.* 3. *c.* 31. § 3, 4. 54 *Geo.* 3. *c.* 93. & 55 *Geo.* 3. *c.* 114.

The salary of the Lord Chancellor is, by 42 *Geo.* 3. *c.* 105. fixed at 10,000*l.*: and by 41 *Geo.* 3. *c.* 25. 55 *Geo.* 3. *c.* 114. that of the Master of the Rolls at 4300*l.*

By 36 *Geo.* 3. *c.* 26. the salary of the Chief Justice of K. B. is increased to 4000*l.* a year. That of the C. J. of C. P. and the C. Baron to 3500*l.* And those of the Puisne Judges and Barons, to 2500*l.* By 50 *Geo.* 3. *c.* 31. § 3. 650*l.* are added to the Puisne Judges and Barons.

By 40 *Geo.* 3. *c.* 69. the following allowances may be made to the Judges on resignation. Lord Chancellor 4000*l.* a year. Chief Justice of K. B. 3000*l.* Master of the Rolls, 2700*l.* Chief Justice of C. P. and Chief Baron of Exchequer, 2700*l.* Puisne Judges and Barons, 2000*l.*—By 54 *Geo.* 3. *c.* 95. the following sums are added, *viz.* To C. J. of K. B. 800*l.* To C. J. of C. P. and C. Baron, 600*l.* Puisne Judges and Barons, 600*l.* And by 55 *Geo.* 3. *c.* 114. 600*l.* are added to the allowance to the Master of the Rolls, on resignation.

In Great Britain the King is considered as the fountain of justice, and general conservator of the peace of the kingdom. The original power of Judicature, by the fundamental principles of society, is lodged in the society at large; but as it would be impracticable to render complete justice to every individual by the people in their collective capacity, therefore, every nation has committed that power to certain select magistrates, who, with more ease and expedition, can hear and determine complaints; and in this kingdom, this authority has immemorially been exercised by the King or his substitutes. He, therefore, has alone the right of erecting Courts of Judicature; for though the constitution of the kingdom hath entrusted him with the whole executive power of the laws, it is impossible, as well as improper, that he should personally carry into execution this great and extensive trust; it is, consequently, necessary, that Courts should be erected, to assist him in executing this power; and equally necessary, that, if erected, they should be erected by his authority. And hence it is, that all jurisdictions of Courts are either mediately or immediately derived from the Crown, their proceedings run generally in the King's name, they pass under his seal, and are executed by his officers.

It is probable, and almost certain, that in very early times, before our Constitution arrived at its full perfection, our Kings, in person, often heard and determined causes between party and party. But, at present, by the long and uniform usage of many ages, our Kings have delegated their whole judicial power to the Judges of their several Courts; which are the grand depositaries of the fundamental laws of the kingdom, and have gained a known and stated jurisdiction, regulated by certain and established rules, which the Crown itself cannot alter, but by act of parliament. 2 *Hawk. P. C. c.* 1. § 3.

In order to maintain, both the dignity and independence of the Judges in the Superior Courts, it is enacted by the *stat.* 13 *W.* 3. *c.* 2. that their commissions shall be made (not, as formerly, *durante bene placito*, but) *quandiu se bene gesserint*, and their salaries ascertained and established; but that it may be lawful to remove them on the address of both houses of parliament. And by the noble improvements of that law in the statute of 1 *Geo.* 3. *c.* 23. enacted at the earnest recommendation of KING George III. himself from the throne, the Judges are continued in their offices during their good behaviour, notwithstanding any demise of the Crown, (which was formerly held immediately to vacate their seats); and their full salaries are absolutely secured to them during the continuance of their commissions, by which means the Judges are rendered completely independent of the King, his Ministers, and his Successors; his Majesty having been pleased to declare, that "he looked upon the independence and uprightness of the Judges, as essential to the impartial administration of Justice, as one of the best securities of the *rights and liberties of his Subjects*, and as most conducive to the honour of the Crown." *Comm. Journ.* 3 *March*, 1761. See Ld. *Raym.* 747. and *stat.* 1 *Ann. st.* 1. *c.* 8. which continued the commissions of the Judges for six months after the demise of the Crown.

In criminal proceedings, or prosecutions for offences, it would be a still higher absurdity, if the King, personally, sat in judgment; because, in regard to these, he appears in another capacity, that of prosecutor. All offences are either against the King's peace, or his crown and dignity; and are so laid in every indictment. For though in their consequences they generally seem (except in the case of treason, and a very few others) to be rather offences against the kingdom than against the King, yet, as the Public, which is an invisible body, has delegated all its power and rights, with regard to the execution of the laws, to one visible Magistrate, all affronts to that power, and breaches of those rights, are immediately offences against him, to whom they are so delegated by the public. He is, therefore, the proper person to prosecute for all public offences and breaches of the peace, being the person injured in the eye of the law. And hence also arises the most mild and equitable branch of the prerogative, *One of the most distinguishing features in a* MONARCHY, that of *pardoning* offences; for it is reasonable that he who only is injured should have the power of forgiving.

In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removeable at pleasure by the Crown, consists one main preservative of the public liberty; which cannot subsist long in any State, unless the administration of common justice be, in some degree, separated both from the Legislative, and also from the Executive Power. Were it joined with the Legislative, the life, liberty, and property of the subject would be in the hands of arbitrary Judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though Legislators may depart from, yet Judges are bound to observe. Were it joined with the Executive, this union might soon be an over-balance for the Legislative. For which reason, by *stat.* 16 *Car.* 1. *c.* 10. which abolished the Court of Star-Chamber, effectual care is taken to remove all judicial power out of the hands of the King's privy council. See 1 *Comm.* 266—269. *c.* 7.

The personal safety of the *Judges*, and the respect due to them, being also of essential consequence towards the preservation of their independence and integrity, which is no less in danger from the *ardor civium prava jubentium*, than from the *vultus instantis tyranni*; many provisions have been made by law to restrain and punish affronts and injuries, to them personally, and to the Courts of Justice, over which they preside.

One species of treason under *stat.* 25 *E.* 3. *c.* 2. (see title *Treason*,) is, "If a man slay the Chancellor, Treasurer, or the King's Justices of the one Bench or the other, Justices in Eyre, or Justices of Assise, and all other Justices assigned to hear and determine, being in their places doing their offices." But this statute extends only to the actually killing of them, and not to wounding or attempting to kill them. It extends also only to the officers therein specified; and, therefore, the Barons of the Exchequer as such, are not within the protection of this act. 1 *Hal. P. C.* 231. But the Lord

Keeper, or Commissioners of the Great Seal, now seem to be within it, by virtue of the *stats.* 5 *Eliz. c.* 18. 1 *W. & M. c.* 21.—2 *Comm.* 84.

*Striking* in the King's superior Courts of Justice in Westminster-Hall, or at the assises. See this Dict. tit. *Misprision.*

As the Judges are thus guarded against influence or injury, to enable them to do justice to the people, so are they protected in the upright discharge of their duty, by being indemnified from answering for the consequence of the Judgments given by them.

The Judges of Courts of Record are freed from all prosecutions whatsoever, except in parliament, where they may be punished for any thing done by them in such Courts as Judges; this is to support their dignity and authority, and draw veneration to their persons, and submission to their Judgments; but if a Judge will so far forget the dignity and honour of his post, as to turn solicitor in a cause which he is to judge, and privately and extra-judicially tamper with witnesses, or labour Jurors, he may be dealt with according to the same capacity to which he so basely degrades himself. 12 *Rep.* 24. *Vaugh.* 138. *S. P. C.* 173.

Judges are not in any way punishable for a mere error of judgment: and no action will lie against a Judge for an erroneous Judgment; or for a wrongful imprisonment, &c. 2 *Hawk. P. C. c.* 1. § 17. 1 *Mod.* 148.

But it is said, that where Judges are limited to the subject-matter of their jurisdictions, and they exceed the limits of their jurisdictions, action lies against them: *per Powel*, J. 3 *Lutw.* 1565, cites *Hard.* 480.

A Judge is not answerable to the King, or the party, for mistakes of errors of his judgment, in a matter of which he has jurisdiction. 1 *Salk.* 397.

If an action be brought against a *Judge of Record*, for an act done in his judicial capacity, he may plead that he did it as a Judge of Record, and that will be a sufficient justification. And so may a Judge of a Court in a foreign country, under the dominion of the Crown. *Mostyn* v. *Fabrigas*, *Cowp.* 172. See this Dictionary, titles *Action*, *Courts Martial*, *Navy*, *&c.*

With respect to the general conduct of the Judges, the following observations are worthy attention:

A Judge at his creation takes an oath, *That he will serve the King, and indifferently administer justice to all men, without respect of persons, take no bribe, give no counsel where he is a party, nor deny right to any, though the King, or any other, by letters, or by express words, command the contrary, &c. and in default of duty, to be answerable to the King in body, land and goods.* *Stat.* 18 *Ed.* 3. *stat.* 4. See also *stat.* 20 *Ed.* 3. *cap.* 1, 2.

*Judex est lex loquens*, and ought to judge by law, and not by examples; by *Glanvil* a Judge is called *justitia in abstracto*, because he should be, as it were, justice itself. *Co. Lit.* 71. 7 *Rep.* 4. And all the commissions of Judges are bounded with this limitation, *Facturi quod ad justitiam pertinet secundum legem et consuetudinem Anglice.*

The Judges are to give Judgment according to law, and what is alledged and proved: and they have a private knowledge, and a judicial knowledge, though they cannot judge of their own private knowledge, but may use their discretion; but where a Judge has a judicial knowledge, he may and ought to give Judgment according to it. King Henry IV. demanded of Judge Gascoigne, If he saw one in his presence kill A. B. and another person, who was not culpable, should be indicted of this, and found guilty before him, what he would do in this case; to which he answered, That he ought to respite the Judgment against him, and relate the matter to the King, in order to procure him a pardon: for there he cannot acquit him, and give Judgment according to his private knowledge. *Plowd.* 82.

The King in all cases doth judge by his Judges; who ought to be of counsel with prisoners: and if they are doubtful or mistaken in matter of law, a stander-by may be allowed to inform the Court, as *amicus curiæ*. 2 *Inst.* 178. Our Judges are to execute their offices in proper person, and cannot act by deputy, or transfer their power to others; as the Judges of Ecclesiastical Courts may. 1 *Rol. Abr.* 382. *Bro. Judges*, 11. Yet where there are divers Judges of a Court of Record, the act of any one of them is effectual; especially if their commissions do not expressly require more. 2 *Hawk. P. C. c.* 1. Though what a majority rules when present, is the act of the court. If on a demurrer or special verdict, the Judges are divided in opinion, two against two, the cause must be adjourned into the Exchequer Chamber. 3 *Mod.* 156. And a rule is to be made for this purpose, and the record certified, &c. 5 *Mod.* 335. In fines levied, all the Judges of C. B. ought to be particularly named: but when writs of *certiorari* to remove records out of that Court, &c. are directed to the Chief Justice, without naming his companions. 1 *H.* 7. 27. *Jenk. Cent.* 167.

When a record is before the Judges, they ought *ex officio* to try it: and they are to take notice of statutes, and of the terms, &c. *Jenk. Cent.* 215. 298. No Judge is compellable to deliver his opinion before-hand, in relation to any question which may after come judicially before him. 3 *Inst.* 29. Judges of the common law, have no ordinary jurisdiction to examine witnesses at their chambers: though by consent of parties, and rule of court, they may on interrogatories; and some things done by Judges at their chambers, into proceedings in court, are accounted as done by the court.

A Judge shall not be generally excepted against, or challenged; or have any action brought against him, for what he does as Judge. 1 *Inst.* 294. 2 *Inst.* 422.

A Judge ought not to judge in his own cause, or in pleas where he is party. 8 *Rep.* 118. If a fine be levied to a Justice of Bank, he cannot take the conusance; for he cannot be his own Judge. 8 *H.* 6. 21. *Br. Patents, pl.* 15. cites S. C. *per Martin.* If a fine be levied by, or to a Justice in Bank, his name shall not be in the fine. 11 *H.* 6. 49, *b.* So if a Justice of Bank be sued in Bank, he cannot record it; it shall be recorded by the other Justices. *Ibid.* If the Chief Justice of Bank be to sue a writ there, the writ shall not be in his name, but in the name of the secondary. 8 *H.* 6. 19, *b.*

None may judge in his own cause, for it is a manifest contradiction that a man can be agent and patient in the same thing, and what Lord Coke says in Dr. Bonham's case is far from any extravagancy; for it is a very reasonable and true saying, that if an act of parliament should ordain, that the same person should be party and Judge, or, which is the same thing, judge in his own cause, it would be a void act of parliament; *per Holt*, Ch. J. 12 *Mod.* 687. *Bridgm.* 11, 12.

Judgment given by a Judge, who is party in the suit with another, and so entered of record, is error, although several other Judges sit there, and give Judgment for the Judge who is party. *Jenk.* 90. *pl.* 74.

Where a Judge has an interest, neither he nor his deputy can determine a cause, or sit in Court: and if he does, a prohibition lies. *Hard.* 503.

Judges are punishable, however, for wilful offences against the duty of their situation; instances of which happily live only in remembrance; and as to which, the following short extracts and references may be sufficient:

Among the laws of King Edgar is this, *viz. Judex qui injustum judicium judicabit alicui, det Regi CXXs. nisi jurare audeat, quod rectius judicare nescivit. Decem Scriptores Anglicani* 872. *l.* 3. The same among the laws of Canute, *Ibid.* 924. *l.* 2. adds, that *Et dignitatem suæ legalitatis semper amittat, si non eam rediniat erga Regem, sicut ei permittetur.*

*In Danelaga Lahstithes reus sit; si non juret, quod melius nescivit. Chronicon Johannis Bromton.*

There are ancient precedents of Judges, who were fined when they transgressed the laws, though commanded by warrants from the King; and it is said, that Earl Typtoft, who was a Chancellor, was beheaded, for acting upon the King's warrant against law. *Burnet's Rich.* 2 *pag.* 38.

Bribery in Judges is punishable by loss of office, fine, and imprisonment; and by the common law, bribery of Judges in relation to a cause depending before them, has been punished as treason. 1 *Leon.* 295. *Cro. Jac.* 65. 1 *Hawk. P. C.* See title *Bribery.*—A Judge ignorantly condemns a man to death for felony, when it is not felony: for this offence, the Judge shall be fined and imprisoned, and lose his office. *Jenk. Cent.* 162. If a Judge who hath no jurisdiction of the cause, give judgment of death and award execution, which is executed, such Judge is guilty of felony; and also the officer who executes the sentence. *H. P. C.* 35. 10 *Rep.* 76. And if Justices of Peace, on indictment of trespass, arraign a man of felony, and judge him to death, and he is executed, it is felony in them. *H. P. C.* 35. *Dalt. c.* 98.

A Justice cannot rase a record, or embezzle it, nor file an indictment which is not found, nor give judgment of death where the law does not give it; if he does, it is misprision, he shall lose his office, and make fine for misprision: but it is not felony. *Br. Judges, pl.* 33. cites 2 *R.* 3. 9.

By 41 *Geo.* 3. (U. K.) *cap.* 105, Judges of Scotland or Ireland, to whom bills respecting lands may be referred by the House of Lords, are empowered to examine witnesses on oath, as if sworn at the bar of that house.

See further 14 *Vin. Abr.* title *Judges;* and this Dict., title *Justices.*

JUDGER. In Cheshire, to be Judger of a town, is to serve on the Jury there. *Lejcester's Hist. Antiq.* 302.

## JUDGMENT, *Judicium, quasi, juris dictum.*

The Sentence of the Law, pronounced by the Court, upon the matter contained in the record. 3 *Comm.* 395. *c.* 24.

I. *Of the various Kinds of Judgments in Civil Cases.*
II. *Points of Practice relating thereto.*
III. *Of Arrest of Judgment: and of Statutes Regulating Judgments.*

I. JUDGMENTS are of four sorts. 1. Where the facts are confessed by the parties, and the law determined by the court; as in case of Judgment upon a *Demurrer.* 2. Where the law is admitted by the parties, and the facts disputed; as in case of Judgment upon a *Verdict.* 3. Where both the fact and the law arising thereon are admitted by the defendant; which is the case of Judgments by *Confession* or *Default.* Or, 4. Where the plaintiff is convinced, that fact, or law, or both, are insufficient to support his action, and therefore abandons or withdraws his prosecution; which is the case in Judgments upon a *Nonsuit* or *retraxit.* 3 *Comm.* 396. *c.* 24.

The Judgment, though pronounced or awarded by the Judges, is not their determination or sentence, but the determination and sentence of *the law.* It is the conclusion that naturally and regularly follows from the premises of law and fact, which stand thus: Against him, who hath rode over my corn, I may recover damages by law; now A. hath rode over my corn; therefore I shall recover damages against A. If the major proposition be denied, this is a demurrer in law: if the minor, it is then an issue of fact; but if both be confessed (or determined) to be right, the conclusion or Judgment of the court cannot but follow. Which Judgment or conclusion depends not therefore on the arbitrary caprice of the Judge, but on the settled and invariable principles of justice. The Judgment, in short, is the remedy prescribed by law for the redress of injuries; and the suit or action is the vehicle or means of administering it. What that remedy may be, is, indeed the result of deliberation and study to point out; and, therefore, the stile of the Judgment is, not that it is decreed or resolved by the court, for then the Judgment might appear to be their own; but, "It is considered," *consideratum est per curiam*, that the plaintiff do recover his damages, his debt, his possession, and the like; which implies, that the Judgment is none of their own, but the act of law, pronounced and declared by the Court after due deliberation and enquiry. 1 *Inst.* 39.

All these species of Judgments are either *interlocutory* or *final. Interlocutory* Judgments are such as are given in the middle of a cause, upon some pleas, proceeding, or default, which is only intermediate, and does not finally determine or complete the suit. Of this nature are all Judgments for the plaintiff upon pleas in abatement of the suit or action; in which it is considered by the court, that the defendant do answer over, *respondeat ouster;* that is, put in a more substantial plea. 2 *Saund.* 30. It is easy to observe, that the Judgment here given is not final, but merely interlocutory; for there are afterwards farther proceedings to be had, when the defendant hath put in a better answer.

But the Interlocutory Judgments, most usually spoken of, are those incomplete Judgments, whereby the right of the plaintiff is, indeed established, but the *quantum* of damages sustained by him is not ascertained; which is a matter that cannot be done without the intervention of a Jury. This can only happen where the plaintiff recovers; for when Judgment is given for the defendant, it is always complete as well as final. This sort of interlocutory Judgment happens in the first place, where the defendant suffers Judgment to go against him by default, or *nihil dicet;* as if he puts in no plea at all to the plaintiff's declaration: by confession, or *cognovit actionem*, where he acknowledges the plaintiff's demand to be just: or by *non sum informatus*, when the defendant's attorney declares he has no instructions to say any thing in answer to the plaintiff, or in defence of his client; which is a species of Judgment by default.

If these, or any of them, happen in actions where the specific thing sued for is recovered, as in action of debt for a sum certain, the Judgment is absolutely complete. And therefore it is very usual, in order to strengthen a creditor's security, for the debtor to execute a warrant of attorney to some attorney named by the creditor, empowering him to confess a Judgment by either of the ways just now mentioned, (by *nihil dicit, cognovit actionem,* or *non sum informatus,*) in an action of debt to be brought by the creditor against the debtor for the specific sum due; which Judgment, when confessed, is absolutely complete and binding; provided the same (as is also required in all other Judgments) be regularly docketed; that is, abstracted and entered in a book, according to the directions of *stat.* 4 *& 5 W. & M. c.* 20, by which it is provided, that no Judgment shall affect purchasers of lands, and mortgagees, till docketed, nor have any preference against heirs, executors, &c. in the administration of estates. See *post, Judgments acknowledged for Debts.*

But, where damages are to be recovered, a Jury must be called in to assess them; unless the defendant, to save charges, will confess the whole damages laid in the declaration; otherwise the entry of the Judgment is, "that the plaintiff ought to recover his damages (indefinitely); but because the court know not what damages the said plaintiff hath sustained, therefore the sheriff is commanded, that by the oaths of twelve honest and lawful men, he inquire into the said damages, and return such inquisition into courts. This process is called a *Writ of Inquiry;* in the execution of which the sheriff sits as a Judge, and tries by a Jury, subject to

nearly the same law and conditions as the trial by Jury at *nisi prius*, what damages the plaintiff hath really sustained; and when their verdict is given, which must assess *some* damages, the sheriff returns the inquisition, which is entered upon the roll in manner of a *postea*, and thereupon it is considered, that the plaintiff do recover the exact sum of the damages so assessed. In like manner, when a demurrer is determined for the plaintiff upon an action wherein damages are recovered, the Judgment is also incomplete, without the aid of a writ of inquiry.

It was said by Wilmot, C. J. that a writ of inquiry is an inquest of office to inform the conscience of the court; who, if they please, may themselves assess the damages. 3 *Wils.* 62. Hence, a practice is now established in the courts of K. B. and C. P. in actions where Judgment is recovered by default, upon a bill of exchange, or promissory note, to refer it to the Master or Prothonotary, to ascertain what is due for principal, interest, and costs, whose report supersedes the necessity of a writ of inquiry. 4 *Term Rep*, 275. *H. Black. Rep.* 541. In cases of difficulty and importance, the court will give leave to have the writ of inquiry executed before a Judge, at Sittings or *nisi prius*; and then the Judge acts only as an assistant to the sheriff. The number of the Jurors sworn upon this inquest need not be confined to twelve; for when a writ of inquiry was executed at the bar of the court of K. B. in an action of *scand. mag.* brought by the Duke of York (afterwards James II.) against Titus Oates; fifteen were sworn upon the Jury, and gave all the damages laid in the declaration; *viz.* 100,000*l.* In that case, the sheriff of Middlesex sat in court covered, at the table below the Judges. 3 *St. Tr.* 987. See further, *Writ of Inquiry.*

*Final Judgments* are such as at once put an end to the action, by declaring, that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for. In which case, if the Judgment be for the plaintiff, it is also considered, that the defendant be either amerced, for his wilful delay of justice, in not immediately obeying the King's writ, by rendering the plaintiff his due. 8 *Rep.* 40. 64.; or be taken, *capiatur*, till he pays a fine to the King for the public misdemeanor, which is coupled with the private injury, in all cases of force; (8 *Rep.* 59. 11 *Rep.* 45. 5 *Mod.* 285.) of falsehood, in denying his own deed; (*F. N. B.* 121. 1 *Inst.* 131. 8 *Rep.* 60. 1 *Roll. Abr*, 219. *Lill. Entr.* 379. *C. B. Hil.* 4 *Ann. Rot.* 430.) or unjustly claiming property in replevin; or of contempt by disobeying the command of the King's writ, or the express prohibition of any statute. 8 *Rep.* 60. But in case of trespass, ejectment, assault, and false imprisonment, it is provided by the *stat.* 5 & 6 *W. & M. c.* 12. that no writ of *capias* shall issue for this fine, nor any fine be paid; but the plaintiff shall pay 6*s.* 8*d.* to the proper officer, and be allowed it against the defendant among his other costs. And, therefore, upon such Judgments in the Common Pleas, they used to enter that the fine was remitted, and now in both courts they take no notice of any fine or *capias* at all. *Salk.* 54. *Carth.* 390. But if Judgment be for the defendant, then, in case of fraud and deceit to the Court, or malicious or vexatious suits, the plaintiff may also be fined. 8 *Rep.* 59, 60. But in most cases it is only considered, that he and his pledges of prosecuting, be (nominally) amerced for his false claim, *pro falso clamore suo*, and that the defendant may go thereof without a day, *eat inde sine die*; that is, without any farther continuance or adjournment; the King's writ commanding his attendance being now fully satisfied, and his innocence publicly cleared. 3 *Comm.* 395—399.

II. JUDGMENT is sometimes had with a *cessat executio*; and if the defendant gives a Judgment, with stay of execution, till a certain day, the plaintiff may, notwithstanding, sue forth a *capias* or a *fieri facias* into the county where the action is laid, returnable before the day, to enable him at that day to take a *testatum* against the defendant; though he shall not in that case sue out a *capias* to warrant a *scire facias* against the bail. *Pasch.* 22 *Car.* 2. See title *Capias.* If debt be brought against an executor upon the bond of the testator, and he pleads *plene administravit*, this is a confession of the debt; and the plaintiff may have Judgment with a *cessat executio*, till the defendant hath assets. 4 *Rep.* 2 *Nels. Abr.* 1052.

Judgment upon a demurrer to a declaration, &c. is no bar to any other action; because it is not on the merits, and the plaintiff may afterwards make his declaration right, and then proceed. 2 *Lill.* 113. But other Judgments may be pleaded in bar to any other action for the same cause; and Judgment in an inferior court, may be alledged in bar to an action in a superior court. 2 *Lev.* 93.

Judgment final ought not to be given upon default in real actions; but a grand cape upon default before appearance, and a petit cape on default after appearance. 1 *Lev.* 105.

All Judgments given in any court of record, must be duly entered: the plaintiff's attorney, four days after the *postea* is bought into court, if the rule for Judgment is out, may enter Judgment for his client by the course of the court. 2 *Lill. Abr.* 95. But on a rule for Judgment, Sunday is not one of the four days, though the rule is given the last day of the term. After a rule to sign Judgment, there ought to be four days exclusive of the day on which the rule was made, before the Judgment is signed, that the party may have a reasonable time to bring writ of error: in C. B. they never give rules for signing Judgment, but stay till the *quarto die post*, which makes but four days inclusive. *Mod. Cas.* 241. A plaintiff got his Judgment signed on the very day, but it was not executed till after the sixth day, so that the defendant had time enough to bring a writ of error, or move any thing in arrest of Judgment: but the court of B. R. held the signing of the Judgment to be irregular, it being before the day allowed by the rules of the court; and though execution was taken out afterwards, Judgment was set aside. 5 *Mod.* 205. If a *distringas* is returnable within term, and the cause is tried two or three days only before the end of the term, the Judgment shall be entered that very term, though there be not four days to move in arrest of Judgment. 1 *Salk.* 77. But a four-day rule must be given, and the party cannot sign Judgment, till four days exclusive are elapsed, and if Sunday intervenes, that is not to be reckoned one of the four days. But if verdict be given after term, no Judgment can be given on it till the next term following; for the Judgment is the act of the Court, and the Court sits not but in term. *Mich.* 22 *Car. B. R.* See title *Practice.*

If verdict pass for the plaintiff, and he will not enter his Judgment, the defendant, by motion of course, may oblige him to it. 2 *Lill. Abr.* 97. The defendant may enforce the plaintiff to enter his Judgment to the end he may plead it to another action. *Latch.* 216. 1 *Danv.* 722. *Palm.* 281. So if the defendant wants to bring a writ of error.

Judgments are not only to be signed by the proper officer, but entered of record; before which they are not Judgments: and in a Judgment given to recover a sum of money, the sum must be entered in words at length; and not in figures, which may be easily altered; and a Judgment was reversed, because the time when given was in figures, and the sum recovered expresed in figures, &c. But the court may amend their Judgments of the same term, because the term is but as one day in law; though they may not do it in another term. 2 *Lill.* 103. 3 *Lev.* 430. If a Judgment be unduly obtained, the court will vacate the Judgment, and restore the party damnified; if not punish the offender: but it is against the course of the court to vacate a Judgment the last day of the term. *Pasch.* 1656.

A Judgment entered in C. B. shall relate to the essoin day of the term, and be a Judgment from that time: but a Judgment in B. R. shall relate only to the first day of the term. *Cro. Car.* 102.

Cases in the King's Bench are frequently argued, and the opinion of the Court pronounced, in Serjeant's Inn Hall, in time of vacation: in these cases, the Judgment bears date of the ensuing term. *Cartwright* v. *Keely*, 7 *W. P. Taunton*, 192.

If a rule be given for the defendant to plead, at a certain day, and he do not plead accordingly, the plaintiff may enter Judgment against him, without moving the court; though in real actions, and criminal causes, on indictment, &c. there must be a motion in court, for a peremptory rule. 2 *Lill.* 116. Yet a plaintiff, after he hath signed Judgment against the defendant, may waive it if he will, and accept of a plea from the defendant. *Trin.* 23 *Car. B. R.*

If a Judgment be obtained, but the plaintiff doth not take out execution within a year and a day, the Judgment must be revived by *scire facias*. If any thing be entered in a Judgment, which is not mentioned in the plaintiff's declaration, the Judgment is not good. 2 *Lill.* 104. And where it appears upon the record, that the plaintiff hath no cause of action, he shall never have Judgment. 8 *Rep.* 120. In such case the Court may give Judgment for the defendant. 1 *Plowd.* 66.

In debt on specialty, the whole and exact sum must be demanded, or the Judgment upon it will not be good. 3 *Mod.* 41. If more be in the Judgment than the plaintiff demands, it is erroneous; though this may be helped by a *remisit dampna* for part. 2 *Lill.* 27. If in case, trespass, &c. a verdict is given for more damages than laid in the plaintiff's declaration, and he does not remit the surplus damages, but takes Judgment for the whole, it is an incurable error, and cannot be amended. See titles *Debt*, *Damages*.

If issue is found against one party in a suit, and not against the other, Judgment may be for the plaintiff to recover against him where the matter is found; and a *nil capiat per billam* be entered against the plaintiff as to the other. 1 *Saund.* 216. And when several damages are recovered against several defendants, the plaintiff may enter a *nolle prosequi* as to one of the defendants, &c. and have Judgment against one only for the damages against him. 3 *Mod.* 101. If one entire Judgment is given against two several persons, and one of them is an infant, appearing by attorney, the whole Judgment is void; which being entire cannot be divided, except the infant be joint executor with the other party. When a Judgment is entire, it cannot be divided, to make one part of it good, and another part thereof erroneous; but if it be not an entire Judgment, it may. 2 *Lill.* 100. See *post*, III. On action where damages are to be recovered, if the declaration be good in part, and insufficient in part, and the defendant demurs upon the entire declaration; the plaintiff shall have Judgment for that which is well laid, and be barred for the rest, 2 *Saund.* 379. And if an action of debt upon three bonds, it appears that one of them is not forfeited, &c. the plaintiff shall have Judgment for the other two. 1 *Saund.* 286.

There were four counts in the declaration; *non assumpsit* pleaded to three, and a demurrer to the fourth. After Judgment on the demurrer, the plaintiff takes out a writ of inquiry, and executes it; the demurrer being determined, the Court held the Judgment regular, and that there was no occasion for a *nolle prosequi*, to be entered on the roll as to the three counts, until he enter final judgment. *Stra.* 532.

Where a Judgment is partly by the common law, and partly by statute, the Judgment at common law may remain, and be complete, without the other. 1 *Salk.* 24.

Where there are two distinct Judgments, one at common law, and the other by statute, one may be affirmed, and the other reversed, on a writ of error. *Annaly*, 50.

Where entire Judgment is given for the plaintiff on two counts, one of which is bad, the court may reverse it as to the first, and affirm it as to the second count. *Everard* v. *Paterson, C. P.* 6 *W. P. Taunton*, 645. (625.)

Every Judgment ought to be complete and formal: one Judgment cannot determine another Judgment, and the Judges will not give a Judgment against law, although the plaintiff and defendant do agree to it. 1 *Salk.* 213. *Cro. Eliz.* 827. In actions personal, Judgment given against the plaintiff upon any plea to bar him, is peremptory. *Jenk. Cent.* 52. If the defendant doth not deny the debt, or other matter in suit, but endeavours to elude the action by insufficient pleading; in this case, if it be found for the plaintiff, he shall have Judgment; but not *vice versâ*, if for the defendant, because the matter of the suit is not fully and sufficiently denied, but in some measure confessed by the insufficient plea. *Ibid.* 70.

Judgment may not be given for the plaintiff upon an insufficient bar, if the replication be so, and shew no title; but a Judgment shall not be set aside for mispleading a point collateral to the issue. *Hob.* 8. 128. See *post*, III. In debt upon an obligation, the defendant pleaded that he delivered it on a condition to be performed by the plaintiff, which he had not done, and therefore it was not his deed; the jury found for the defendant, that the condition was not performed, yet the plaintiff had judgment; for the defendant's plea confesses it to be his deed, and the verdict does not disprove it, and the issue is, deed or no deed, &c. Here, therefore, the plaintiff hath his Judgment upon the defendant's confession, not upon the verdict. *Jenk. Cent.* 102.—A Judgment contrary to the verdict found in the cause is generally void; for it is to be warranted by the verdict. *Mich.* 22 *Car. B. R.* There may be cases where Judgment may be given for one of the parties contrary to the verdict; as where the defendant pleads such a plea as in effect acknowledges the demand, there, though there should be a verdict for the defendant, Judgment shall be for the plaintiff, or the Judge of *nisi prius* may refuse to try it. *Annaly*, 250. If a verdict is imperfect, Judgment cannot be given upon it; and for the uncertainty of the verdict, Judgment may be void. 2 *Lill.* 111. *Raym.* 220. Action of debt lies upon a good Judgment, as well after writ of error brought as before. *Raym.* 100. 2 *Mod.* 127. But if error is brought, and depending, the court will, on motion, stay proceedings in the new action, or rather prevent plaintiff from taking out execution, defendant confessing Judgment in the last suit. See title *Debt*. In actions of debt on bonds, a rule may be made to stay proceedings on payment of principal, interest, and costs. *Mod. Ca.* 60. See *stat.* 4 *Ann. c.* 16. § 13. and this Dictionary, title *Bond*. If a Judgment is recovered jointly against three defendants, the plaintiff cannot bring action of debt upon that Judgment against one alone. 2 *Leon.* 220. A plaintiff shall not have a new action of debt on the same bond, &c. after Judgment had on it, as long as the Judgment is in force. 6 *Rep.* 2. 2 *Nels. Abr.* 1056. An erroneous Judgment in Chancery is reversible in *B. R. Dyer*, 315. And if the House of Lords reverse a Judgment of B. R. the Lords are to enter the new Judgment, and not the Court of B. R. who by the first Judgment had executed their authority. 1 *Salk.* 403. See this Dictionary, titles *Appeal*, *Error*.

A regular Judgment in a crown cause cannot be set aside on payment of costs. 1 *Wils.* 163.

Where there is a Judgment and no surprize, it shall not be set aside on an affidavit of a matter relative to the merits which might have been pleaded. *Annaly*, 157.

Where the condition of a bond was, that the money was not to be paid till a future day, and the conusee by virtue of a warrant of attorney entered Judgment, and took out execution before the day, the Court would not set the Judgment aside, but the execution. *Annaly*, 270.

A regular interlocutory Judgment may be set aside, so as to let in the defendant to try the merits of his case; but it must be on payment of costs, and such merits likewise must appear upon affidavit. *Stra.* 823. 1242. 1 *Burr.* 568. A writ of inquiry was set aside, and defendant let in to plead a fair plea on payment of costs. *Salk.* 518. 6 *Mod.* 191.

The *stat.* 8 *W.* 3. *c.* 11. orders Judgment for costs, upon demurrers, and on suing writs of error, where the former Judgment is affirmed, &c. See this Dictionary, title *Costs.* The statutes of jeofails extend to Judgments upon *nihil dicit*, confession, *non sum informatus*, *&c.* *Stat.* 4 *Ann*, *c.* 16. For further matter, see titles *Abatement*, *Amendment*, *Execution*, *Issue*, *Practice*, *&c.*

III. Arrests of Judgment arise from intrinsic causes appearing upon the face of the record. Of this kind are: First, where the declaration varies totally from the original writ; as where the writ is in debt or detinue, and the plaintiff declares in an action on the case for an *assumpsit*; for, the original writ out of Chancery being the foundation and warrant of the whole proceedings in the Common Pleas, if the declaration does not pursue the nature of the writ, the Court's authority totally fails. Also, secondly, Where the verdict materially differs from the pleadings and issue thereon; as if, in an action for words, it is laid in the declaration that the defendant said, "the plaintiff is a bankrupt;" and the verdict finds specially that he said "the plaintiff *will be* a bankrupt." Or, thirdly, If the case laid in the declaration is not sufficient in point of law to found an action upon.

It is an invariable rule with regard to Arrests of Judgment upon matter of law, "that whatever is alledged in Arrest of Judgment must be such matter as would have been, upon demurrer, sufficient to overturn the action or plea." As if, on an action for slander, in calling the plaintiff a Jew, the defendant denies the words, and issue is joined thereon; now, if a verdict be found for the plaintiff, that the words were actually spoken, whereby the fact is established, still the defendant may move in Arrest of Judgment, that to call a man a Jew is not actionable; and, if the Court be of that opinion, the Judgment shall be arrested, and never entered for the plaintiff. But the rule will not hold *è converso*, "that every thing that may be alledged as cause of demurrer, will be good in Arrest of Judgment;" for if a declaration of plea omits to state some particular circumstance, without proving which, at the trial, it is impossible to support the action or defence, this omission shall be aided by a verdict. As if, in an action of trespass, the declaration doth not alledge, that the trespass was committed on any certain day, *Carth.* 389; or, if the defendant justifies, by prescribing for the right of common for his cattle, and does not plead that his cattle were *levant* and *couchant* on the land, *Cro. Jac.* 44; though either of these defects might be good cause to demur to the declaration or plea, yet, if the adverse party omits to take advantage of such omission in due time, but takes issue, and has a verdict against him, these exceptions cannot, after verdict, be moved in Arrest of Judgment. For the verdict ascertains those facts, which before, from the inaccuracy of the pleadings, might be dubious; since the law will not suppose, that a Jury, under the inspection of a Judge, would find a verdict for the plaintiff or defendant, unless he had proved those circumstances, without which, his general allegation is defective. 1 *Mod.* 292.

After judgment for plaintiff on demurrer, without argument, and general damages assessed, the Court of C. P. refused to permit the defendant to move in arrest of Judgment, on the ground that the damages appeared to be partly given upon a count which could not be sustained: for the defendant had the opportunity of excepting to that count on demurrer. *Creswell* v. *Peckham*, 6 *W. P. Taunton*, 630 (630).

Exceptions, that are moved in Arrest of Judgment, must be much more material and glaring, than such as will maintain a demurrer; or, in other words, many inaccuracies and omissions, which would be fatal, if early observed, are cured by a subsequent verdict; and not suffered, in the last stage of a cause, to unravel the whole proceeding. But if the thing omitted be essential to the action or defence, as if the plaintiff does not merely state his title in a defective manner, but sets forth a title that is totally defective in itself, or if to an action of debt the defendant pleads *not guilty* instead of *nil debet*, these cannot be cured by a verdict, for the plaintiff in the first case, or for the defendant in the second. 3 *Comm.* 323—5.

Although it appear to the Court that the defendant's title is not good, if the plaintiff, in his declaration, hath not set forth a good title for himself, the Court shall never give him Judgment. 2 *Lill.* 98. Though the plaintiff destroys the defendant's title, if he gives him another title by pleading, &c. the defendant shall have Judgment; for the court are to judge upon the whole record. 8 *Rep.* 90. But if action of trespass is brought for trespass done in lands belonging to such a house, and it appears at the trial that the plaintiff had no title to the house, the Court cannot give Judgment to turn him out of possession, because that was not judicially before them. 3 *Salk.* 213.

Judgments are to continue, till they shall be attaint by error. *Stat.* 4 *H. S. c.* 23. And after verdict given in any Court of record, there shall be no stay of Judgment for want of form in a writ, count, &c. or mistaking the name of either party, sum of money, day, month, year, &c. rightly named in any writ or record preceding, &c. 18 *Eliz. c.* 14. See titles *Abatement*, *Amendment*, *Error*.

By *stat.* 17 *Car.* 2. *c.* 8. in all actions personal, real, or mixed, the death of either party between the verdict and the judgment, shall not be alleged for error, so as such judgment be entered within two terms after such verdict.—Upon this statute the Judgment is entered for or against the party as though he were alive, 1 *Salk.* 42; and as to its being entered, or at least signed, within two terms after the verdict, see 1 *Sid.* 385. *Barnes*, 261. But there must be a *scire facias*, to revive it before execution, 1 *Wils.* 302; and such *scire facias* pursuing the form of the Judgment should be general. 2 *Ld. Raym.* 1280; as in a Judgment recovered by or against the party himself. *Tidd. c.* 42. If the plaintiff die after the assises begin, though the trial be after his death, that is within the remedy of the statute. 1 *Salk.* 8. See title *Execution*.

By the statute of Frauds, 29 *Car.* 2. *c.* 3. § 14, 15. the day of signing any Judgment, shall be entered on the margin of the roll: (and so in counties palatine, by *stat.* 8 *Geo.* I. *c.* 25. § 6:) and such Judgment, as against purchasers shall relate to such time only. See also *stat.* 4, 5 *W. & M. c.* 20. as to docketing and registering of Judgments by the officers of the several courts.

By *stat.* 8, 9 *W.* 3. *c.* 11. § 6. the death of the plaintiff or defendant, after interlocutory and before final Judgment, shall not abate the action; but a *scire facias* shall issue to shew cause why damages should not be assessed, and a writ of inquiry of damages awarded thereon; on return of which, final Judgment shall be given for the plaintiff.

Where either party dies after the interlocutory Judgment, and before the execution of the writ of inquiry, the *scire facias* on this act ought to be, to shew cause why the damages ought not to be assessed and recovered, and to have the Judgment of the court thereon. *Lill. Ent.* 647. 6 *Mod.* 144. But when the death happens after writ of inquiry executed, and before final Judgment, the *scire facias* must be to shew cause why the damages assessed should not be adjudged. 1 *Wils.* 213, 1 *Term Rep.* 388. The Judgment upon this statute is not entered for or against the party himself, as upon 17 *C.* 2. *c.* 8.

but for or against his executors, &c. 1 *Salk.* 42. And where a defendant dies after interlocutory, and before final Judgment, two writs of *scire facias* must be sued out, before execution can be had; one before final Judgment issued, in order to make the executors party to the record, and the other after final Judgment issued, to give them an opportunity of pleading no assets, &c. *Tidd. c.* 42.

Judgments acknowledged for Debts. The course for one to acknowledge a Judgment for debt is for him that doth acknowledge it to give a warrant of attorney to some attorney of that court where the Judgment is to be acknowledged, to appear for him, to file common bail, and receive a declaration, and then plead *non sum informatus*, &c. or to let it pass by *nihil dicit*; whereupon Judgment is entered for want of a plea. 2 *Lill.* 105. The person to whom this warrant of attorney is given, has all the benefit of a Judgment and execution, against the debtor's person and property, without being delayed by any intermediate process, as in the case of a regular suit. It is frequently given by a person arrested, upon condition of his discharge, and that longer time shall be allowed him for the payment of the debt, or that some other indulgence shall be shewn him. But to prevent persons in this situation from being imposed upon, no warrant of attorney to confess a Judgment, given by a person arrested upon *mesne process*, shall be of any force, unless some attorney be present on behalf of the person in custody, who shall explain the nature of the warrant, and subscribe his name as a witness to it. *Cromp. Pract.* See 1 *Salk.* 402.

If one be seemingly discharged, with design that he should give a warrant of attorney to confess a Judgment, it is ill: but if one arrested by process of an inferior court, gives a warrant for confessing Judgment in that court, B. R. will not set it aside, though an attorney be not present. *Mod. Cas.* 85. By rule of B. R. *Easter*, 15 *Car.* 2. no bailiff is to take from any prisoner in his custody, a warrant to acknowledge Judgment, unless in the presence of an attorney. But where one has been in prison some time, and he confesses Judgment to his creditor voluntarily, that Judgment shall stand, although there be no attorney. 7 *Mod.* 115. See title *Arrest.*

If a warrant of attorney to confess a Judgment is given unconditionally, or without delay of execution, Judgment may be signed, and execution taken out upon the same day it is given; and thus a debtor may give one creditor a preference to another, who has obtained Judgment after a long litigation. 5 *Term Rep.* 235.

If one gives a warrant of attorney to confess Judgment, and dies before it is confessed, this is a countermand of the warrant. 1 *Ventr.* 310. Though the Courts have, on motion, allowed Judgment to be entered up. Where they may be entered after the party's death, see *Annaly*, 158. But the rule does not hold in adversary suits. *Ibid.* 183. If a feme sole gives warrant of attorney to confess Judgment, and marries before it is entered, the warrant is absolutely countermanded; and Judgment shall not be entered against husband and wife. 1 *Salk.* 399.

A Judgment confessed upon terms, being in effect conditional, the Court will see the terms performed: but where a Judgment is acknowledged absolutely, and a subsequent agreement is made, this does not affect the Judgment, and the Court will take no notice of it. 7 *Mod.* 400. If a warrant be to enter Judgment as of such a term, or any time after; the attorney may enter it at any time during life: but without those words the Judgment must be entered the term expressed in the warrant: and if no term be mentioned, it may be intended the next term. 1 *Mod.* 1. Or it has been held it may be entered within a year after the date of it: and if Judgment upon a warrant of attorney be not entered within the year, it cannot be done without leave of the Court, on motion and affidavit made of the party's being living, and the debt not satisfied. *Cromp. Pract.* 2 *Lill. Abr.* 118. 2 *Show.* 253.

In order to obtain leave to enter up Judgment on an old warrant of attorney, it must be sworn that the defendant was alive on a day in full term: the *essoin-day* is not sufficient. *Eyles* v. *Warren*, *Term Rep. K. B. Tr.* 55 *Geo.* 3. 174.

By rule of *Michaelmas*, 42 *Geo.* 3. (2 *East*, 136.) no Judgment can be signed upon any warrant authorising any attorney to confess Judgment, without such warrant of attorney being delivered to and filed by the Clerk of the Dockets; who is ordered to file the warrants in the order in which they are received. See also *Tidd.* 1 *vol.* 438. 500. and 2 *vol.* 841. 858.

For Judgment by confession and default, see also 1 *Tidd. c.* xxiii. *p.* 503. A mere *cognovit* need not be stamped unless it contain any terms of agreement between the parties. *Ibid.* See also 2 *Bos. & Pull.* 150.

It is dangerous to take a Judgment acknowledged in the vacation, as of the preceding term; and if any such Judgment be taken, the warrant of attorney to confess the same must bear date before, or in the term whereof it is confessed: but the safest way is to make it a Judgment of the subsequent term. 2 *Lill.* 103.

By *Holt*, Chief Justice, If one will enter a Judgment as of a precedent, term, he must actually enter it before the essoin-day of the succeeding term: and if Judgment be signed in *Hilary* term, and in the subsequent vacation the defendant sells lands, if before the essoin of *Easter* term, the plaintiff enters his Judgment, it shall affect the lands in the hands of the purchasers; (but see *stat.* 29 *C.* 2. *c.* 3.) and if one enters Judgment so in vacation, when the party is dead, the Judgment shall be good by relation, if he was living in the precedent term. 1 *Salk.* 401. As to complaints for delay of entering Judgments, the same shall be examined into by commissioners and ordered to be entered, &c. See *stat.* 14 *Ed.* 3. *st.* 1. *c.* 5.

Judgments, as against purchasers, shall only relate to the day of signing. *Stat.* 29 *Car.* 2. *c.* 3. § 15. And see *stat.* 4, 5 *W. & M. c.* 20. as to docketting of Judgments signed by confession, &c. See title *Execution.* If any person having acknowledged or suffered a Judgment as a security for money, afterwards on borrowing other money of another, mortgage his lands, &c. without giving notice of such Judgment, unless he pay it off in six months, he shall forfeit his equity of redemption, &c. *Stat.* 4 *W. & M. c.* 16. See title *Mortgage.* To search for Judgments a fee is paid of 4*d.* a term.

On Judgments, a release of errors is usually entered into at the time of the warrant of attorney given, or Judgment had. And in case of several Judgments, if two are given in one term, and the last is first executed, that creditor hath the best title. *Latch.* 53. When a Judgment is satisfied, it is to be acknowledged on record by attorney, &c. Acknowledging a Judgment in the name of another, who is not privy or consenting to the same, is felony, by *stat.* 21 *Jac.* 1. *c.* 26.

Judgments in criminal Cases. See *Execution (criminal.)* When, upon a capital charge, the Jury have brought in their verdict, Guilty, in the presence of the prisoner; he is either immediately, or a convenient time soon after, asked by the court, if he has any thing to offer why Judgment should not be awarded against him. And in case the defendant be found guilty of a misdemeanor, (the trial of which may, and does usually, happen in his absence, after he has once appeared,) a *capias* is awarded and issued, to bring him in to receive his Judgment; and if he absconds, he may be prosecuted even to outlawry. But whenever he appears in person, upon either a capital or inferior conviction, he may, at this period, as well as at his arraignment, offer any exceptions to the indictment, in *arrest* or stay of Judgment; as for

want of sufficient certainty in setting forth either the person, the time, the place, or the offence. And, if the objections be valid, the whole proceedings shall be set aside; but the party may be indicted again. 4 *Rep.* 45. And we may take notice, 1. That none of the statutes of jeofails, for amendment of errors, extend to indictments or proceedings in criminal cases; and therefore a defective indictment is not aided by a verdict, as defective pleadings in civil cases are. 2. That in favour of life, great strictness has at all times been observed, in every point of an indictment. Sir Matthew Hale, indeed, complains, "that this strictness is grown to be a blemish and inconvenience in the law, and the administration thereof: for that more offenders escape by the over-easy ear given to exceptions in indictments, than by their own innocence." And yet no man was more tender of life than this truly excellent Judge. See 2 *Hal. P. C.* 193.

A pardon may also be pleaded in arrest of Judgment: and it has the same advantage when pleaded here, as when pleaded upon arraignment; *viz.* the saving the attainder, and of course the corruption of blood, which nothing can restore but parliament, when a pardon is not pleaded till after sentence. And certainly, upon all accounts, when a man hath obtained a pardon, he is in the right to plead it as soon as possible. See title *Pardon*.

Praying the benefit of clergy may also be ranked among the motions in arrest of Judgment. See title *Clergy, Benefit of.*

If all these resources fail, the Court must pronounce that Judgment which the law hath annexed to the crime, for which reference may be made to the titles of the several offences, in this Dictionary. Of these some are capital, which extend to the life of the offender, and consist generally of being hanged by the neck till dead; though in very atrocious crimes other circumstances of terror, pain, or disgrace are superadded in the Judgment: as, in treasons of all kinds, being drawn or dragged to the place of execution; in high treason affecting the King's person or government, the head being severed from the body, and the body quartered; (See title *Treason*, V. 3.) and in murder, a public dissection; (See *Homicide*, III. 3.) In cases of any treason committed by a female, the Judgment at common law was to be burned alive. But now, by *stat.* 30 *Geo.* 3. *c.* 48. it is enacted, "That in all cases of conviction of any woman for high or petit treason, the Judgment shall be, that she shall be drawn and hanged and not burned; and if any woman is convicted of petit treason, she shall be liable to such farther Judgment as is directed by *stat.* 25 *Geo.* 2. *c.* 37. to be given upon persons convicted of wilful murder. Indeed the humanity of the English nation ever authorised, by a tacit consent, an almost general mitigation of such part of these Judgments as savoured of torture or cruelty: a sledge or hurdle being usually allowed to such traitors as are condemned to be drawn; and there having been very few instances (and those accidental, or by negligence) of any persons being embowelled, (while that remained part of the Judgment for high treason,) till previously deprived of sensation by strangling.

Some punishments consist in exile or banishment, by abjuration of the realm or transportation; others in loss of liberty, by perpetual or temporary imprisonment. Some extend to confiscation, by forfeiture of lands, or moveables, or both, or of the profits of lands for life; others induce a disability of holding offices or employments, being heirs, executors, and the like. Some, though rarely, occasion a mutilation or dismembering, by cutting off the hand or ears; others fix a lasting stigma on the offender, by slitting the nostrils, or branding in the hand or cheek. Some are merely pecuniary by stated or discretionary fines; and, lastly, there are others that consist principally in their ignominy, though most of them are mixed with some degree of corporal pain; and these are inflicted chiefly for such crimes as either arise from indigence, or render even opulence disgraceful; such as whipping, hard labour in the House of Correction, or otherwise, the pillory, (now inflicted only in cases of perjury) the stocks, and the ducking-stool. Disgusting as this catalogue may seem, it will afford pleasure to the English reader, and do honour to the English law, to compare it with that shocking apparatus of death and torment, to be met with in the criminal codes of almost every other nation in Europe. And it is, moreover, one of the glories of our English law, that the species, though not always the quantity or degree, of punishment is *ascertained* for every offence; and that it is not left in the breast of any Judge, nor even of a jury, to alter that Judgment, which the law has before-hand ordained for every subject alike, without respect of persons. For, if Judgments were to be the private opinions of the Judge, men would then be slaves to their magistrates, and would live in society, without knowing exactly the conditions and obligations which it lays them under. And besides, as this prevents oppression on the one hand, so on the other it stifles all hopes of impunity or mitigation, with which an offender might flatter himself, if his punishment depended on the humour or discretion of the court. Whereas, where an established penalty is annexed to crimes, the criminals may read their certain consequence in that law, which ought to be the unvaried rule, as it is the inflexible judge of his actions. 4 *Comm.* 375, *&c.*

The discretionary length of imprisonment, which our Courts are enabled to impose, may seem an exception to this rule. But the general nature of the punishment, *viz.* by fine or imprisonment, in these cases, fixed and determinate; though the duration and quantity of each must frequently vary, from the aggravation or otherwise, of the offence, the quality and condition of the parties, and from innumerable other circumstances. The *quantum*, in particular, of pecuniary fines, neither can, nor ought to be, ascertained by any invariable law. The value of money itself changes from a thousand causes; and, at all events, what is ruin to one man's fortune, may be a matter of indifference to another's. Our statute law has not, therefore, often ascertained the quantity of fines, nor the common law ever: it directing such an offence to be punished by fine in general, without specifying the certain sum; which is fully sufficient, when we consider, that however unlimited the power of the Court may seem, it is far from being wholly arbitrary; but its discretion is regulated by law. 4 *Comm.* 378. See this Dictionary, title *Fines for Offences.*

No man can be attainted of treason or felony, but on Judgment by express sentence, or by outlawry, or abjuration. 2 *Hawk. P. C. c.* 48. § 25. And a person shall not have two Judgments for one offence; for in outlawry, which is a Judgment, execution shall be awarded against the offender, but no sentence pronounced. *Finch.* 389. 467. But one convicted of a scandalous libel, had Judgment to pay a fine, and to go to all the courts in Westminster-Hall, with a paper in his hat signifying his crime; and on his behaving impudently, his punishment was encreased. 1 *Salk.* 401. No Judgment or punishment can be inflicted unknown to our laws, but only by act of parliament. *Dalis.* 20. And the law makes no distinction, in fixed and stated Judgments, between a peer and a commoner; or between a common and ordinary case and one extraordinary. 2 *Hawk. P. C. c.* 48. § 2.

Judgment cannot be given for a corporal punishment, in the absence of the party. 1 *Salk.* 400. Though persons may have Judgment to be fined in their absence, having a clerk in court to undertake for the fine. 1 *Salk.* 56. See *Wilkes's Ca. Bro. P. C.*

JUDGMENT, OR TRIAL BY THE HOLY CROSS. A trial in ecclesiastical cases, anciently in use among the Saxons. *Cress. Church Hist.* 960. See *Ordeal.*

JUDICATORES TERRARUM. Persons in the county palatine of Chester, who, on a writ of error of Chancery, are to consider of the judgment given there, and reform it; and if they do not, and it be found erroneous, they forfeit 100*l.* to the King by the custom. *Dyer*, 348. *Jenk. Cent.* 71.

JUDICES FISCALES. So Polidore Virgil calls Empson and Dudley, who were employed by Hen VII. for taking the benefit of penal statutes, and were put to death by Hen. VIII. See *Lord Herb. H.* 8. *fol.* 5, 6.

JUDICIAL Decisions, Opinions, or Determinations, are the sentiments of the Judges deliyered in a cause in Court before them, and which form the decree or judgment of the Court. See *Hale's Hist. Com. Law.* 68, 69, cites *Plowden*, 122 to 130, 140, &c.

An extra-judicial opinion, given in or out of Court, is no more than the *prolatum* or saying of him who gives it, nor can be taken for his opinion, unless every thing spoken at pleasure must pass as the speaker's opinion. *Vaugh.* 382.

So an opinion given in Court, if not necessary to the judgment given of record, but that it might have been as well given, if no such, or a contrary opinion, had been broached, is no Judicial opinion, nor more than a *gratis dictum*. But an opinion, though erroneous, concluding to the judgment, is a Judicial opinion, because delivered under the sanction of the Judge's oath upon deliberation, which assures that it is, or was when delivered, the opinion of the deliverer. *Vaugh.* 382. See title *Judges*.

JUDICIAL POWER. See title *Judges*.

JUDICIAL PROCEDURE. See *Practice*.

JUDICIAL WRITS. The *Capias*, and all other subsequent to the original writ, not issuing out of Chancery, but from the Court into which the original was returnable, and being grounded on what has passed in that Court in consequence of the sheriff's return, are called Judicial, not original writs; they issue under the private seal of that Court, and not under the Great Seal of England; and are tested, not in the King's name, but in that of the Chief Justice only. 3 *Comm.* 282. See titles *Capias*, *Writ*, *Process*.

JUDICIUM DEI. The Judgment of God; so our ancestors called those, now prohibited, trials of ordeal, and its several kinds. *Leges Edw. Conf. c.* 16.

See *Spelman's Glossary* on this word, and *Dr. Brady* in his *Glossary*, at the end of his *Introd. to Eng.* And this Dictionary, title *Ordeal*.

JUDICIUM PARIUM. See *Jury*.

JUG. A watery place. *Domesday*.

JUGGLERS. See *Vagrants*.

JUGULATOR. A cut throat, or murderer. *Thom. Walsingham, p.* 343.

JUGUM TERRÆ. A yoke of land, in *Domesday*, contains half a plow-land. So also 1 *Inst. fo.* 5. *a.* So in *Domesday*, *Unum Jugum de ora, et unum Jugum de herce; i. e.* The rent of a yoke of land, and another yoke of land to plough. *Gale*, 760.

JUNCARE. To strew rushes as was of old the custom for accommodating the parochial church, and the very bedchamber of princes. *Pat.* 14 *Ed.* 1.

JUNCARIA, OR JONCARIA, from *Juncus*, the Latin word for a rush.] A soil or place where rushes grow. *Co. Lit. fo.* 5. *Pat.* 6. *Ed.* 3. *p.* 1. *m.* 25.

JUNCTUM, JUNCTA. A measure of salt. 2 *Mon. Ang. p.* 99.

JURA REGALIA. See titles *Regalia*, *King*.

JURATORY CAUTION. A proceeding in Scotch law. See *Bell's Scotch Law Dict.*

JURATS, *jurati*.] Officers in nature of aldermen, *sworn* for the government of many corporations. As Romney Marsh is incorporate of one bailiff, twenty-four *jurats*, and the commonalty thereof, by *Chart.* 1 *Ed.* 4. And we read of the mayor and Jurats of Maidstone, Rye, Winchelsea, &c. Also Jersey hath a bailiff, and twelve Jurats, or sworn assistants to govern that Island. See *stat.* 2 & 3 *Ed.* 6. *c.* 30. 13 *Ed.* 1. *c.* 26.

JURE-DIVINO Right to the throne. See title *King*.

JURE-DIVINO Right to tithes. See title *Tithes*.

JURIDICAL DAYS, *Dies juridizi*.] Days in court, on which the law was administered. See *Day*.

JURISDICTION, *jurisdictio*.] An authority or power, which a man hath to do justice in causes of complaint brought before him; of which there are two kinds; the one which a person hath by reason of his fee, and by virtue thereof doth right in all plaints concerning the lands within his see; the other is a Jurisdiction given by the prince to a bailiff, as divided by the Normans; and by him whom they called a bailiff, we may understand all who have commission from the King to give judgment in any cause. *Custom. Normand. cap.* 2. The Courts and Judges at Westminster have jurisdiction all over England; and are not restrained to any county or place: but all other Courts are confined to their particular Jurisdictions; which, if they exceed, whatever they do is erroneous. 2 *Lil. Abr.* 120.

A court shall not be presumed to have a Jurisdiction, where it doth not appear to have one. 2 *Hawk. c.* 10. If an action is brought in a corporate town, and the plaint sheweth not that the matter arises *infra Jurisdictionem* of the Court, it will be wrong, though the town be in the margin: but the county serves in the margin for the superior Courts. *Jenk. Cent.* 322. The declaration in a base Court must allege, that the goods were sold and delivered within the Jurisdiction thereof, as well as that the defendant promised within it. 1 *Wils. par.* 2. *p.* 15. See title *Inferior Courts*.

After a verdict for the plaintiff in C. B. for less than 40*s.* the defendant may enter a suggestion on the roll, that he resided in Middlesex, which if true, the Court of C. B. hath no Jurisdiction by *stat.* 22 *Geo.* 2. *c.* 33. See titles *County Courts*, *Courts of Conscience*.

Where commissioners or inferior Jurisdictions, whose powers are limited, assume a Jurisdiction they have not, the law gives an action against them. 2 *Wils.* 382.

Although a case be debated and have Judgment in the Spiritual Courts, yet the Kings' Courts may afterwards discuss the same matter. *Artic. Cleri. stat.* 9 *Ed.* 2. *c.* 6.

In some causes, the Spiritual and Temporal Courts have a concurrent Jurisdiction. See title *Prohibition*: further on this subject, titles *Cognizance*, *Courts*, *Abatement*.

JURIS UTRUM. A writ which lies for the parson of a church, whose predecessor hath alienated the lands and tenements thereof. *F. N. B.* 48. When a clerk is in full possession of the benefice, the law gives him the same possessory remedies to recover his glebe, his rents, his tithes, and other ecclesiastical dues, by writ of entry, assize, ejectment, debt, or trespass, (as the case may happen) which it furnishes to the owners of lay property. Yet he shall not have a writ of right, nor such other similar writs as are grounded upon the mere right; because he hath not in him, the entire fee and right; (*F. N. B.* 49.) but he is entitled to a special remedy called a writ of *Juris Utrum*, which is sometimes stiled the Parson's writ of right; (*Booth*, 221.) being the highest writ which he can have. *F. N. B.* 48. This lies for a parson and a prebendary at common law, and for a vicar by *stat.* 14. *E.* 3. *st.* 1. *c.* 17. and is in the nature of an assize, to inquire whether the tenements in question are frank-almoign belonging to the church of the demandant, or else lay-fee of the tenant. *Registr.* 32. And thereby, the demandant may recover lands and tenements, belonging to the church, which were alieued by the predecessor, or of which he was disseissed; or which were recovered against him by verdict, confession, or default, without praying in aid of the patron and Ordinary, or

on which any person has intruded since the predecessor's death. *F. N. B.* 48, 49. But since the restraining statute of 13 *Eliz. c.* 10. whereby the alienation of the predecessor, or a recovery suffered by him of the lands of the church, is declared to be absolutely void, this remedy is of very little use; unless where the parson himself has been deforced for more than twenty years. *Booth.* 221. For the successor, at any competent time after his accession to the benefice, may enter, or bring an ejectment. 3 *Comm.* 252, 253.

A *Vicar* shall have a *Juris Utrum* against a *Person* for the glebe of his vicarage, which is part of the same church: and the plaintiff ought to be named parson or vicar, or such name in right of which he bringeth his action. *New Nat. Br.* 111.

JURNALE, From *jour*, or *journeé*, Fr. a day.] The journal or diary of accounts in a religious House. *Paroch. Antiq. p.* 571. *Cowell.*

JURNEDUM. A journey, or one day's travelling. *Cowell.*

JUROR, *jurator.*] One of those persons who are sworn on a jury. See title *Jury.*

## JURY; JURATA: *from* Lat. *jurare*, to swear.

A certain number of men sworn to inquire of, and try, a matter of Fact, and declare the truth, upon such evidence as shall be delivered them in a cause: and they are sworn judges upon evidence in matter of fact.

The privilege of Trial by Jury is of great antiquity in this kingdom; some writers will have it that Juries were in use among the Britons: but it is more probable that this trial was introduced by the Saxons, yet some say that we had our trials by Jury from the Greeks; the first trial by a Jury of twelve, being in Greece. By the laws of King Ethelred, it is apparent that Juries were in use many years before the Conquest; and they are, as it were, incorporated with our constitution, being the most valuable part of it. *Wilk. Ll. Angl. Sax.* 117.

The truth seems to be that this tribunal was universally established among all the northern nations, and so interwoven in their very constitution, that the earliest accounts of the one give us also some traces of the other. Its establishment, however, and use in this island, of what date soever it be, though for a time greatly impaired and shaken by the introduction of the Norman trial by battel, was always so highly esteemed and valued by the people, that no conquest, no change of government, could ever prevail to abolish it. In *Magna Charta* it is more than once insisted on as the principal bulwark of our liberties; but especially by chapter 29, that no freeman shall be hurt in either his person or property; "*nisi per legale judicium parium suorum, vel per legem terræ.*" And it was ever esteemed, in all countries, a privilege of the highest and most beneficial nature.

This mode of trial was not extended to Scotland in *civil* cases, until very lately, by *stats.* 55 *Geo.* 3. *c.* 42. 59 *Geo.* 3. *c.* 35. In *criminal* cases the verdicts in that part of the kingdom were given in writing, until the act 54 *Geo.* 3. *c.* 67. which allows them to be returned *vivâ voce.* See title *Scotland, Session Court of.*

Trials by Jury in civil causes are of two kinds; *extraordinary*, and *ordinary*. The extraordinary shall be only briefly hinted at. The first species of extraordinary trial by Jury is that of the *Grand Assise*, which was instituted by King Henry VII, in parliament, by way of alternative offered to the choice of the tenant or defendant in a writ of right, instead of the barbarous and unchristian custom of duelling. For this purpose a writ *de magnâ assisâ eligendâ* is directed to the sheriff, to return four knights, who are to elect and chuse twelve others to be joined with them, in the manner mentioned by *Glanville*; (*l.* 2. *c.* 11. 21,) who, having probably advised the measure himself, is more than usually copious in describing it: and these all together, form the grand assise, or great Jury, which is to try the matter of right, and must now consist of sixteen Jurors. *F. N. B.* 4. *Finch. L.* 412. 1 *Leon.* 303. It seems not, however, to be ascertained, that any specific number above twelve is absolutely necessary to constitute the grand assise; but it is the usual course to swear upon it the four knights, and twelve others. *Vin. Abr.* title *Trial*, X e. See the proceedings upon a writ of right before the sixteen recognitors of the grand assise in 2 *Wils.* 541. And further this Dictionary, title *Writ of Right.*

Another species of extraordinary Juries, is the Jury to try an *Attaint*; which is a process commenced against a former Jury for bringing a false verdict. It is sufficient here to observe, that this Jury is to consist of twenty-four of the best men in the county, who are called the Grand Jury in Attaint, to distinguish them from the first or *petit Jury*; and these are to hear and try the goodness of the former verdict. See this Dictionary, title *Attaint.*

With regard to the *Ordinary Trial by Jury*, it may be considered, according to the following divisions; first premising, that these Juries are not only used in the circuits of the Judges, but in other courts and matters: as if a Coroner inquire how a person killed came by his death, he doth it by Jury: and the Justices of peace in their Quarter-sessions, the Sheriff in his County Court, the Steward of a Court-Leet or Court-Baron, &c. if they inquire of any offence, or decide any cause between party and party, they do it in like manner. *Lamb. Eiren.* 384.

I. *Of the mode of summoning, and compelling the Appearance of Juries.*
II. *Of Challenging Jurors; and herein of their Qualifications.*
III. *Of the Verdict of a Jury in civil Cases*; and see title *Verdict.*
IV. 1. *Of Juries in criminal Cases; and*
2. *How far they are Judges of Law, as well as Fact.*

I. When an issue is joined between the parties in a suit, by these words, "and this the said A. prays may be inquired of by the country," or, "and of this he puts himself upon the country, and the said B. does the like," the Court awards a writ of *venire facias* upon the roll or record, commanding the Sheriff, that *he cause to come here*, on such a day, twelve free and lawful men (*liberos et legales homines*) of the body of his county, by whom the truth of the matter may be better known, and who are neither of kin to the aforesaid A. nor the aforesaid B. to recognise the truth of the issue between the said parties." And such writ is accordingly issued to the Sheriff.

Thus the cause stands ready for a trial at the bar of the Court itself; for all trials were there antiently had, in actions which were there first commenced; which then never happened but in matters of weight and consequence; all trifling suits being ended in the Court-Baron, Hundred, or County Courts; and indeed all causes of great importance or difficulty are still frequently retained upon motion, to be tried at the bar in the Superior Courts. (See title *Trial.*) But when the usage began, to bring actions of any trifling nature in the Courts of Westminster-Hall, it was found to be an intolerable burthen to compel the parties, witnesses, and Jurors to come from Westmorland, perhaps, or Cornwall, to try an action of assault at Westminster. A practice, therefore, very early obtained, of *continuing* the cause from term to term in the Court above, provided the Justices in Eyre did not previously come into the county where the cause of action arose; and if it appeared that they arrived there within that interval, then the cause was removed from the juris-

diction of the Justices at Westminster to that of the Justices in Eyre. *Bract. l. 3. tr.* 1. *c.* 11. § 8. Afterwards, when the Justices in Eyre were superseded by the modern Justices of Assise, (who came twice or thrice in the year into several counties, *ad capiendas assisas*, to take or try writs of assise, of *mort d'ancestor*, *novel disseisin*, *nusance*, and the like,) a power was superadded by *stat. Westm.* 2. 13 *Ed.* 1. *c.* 30. to these Justices of Assise to try common issues in trespass, and other less important suits, with directions to return them (when tried) into the Court above; where alone the judgment should be given. And as only the trial, and not the determination of the cause, was now intended to be had in the Court below, therefore the clause of *nisi prius* was left out of the conditional *continuances* before-mentioned, and was directed by the statute to be inserted in the writs of *venire facias:* that is, "that the Sheriff should cause the Jurors to come to Westminster, (or wherever the King's Courts should be held,) on such a day in Easter and Michaelmas terms; *nisi prius*, *unless before* that day the Justices assigned to take assizes shall come into his said county." By virtue of which the Sheriff returned his Jurors to the Court of the Justices of Assise which was sure to be held in the vacation before Easter and Michaelmas terms, and there the trial was had. See title *Justices of Assise.*

An inconvenience attended this provision: principally because as the Sheriff made no return of the Jury to the Court at Westminster, the parties were ignorant who they were till they came upon the trial, and therefore were not ready with their challenges or exceptions. For this reason, by *stat.* 42 *Edw.* 3. *c.* 11. the method of trials by *nisi prius* was altered; and it was enacted that no inquests (except of assise and gaol-delivery) should be taken by writ of *nisi prius*, till after the Sheriff had returned the names of the Jurors to the Court above. So that now in almost every civil cause the clause of *nisi prius* is left out of the writ of *venire facias*, which is the Sheriff's warrant to warn the Jury; and is inserted in another part of the proceedings: for now the course is, to make the Sheriff's *venire* returnable on the last return of the same term wherein issue is joined, *viz. Hilary* or *Trinity* terms; which, from the making up of the issues therein, are usually called *issuable* terms. And he returns the names of the Jurors in a *panel* (a little pane, or oblong piece of parchment) annexed to the writ. This Jury is not summoned, and therefore not appearing at the day, must unavoidably make default; for which reason, a compulsive process is now awarded against the Jurors, called in the Common Pleas, a writ of *habeas corpora juratorum*, and in the King's Bench, a *distringas*, commanding the Sheriff to *have their bodies*, or to *distrain* them by their lands and goods, that they may appear upon the day appoined. The entry, therefore, on the roll or record is, "that the Jury is respited, through the defect of the Jurors, till the first day of the next term, then to appear at Westminster; *unless before* that time, *viz.* on Wednesday the fourth of March, the Justices of our Lord the King, appointed to take assises in that county, shall have come to Oxford;" [that is, to the place assigned for holding the assises:] and thereupon the writ commands the Sheriff to have their bodies at Westminster on the said first day of next term, *or* before the said justices of *Assize*, if before that time they come to Oxford; *viz.* on the fourth of March aforesaid. And as the Judges are sure to come and open the circuit commissions on the day mentioned in the writ, the Sheriff returns and summons this Jury to appear at the assises, and there the trial is had before the Justices of *Assise* and *Nisi prius:* among whom are usually two of the Judges of the Courts at Westminster, the whole kingdom being divided into six circuits for this purpose. (See titles *Assise*, *Circuits.*) Thus it may be observed, that the trial of common issues, at *nisi prius*, which was in its original only a collateral incident to the original business of the Justices of Assise is now, by the various revolutions of practice, become their principal civil employment; hardly any thing remaining in use of the real *assises* but the name.

If the Sheriff be not an indifferent person, as if he be a party in the suit, or be either related by blood or affinity to either of the parties, he is not then trusted to return the Jury; but the *venire* shall be directed to the Coroners, who, in this, as in many other instances, are the substitutes of the Sheriff, to execute process when he is deemed an improper person. If any exception lies to the Coroners, the *venire* shall be directed to two clerks of the Court, or two persons of the county named by the Court, and sworn. And these two, who are called *Elisors*, or Electors, shall indifferently name the Jury, and their return is final; no challenge being allowed to their array. *Fortesc. de Laud. Ll. c.* 25. *Co. Litt.* 158. See 3 *Comm. c.* 23.

The learned Commentator here pauses to enlarge in the praise of this mode of trial, even in these its preparatory stages, as most admirably adapted for the impartial investigation of truth. He then proceeds:

When a cause is ready for trial, the Jury is called and sworn. To this end the Sheriff returns his compulsive process, the writ of *habeas corpora*, or *distringas*, with the panel of Jurors annexed to the Judge's officer in Court. The Jurors contained in the panel are either *special* or *common* Jurors.

SPECIAL JURIES were originally introduced in trials at bar, when the causes were of too great nicety for the discussion of ordinary freeholders; or where the Sheriff was suspected of partiality, though not upon such apparent cause as to warrant an exception to him; he is, in such cases, upon motion in Court, and a rule granted thereupon, to attend the prothonotary, or other proper officer, with his freeholder's book; and the officer is to take, indifferently, forty-eight of the principal freeholders in the presence of the attornies on both sides; who are each off them to strike of twelve, and the remaining twenty-four are returned upon the panel. By *stat.* 3 *Geo.* 2. *c.* 25. (17, 18 *Geo.* 3. *c.* 25, *Ir.*) either party is entitled upon motion to have a Special Jury struck upon the trial of any issue as well at the assises as at bar; he paying the extraordinary expences, unless the Judge will certify that the cause required such special Jury. See *stat.* 24 *Geo.* 2. *c.* 18. (*Irish Act*, 40 *Geo.* 3. *c.* 72.)

By the said *stat.* 3 *Geo.* 2. *c.* 25. when any *Special Jury* shall be ordered by rule of the said Courts in any cause arising in any city, &c. the Jury is to be taken out of lists or books of persons qualified, which shall be produced and brought by the Sheriffs, &c. before the proper officer, as the freeholder's book is for striking *Juries* in causes arising in counties. And by *stat.* 6 *Geo.* 2. *c.* 37. (which makes perpetual *stat.* 3 *Geo.* 2. *c.* 25.) the Justices of assise for the counties palatine of Chester, Lancaster, &c. upon motion in behalf of the King, or any prosecutor or defendant, in an indictment, information, or any suit, may appoint a Jury to be struck for trial of issues in like manuer as *Special Juries* in the Courts of Law at Westminster.

Though this Special Jury is allowed as well in indictments and informations for misdemeanors (in England but not in Ireland) as in civil actions; yet there cannot be a Special Jury in cases of treason or felony, on account of the prisoner's privilege of peremptory challenge. See *post*, IV. 21 *Vin. Abr.* 301. If, after a Special Jury has been struck, the cause goes off for default of Jurors, no new Jury can be struck, but the cause must be tried by the Jury first appointed. 5 *Term Rep.* 453.

The nomination of a Special Jury, is to be in the presence of the attornies on each side; but if either of them refuse to come, then the Secondary, &c. may proceed *ex parte*, and he

shall strike twelve for the attorney who makes default. *R. Trin.* 8 *W.* 3. *B. R.*

It may also be judged, that if a rule is made for a *Special Jury*, and it is not expressed, that the Master of the office or Secondary shall strike forty-eight freeholders, and that each of the parties shall strike out twelve; in such case the Master may strike twenty-four, and either of the parties strike out any. 1 *Salk.* 405. A *Special Jury* may be granted to try a cause at bar, without the consent of parties. *Pasch.* 10 *Geo.* 1. A rule may be made for a good Jury, and that a special verdict may be found, &c. *Mod. Cas. in Law and Eq.* 221.

*A Common Jury* is one returned by the Sheriff according to the directions of *stat.* 3 *Geo.* 2. *c.* 25; which appoints that the Sheriff or officer shall not return a separate panel for every separate cause, as formerly, but one and the same panel for every cause to be tried at the same assises, containing not less than forty-eight, nor more than seventy-two, Jurors: and that their names being written on tickets, shall be put into a box or glass; and when each cause is called, twelve of these persons, whose names shall be first drawn out of the box, shall be sworn upon the Jury, unless absent, challenged, or excused; or unless a previous view of the messuages, lands, or place in question, shall have been thought necessary by the Court: in which case it is provided by *stat.* 4 *Ann. c.* 16. 3 *Geo.* 2. *c.* 25. (*Irish Acts*, 6 *Ann. c.* 10. 29 *Geo.* 2. *c.* 6.) that six or more of the Jurors returned, to be agreed on by the parties, or named by a Judge, or other proper officer of the Court, shall be appointed by special writ of *habeas corpora*, or *distringas*, to have the matters in question shewn to them by two persons named in the writ; and then such of the Jury as have had the view, or so many of them as appear, shall be sworn on the inquest previous to any other Jurors. See this Dictionary, title *View*. These statutes are well calculated to restrain any suspicion of partiality in the Sheriff, or any tampering with the Jurors when returned.

It may be proper also to notice certain other provisions made with a view to the same desirable purposes. Panels of Juries returned to inquire for the King, may be reformed by the Judges of goal delivery, &c. *Stat.* 3 *Hen.* 8. *c.* 12.—Jurymen not appearing shall forfeit issues, if they have no reasonable excuse for their defaults, *viz.* 5*s.* on the first writ, upon the second 10*s.* and the third writ 13*s.* 4*d.* *Stat.* 35 *Hen.* 8. *c.* 6. And see Irish Act, 10 *Car.* 1. *st.* 2. *c.* 13.—No Jury is to appear at Westminster for a trial, when the offence was committed thirty miles off; except the Attorney General require it. *Stat.* 18 *Eliz. c.* 5. § 2. Constables of parishes, &c. at Michaelmas quarter-sessions yearly, are to return to the Justices of peace, lists of the names and places of abode of persons qualified to serve on Juries, between the ages of twenty-one and seventy, attested upon oath, on pain of forfeiting 5*l.* And the Justices of peace shall order the Clerk of the peace to deliver a duplicate of those lists to the Sheriff, &c. And Sheriffs are to impanel no other persons, under the penalty of 20*l.* &c. *Stats.* 7 & 8 *W.* 3. *c.* 32. 3 *Ann. c.* 18. And as to Ireland, see Irish Acts, 12 *Geo.* 1. *c.* 4. 29 *Geo.* 2. *c.* 6.

No Sheriff, Bailiff, &c. shall return any person to serve on a Jury, unless he hath been duly summoned six days before the day of appearance; nor shall take any money or other reward to excuse the appearance of any Juryman, on pain of forfeiting 10*l.* *Stat.* 4 & 5 *W.* & *M. c.* 24.

By the *stat.* 3. *Geo.* 2. *c.* 25. lists of Jurors qualified are to be made from the rates of each parish, and fixed on the doors of churches, &c. twenty days before the feast of St. Michael, that public notice may be given of persons qualified omitted, or of persons inserted who are not so, &c. and the lists being set right by the Justices of peace in quarter-sessions, duplicates are to be delivered to the Sheriffs of counties, by the clerks of the peace; the names contained in which shall be entered alphabetically by the Sheriffs in a book, with their additions, and places of abode, &c. If any Sheriff shall return other persons to serve on Juries; or the clerk of the assise record any appearance, when the party did not appear, they shall be fined by the Judges, not above 10*l.* nor less than 40*s.* The like penalty for taking money to excuse persons from serving; and the Sheriffs may be fined 5*l.* for returning Jurors, who have served two years before, &c. Jurors making default in appearance shall be fined not exceeding 5*l.* nor under 40*s.* By *stat.* 4 *Geo.* 2. *c.* 7. § 2. no person shall be returned as a Juror at *Nisi prius* in Middlesex, who has been returned there in the two preceding *terms* or *vacations:* and as to *Dublin* Juries, see Irish Act, 40 *Geo.* 3. *c.* 72. By *stat.* 3 *Geo.* 2. *c.* 25. no persons shall be returned as Jurors at assises in counties who have served within *two years*; except in Rutlandshire, (the smallest county in England,) where the time is limited to one year; and in Yorkshire, (the largest,) where it is extended to *four* years; and similar provisions are made in Ireland, by Irish act, 29 *Geo.* 2. *c.* 6. The *stat.* 29 *Geo.* 2. *c.* 19. enacts, that persons summoned on Juries in Courts of Record in London, or in any other cities, corporations, and franchises, not attending, may be fined from 40*s.* to 20*s.*

If the Sheriff return twelve Jurors, only according to the writ, where he ought to have returned twenty-four, according to the usage, for speeding the trial in case of challenge, death, or sickness, &c. he shall be amerced. *Jenk. Cent.* 172.

Either the plaintiff or defendant may use their endeavours for any Juryman to appear; but one who is not a party to the suit may not: and an attorney was thrown over the bar, because he had given the names of several persons in writing to the Sheriff, whom he would have returned on the Jury, and the names of others whom he would not have returned. *Moor.* 882. If a Juryman appear, and refuse to be sworn, or refuse to give any verdict, if he endeavours to impose upon the Court, or is guilty of any misbehaviour after departure from the bar, he may be fined, and attachment issue against him. 2 *Hawk. P. C. c.* 22. § 15—18.

If, by means of challenges, or other cause, a sufficient number of unexceptionable Jurors doth not appear at the trial, either party may pray a *tales*. A *tales* is a supply of *such* men, as are summoned upon the first panel, in order to keep up the deficiency. For this purpose a writ of *decem tales*, *octo tales*, and the like, was used to be issued to the Sheriff at common law, and must be still so done at a trial at bar, if the Jurors make default. But at the assises, or *Nisi prius*, by virtue of *stat.* 35 *Hen.* 8. *c.* 6. and other subsequent statutes, (14 *Eliz. c.* 9. 7 & 8 *W.* 3. *c.* 32. &c. and in Ireland, 10 *Car.* 1. *stat.* 2. *c.* 13. 29 *Geo.* 2. *c.* 6.) the Judge is empowered at the prayer of either party to award a *tales de circumstantibus* of such persons present in Court, as are duly qualified to be joined to the other Jurors to try the cause, who are liable however to the same challenges as the principal Jurors. This is usually done till the legal number of twelve be completed. See 10 *Rep.* 102. *Finch*, 414. 2 *Rol. Ab.* 67.

Upon a trial at bar, if the Jury do not appear full, the Court cannot grant a *tales de circumstantibus*, but will grant a *decem tales*, returnable in some convenient time the same term, to try the cause. 2 *Lill. Abr.* 552. A plaintiff or defendant may have a *tales de circumstantibus*; and the statutes which authorise Justices of *Nisi prius* to award a *tales de circumstantibus*, extend as well to capital cases as to others; but such a *tales* cannot be prayed for the King upon an indictment or criminal information, without a warrant from the Attorney General, or an express assignment from the Court before which the inquest is taken; though it may be

awarded on an information *qui tam*, &c. because of the interest which the prosecutor hath in such prosecutions. 2 *Hawk. P. C. c.* 41. § 18. 3 *Salk.* 339. A *tales* is not to be granted where the whole Jury is challenged, &c. but the whole panel, if the challenge be made good, is to be quashed, and a new Jury returned; for a *tales* consists but of some persons to supply the places of such of the Jurors as were wanting of the number of twelve, and is not to make a new Jury. 2 *Lill. Abr.* 252.

If but one Juror appears on the principal panel, the Court may order a *tales* under *stat.* 35 *Hen.* 8. *c.* 6. 10 *Rep.* 102. And if upon a *habeas corpora*, or a *distringas jur.* none of the Jury appear, it is said a *decem tales* shall be awarded: but it shall not be had upon a *venire fac.* *Cro. Eliz.* 502. *Moor*, 528. See *Dyer*, 245. 2 *Roll. Rep.* 75. At the assises, one of the principal panel appeared, and no more, and a *tales* was awarded, the title whereof was *nomina decem talium*, and under it eleven were returned; this was, notwithstanding, held good; for it is only a misprision of the clerk, and *decem* was struck out, and then the title was *nomina talium*, &c. And it was adjudged, that if, after a *tales* granted, the principal panel should be quashed, the *tales* should stand good, and more be added, &c. 4 *Rep.* 103. 2 *Cro.* 316.

Before the *stat.* 3 *Geo.* 2. *c.* 25. twenty four different Jurors were returned for the trial of each separate cause in the manner of twenty-four special Jurymen at present; hence the necessity of praying a *tales*, from the non-attendance of twelve unexceptionable persons in each panel, would frequently occur. And by *stat.* 7 & 8 *W.* 3. *c.* 32. it was enacted, that the *tales*-men should be selected from those who had been summoned on other panels. But since the practice was introduced by the said *stat.* 3 *Geo.* 2. *c.* 25. of impanelling not less than forty-eight, nor more than seventy-two, for the trial of all common causes, the provisions of the statutes respecting a *tales*, are now confined, in a great measure to Special Juries. If a *tales* in default of special Jurymen is prayed, it is supplied agreeably to *stat.* 7 & 8 *W.* 3. *c.* 32. from the panel of common Jurymen. No *tales* can be prayed where all the special Jurymen are absent. A *tales* may be prayed as in civil actions in cases of misdemeanor tried by writ of *nisi prius*. 3 *St. Tr.* 57.

Where a common-Jury panel was returned, together with a special-Jury panel, and no special Juryman appearing, the cause was tried by a common Jury, the trial was set aside. *Holt* v. *Meddowcroft*, *Term Rep. K. B. Hil.* 56 *Geo.* 3. 467.

When a sufficient number of persons impanelled, or *tales*-men appear, they are then separately *sworn* "well and truly to try the issue joined between the parties, and a true verdict to give according to the evidence," and hence they are denominated the Jury, *jurator*; and Jurors, sc. *juratores*.

The number of the Jury thus sworn must in general be twelve; to this, there are, however, a very few exceptions.

In the manor of Penryn Farrein, in Cornwall, there was a custom to try an issue with *six* Jurors; but this custom was adjudged no good custom, as *Rolle*, Chief Justice, affirmed, *Mich. Term*, 1652. MSS. *Not.* The printed books also furnish two cases against such a custom; in the first of which cases, *Rolle* appears to have argued for it; and to have noticed that there was a multitude of records in twenty several Courts in Cornwall, proving its prevalency. See *Fredymock* v. *Perryman*, *Cro. Car.* 259. 1 *Ro. Abr.* 564. and *Aike et al.* v. *Aunkin*, 1 *Sid.* 233. In some special cases only, the Jury may be less than twelve; and in some, must or may be more.—*They may be less:* Thus it may be in Wales under the provision of *stat.* 34 & 35 *Hen.* 8. *c.* 26. concerning Wales, which allows of six: See the *stat.* § 74. *Cro. Car.* 259. 1 *Sid.* 233. and *stat.* 3 *Geo.* 2. *c.* 25. § 9. So also it is in some special cases in England, as six or eight in inquiry of damages on default, and in inquiry of waste; though this latter has been questioned, and even denied. *Spelm. Gloss. voc. Jurata.* *F. N. B.* 137. (C). *Dunc. Trials per pais*, *c.* 6. 1 *Vent.* 113. *Finch*, *L.* 400. Further, there is in *Glanvil*, a writ for a Jury of eight to inquire into the age where infancy is alledged. *Glanvil*, *l.* 13. *c.* 14, 15, 16. See title *Infant*—Instances, in which the law allows or requires *more than twelve*, are *Attaint*, in which there must be *twenty-four*; the *Grand Assise*, in which there must be sixteen; the *Grand Jury*, for indictments, which usually consist of some number between twelve and twenty-three; a writ of enquiry of *Waste*, in which thirteen have been allowed. *Finch, L.* 484. *Spelm. Gloss. voc. Jurata.* 2 *H. H. P. C.* 161. *Cro. Car.* 414. 1 *Inst.* 155, *a. in n.*

II. As the Jurors appear, when called, they shall be sworn, unless *challenged* by either party. Challenges are of two sorts, challenges to the *array*, and challenges to the *polls*.

Challenges to the Array, are at once an exception to the whole panel, in which the Jury are arrayed or set in order by the Sheriff in his return; and they may be made on account of partiality, or some default in the Sheriff, or his under officer who arrayed the panel. And, generally speaking, the same reasons that before the awarding the *venire* were sufficient to have directed it to the coroners or elisors, will also be sufficient to quash the array, when made by a person or officer of whose partiality there is any tolerable ground of suspicion. Also, though there be no personal objection against the Sheriff, yet if he arrays the panel at the nomination, or under the direction of either party, this is good cause of challenge to the array. Formerly, if a Lord of Parliament had a cause to be tried, and no knight was returned upon the Jury, it was a cause of challenge to the array. *Co. Litt.* 156. *Selden Baronage*, II, 11. But an unexpected use having been made of this dormant privilege by a spiritual Lord, (the Bishop of Worcester, *M.* 23 *Geo.* 2. *B. R.*) it was abolished by *stat.* 24 *Geo.* 2. *c.* 18. (25 *Geo.* 3. *c.* 31. *Ir.*) But still in an attaint, a knight must be returned on the Jury. *Co. Lit.* 156.

Also by the policy of the antient law, the Jury was to come *de vicineto*, from the neighbourhood of the vill or place where the cause of action was laid in the declaration, and therefore some of the Jury were obliged to be returned from the Hundred in which such vill lay; and, if none were returned, the array might be challenged for defect of hundredors. For, living in the neighbourhood, they were properly the very country, or *pais*, to which both parties had appealed; and were supposed to know before-hand the characters of the parties and witnesses, and therefore they better knew what credit to give to the facts alledged in the evidence. But this convenience was over-balanced by another very natural and almost unavoidable inconvenience; that Jurors coming out of the immediate neighbourhood, would be apt to intermix their prejudices and partialities in the trial of right. And this our law was so sensible of, that it has for a long time been gradually relinquishing this practice; the number of necessary hundredors in the whole panel, which, in the reign of Edward III. were constantly six, being in the time of Fortescue, reduced to *four*. *Gilb. Hist. C. P. c.* 1. *Fortesc. de Laud. Ll. c.* 25. Afterwards, indeed, *stat.* 35 *Hen.* 8. *c.* 6. restored the antient number of *six*; but that clause was soon virtually repealed by *stat.* 27 *Eliz. c.* 6. which required only *two*. And Sir Edward Coke also gives us such a variety of circumstances, whereby the Courts permitted this necessary number to be evaded, that it appears they were heartily tired of it. 1 *Inst.* 157. At length, by *stat.* 4 & 5 *Ann. c.* 16. it was entirely abolished upon civil actions, except upon penal statutes; and upon those also by *stat.* 24 *Geo.* 2. *c.* 18.

the Jury being now only to come *de corpore comitâtûs*, from the body of the county at large, and not *de vicineto* or from the particular neighbourhood. And see as to *Ireland*, Irish Acts, 6 *Ann. c.* 10. § 6; 29 *Geo.* 2. *c.* 6. § 1.

The array, by the ancient law, may also be challenged, if an alien be party to the suit, and, upon a rule obtained by his motion to the Court for a Jury, *de medietate linguæ*, such a one be not returned by the Sheriff, pursuant to the *stat.* 28 *Ed.* 3. *c.* 13. enforced by *stat.* 8 *Hen.* 6. *c.* 29. which enacts, that where either party is an alien born, the Jury shall be one half denizens, and the other aliens, (if so many be forth-coming in the place,) for the more impartial trial. A privilege indulged to strangers in no other country in the world, but which is as ancient with us as the time of King Ethelred. But when both parties are aliens, no partiality is to be presumed to one more than another; and therefore it was resolved soon after the *stat.* 8 *Hen.* 6. that where the issue is joined between two aliens, (unless the plea be had before the Mayor of the Staple, and thereby subject to the restrictions of *stat.* 27 *Ed.* 3. *st.* 2. *c.* 8.) the Jury shall all be denizens. *Yearb.* 21 *Hen.* 6. 4. And it now might be a question, how far the *stat.* 3 *Geo.* 2. *c.* 25. (before referred to) hath in civil causes undesignedly abridged this privilege of foreigners, by the positive directions therein given concerning the manner of impanelling Jurors, and the persons to be returned in such panel. So that, (unless this statute is to be construed by the same equity, which *stat.* 8 *Hen.* 6. *c.* 29. declared to be the rule of interpreting *stat.* 2 *H.* 5. *st.* 2. *c.* 3. concerning the landed qualification of Jurors in suits to which aliens were parties) a court might perhaps hesitate, whether it has now a power to direct a panel to be returned *de medietate linguæ;* and thereby alter the method prescribed for striking a Special Jury, or balloting for common Jurors.

*Challenges to the Polls, in capita*, are exceptions to particular Jurors; by the laws of England, in the time of *Bracton* and *Fleta*, a Judge might be refused for good cause; but now the law is otherwise, and it is held, that Judges and Justices cannot be challenged. See *Bract. l.* 5. *c.* 15. *Fleta, l.* 6. *c.* 37. *Co. Lit.* 294.

Challenges to the Polls of the Jury (who are judges of fact) are reduced to four heads by *Sir Edward Coke; propter honoris respectum; propter defectum; propter affectum; et propter delictum.*

*Propter honoris respectum*, as if a Lord of Parliament be impanelled on a Jury, he may be challenged by either party, or he may challenge himself.

*Propter defectum*, as if a Juryman be an alien born, this is defect of birth: if he be a slave or bond-man, this is defect of liberty, and he cannot be *liber et legalis homo.* Under the word *homo* also, though a name common to both sexes, the female is however excluded, *propter defectum sexûs:* except when a widow feigns herself with child, in order to exclude the next heir, and a supposititious birth is suspected to be intended; then upon the writ *de ventre inspiciendo*, a Jury of women is to be impanelled to try the question, 'whether with child or not.' *Cro. Eliz.* 566. See this Dictionary, title *Ventre inspiciendo.*

But the principal deficiency is a defect of estate, sufficient to qualify him to be a Juror. This depends upon a variety of statutes. First, by *stat. Westm.* 2. 13 *Ed.* 1. *c.* 38. none shall pass on Juries in assises within the county, but such as may dispend twenty shillings by the year, at the least, which is increased to forty shillings by *stats.* 21 *Ed.* 1. *st.* 1. 2 *Hen.* 5. *st.* 2. *c.* 3. This was doubled by *stat.* 27 *Eliz. c.* 6. which requires, in every such case, the Jurors to have estate of freehold to the yearly value of four pounds at the least. This qualification was raised by *stat.* 16 & 17 *Car.* 2. *c.* 3. to twenty pounds *per annum;* which being only a temporary act, for three years, was suffered to expire without renewal to the great debasement of Juries. However by *stat.* 4 & 5 *W.* & *M. c.* 24. it was again raised to ten pounds *per annum* in England, and six pounds in Wales, of freehold lands or *copyhold;* which is the first time that copyholders (as such) were admitted to serve upon Juries in any of the King's Courts; though they had before been admitted to serve in some of the Sheriff's Courts, by *stats.* 1 *Ric.* 3. *c.* 4. 9 *Hen.* 7. *c.* 13. All cities, boroughs, and corporate towns, are excepted out of the *stat.* 4 & 5 *W.* & *M. c.* 24. And by an antient statute, 23 *Hen.* 8. *c.* 15. trials *of Felons* in corporations may be by freemen worth forty pounds in goods. Lastly, by *stat.* 3 *Geo.* 2. *c.* 25. any leaseholder for the term of five hundred years absolute, or for any term determinable upon life or lives, of the clear yearly value of twenty pounds *per annum*, over and above the rent reserved, is qualified to serve upon Juries.

The Irish act 29 *Geo.* 2. *c.* 6. requires a qualification of a freehold estate of 10*l.* or a leasehold of 15*l. per ann.* for jurors in the courts or assizes in Ireland.

On account of the small number of freeholders in the county of Middlesex, and the frequent occasion for Juries at Westminster in that county, it is enacted by *stat.* 4 *Geo.* 2. *c.* 7. that a leaseholder for any number of years, if the improved annual value of his lease be fifty pounds, above all ground rents and other reservations, shall be liable to serve upon Juries for that county. By *stat.* 3 *Geo.* 2. *c.* 25. persons impanelled upon any Jury within the city of London shall be householders, and possessed of some estate, either real or personal, of the value of one hundred pounds. When the Jury is *de medietate lingue*, that is, one moiety of the English tongue or nation, and the other of any foreign one, no want of lands shall be cause of challenge to the alien; for as he is incapable to hold any, this would totally defeat the privilege. See *ante*, and *stats.* 2 *Hen.* 5. *st.* 2. *c.* 3. 8 *Hen.* 6. *c.* 29.

Jurors may be challenged *propter affectum*, for suspicion of bias or partiality. This may be either a *principal* challenge, or *to the favour.* A *principal* challenge is such, where the cause assigned carries with it *primâ facie* evident marks of suspicion, either of malice or favour: as, that a Juror is of kin to either party within the ninth degree *Finch. L.* 401. that he has been arbitrator on either side; that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a Juror in the same cause; that he is the parties master, servant, counsellor, steward, or attorney of the same society or corporation with him: all these are principal causes of challenge; which, if true, cannot be over-ruled, for Jurors must be *omni exceptione majores.*

In Ireland by 33 *H.* 8. *st.* 1. *c.* 4. it was provided that consanguinity or affinity (not being within the fifth degree) should not be a principal challenge: and by 29 *Geo.* 2. *c.* 6. that in actions between a protestant and a papist, challenge lay against a papist Juror. But both these acts seem superseded or obsolete.

Challenges *to the favour* are where the party hath no principal challenge; but objects only some probable circumstances of suspicion, as acquaintance and the like; the validity of which must be left to the determination of *Triers*, whose office it is to decide whether the Juror be favourable or unfavourable. The Triers, in case the first man called be challenged, are two indifferent persons named by the Court, and, if they try one man, and find him indifferent, he shall be sworn; and then he and the two Triers shall try the next; and when another is found indifferent and sworn, the two Triers shall be superseded, and the two first sworn on the Jury shall try the rest. *Co. Lit.* 158.

Challenges *propter delictum* are for some crime or misdemeanor, that affects the Juror's credit and renders him infamous. As for a conviction of treason, felony, perjury, or conspiracy; or if for some infamous offence he hath received judgment of the pillory, tumbrel, or the like, or to be branded,

whipt or stigmatised; or if he be outlawed or excommunicated; or hath been attainted of false verdict, *præmunire*, or forgery; or, lastly, if he hath proved recreant when champion in the trial by battel, and thereby hath lost his *liberam legem*. A Juror may himself be examined on oath of *voir dire*, *veritatem dicere*, with regard to such causes of challenge, as are not to his dishonour or discredit, but not with regard to any crime, or any thing which tends to his disgrace or disadvantage. *Co. Lit.* 158. *b.* and see the notes there.

Besides these challenges, which are exceptions against the fitness of Jurors, and whereby they may be *excluded* from serving, there are also other causes to be made use of by the Jurors themselves, which are matter of exemption; whereby their service is *excused*. As by *stat. Westm.* 2 *E.* 1. *c.* 38. sick and decrepit persons, persons not commorant in the county, and men above seventy years old; and by the *stat.* 7 & 8 *W.* 3. *c.* 82. infants under twenty-one. This exemption is also extended by divers statutes, customs, and charters, to physicians, and other medical persons, counsel, attornies, officers of the Courts, and the like; all of whom, if impanelled, must shew their special exemption. Clergymen are also usually excused, out of favour and respect to their function; but if they are seised of lands and tenements, they are, in strictness, liable to be impanelled in respect of their lay fees, unless they be in the service of the King or some Bishop. *F. N. B.* 166. *Reg. Brev.* 179.

Barons of the realm, as has been already hinted, and all above them, are not to serve in any ordinary Jury; and others may have this privilege by writ, or the King's grant, &c. 6 *Rep.* 53. 1 *Brownl.* 30. But such as have charters of exemption, shall be sworn on great assises, and in attaints, &c. when their oath is requisite. *Stat.* 52 *H.* 3. *c.* 14.

It has been already remarked that a person indicted of treason may challenge *thirty-five* of those returned on the panel of Jurors to try him, without cause shewn; and if two or more are to be tried, they may *challenge* so many each; but then they are to be tried singly, or all may *challenge* that number in the whole, and be tried jointly. 3 *Salk.* 81. By *stat.* 3 *Hen.* 7. *c.* 14. in treason, by the King's sworn servants, for compassing to kill the King, tried before the steward of the King's household, &c. no *challenge* shall be allowed but for malice. Some statutes which take away the benefit of clergy from felons, exclude those from their clergy who peremptorily *challenge* more than *twenty*, whereby they are liable to judgment of death. See *stats.* 22 *Hen.* 8. *c.* 14 28 *Hen.* 8. *c.* 1. 1 *E.* 6. *c.* 12. § 11. 3 & 4 *W.* & *M.* *c.* 9. But it is now settled, that if the offender be within the benefit of clergy, the *challenge* shall be over-ruled, and the party put upon his trial. 2 *Hawk. P. C. c.* 43.

All *peremptory challenges* are to be taken by the party himself; and where there are divers *challenges*, they must be taken all at once. But there can be no *challenge* till the Jury is full; and then the array is to be *challenged*, before one of them is sworn. *Hob.* 235. Where the King is party, if the other side *challenge* a Juror above the number allowed by law, he ought to shew the cause of his *challenge* immediately. 1 *Bulst.* 191. A defendant shall shew all causes of *challenge*, before the King shall shew any. 2 *Hawk. P. C. c.* 43.

If the Juror is convicted and attainted of treason, felony, perjury, adjudged to the pillory, or other punishment whereby he becomes infamous, or is outlawed or excommunicate, these are all principal challenges; but in these cases and others, he that challengeth is to shew the record, if he will have it take place as a principal *challenge*: otherwise he must conclude to the favour, unless it be a record of the same Court. *Co. Lit.* 157. A person under prosecution for any crime, may, before indicted, *challenge* any of the *Grand Jury*, as being outlawed, &c. or returned at the instance of the prosecutor, or not returned by the proper officer, &c. 2 *Hawk P. C. c.* 25. § 16.

A principal *challenge* being found true, is sufficient without leaving it to Triers; but if some of a Jury are *challenged* for favour, they shall be tried by the rest of the Jury whether indifferent. *Co. Lit.* 158. Where a *challenge* is made to the array, the Court appoint the two Triers, who are sworn, and then the cause of favour is shewed to them, which may be called the issue they are to try; and if it is proved, then they give their verdict that they are not indifferently impanelled, and this is entered of record; but if the favour is not proved, then they say the Jury were indifferently impanelled, and so the trial goes on, without making any entry of the matter. 1 *Bulst.* 114.

If one take a principal *challenge* against a Juror, he cannot afterwards *challenge* that Juror for favour, and waive his former *challenge*; but a *challenge* may be made to the polls after it has been made to the array. *Wood*, 592. A new Jury is to be impanelled by the Coroner, where the array is quashed for partiality, &c. of the Sheriff. *Trials per pais*, 15.

If a plaintiff or defendant have action of battery, &c. against the Sheriff, or the Sheriff against them, it is cause of *challenge*; and if either of the parties have action of debt against the Sheriff; or if the Sheriff hath any parcel of land depending on the same title as the parties: or if he, or his bailiffs who returned the Jury, be under the distress of either party, &c. these are good causes of *challenge*. Where one of the Jurors hath a suit at law depending with the plaintiff, it is good *challenge*. *Stile*, 129. An action depending betwixt either of the parties and a Juror, implying malice, is cause of *challenge*; and a Juror may be challenged for holding lands by the same title as the defendant. 2 *Leon.* 40. If a person owes suit of Court, &c. to a lord of a hundred who is a plaintiff, it is a principal *challenge*, as he is within the distress of the plaintiff. *Dyer*, 176. But it is said to be no *challenge*, that a person is in debt to either party. 1 *Nels. Abr.* 426. A Juror returned by a wrong name may be challenged and withdrawn, so that the Jury shall not be taken; yet a *tales* may be granted. 1 *Lil. Abr.* 260. And if a Juror declares the right of either of the parties, &c. it is cause of *challenge*; though it hath been ruled that it is not sufficient cause of *challenge*, that a Juror delivered his opinion touching the title of the land in question, because his opinion may be altered on hearing the evidence. *Pasch.* 23 *Car. B. R.*

If there are two defendants on a real action, or two tenants, and one *challenge* a Juror and the other will not, the Juror (the *challenge* being allowed) shall be drawn against the rest. 11 *Hen.* 6. 15. *Jenk. Cent.* 114. To say of a person to be tried for any crime, that *he is guilty, or will be hanged*, &c. is good cause of *challenge*; but the prisoner must prove it by witnesses, and not out of the mouth of the Juryman, who may not be examined: and though a Juryman may be asked upon a *voir dire*, whether he hath any interest in the case, or whether he hath a freehold, &c. yet a Juryman or a witness shall not be examined whether he hath been convict of felony, or guilty of any crime, &c. which would make a man discover that of himself which tends to make him infamous, and the answer might charge him with a misdemeanor. 1 *Salk.* 153.

If one *challenge* a Juror, and the challenge is entered, he may not have him afterwards sworn on the Jury. And if the defendant do not appear at the trial when called, he loseth his *challenge* to the Jurors, though he afterwards appear. 1 *Lil. Abr.* 259. When the Jury appear at a trial, before the Secondary calls them to be sworn, he bids the plaintiff and defendant to attend their challenges, &c.

In a case where a person, not summoned on the Jury, was sworn on the Jury at *Nisi Prius* in the name of a person for whom a summons to serve on that jury was delivered, and to whose house the Juror had succeeded, the irregularity being noticed before verdict, the court awarded a *venire de novo*. *Dovey* v. *Hobson*, 6 *W. P. Taunton*, 469.

III. The Jury, after the proofs in a cause are summed up, unless the case be very clear, withdraw from the bar to consider of their verdict; and, in order to avoid intemperance and causeless delay, are to be kept without meat, drink, fire, or candle, unless by permission of the Judge, till they are all unanimously agreed. If they eat or drink at all, or have any eatables about them, without consent of the Court, and before verdict, it is fineable; and if they do so at his charge for whom they afterwards find, it will set aside the verdict. Also if they speak with either of the parties, or their agents, after they are gone from the bar; or if they receive any fresh evidence in private: or if to prevent disputes, they cast lots for whom they shall find; any of these circumstances will entirely vitiate the verdict. And it has been held, that if the Jurors do not agree in their verdict before the Judges are about to leave the town, though they are not to be threatened or imprisoned, the Judges are not bound to wait for them, but may carry them round the circuit from town to town in a cart. *Mirr. c.* 4. § 24. *Lib. Ass. fol.* 40. *pl.* 11. This necessity of a total unanimity seems to be peculiar to our own constitution. See *Barrington on the Statutes*, 19, 20, 21. 3 *Comm. c.* 23; and Mr. *Christian's* notes there; and *post*, IV.

After a Juror is sworn he may not go from the bar until the evidence is given, for any cause whatsoever, until leave of the Court; and with leave he must have a keeper with him. 2 *Lil.* 123. 127. A witness may not be called by the Jury to recite the same evidence he gave in Court, when they are gone from the bar. *Cro. Eliz.* 189. Nor may a party give a brief or notes of the cause to the Jury to consider of; if he doth, he and the Jurors may be fined. *Moor.* 815.

If Jurymen after sworn, either before or after they are agreed of their verdict, eat and drink, the verdict may be good; but they are fineable: and if it be at the charge of either party, the verdict is void. *Dalis.* 10. *Cro. Jac.* 21. If they agree to cast lots for their verdict, or to bring in guilty or not guilty, as the Court shall seem inclined, they may be fined. 2 *Lev.* 205. *Cro. Eliz.* 779. But a Jury have been permitted to recal their verdict; as where one was indicted of felony, the Jury found him not guilty, but immediately before they went from their bar, they said they were mistaken, and found him guilty, which last was recorded for their verdict. *Plowd.* 211.

The Jury are to judge upon the evidence given, but the *Jurors* may not contradict what is agreed in pleading between the parties; if they do, it shall be rejected; and where the *Jury* find the fact, but conclude upon it contrary to law, the Court may reject the conclusion. 1 *And.* 41. 10 *Rep.* 56. *Co. Lit.* 22. *Hob.* 222. The *Jury* may find a thing done in another county upon a general issue; and foreign matters done out of the realm, &c. *Moor. c.* 238. *Godb.* 33. Jurors having once given their verdict, although it be imperfect, shall not be sworn again in the same issue, unless it be in assise. 2 *Cro.* 210.

If a *Juryman* is guilty of bribery, he is disabled to be of any assise or *Jury*; and shall be imprisoned and ransomed at the King's will. *Stat.* 5 *E.* 3. *c.* 10. *Jurymen* accused of bribery, are to be tried presently by a *Jury* then taken. *Stat.* 34 *E.* 3. *c.* 8. And if a Juror takes any thing of either party to give his verdict, he shall pay *ten times as much* as taken, or suffer a year's imprisonment. *Stat.* 38 *E.* 3. *cap.* 12. And on this statute a writ of *decies tantum* lies; and this though they give no verdict, or the verdict be true; if they take money. *Reg. Orig.* 188. *F. N. B.* 171. *New Nat. Br.* 380. *Dyer* 95. See this Dictionary, title *Decies tantum*, *Embracery*.

A *Jury* sworn and charged in case of life and member, cannot be discharged till they give a verdict. In civil cases it is otherwise: as where nonsuits are had, &c. And sometimes when the evidence has been heard, the parties doubting of the verdict, do consent that a Juror shall be withdrawn or discharged. 1 *Inst.* 154. 227.

A *Verdict*, *vere dictum*, is either *privy* or *public*. A privy verdict is when the Judge hath left or adjourned the Court, and the Jury being agreed, in order to be delivered from their confinement, obtain leave (in civil cases) to give their verdict privily to the Judge out of Court, which privy verdict is of no force, unless afterwards affirmed by a public verdict given openly in Court; wherein the Jury may, if they please, vary from their privy verdict. So that the privy verdict is indeed a mere nullity; and yet it is a dangerous practice, and therefore very seldom indulged, and cannot be given in treason or felony. 2 *Bro. P. C.* 300. See *post*, IV. But the only effectual and legal verdict, is the public verdict; in which they openly declare to have found the issue for the plaintiff or for the defendant; and if for the plaintiff, they assess the damages also sustained by him. Sometimes if there arises in the case any difficult matter of law, the Jury for the sake of better information, and to avoid the danger of having their verdict attainted, will find a *special* verdict, which is grounded on *stat. Westm.* 2. 13 *E.* 1. *c.* 30. § 2. And herein they state the naked facts as they find them to be proved, and pray the advice of the Court thereon; concluding conditionally, that if upon the whole matter the Court shall be of opinion that the plaintiff had cause of action they then find for him; if otherwise, then for the defendant. This is entered at length on the record, and afterwards argued and determined in the Court at Westminster, from whence the issue came to be tried.—Another method of finding a species of special verdict is where the Jury find a verdict generally for the plaintiff, but subject nevertheless to the opinion of the Judge or the Court above, on a special case stated by the counsel on both sides with regard to a matter of law.—But in both these instances the Jury may, if they think proper, take upon themselves to determine, at their own hazard, the complicated question of fact and law; and without either special verdict or special case, may find a verdict absolutely either for the plaintiff or the defendant. *Litt.* § 386. 3 *Comm. c.* 23.—It may be sufficient in this place to remark, that in case the Jury find against what in the opinion of the Court above is law, such Court will *repeatedly* grant a new trial, till what they consider to be a proper verdict is found. This might alone be an answer as to the Juries being judges of law in *civil* cases; but see *post*, IV, 2. and this Dict. title *Trial*, (*New Trial*).

It was an ancient doctrine, that such evidence as the Jury might have in their own consciences, by their private knowledge of facts, had as much right to sway their judgment, as written or parol evidence delivered in Court. And therefore it hath been often held, that though no proofs be produced on either side, yet the Jury might bring in a verdict. *Yearb.* 14 *Hen.* 7. 29. *Plowd.* 12. *Hob.* 227. 1 *Lev.* 87. For the oath of the Jurors, to find according to their evidence, was construed to be, to do it according to the best of their own knowledge. *Vaugh.* 148, 149. This seems to have arisen from the ancient practice in taking recognitions of assise, at the first introduction of that remedy; the sheriff being bound to return such recognitors as knew the truth of the fact, and the recognitors, when sworn, being to retire immediately from the bar, and bring in their verdict according to their own personal knowledge, without hearing extrinsic evidence, or receiving any direction from the Judge. *Bract. l.* 4. *tr.* 1. *c.* 19. § 3. *Fleta. l.* 4. *c.* 9. § 2. And the same doctrine, (when attaints came to be extended to trials by Jury, as well as to recognitions of assise,) was also applied to the case of common Jurors; that they might escape the heavy penalties of the *attaint*, in case they could show, by any additional proof, that their verdict was agreeable to

the truth, though not according to the evidence produced: with which additional proof the law presumed they were privately acquainted though it did not appear in Court. But this doctrine was again exploded, when *attaints* began to be disused, and *new trials* introduced in their stead. For it is quite incompatible with the grounds upon which such new trials are every day awarded, *viz.* that the verdict was given *without*, or *contrary to*, evidence. And therefore, together with new trials, the practice seems to have been first introduced, which now universally obtains, that if a Juror knows any thing of the matter in issue, he may be sworn as a witness, and give his evidence publicly in court. See *Styl.* 233. 1 *Sid.* 133. See further, titles *Verdict*, *Trial*.

IV. 1. The *Trial by* Jury, *in Criminal Cases*, is more peculiarly the grand bulwark of the liberties of every subject of Great Britain; and is secured, as has already been mentioned, by the Great Charter, 9 *H.* 3. *c.* 29.

The antiquity and excellence of this trial, in civil cases, has already been explained at length. The arguments in its favour hold much stronger in criminal cases. Our law has therefore wisely and mercifully placed the strong *twofold* barrier of a *presentment* and a *trial* by Jury, between the liberties of the people and the prerogative of the Crown. It has, with excellent forecast, contrived, that no man should be called to answer for any capital crime, unless on the preparatory accusation of twelve *or more* of his fellow-subjects, the Grand Jury: and that the truth of every accusation should be afterwards confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen, and superior to all suspicion. So that the liberties of England cannot but subsist so long as this *Palladium* remains sacred and inviolate; unawed by the power of the Monarch, and unstained by the weakness or wickedness of those who are called upon to exercise this invaluable privilege.

The Grand Jury generally consists of twenty-four men of greater quality than the other, chosen indifferently out of the whole county by the Sheriff; and the Petit Jury consisteth of twelve men, of equal condition with the party indicted, impanelled in criminal cases, called the Jury of Life and Death: the Grand Jury find the bills of indictment against criminals, and the Petit Jury convict them by verdict, in the giving whereof all the twelve must agree: and according to their verdict the judgment passeth. 3 *Inst.* 30, 31. 221. See this Dict. title *Indictment*.

When a prisoner on his arraingment has pleaded *not guilty*, and for his trial hath put himself upon his country, which country the Jury are, the Sheriff of the county must return a panel of Jurors; freeholders without just exception, and of the neighbourhood; that is, of the county where the fact is committed. 2 *Hal. P. C.* 264. 2 *Hawk. P. C. c.* 40. If the proceedings are before the Court of K. B. time is allowed, between the arraignment and trial, for a Jury to be impanelled by writ of *venire facias* to the sheriff as in civil causes: but before Commissions of *oyer and terminer*, and gaol delivery, the sheriff, by virtue of a general precept directed to him beforehand returns to the Court a panel of forty-eight Jurors, to try all felons that may be called upon their trial at that session. 4 *Comm. c.* 27.

*Challenges* may be made in criminal cases either on the part of the King, (the prosecution,) or on that of the prisoner; and either to the whole array or to the separate polls, for the very same reasons that they may be made in civil causes. For it is here at least as necessary as there, that the Jury be liable to no objection: that the Sheriff or returning officer be totally indifferent; and that where an alien is indicted, the Jury should be half foreigners, if so many are found in the place: this latter privilege, however, does not hold in treasons, aliens being very improper judges of the breach of allegiance. See 2 *Hawk. P. C. c.* 43. § 37. 2 *Hal. P. C.* 271.

By *stat.* 3 *Geo.* 2. *c.* 25. § 20. no persons are to be returned as Jurors for the trial of any capital offence who are not qualified to serve as Jurors in civil cases: and such deficiency is cause of challenge, to which the party challenged may be examined on oath.—Challenges on that account, or upon any of the accounts specified in civil cases, are styled challenges *for cause;* and those may be without stint in both criminal and civil trials. But in criminal cases, at least in capital ones, there is in favour of life allowed to the prisoner an arbitrary and capricious species of challenge, to a certain number of Jurors, without showing any cause at all: a provision full of that tenderness and humanity to prisoners for which the English *laws* are justly famous. This is grounded on two reasons, *viz.* the sudden impressions and unaccountable prejudices, which every one is apt to conceive on the bare looks and gesture of another; and the consideration that the very questioning a person's indifference may provoke resentment;—a Juror therefore challenged for insufficient cause may afterwards be peremptorily challenged.

This privilege of peremptory challenges, though allowed to the prisoner is denied to the King, by *stat.* 33 *E.* 1. *stat.* 4. which enacts, that the King shall challenge no Jurors without assigning a cause certain, to be tried and approved by the Court. However, it is held that the King need not assign his cause of challenge till all the panel is gone through, and unless there cannot be a full Jury without the persons so challenged: and then and not sooner the King's counsel must show the cause, otherwise the Jurors shall be sworn. 2 *Hawk. P. C. c.* 43. § 3. 2 *Hal. P. C.* 271. *Raym.* 473.

These peremptory challenges of the prisoner must however have some reasonable boundary: this is settled by the common law at the number of *thirty-five*, that is one under the number of three full Juries: and if a prisoner peremptorily challenged above that number, and would not retract his challenge, he was formerly to be dealt with as one who stood mute, or refused his trial, by sentencing him, in cases of *felony*, to the *peine forte et dure;* (pressing to death, now totally abolished. See that title, and title *Trial*) and by attainting him in treason. And so the law stands at this day, in England, with regard to treason of any kind. But by *stat.* 22 *Hen.* 8. *cap.* 14, (which, with regard to felonies stands unrepealed by *stat.* 1 & 2 *P. & M. c.* 10,) no person arraigned for *felony* can be admitted to make any more than *twenty* peremptory challenges. If, in such case, the prisoner peremptorily challenged twenty-one, the old opinion was, that judgment of *peine forte et dure* should be given, as where he challenged thirty-six at the common law. 2 *Hawk. P. C. c.* 43. § 9. But the better opinion seems to be, that such challenge shall be only disregarded and overruled, and the Juror be regularly sworn. 3 *Inst.* 227. 2 *Hal. P. C.* 270. In Ireland by *stat.* 10, 11 *Geo.* 3. *cap.* 9. no more than twenty can be challenged either in treason, murder, or felony.

If, by reason of challenges, or the default of Jurors, a sufficient number cannot be had of the original panel, a *tales* may be awarded, as in civil causes: though this cannot take place in mere commissions of gaol-delivery, but in which the Court may by word order a *new* panel to be returned *instanter*. 4 *Inst.* 68. 4 *St. Tr.* 728. *Cook's Ca.* See *ante*.

When at length the number of twelve is completed, they are sworn, "well and truly to try, and true deliverance make, between our Sovereign Lord the King, and the prisoner whom they have in charge; and a true verdict to give according to their evidence." 4 *Comm.* 27.

When the evidence on both sides is closed, and indeed when any evidence hath been given, the Jury cannot be

discharged, unless in cases of evident necessity, till they have given in their verdict! but they are to consider of it, and deliver it in with the same forms as upon civil causes; only they cannot, in a criminal case which touches life or member, give a *privy* verdict. See 1 *Inst.* 227. 3 *Inst.* 110. *Fost.* 27. 2 *Hal. P. C.* 300. 2 *Hawk. P. C. c.* 47. § 1, 2. But the Judges may adjourn, while the Jury are withdrawn to confer, and return to receive the verdict in open Court. 3 *St. Tr.* 731. 4 *St. Tr.* 231. 455. 485.

On the State Trials for *High Treason*, at the Sessions-house in the Old Bailey, London, under a special commission in 1794, against Tho. Hardy, Horne Tooke, and several others charged with having formed the destructive project of *A Convention of the People*, to overthow the Monarchy and the Constitution, the Jury on each Prisoner were kept together in the Custody of the Sheriff or his Bailiffs night and day, for several days successively, during the whole of the proceedings on each trial, and till they gave their verdicts. The Court adjourned from evening till morning; and also once in the day for the purpose of refreshment, and from Saturday evening till Monday morning, when Sunday intervened.—The Sheriff was charged to see that no improper communication was had with the Jury during these intervals. And the first Jury having been sent several nights to an Hotel in Covent Garden, at some distance from the Court, a slight suspicion arising that they were not kept quite free from extraneous information, the subsequent Juries were accommodated with beds in rooms nearly adjoining the Court.

Similar precautions have been taken on subsequent important occasions.—But in a case where, on the trial of an indictment for a misdemeanor, which continued more than one day, the Jury, without the knowledge or consent of the defendants separated at night, the Court of K. B. held that the verdict was not, therefore, void, and that it formed no ground for granting a new trial, it not appearing that there was any suspicion of any improper communication having taken place. *R.* v. *Kinnear & al. Term Rep. K. B. E.* 59 *Geo.* 3. 462.

A Culprit was indicted for murder. The Jury were sworn, and part of the evidence given, but before the trial was over, one of the Jurymen was taken ill, went out of Court with the Judge's leave, and presently after died. The Judge, doubting whether he could swear another Jury, discharged the eleven, and left the prisoner in gaol. The Court was moved for a writ of *habeas corpus*, to bring up the prisoner that he might be discharged, having been once put upon his trial. This being a new case, the Court said they would advise with the other Judges upon it; and afterwards they all agreed that the prisoner might be tried at the next assises, or the Judge might have ordered a new Jury to have been sworn immediately. *Mich.* 4 *Geo.* 3. *R.* v. *Gould. Burn's J.* title *Jurors* V. *ad fin.*

The verdict in a criminal case thus publicly and openly given may be either *general*, *Guilty*, or *Not Guilty*; in which precise terms alone a general verdict must be given; or *special*, when it must set forth all the circumstances of the case, and pray the judgment of the Court whether, for instance, on the facts stated, it be murder, manslaughter, or no crime at all.

This special verdict is where the Jury *doubt* the matter of law, and therefore *choose* to leave it to the determination of the Court though they have an *unquestionable right* of determining upon *all the circumstances*, and finding a general verdict if they think proper so to hazard *a breach of their oaths*: and if their verdict be notoriously wrong, they may be punished, and the verdict set aside by attaint at the suit of the King, but not at the suit of the prisoner. 2 *Hal. P. C.* 310. 4 *Comm.* 361. *c.* 27. See *post*, IV. 2.

The instances which formerly happened of *fining*, *imprisoning*, or otherwise punishing Jurors, merely at the discretion of the Court, for finding their verdict contrary to the direction of the Judge, were *arbitrary*, *unconstitutional*, *and illegal*; and indeed it would be a most unhappy case for the Judge himself, if the prisoner's fate depended on his directions; unhappy also for the prisoner; for if the Judge's opinion must rule the verdict, the trial by Jury would be useless. 2 *Hal. P. C.* 313.

Yet in many instances where, contrary to evidence, the Jury have found the prisoner *guilty*, their verdict hath been mercifully set aside, and a new trial granted by the Court of King's Bench: for in such case it cannot be set right by attaint. 1 *Lev.* 9. *T. Jones*, 163. 10 *St. Tr.* 416. As the party is found guilty in fact, by twenty-four. 1 *Rol.* 280. *l.* 2. 7. But the Court have never interfered even to grant a new trial where a prisoner is once *acquitted*; however contrary the verdict might be to the opinion of the Judge, or to what, in the eyes of all but the Jury, might be deemed the real justice of the case. See 2 *Hawk. P. C. c.* 47. § 11, 12, where it is positively stated as *settled*, that the Court cannot set aside a verdict which *acquits* a defendant of a prosecution properly criminal. See this Dict., title *Trial.* (*New Trial.*)

2. The Question whether *Juries* are, or are not, *Judges of Law* as well as of *Fact*, has been long agitated with great zeal and energy.

We have already seen, that Juries may, by a general verdict of *acquittal* in criminal prosecutions, prevent the case from coming under the final consideration of the Court; who, in that event, have no opportunity of deciding on the question of law. But in cases of *conviction*, it is the established rule, that the Judges of the Court in which the prosecution is carried on, may arrest the judgment, or grant a new trial, where they are of opinion that the offence is not such as is charged in the indictment; that the indictment is defective in charging it; or, that the verdict is against evidence. See *Brown's Ca. Leach's Crown Law*, *p.* 135. *c.* 77. Thus much therefore appears indisputable, that in one event the Court are the acknowledged Judges of the law, as the Jury are of the fact: and that the latter have the *absolute* POWER of ACQUITTAL in criminal cases; but not of conviction. A provision, indeed, full of that wisdom and mercy which so eminently characterise the English laws.

This litigated question has principally arisen on prosecutions for *Libels*, and above all others on those for *State Libels*; in which it had for a long time been the usage for the Judge to direct the Jury, that if the fact of the publication of the paper charged to be a libel was proved, and if they believed the inuendoes in the indictment, they must find the defendant guilty; see *R.* v. *St. Asaph*, *Dean*, and *R.* v. *Withers*: 3 *Term. Rep.* 428, without adverting to any other circumstances, such as whether the paper were in their opinion a libel, or published with a malicious, seditious, &c. intention.

The *stat.* 32 *Geo.* 3. *c.* 60, (extended to Ireland 33 *Geo.* 3. *c.* 43. *Irish*) after reciting that "doubts had arisen whether on the trial of an indictment or information for the making or publishing any libel, where an issue or issues are joined between the King and the defendant, on the plea of *not guilty* pleaded, it be competent to the Jury impanelled to try the same, to give their verdict *upon the whole matter in issue*;" enacts, that "on every such trial, the Jury, sworn to try *the issue*, may give a general verdict of guilty or not guilty, *upon the whole matter put in issue*, upon such indictment or information; and shall *not* be required or directed, by the Court or Judge, before whom the indictment, &c. shall be tried, to find the defendant guilty, *merely* on the proof of the publication, by such defendant, of the paper charged to be a libel, and of the sense ascribed to the same in such indictment." § 1.

But it is provided by the said statute, that the Court or Judge shall, according to their discretion, give their opinion and directions to the Jury on the matter in issue, as in other criminal cases—that the Jury may also find a special verdict; and that in case the Jury shall find the defendant *guilty*, he may move in arrest of judgment, as *by law* he might have done before the passing of the act. §§ 2, 3, 4.

It is observable, that as the rule on this subject laid down by *Lord Coke*, 1 *Inst.* 155, *b.* is in a negative way; "ad quæstionem facti *non* respondent Judices, ad quæstionem juris *non* respondent Juratores—Judges are *not* to answer to the question of fact; Juries are *not* to answer to the question of law;" so the statute 32 *Geo.* 3. in the same kind of language provides, that "the Jury shall *not* be required or directed to find a verdict of guilty, merely on the proof of publication, and the sense ascribed to the paper."—The statute does not proceed any further to state what matters may or may not be given or produced in evidence in such trials: nor does it say one word positively as to the right or province of the Jury to decide the question of law. The doubt expressed by the act to have been entertained is, whether it were competent to the Jury to give their verdict upon *the whole matter in issue*. Now, wherever the question of *Law* is in *issue*, it is always tried by the Court on a demurrer, and is never submitted at all to a Jury. On an issue of *Fact*, (such as that joined on all indictments is,) the law is never in dispute.

The provision in the act, "that in cases where the Jury shall find a verdict of *guilty*, the defendant may move in arrest of judgment, as *by law*, he might have done before the passing of the act," seems as express a denial of the right of the Jury to determine the question of law, as could possibly be framed; since that question *can never arise* on a verdict of Not guilty. It was, doubtless, adopted *in majorem cautelam*; lest by any forced construction, the statute should have been interpreted as taking into consideration the question how far the Jury could act as Judges of law.

The whole fallacy of the controversy seems to have originated, first, from the complication of fact and law, which is more apparent in prosecutions for libel, than in other criminal cases: and, secondly, from confounding the terms POWER and RIGHT as synonimous: faculties frequently so similar in their operation, that it requires the discrimination of a penetrating mind to assign the effects arising from either to their proper source. The Jury, as the law at present stands, have the POWER *of acquittal*, absolute and uncontrouled; except may-be, by the tedious and now most uncertain process of *Attaint*; which, though it might punish the Jury for their verdict, yet could not convict the defendant whom they had acquitted; and it is even doubted whether such attaint could be maintained, in a criminal case, against a Jury. *Vaugh.* 146. See 1 *Ro. Abr.* 281: *l.* 5. *F. N. B.* 107. *D.* cites 42 *E.* 3. 26. that it may; but which seems rather to apply to the circumstances of a civil action. In *Vaugh.* 164. *Bushel's Case*, the great case on the power of Juries, *Vaughan*, Chief Justice, cites 10 *Hen.* 4. *Attaint*, 60, 64. and says that there is no case in all the law, of such an attaint; nor any opinion but that of *Thirning's* in the case cited, for which there is no warrant in law; and thinks the law clear that an attaint did not lie. 3 *Vin. Abr.* tit. *Attaint* (A) pl. 17. See also the same title A. 2. pl. 12. O. pl. 3. A. 2. pl. 16. G. pl. 1, 12, 13. 1 *Inst.* 228. *a.* In 1 *Ld. Raym.* 469. it is observed, that in an attaint in a civil cause, a man's property is only brought into question a second time, and not his liberty or life. And *Hawkins* states, that it seems to be certain that no one is liable *to any prosecution whatsoever*, in respect of any verdict given by him in a criminal matter, either upon a grand or petty Jury. See 1 *Hawk. P. C. c.* 72. § 5. 2 *Hawk. P. C. c.* 22. § 20—23.—From all which authorities, it appears on the whole, that attaint in criminal cases is a very rare and doubtful proceeding; and that only instances of very undoubted and corrupt contumacy can justify even the laying blame upon a Jury. See also this Dict. title *Attaint*.

There is no doubt that before the passing of the above-mentioned *stat.* 32 *Geo* 3. *c.* 60. if a Jury were convinced either that the paper alleged to be a libel was not such in law, or that the defendant published the same through an innocent negligence, or inadvertence, they had always the *power* of giving a verdict of acquittal, which could never be called in question. Whether that statute has conferred any further privilege on them is left for the Reader to determine; after considering the foregoing observations, and those which follow; extracted from two most learned, ingenious, and constitutional writers.

On the trial of John Lilburne for treason, in 1649, high words passed between the Court and him, in consequence of his stating that the Jury were Judges both of law and fact, and citing passages in 1 *Inst.* 228, *a.* to prove it. 2 *St. Tr.* 4 *ed.* 69. In the case of *Penn* and *Meade*, who, in 1670 were indicted for unlawfully assembling the people, and preaching to them, the Jury gave a verdict against the directions of the Court in point of law, and for this were committed to prison. But the commitment was questioned, and on a *habeas corpus* brought in the Court of Common Pleas, it was declared illegal, *Vaughan*, Chief Justice, distinguishing himself on the occasion by a most profound argument in favour of the rights of a Jury. *Bushel's Ca.* 1 *Freem.* 1. *Vaugh.* 135. However, the contest did not cease, as appears by *Sir John Hawles's* famous 'Dialogue between a Barrister and a Juryman,' which was published in 1680, to assert the claims of the latter, against the then current doctrine, decrying their authority. Since the Revolution also, many cases have occurred, in which there has been much debate on the like topick. See *Hardw.* 23. *Franklyn's Ca.* 9 *St. Tr.* 275. *Peter Zenger's*, *ib. Owen's Ca.* 10. *St. Tr.* 196. *App. Woodfall's Ca.* 5 *Burr.* 261. *R. v. Shipley*, *Dean of St. Asaph.* By attending to the cases before referred to, it will be easy to trace the progress of the controversy on the limit of the Jury's province. 1 *Inst.* 155. *b. in n.*

*Mr. Hargrave*, the author of the above note, then proceeds to give his own ideas on the subject; which, from the known learning and probity of the writer, are deserving very serious attention.

"On the one hand, says he, as the Jury may, as often as they think fit, find a general verdict, I therefore think it unquestionable that they *so far* MAY *decide* upon the *law* as well as fact; such a verdict *necessarily involving* both. For this, there is the authority of *Littleton* himself, who writes, that, 'If the inquest will take upon them the knowledge of the law upon the matter, they may give their verdict generally.' § 368. 228. *a.* But, on the other hand, it seems clear, that questions of law generally, and more properly belong to the Judges, and that, exclusively of the fitness of having the law expounded by those who are trained to the knowledge of it by long study and practice, this appears from various considerations.—*First*, If the parties litigating agree in their facts, the cause can never go to a Jury, but is tried on a demurrer; it being a rule, apparently without exception, that issues in law are ever determined by the Judges, and only issues of fact are tried by a Jury. 1 *Inst.* 71, *b.*—*Secondly*, Even when an issue of fact is joined, and comes before a Jury for trial, either party, by demurring to evidence, which includes an admission of the fact, to which the evidence applies, may so far draw the cause from the cognizance of the Jury; for in that case, the law is referred for the decision of the Court, from which the issue of fact comes; and the Jury is either discharged, or, at the utmost, only ascertains the damages 1 *Inst.* 72, *a. Cocksedge* v. *Fanshaw*, *Dougl.* 119—134. *Cort* v. *Birkbeck*, *Dougl.* 218—225. *Bull. N. P.* 26 *ed.* 313.

—*Thirdly*, The Jury is supposed to be so inadequate to finding out the law, that it is *incumbent on the Judge* who presides at the trial to inform them what the law is; and as a check to the Judge in the discharge of this duty, either party may, under *stat. Westm.* 2. *c.* 31. make his exception in writing to the Judge's direction, and enforce its being made a part of the record, so as afterwards to found error upon it. See 2 *Inst.* 426. *Trials per pais*, 8 *ed.* 222. 466. *Fabrigas* v. *Mostyn*, 11 *St. Tr. Money* v. *Leach*, 3 *Burr.* 1742. *Bull. N. P.* 2*d ed.* 315. [This Dict. title *Bill of Exceptions.*] —*Fourthly*, The Jury is ever at liberty to give a special verdict, the nature of which is to find the facts at large, and leave the conclusion of law to the Judges of the Court from which the issue comes. Formerly, indeed, it was doubted whether, in certain cases in which the issue was of a very limited and restrained kind, the Jury was not *bound* to find a *general* verdict: but the contrary was settled in *Downman's Ca.* 9 *Co.* 11 *b.* and the rule now holds both in criminal and civil cases without exception. See 1 *Inst.* 227. *b. Staunf. P. C.* 165 *a.* 2 *Ld. Raym.* 1494.—*Fifthly*, Whilst attaints, which still subsist in law, [see *ante*,] were in use, it was hazardous in a Jury to find a general verdict where the case was doubtful, and they were apprised of it by the Judges; because if they mistook the law, [against the direction of the Judge,] they were in danger of an attaint. 1 *Inst.* 228, *a. Hob.* 227. *Vaugh.* 144. 2 *H. H. P. C.* 310. *Gilb. C. P.* 2*d edit.* 128. —*Sixthly*, If the Jury find the facts specially, and add their conclusion as to the law, it is not binding on the Judges; but they have a right to controul the verdict, and declare the law as they conceive it to be. At least this is the language of some most respectable authorities. *Staunf. P. C.* 165, *a. Plowd.* 114, *a*, *b.* 4 *Co.* 42, *b. Hal. H. P. C.* i. 471. 476, 477; ii. 302. See *ante*, III.—*Lastly*, The Courts have long exercised the power of granting new trials in civil cases, where the Jury finds against that which the Judge, trying the cause, or the Court at large, holds to be law; or where the Jury finds a general verdict, and the Court conceives that on account of difficulty of law there ought to have been a special one. *Hardw.* 26. [And the Court will grant such new trial, even a second and a third time, till the Jury give a general verdict consonant to law; or a special verdict, on which the Court may pronounce the law. See *Tindal* v. *Brown*, 1 *Term. Rep.* 167. and this Dict. title *Trial*; (*New Trial.*)] Though too in criminal and penal cases the Judges do not claim such a discretion against persons acquitted, the reason presumed is in respect of the rule, *nemo bis punitur aut vexatur pro eodem delicto;* or the hardship which would arise from allowing a person to be twice put in jeopardy for one offence: and if this be so, it only shews, that on that account an exception is made to a general rule. 4 *Comm.* 361. 2 *Ld. Raym.* 1585. 2 *Stra.* 899. 4 *Co.* 40, *a. Wingate's Maxims*, 695. Upon the whole, (says *Mr. Hargrave*,) the result is, that the *immediate* and *direct right* of deciding upon questions of law is entrusted to the Judges; that in a Jury it is only *incidental:* That in the exercise of this *incidental* RIGHT, the latter are not only placed under the superintendence of the former, but are in *some degree* controulable by them: and therefore, that in all points of law arising on a trial, Juries ought to shew *the most respectful deference* to the advice and recommendation of Judges. Nor is it any small merit in this arrangement, that in consequence of it, every person accused of a crime is enabled, by the general plea of *not guilty*, to have the benefit of a trial, in which the Judge and Jury are a check upon each other. 1 *Inst.* 155. *a.* &c. *in n.*"

The Student will perceive from the above extract, that *Mr. Hargrave* admits the *incidental* RIGHT of the Jury to determine questions of law; in which he goes further than the writer from whom the subsequent long quotation is introduced.

*Mr. Wynne*, in his *Eunomus*, or Dialogues concerning the Law and Constitution of England. *Dial.* 3. § 53. *et seq.* examines the dispute, very elegantly, in the following manner:

"All that may here be said upon the subject of Juries is agreeable to the established maxim above recognised, *ad questionem facti*, &c. This is the fundamental maxim acknowledged by the Constitution; and yet this is the maxim which those who have advanced doctrines against the Constitution have ever in their mouths.

"Fundamental maxims of Law or Government are so plain and intuitive, that every body understands them; those of the lowest capacity make them their standard in their own breasts to judge by. And therefore they who would lead a party in a wrong cause with success, must do it not by disputing fundamentals, but by awowing and afterwards perverting them. This seems to be much the case in the present contested question.

"It is undoubtedly true, that the Jury are judges, the only judges of the *fact:* is it not equally within the spirit of the maxim, that *Judges only* have the competent cognisance of the *law?* Can it be contended that the Jury have, in reality, an adequate knowledge of law; or that the Constitution ever designed they should? Every country village has its Jurors, whom nobody will suppose to be lawyers: and it is from the generality that we are to form our notions of the nature of a Jury, as the law has prescribed it; not from the abilities of any particular man, or any particular Jury. But it is said, and it is an argument not a little insisted upon, that *the law and the fact are often complicated.* Then it is the province of the Judge to distinguish them; to tell the Jury, that supposing they believe that such and such facts were done, what the law is in such circumstances. *This is an unbiassed direction:* this keeps the province of Judge and Jury distinct: the facts are left altogether to the Jury, and the law does not controul the fact, but arises from it. If the law is thought to be mistaken, the direction of the Judge that gave it may be considered in another Court; and if it *is* mistaken, the verdict in conformity to it will be of no effect. But a verdict cannot be complained of as contrary to the direction of law given; it can scarcely be concluded it is: and the reason is, because the law arises only from the fact; and the Jury previously find the fact in their own mind, before they couple it with the law pronounced from the Bench to make up their verdict. Every verdict is compounded of law and fact; but the law and the fact are always distinct in their nature. See *Vaugh.* 146. 152.

"Littleton and his Commentator have been made advocates on this occasion; and have been thought to say, though at the peril of contradicting themselves an hundred times, that Jurors are the judges of the law as well as the fact; in the passage already repeatedly cited and alluded to; 1 *Inst.* 228, *a;* "If they will take upon them the knowledge of the law upon the matter, they may give their verdict generally, as is put in their charge." See 2 *Ld. Raym.* 1494. *Hardw.* 16. But does not the Judge betray his trust in not telling them how the law is? If he does not tell them, it is true they may suppose it to be so, and find accordingly: if he does tell them how the law is, they are to compare the fact with the law; but cannot of their own head say what the law is. *The law is never submitted to them*, as part of their inquiry. *Vaugh.* 143. No finding can in general be complained of, as against a Judge's direction; but as against the weight of evidence, and in that case the remedy is well known. The warrant of commitment, as stated in the return in *Bushell's* case, was nevertheless expressly granted against the Jury, *for finding contrary to the direction of the Judge in a matter of law.* Which part of the return, *Vaughan*, C. J. said, literally taken, was insignificant and not intelligible; and if it had any meaning, stript of the veil and colour of

words, was a direct argument for the abolition of the form of trial by Jury; because the Judge in such case must resolve both the law and the fact. True it is, the Chief Justice does there put a particular case of a Jury finding against a Judge's direction, which in general, for the reason he has given, is impossible: and that case is, where a Judge asks the Jury previous to the verdict, How they find such a particular thing propounded to them? If on their giving an answer the Judge adds, Then, as you agree to find the fact so, the law is for the plaintiff or defendant: and if the finding is afterwards contrary to what he declares, they do in that case find contrary to the Judge's direction in matter of law. But in that case, the regular order of proceeding is directly inverted; the Judge makes them find a particular fact previous to his declaration of the law: whereas, what *Vaughan*, C. J. calls the discreet and lawful assistance of a Judge to a Jury, is always to give an hypothetical direction to the Jury; not by previously having their answer to the fact, and thereupon declaring the law to controul their verdict; but to leave their verdict free, by saying, *If you find the fact so and so*, then the law is for the plaintiff; or you are to find for the plaintiff; or *vice versâ*. See *Vaugh*. 136. 143, 144.

"All this reasoning shews, that the province of Judge and Jury, as to law and fact, are separate and exclusive: that in the general and regular form of proceeding, it is impossible for a verdict to be said to be against a direction in law; but if the case should happen, the verdict must be rectified; for this plain reason, that it appears in such a case the Jury have taken upon them the determination of the law, which is entirely out of their jurisdiction.

"Besides what has been already said, it seems undeniably to appear, that Juries are designed by the Constitution to be Judges of the fact only, and not of the law, for these reasons: *First*, Because the contrary supposition is against the plain tenor of their *Oath*. The form of every oath administered in a court of justice, is either according to common law, or as required by some act of parliament. 3 *Inst*. 165. An oath of office contains a summary description of duty; and the terms of a Jury's oath are so strictly applicable to fact only, that they do by the strongest implication exclude any cognizance of the law. Every Juror, in a cause, is enjoined by his oath "well and truly to try the *issue joined* between the parties, and a true verdict to give *according to the evidence*." Now to consider this by parts. 1. He is *well and truly to try;* How can one well and truly try any point but according to his knowledge? Either, as has been contended, according to his own previous knowledge, or according to the information he meets with at the time of the examination: A Juror may have knowledge of both kinds as to the fact; but it is not requisite he should have either as to the law.—2. The oath directs the Jury to try *the issue joined;* this issue is always a fact denied on one side, and affirmed on the other; where the law is directly in dispute, the issue (as has been already repeatedly observed in the remarks on the *stat.* 32 *Geo.* 3. *c.* 60.) goes before the Court, and not at all before a Jury. And though during the trial of an issue of fact, points of law do very often incidentally arise, it does not follow from thence that they are under the cognizance of the Jury; any more than disputes about practice, the competence of witnesses, or whether such and such evidence is admissible; which do as often arise in the course of a trial, and were never contended to belong to the Jury. The law, therefore, because it arises out of the fact, and because in the end it is to govern it, does not, on that account, appertain to the Jury, if from other considerations it appears to be improper.—3. What can be meant by a *true Verdict?*—Truth, both Philosophers and Lawyers will refer to fact, rather than opinion about law: when it is referred to opinion, we mean the agreement of a proposition with our own ideas, or the ideas of others. But how those who have such faint and imperfect ideas as Jurors have of law, can discern this agreement, or judge of the truth in such a case, every reasoning man must be at a loss to determine.—4. But to exclude the possibility of a doubt in this question, their oath does not only direct them to find the truth, but tells them what rule or measure they are to go by in their inquiry. They are to find a *true verdict according to the evidence*. This branch of the oath, which governs the whole, can be applied only to the fact. *The fact only is in evidence*, and consequently the law not being in evidence *is not before them*. See *Vaugh*. 143. Thus in the clearest terms does the oath limit and define their duty.

"But, *secondly*, in the course and management of a trial, other persons are likewise under an oath, and have duties incumbent on them also. Now without looking into the oath of a Judge, it will be easily understood to be inconsistent with his duty and his oath to be a mere cypher on the Bench. A Judge, however, will be little more than a cypher, either if he sits and says nothing, or if what he does say, is to go for nothing. The Jury's ignorance of law makes it necessary for the Judge to tell them what the law is in the case before them; but he tells it them surely to very little purpose, if they think themselves afterwards at liberty to determine otherwise.

"Other arguments there are also which deserve to have weight on this question, drawn from the forms of pleading and the general frame of records; than which none perhaps can be produced more worthy to be relied on.

"1. It is well known in constant experience, that by the mode of drawing a *demurrer*, the matter in debate is referred altogether to the decision of the Court, and in reality never does go before a Jury. By a demurrer, the bare law is in question; the fact being constantly admitted, if clearly expressed. The reason of admitting the fact in that case seems to be, that without such confession of the fact the Court have no ground to go upon; for the law in every case arises from the fact. The case then must really exist before the legality of it, as to circumstances, can be determined. But if a matter where *the law only* is in question, is never, nor can in its nature be, sent to a Jury, it proves almost to a demonstration, that the Jury have nothing to do with bare law.—2. Nor is the argument to be drawn from the nature of a *special verdict* of less force on this occasion. The *ignorance* of the Jury as to the law in the case, and their reference to the Court, is the constant language of a special verdict. Not that the Jury can in reality be supposed more ignorant of the law arising in such a case, than they are in a thousand others, where all is concluded under a general verdict. Indeed in that light, the common Juries are now much improved in their knowledge of the law, there being very few instances of their expressing their doubts in special verdicts at this day. The reason of having special verdicts was, at all times, in order to have the point of law solemnly determined, and remain on record; without which, in many cases, no writ of error could have been brought in former times, nor the point reserved for the consideration of the Court. The usage of *stating a case*, and having a *general* verdict, subject to the opinion of the Court afterwards on the circumstances of the case, is an invention of late times; and is found in practice to be less expensive, and to answer to the parties as well as a special verdict. But the case stated, and the special verdict, are equally proofs of what is here contended for, by expressly leaving the law to the Court for their determination. See *ante*, III.

"The professed patrons of the right of the Jury to be judges of law have principally applied their doctrine, as has been already remarked, to the case of *libels:* but they were aware that the conclusion would be general, though the case was particular; because the right of the Juries to determine

the law in the case of libels, could only be a consequence of their right to find the law in other cases. There seems to be this fatality that has in practice attended the case of libels, that the law and the fact have not been always accurately distinguished: and perhaps in feverish times, some particulars have been contended for as implications of law, which ought rather to have been considered as facts, and left to the Jury. [An evil, and perhaps the only one, in some measure guarded against by the construction put on the *stat.* 32 *Geo.* 3. *c.* 60. mentioned at the beginning of this discussion.]

"It seems however, universally, that any action, the *intention* of the agents, and every other circumstance under which that action was done, are equally *facts*, and as such cognizable by a Jury; but *whether* that action, under all the circumstances in which it has been admitted or proved to have been done, *is a crime or not*, is what *the law alone can determine:* and the Judges, whose breasts are the depositories of the law, alone can pronounce. Otherwise it is evident the quality of human actions, more especially of those that are in themselves indifferent, and have been defined by society alone, would be referred not only to a *very variable standard*, but an *incompetent* one. Apply this particularly to the case of libels, and the least reflection will be sufficient to shew, that the power and province of Juries is the same in case of libels as in every other case. And that in no case whatever a Jury has, in its nature, a cognizance of law, though by accident the law may have been sometimes left to them."

To draw towards a conclusion of this long discussion; the very interesting nature of which must plead the Editor's excuse for the foregoing multiplied extracts and observations:—There are some arguments in favour of the Jury's right, as relates to criminal cases, which seem not answered by the remarks arising from the conduct of civil causes. In the first place, their *Oath* is, that they shall "well and truly *try*, and *a true deliverance* make, between our Sovereign Lord the King, and the Prisoner whom they have in charge, and a true Verdict give according to the evidence."—Now it is not expressed *what* they shall try; it is therefore inferred, that the whole of the case is submitted to their determination. But we must recollect that in this, as in all cases, an *Issue* is joined, between the King and the Prisoner, of *Not guilty;* and *Guilty:* (see this Dict titles *Pleading*, *Trial*.) The Verdict according to the Evidence must be therefore on the Issue, as in all other cases; and the Fact only, not the Law, is submitted to the consideration of the Jury.—Some doubt has arisen on the word *Deliverance;* whether it applies to delivering the verdict; to the deliverance of the culprit from his charge and imprisonment; or whether it does not simply mean a true *deliberation* on, and consideration of, the evidence produced to them; which latter is the sense most approved by legal writers and historians on the subject. If indeed it does apply to the deliverance of the prisoner, still it must be *a true deliverance*, on proof of his innocence, or rather on failure in the proof of his guilt.

Another argument, which at first bears the appearance of more weight than those just mentioned, though it has not been frequently relied on, is this; That, from the very nature and words of the verdict the Jury are constituted Judges of the law, as well as the fact, in criminal cases—That the words GUILTY or NOT GUILTY do not merely ascertain the commission or non-commission of any indifferent fact; but the commission of a *criminal* fact; or the being free from any crime, as the fact is not done, or as the fact though done were lawful, or performed without any illegal or criminal intention. That therefore the Jury *in terms* decide, by their verdict, not only on the perpetration of the fact, but on the criminality annexed to it; since, if the fact be not criminal, no guilt is incurred; and therefore the verdict of *guilty* would be false, and of *not guilty* nonsensical; no guilt attaching to a praiseworthy, an indifferent, or an innocent act.—Two answers suggest themselves; one, that the language in which alone the Jury can deliver a general verdict, according to the rules positively prescribed to them by law, at all events allows the fact charged to be criminal, as far as the judgment or discretion of the Jury on that question can be exercised, whatever may be the subsequent decision of the Court. The second, that the language of the verdict, interpreted according to the rules of law, of practice, and of common sense, is this—"GUILTY—If the fact with which the prisoner is charged be sufficiently stated, and is a crime in the eye of the law." And that this is the true interpretation of the verdict of *guilty*, the right of the Court to arrest the judgment, in case, on inspection of the record, they are of opinion that the fact charged is no crime, or, if a crime, is defectively charged, is undeniable proof. This right of the Court to decide the law in the event of a verdict of guilty is recognised by *stat.* 32 *Geo.* 3, *c.* 60. already so often cited.

Still it may be objected that the Jury by a verdict of NOT GUILTY have a *right* to decide the law. But the fallacy of confounding the terms *right* and *power* has already been noticed: and it may be added that though several Juries were successively to acquit several defendants on a charge of publishing the same libel, their verdicts could never be produced as precedents in law, that another might not be indicted for the same libel, and found guilty by another Jury; and this has actually happened.—To put the case still stronger; it is by no means an uncommon circumstance, that where several criminals are included in the same indictment, they sever in their challenges, and are therefore tried separately: but it was never imagined that the conviction or acquittal of one, had the least effect upon the question of the guilt or innocence of the others: Whereas the decision of the Court, on an indictment, that the fact charged in it as a crime was not such, or was defectively charged, would quash the whole indictment against all; and be a precedent for arresting the judgment on any subsequent conviction, or indictment under the same circumstances.—Why? Clearly because in one case the mere fact is decided, as relates to the Individual accused; in the other the question of law, as relates to the Crime charged.

For further matter incidental to the duty and office of a Jury, see this Dict. titles *Trial*, *Verdict*.

JURROCK, [or *Jarrock*,] A kind of cork; see *stat.* 1 *R.* 3. *c.* 8.

JUS. Law or right, authority and rule. *Lit. Dict.*

JUS ACCRESCENDI. Is the right of survivorship between joint-tenants. *Lit.* 280. 1 *Inst.* 180. See title *Joint-tenants*.

JUS AD REM. An inchoate and imperfect right, such as a parson promoted to a living acquires by nomination and institution. 2 *Comm.* 312.

JUS ANGLORUM. The laws and customs of the West Saxons, in the time of the *Heptarchy*; by which the people were for a long time governed, and which were preferred before all others, were termed *Jus Anglorum*.

JUS CORONÆ. The right of the Crown; and it is part of the law of England, though it differs in many things from the general law relating to the Subject. 1 *Inst.* 15. The King may purchase lands to him and his heirs, but he is seised thereof in *Jure Coronæ;* and all the lands and possessions whereof the King is thus seised, shall follow the crown in descents &c. See title *King*.

JUS CURIALITATIS ANGLIÆ. See this Dict. title *Curtesy of England*.

JUS DELIBERANDI. The right of deliberating, which, by the law of Scotland, is given to an *heir*, who is not compellable to enter into the estate within a year and a day from the death of his ancestor.

JUS DUPLICATUM. Is where a man hath the possession as well as property of any thing. *Bract. lib.* 4. *tract.* 4. *c.* 4. 2 *Comm.* 189.

JUS GENTIUM. The Law of Nations. The law by which kingdoms and societies in general are governed. *Selden.* See title *Ambassador.*

JUS HABENDI & RETINENDI. Right to have and retain the profits, tithes, and offerings, &c. of a rectory or parsonage. *Hughes's Parsons Law,* 188.

JUS HÆREDITATIS. The right or law of inheritance. See title *Descent.*

JUS IN RE. Complete and full right. Such as a parson acquires, on promotion to a living, who, after nomination and institution, hath corporal possession delivered to him; for till such delivery of corporal possession, he had only *Jus ad rem.* 2 *Comm.* 312.

JUS MARITI, is the right of a husband to his wife's goods, and the rents of her heritage. *Scotch Dict.*

JUS PATRONATUS. A Commission from the bishop directed to some persons, usually his Chancellor, and others of competent learning, who are to summon a jury of six clergymen and six laymen, to inquire who is the rightful *patron* of a *church.* If two patrons present their clerks, the bishop shall determine who shall be admitted by *right of patronage,* &c. on commission of inquiry of six clergymen, and six laymen, living near to the church; who are to inquire on articles as a jury, Whether the church is void? Who presented last? Who is the rightful patron? &c. But if coparceners severally present their clerks, the bishop is not obliged to award a *Jus Patronatûs,* because they present under one title; and are not in like case where two patrons present under several titles. 5 *Rep.* 102. 1 *Inst.* 116.

The awarding a *Jus Patronatûs* is not of necessity, but at the pleasure of the Ordinary, for his better information who hath the right of patronage, for if he will at his peril take notice of the right, he may admit the clerk of either of the patrons, without a *Jus Patronatûs.* 1 *Leon.* 168. A bishop may award a *Jus Patronatûs* with a solemn premonition to all persons, *quorum interest,* &c. where he knows not who is the patron, to give notice of an avoidance by deprivation, &c. *Hob.* 318. This inquiry by *Jus Patronatûs* is to excuse the Ordinary from being a disturber. See 3 *Comm.* 246. *Jus Patronatûs* is not within the statute of limitations. 1 *M. Sess.* 2. *c.* 5. In whose name, and under what *teste* a *Jus Patronatûs* is to issue, see *stat.* 1 *Ed.* 6. *c.* 2. § 3.

JUS POSSESSIONIS. A right of seisin or possession; and a parson hath a right to the possession of the church and glebe, *for he hath the freehold;* and is to receive the profits to his own use. *Pars. Law.* 188. See title *Parson.*

JUS POSTLIMINII. A right to a claim after re-capture, as applied in *Maritime law;* derived from the Roman *Jus Postliminii,* which restored the citizen of Rome who had been made a slave to his *threshold,* i. e. his *franchise.* The term is therefore metaphorically used in our Admiralty Court as a resumption of an original inherent right to a re-captured British ship in the legal owners.

JUS PRESENTATIONIS. The right of the patron of presenting his clerk unto the Ordinary to be admitted, instituted, and inducted into a church. See this Dict. title *Advowson.*

JUS RECUPERANDI, INTRANDI, &c. A right of recovering and entering lands, &c. All these *rights* following the relation of their objects, are the effects of the *Civil Law. Co. Lit.* 266.

JUS RELICTÆ. Is the right a wife hath, after her husband's death, to a third of the moveables, if there be children; and one half if there be none. *Scotch Dict.*

JUSTA. A certain measure of liquor, *quasi* Justa *mensura;* being as much as was sufficient to drink at once. *Mon. Ang. tom.* 1. *pag.* 149.

JUSTICE, *justitia.*] Is defined to be a constant, righteous inclination to give every one his due; or the act of doing what is right and just. *Chamb. Johnson. Locke, Instit.* The delaying *Justice* is an obstruction to and kind of denial thereof; but this is understood of unnecessary and unjust delay, for sometimes it is convenient for the better finding out the truth, and preparation of parties, that they may not be surprised.

*Justice* and right shall not be sold, denied, or delayed. *Mag. Chart.* 9 *Hen.* 3. *c.* 29. Right shall be done to all without respect. *Stat. West.* 1. 3 *Ed.* 1. *c.* 1. *Justice* shall not be delayed for any command under the Great Seal, &c. 2 *Ed.* 3. *c.* 8. 14 *Ed.* 3. *stat.* 1. *c.* 14. 11 *R.* 2. *c.* 10. See titles *Habeas Corpus, Liberties.*

JUSTICEMENTS, from *justitia.* All things belonging to *justice. Co.* on *Westm.* 1. *fol.* 225. Also the effects or execution of *justice* or of jurisdiction.

## JUSTICES; *Justiciarii.*

OFFICERS deputed by the King to administer Justice, and *do right by way of judgment.* They are called Justices because in antient time the Latin word for a Judge was *Justitia,* and for that he hath his authority by deputation, and not *jure magistratûs. Glanvil. lib.* 2. *c.* 6. See title *Judges.*

Of these *Justices* there are various sorts, with various powers and duties, as hereafter shortly set forth under the subsequent titles *Justices of Assise,* &c.; and see this Dict. titles *Courts, Chancery, Equity, King's Bench, Common Pleas, &c.*

JUSTICES OF ASSISE, *Justiciarii ad capiendas assisas.*] Such as were wont by special commission to be sent (as occasion was offered) into this or that county, to take assises for the ease of the subjects; for, as these actions pass always by Jury, many men could not, without damage and charge, be brought to London, therefore Justices for this purpose, by commission particularly authorised, were sent to them. For it seems, that the Justices of the Common Pleas had no power to take assises till the *stat.* of 8 *R.* 2. *c.* 2. by which they were enabled to do it, and to deliver gaols. And the Justices of the King's Bench have by that statute such power affirmed unto them, as they had one hundred years before.

These commissions *ad capiendas assisas,* have of late years been settled and executed only in Lent, and the *long vacation,* (called now the Lent and Summer Assises,) when the Justices, and other learned lawyers, may be at leisure to attend those controversies; whereupon it also falls out, that the matters that were wont to be heard by more general commissions of *Justices in Eyre,* are heard all at one time with these assises, which was not so of old, as appears by *Bracton, lib.* 3. *cap.* 7, *num.* 2. And by this means the Justices of both Benches being worthily accounted the fittest of all others, and their assistants, were employed in these affairs. That Justices of Assise and Justices in Eyre did antiently differ, appeareth by *stat.* 27 *Ed.* 3. *c.* 5. And that Justices of Assise and Justices of Gaol-delivery were different, is evident by *stat.* 4 *Ed.* 3. *c.* 3. The oath taken by the Justices of Assise is all one with that taken by the Justices of the King's Bench, Old Abridgment of Statutes, tit. *Sacramentum Justiciorum, Cowell.* See further title *Assise, Circuits.*

To what is said under this Dict. title *Assise,* may be added, that

The Courts of *Assise* and *Nisi Prius* are composed of two or more commissioners, who are sent twice in every year, by the King's special commission, all round the kingdom, (except London and Middlesex, where Courts of *Nisi Prius* are holden in and after every Term, before the Chief or other Judge of the several superior Courts; and except the four Northern Counties, where the assises are only holden twice

a-year,) to try by a jury of the respective counties the truth of such matters of fact as are then under dispute in Westminster-Hall. See *Circuits.* These Judges of Assise came into use in the room of Justices in Eyre, *justiciarii in itinere* (or *itinerantes*); who were regularly established, if not first appointed, by the parliament of Northampton, A. D. 1176. 22 *Hen.* 2. with a delegated power from the King's Great Court, or *aula regia*, being looked upon as members thereof: and they afterwards made their circuit round the kingdom once in seven years for the purpose of trying causes. *Co. Lit.* 293. They were afterwards directed by *Magna Charta*, *c.* 12. to be sent into every county twice a-year, to take (or receive the verdict of the jurors, or recognitors in certain actions then called) recognitions in assises; the most difficult of which they are directed to adjourn into the Court of Common Pleas, to be there determined. The Itinerant Justices were sometimes mere Justices of Assise, or of Dower, or of Gaol-delivery, and the like; and they had sometimes a more general commission, to determine all manner of causes, being constituted *Justiciarii ad omnia placita. Bract. l.* 3. *tr.* 1. *c.* 11. But the present Justices of Assise and *Nisi Prius* are more immediately derived from the *stat. Westm.* 2. 13 *E.* 1. *c.* 30. which directs them to be assigned out of the King's sworn Justices, associating to themselves one or two discreet knights of each county. By *stat.* 27 *E.* 1. *c.* 4. (explained by 12 *E.* 2. *c.* 3.) assises and inquests were allowed to be taken before any one Justice of the Court in which the plea was brought; associating to him one knight, or other approved man of the county. And, lastly, by *stat.* 14 *E.* 3. *c.* 16. Inquests of *Nisi Prius* may be taken before any Justice of either Bench (though the plea be not depending in his own Court,) or before the Chief Baron of the Exchequer, if he be a man of the law; or otherwise before the Justices of Assise, so that one of such Justices be a Judge of the King's Bench or Common Pleas, or the King's Serjeant sworn. They usually make their circuits in the respective vacations after *Hilary* and *Trinity* terms; assises being allowed to be taken in the holy time of Lent by consent of the Bishops at the request of the King, as expressed in *stat. Westm.* 1. 3 *Ed.* 1. *c.* 51. And it was also usual, during the times of popery, for the prelates to grant annual licences to the Justices of Assise to administer oaths in holy times; for oaths being of a sacred nature, the logic of those ages concluded that they must be of ecclesiastical cognizance. Instances hereof may be met with in the Appendix to *Spelman's* Original of the Terms, and in *Parker's* Antiquities, 209. The prudent jealousy of our ancestors ordained, that no man of law should be Judge of Assise in his own county wherein he was born or doth inhabit. *Statutes* 4 *E.* 3. *c.* 2. 8 *Rich.* 2. *c.* 2. 33 *Hen.* 8. *c.* 24. But this restraint is now taken off, as to *Justices of Oyer* and *Terminer*, by *stat.* 12 *Geo.* 2. *c.* 27. See *post*, that title; and for further information on this head, this Dict. tit. *Assise.*

The Courts of *Nisi Prius* in London and Middlesex are called *Sittings;* and those for Middlesex were established by the Legislature in the reign of Queen Elizabeth. In antient times all issues in actions brought in that county were tried at Westminster in the Terms, at the bar of the Court in which the action was instituted: but when the business of the Courts increased, these trials were found so great an inconvenience, that it was enacted by *stat.* 18 *Eliz. c.* 12. that the Chief Justice of the King's Bench should be empowered to try within the term, or within four days after the end of the term, all the issues joined in the Courts of Chancery and King's Bench; and that the Chief Justice of the Common Pleas, and the Chief Baron of the Exchequer, should in like manner try the issues joined in their respective Courts.—In the absence of any one of the Chiefs, the same authority was given to two of the Judges or Barons of his Court.—The *stat.* 12 *Geo.* 1. *c.* 31. extended the time to eight days after term; and impowered *one* Judge or Baron to sit in the absence of the Chief.—*Stat.* 24 *Geo.* 2. *c.* 18. extended the time after Term still further to 14 days.

JUSTICES OF BOTH BENCHES, Shall decide pleas commenced before other matters be arraigned. *Stat. Westm.* 1. 3 *Ed.* 1. *c.* 46. See this Dict. titles *King's Bench*, *Common Pleas.*

JUSTICES IN EYRE, *Justiciarii itinerantes.* So termed of the old *French* word *eree*, as *a grand erre*, *i. e. magnis itineribus*, proverbially spoken.] These, in antient time, were sent with commission into divers counties to hear such causes especially, as were termed *Pleas of the Crown.* And this was done for the ease of the people, who must else have been hurried to the King's Bench, if the case were too high for the county-court: They differed from the *Justices of Oyer and Terminer*, who were sent upon one or a few special causes, and to one place; whereas, the *Justices in Eyre* were sent through the provinces and counties of the land, with more indefinite and general commission, as appeareth by *Bracton, lib.* 3. *cc.* 11, 12, 13. and *Britton, cap.* 2.

And again, because the Justices of Oyer and Terminer were sent uncertainly upon any uproar, or other occasion in the country; but these in *Eyre* (as Mr. *Gwin* sets down in the *Preface to his Reading*) were sent but once in every seven years; with whom agrees *Horne* in his *Mirror of Justices*, *l.* 2. *c. Queux poient estre actours, &c. and l.* 2. *cap. Des peches criminals, &c. al suit del Roy, &c.* And *lib.* 3. *cap. De Justices in Eyre.* Where he also declares what belongs to their office. But according to *Orig. Juridiciales*, they went oftener. These were instituted by King Henry the Second, as *Camden* in his *Brit.* witnesseth, *pag.* 104.—*Hoveden par. post. suor. Annal. fol.* 113. hath of them these words, *Justiciarii itinerantes, constituti per* Henricum *secundum, qui divisit Regnum suum in sex partes, per quarum singulas tres* Justiciarios *itinerantes, constituit, &c.* In some respect they resembled our *Justices of Assise* at present, though their authority and manner of proceeding much differ. 1 *Inst.* 293. *Cowel.* See ante, tit. *Justices of Assise.*

JUSTICE-AYRES or *Justiciary Courts.* The circuits through Scotland for the distribution of Justice. The form of the Justiciary Court consisting of five of the lords of sessions, added to the Justice general and justice clerk, of whom the Justice general, and in his absence, the Justice clerk is president, was settled by the Scotch act 1672. *c.* 16. The quorum of the court consists of 3 Judges, 1681. *c.* 22. *Stat.* 23 *Geo.* 3. *c.* 45. By *stat.* 20 *Geo.* 2. *c.* 43. it was directed, that circuit courts should be held regularly twice a year; and by 30 *G.* 3. *c.* 17, that the Spring circuit should be held between 12th March, and 12th May.—By 23 *Geo.* 3. *c.* 45. the lords of Justiciary are directed to continue in each town in the circuit at least three days, and in no case to leave any trial that has been begun, undecided. There are three circuits, the *South* consisting of the Boroughs of Jedborough, Dumfries and Oyre. *West*, Glasgow, Inverary and Stirling. *North*, Perth, Aberdeen, and Inverness. The jurisdiction of the Court of Justiciary extends to all crimes, and to civil cases by way of appeal to a certain value. See title *Scotland.*

JUSTICE OF THE FOREST, *Justiciarius forestæ;*] Was a Lord by his office; his office was to hear and determine all offences within the forest, committed against vert or venison: Of these there were two, whereof one had jurisdiction over all *Forests* on this side Trent, the other of all beyond it. The chief point of their jurisdiction consisted upon the articles of the *Charta de foresta*, 9 *Hen.* 3. concerning which see *Camd. Brit. p.* 214. The courts where these Justices sat were called *The Justice-seats of the Forest*, held once every three years.

*Manwood's Forest Laws, cap.* 24. these officers were also called *Justices in Eyre of the Forest*; and were the only *Justices* who might appoint deputies by the statute of 32 *H.* 8. *c.* 35. By *stat.* 57 *Geo.* 3. *c.* 61. the offices of these Justices in Eyre were declared to be abolished, on the termination of the existing interests therein. See title *Forest.*

JUSTICES OF GOAL-DELIVERY, *Justiciarii ad Gaolas deliberandas.*] Are those who are sent with commission, to hear and determine all causes appertaining to such, who for any offence are cast into gaol: part of their authority is to punish such as let to mainprize those prisoners who are not bailable by law, nor by the statute *De Finibus. cap.* 3. *F. N. B. fol.* 151. These seem in antient time to have been sent into the country upon several occasions; but afterwards *Justices of Assise* were likewise authorised to the like purposes. *Anno* 4 *Ed.* 3. *c.* 3. Their oath is all one with others of the King's *Justices* of either Bench. See *stat.* 2 *Ed.* 3. *c.* 2. *Old Abridgment of the Statutes*, title *Sacramentum Justiciariorum. Cowel.* Justices of Assise, if laymen, shall deliver the gaols. *Stat.* 27 *Ed.* 1. *st.* 1. *c.* 3.—The Justices of Peace shall deliver over their indictments to the Justices of Gaol-delivery. *Stat.* 4 *Ed.* 3. *c.* 2.—See *post, Justices of Oyer and Terminer.*

JUSTICE OF THE HUNDRED, *Justiciarius Hundredi.*] *Erat ipse* hundredi Dominus, *qui et centurio et centenarius*, hundredique *aldermannus appellatus est. Præerat omnibus* hundredi *friborgis, congnovitque de causis majusculis, quæ in eisdem finiri non potuerunt. Spelm.* See title *Hundred.*

JUSTICES OF THE JEWS, *Justiciarii ad custodiam Judæorum assignati.*] King Richard I. after his return out of the Holy Land, *anno* 1194, appointed particular Justices, laws, and orders, for preventing the frauds, and regulating the contracts and usury of the Jews. *Hoveden, parte post, p.* 745. *Claus.* 3 *Ed.* 1. *m.* 19.

JUSTICES OF LABOURERS. Justices heretofore appointed to redress the frowardness of *labouring men*, who would either be idle or have unreasonable wages. See the old *stats.* 21 *Ed.* 3. *c.* 1. 25 *Ed.* 3. *c.* 8. 31 *Ed.* 1. *c.* 6.

JUSTICES OF NISI PRIUS, Are all one at this time with *Justices of Assise*, for it is a common adjournment of a cause in the Common Pleas, to put it off to such a day, *Nisi Prius Justiciarii venerint ad eas partes ad capiendas assisas; unless* the Justices shall *first* come to a place named to take the assises; which they are sure to do; and upon this clause of adjournment they are called *Justices of Nisi Prius*, as well as Justices of Assise. Their commission you may see in *Cromp. Juris. fol.* 204; yet with this difference between them, that *Justices of Assise* have power to give judgment in a cause, but *Justices of Nisi Prius* only to take the verdict. But in the nature of both their functions, this seems to be the greatest difference, that *Justices of Nisi Prius* have to deal in causes personal as well as real; whereas *Justices of Assise*, in strict acceptation, meddle only with the possessory writs called *Assise. Cowel.* See title *Justices of Assise*; and titles *Jury, Judges, Assise.*

JUSTICES OF OYER AND TERMINER, *Justiciarii ad audiendum et terminandum.*] Were Justices deputed upon some special or extraordinary occasions. Fitzherbert in his *Nat. Brev.* saith, That the commission *d'Oyer and Terminer* is directed to certain persons upon any great riot, insurrection, heinous misdemeanors, or trespasses committed. And because the occasion of granting this commission should be maturely weighed, it is provided by the statute made 2 *Ed.* 3. *c.* 2. That no such commission ought to be granted, but that they shall be dispatched before the Justices of the one Bench or other, or *Justices errant*, except for horrible trespasses, and that by the special favour of the King. The form of this commission, see *F. N. B. f.* 110.

The Courts of *Oyer and Terminer*, and general *Gaol-delivery*, are of a general nature, and universally diffused over the kingdom; but yet are of a local jurisdiction, and confined to particular districts. These are held before the King's Commissioners, among whom are usually two Judges of the Courts at Westminster, twice in every year, in every county of the kingdom; except the four northern ones, where they are held only once, and London and Middlesex, wherein they are held eight times. These were slightly mentioned under the foregoing article, *Justices of Assise*; and under title *Assise*, it is observed, that, at what is usually called the Assises, the Judges sit by virtue of five several authorities: two of which, the Commission of *Assise* and its attendant jurisdiction of *Nisi Prius*, being principally of a civil nature, are there explained: to which may here be added, that these Justices have, by virtue of several statutes, a criminal jurisdiction also, in certain special cases. 2 *Hal. P. C.* 39. 2 *Hawk. P. C. c.* 7. As to another authority, the Commission of the *Peace*, see *post*, title *Justices of the Peace.* It may here be mentioned, that all the Justices of the Peace of any county wherein the assises are held, are bound by law to attend them, or else are liable to a fine, in order to return recognizances, &c. and to assist the Judges in such matters as lie within their knowledge and jurisdiction, and in which some of them have probably been concerned, by way of previous examination. But the authority now to be explained is the commission of *Oyer and Terminer*, to hear and determine all treasons, felonies, and misdemeanors. This is directed to the Judges and several others, or any two of them; but the Judges or Serjeants at Law only are of the *quorum*, so that the rest cannot act without the presence of one of them. The words of the commission are, "to inquire, hear, and determine:" so that by virtue of this commission they can only proceed upon an indictment found at the same assises; for they must first inquire, by means of the Grand Jury or Inquest, before they are empowered to hear and determine by the help of the Petit Jury. Therefore they have besides all these a commission of general *Gaol-delivery*, which empowers them to try and deliver every prisoner, who shall be in the gaol when the Judges arrive at the circuit town, whenever, or before whomsoever indicted, or for whatever crime committed. It was antiently the course to issue special writs of gaol-delivery for each particular prisoner, which were called the Writs *de bono et malo*; 2 *Inst.* 43. but these being found inconvenient and oppressive, a *general* commission for all the prisoners has long been established in their stead. So that, one way or the other, the gaols are in general cleared, and all offenders tried, punished, or delivered over, twice in every year: a constitution of singular use and excellence. Sometimes also, upon urgent occasions, the King issues a special and extraordinary commission of *Oyer* and *Terminer* and *Gaol-delivery*, confined to those offences which stand in need of immediate inquiry and punishment, upon which the course of proceeding is much the same as upon general and ordinary commissions.

Formerly it was held, in pursuance of the statutes 8 *R.* 2. *c.* 2. 33 *H.* 8. *c.* 4. that no Judge or other lawyer could act in the commission of *Oyer* and *Terminer*, or in that of Gaol-delivery, within his own county where he was born or inhabited; in like manner as they are prohibited from being Judges of Assise, and determining civil causes. But that local partiality, which the jealousy of our ancestors was careful to prevent, being judged less likely to operate in the trial of crimes and misdemeanors, than in matters of property and

disputes between party and party, it was thought proper by the *stat.* 12 *Geo.* 2. *c.* 27. to allow any man to be a Justice of *Oyer* and *Terminer* and general Gaol-delivery within any county of England. 4 *Comm.* 269—271. In fine, as the Justices of *Assise* and *Nisi Prius*, are appointed to try civil causes, so are the Justices of *Oyer* and *Terminer* and *Goal-delivery* to try indictments for crimes all over the kingdom, at what are usually denominated the Circuits or Assises; and the towns where they come to execute their commissions are called the Assise towns, and generally the County towns.

JUSTICES OF THE PAVILION, *Justiciarii Pavilionis.*] Are certain Judges of a *Pie-powder Court*, of a most transcendent jurisdiction, held under the Bishop of Winchester at a fair on St. Giles's Hill near that city, by virtue of letters patent granted by Richard II. and Edw. IV. *Episcopus* Wynton, *et successores suos, à tempore quo, &c.*, Justiciarios *suos, qui vocantur* Justiciarii Paviliones, *cognitiones placitorum et aliorum negotiorum eâdem feriâ durante, necnon claves portarum et custodiam prædictæ civitatis nostræ* Wynton, *pro certo tempore feriæ illius, et nonnullas alias libertates, immunitates et consuetudines habuisse, &c.* See the patent at large in *Prynne's Animad.* on 4 *Inst. fol.* 191.

JUSTICES OF THE PEACE;

Judges of Record, appointed by the King's commission to be Justices within certain limits; generally within the counties where they are resident; for the conservation of the peace, and for the execution of divers things comprehended within their commission, and within divers statutes committed to their charge. *Dalt. c.* 2. See *Burn's J.* title *Justices of the Peace.* The principal of these is the *Custos Rotulorum*, or Keeper of the Records of the County. 1 *Comm.* 349. As to Justices in the Metropolis, see this Dict. title *Police.*

I. *Of the Origin of these Officers.*
II. *Of their Commission, and its determination.*
III. *Of their Qualifications.*
IV. *Of their Power, Duty, and Office.*

I. The Common Law hath ever had a special care and regard for the conservation of the peace: for peace is the very end and foundation of Civil Society. And therefore before the present constitution of Justices was invented, there were peculiar officers appointed by the common law for the maintenance of the public peace. Of these, some had and still have this power annexed to other offices which they hold; others had it merely by itself, and were thence named *Custodes* or *Conservatores Pacis.* Those that were so *virtute officii* still continue: but the latter sort are superseded by the modern Justices.

The King's Majesty is, by his office and dignity royal, the principal Conservator of the peace within all his dominions, and may give authority to any other to see the peace kept, and to punish such as break it: hence it is usually called the King's Peace. *Lamb. Eirenarch.* 12.—The Lord Chancellor or Keeper, the Lord Treasurer, the Lord High Steward of England, (when any such officers are in being), and all the Justices of the Court of King's Bench (by virtue of their offices), and the Master of the Rolls (by prescription), are general Conservators of the peace throughout the whole kingdom, and may commit all breakers of it, or bind them in recognizances to keep it. *Lamb.* 12. The other Judges are so, only in their own Courts. The Coroner is also a Conservator of the peace within his own county; as is also the Sheriff; and both of them may take a recognisance or security of the peace. *Britt.* 3. *F. N. B.* 81. Constables, tything-men, and the like, are also conservators of the peace within their own jurisdictions; and may apprehend all breakers of the peace, and commit them, till they find sureties for their keeping it. *Lamb.* 14. See title *Constable.*

Those that were, without any office, simply and merely Conservators of the peace, either claimed that power by prescription, or were bound to exercise it by the tenure of their lands; or, lastly, were chosen by the freeholders in full county-court before the Sheriff; the writ for their election directing them to be chosen *de probioribus et potentioribus comitatûs sui in custodes pacis. Lamb.* 15—17. But when Queen Isabel, the wife of Edward II. had contrived to depose her husband, by a forced resignation of the crown, and had set up his son Edward III. in his place, this being a thing then without example in England, it was feared would much alarm the people: especially as the old King was living, though hurried about from castle to castle, till at last he met with an untimely death. To prevent therefore any risings, or other disturbances of the peace, the new King sent writs to all the Sheriffs in England, the form of which is preserved by *Thomas Walsingham, Hist. A. D.* 1327; giving a plausible account of the manner of his obtaining the crown; to wit, that it was done *ipsius patris bene placito;* and withal commanded each Sheriff, that the peace be kept throughout his bailiwick, on pain and peril of disinheritance and loss of life and limb. And in a few weeks after the date of these writs, it was ordained in parliament, by *stat.* 1 *Ed.* 3. *st.* 2. *c.* 16. that, for the better maintaining and keeping of the peace in every county, good men and lawful, which were no maintainers of evil, or barretors in the county, should be *assigned* to keep the peace. And in this manner, and upon this occasion, was the election of the conservators of the peace taken from the people and given to the King, *Lamb.* 20; this assignment being construed to be by the King's commission, *stats.* 4 *E.* 3. *c.* 2. 18 *E.* 3. *st.* 2. *c.* 2. But still they were only called Conservators, Wardens, or Keepers of the Peace; till the *stat.* 34 *E.* 3. *c.* 1. gave them the power of trying felonies; and then they acquired the more honourable appellation of Justices. *Lamb.* 23.

Polidore Virgil says, that Justices of the Peace had their beginning in the reign of William I. called the Conqueror; but Sir Edward Coke was of opinion, that in the sixth year of King Ed. I., *Prima fuit institutio Justiciariorum pro pace conservandâ.* Mr. Prynne affirms, that in the reign of King Hen. III. after the agreement made between that King and his barons, Guardians *ad pacem conservandam* were constituted: And Sir Henry Spelman differs from both these, being of opinion that they were not made until the beginning of the reign of King Ed. III. when they were thought necessary for suppressing commotions, which might happen upon dethroning of King Ed. II. It is certain the general commission of the peace, by statute, began 1 Ed. III.; though before that time there were particular commissions of peace, to certain men, in certain places; but not throughout England. 2 *Nels. Ab.* 1063.

To explain further what has been said above, as to the election of the Conservators of the peace being taken from the people and given to the King, it should be remarked, that such election, when made, was by force of the King's writ; after which election so made and returned, the King directed a writ to the party so elected, to take upon him and execute the office, until the King should order otherwise. 2 *Inst.* 558, 559.

Justices of Peace were formerly to be allowed 4*s.* a day during their attendance at the quarter sessions, to be paid by the Sheriffs of counties. See *stats.* 12 *R.* 2. *c.* 10. 14 *R.* 2. *c.* 11.

II. These Justices are appointed by the King's special commission under the Great Seal, the former of which was settled by all the Judges, *A. D.* 1590. *Lamb.* 43. 35. The power of constituting them is only in the King; though they are generally made at the discretion of the Lord Chancellor or Lord Keeper, by the King's leave; and the King may now appoint in every county in England and Wales as many as he shall think fit. 1 *Inst.* 174, 175. See *post*, III. Their commission appoints them all, jointly and severally, to keep the peace; and any two or more of them to inquire of and determine felonies and other misdemeanors: in which number some particular Justices, or one of them, are directed to be always included, and no business to be done without their presence; the words of the commission running thus, "*Quorum* (Of whom) *aliquem vestrum*, A. B. C. D., &c. *unum esse volumus*, any one of you the aforesaid A. B. C. D, &c. we will shall be one;" whence the persons so named are usually called Justices of the *Quorum*. And formerly it was customary to appoint only a select number of Justices, eminent for their skill and discretion, to be of the *Quorum*; but now the practice is to advance almost all of them to that dignity, naming them all over again in the *Quorum* clause, except perhaps only some one person for the sake of propriety: and no exception is now allowable for not expressing in the form of warrants, orders, &c. that the Justice who issued them is of the *Quorum*. *Stat.* 26 *Geo.* 2. *c.* 27. See also *stat.* 7 *Geo.* 3. *c.* 21. When any Justice intends to act under this commission, he sues out a writ of *Dedimus potestatem*, from the Clerk of the Crown in Chancery, empowering certain persons therein named to administer the usual oaths to him; which done, he is at liberty to act.

As the office of these Justices is conferred by the King, so it subsists only during his pleasure; and is *determinable*, 1. By the demise of the crown; that is, in six months after. *Stat.* 1 *Ann. c.* 8. But if the same Justice is put in commission by the Successor, he shall not be obliged to sue out a new *dedimus*, or to swear to his qualification afresh, *stat.* 1 *Geo.* 3. *c.* 13. nor by reason of any new commission, to take the oaths more than once in the same reign. *Stat.* 7 *Geo.* 3. *c.* 9.—2. By express writ under the Great Seal, discharging any particular person from being any longer Justice. *Lamb.* 67.—3. By superseding the commission by writ of *supersedeas*, which suspends the power of all the Justices, but does not totally destroy it, seeing it may be revived again by another writ called a *procedendo*.—4. By a new commission, which virtually, though silently, discharges all the former Justices that are not included therein; for two commissions cannot subsist at once.—5. By accession of the office of Sheriff or Coroner. *Stat.* 1 *Mar. st.* 2. *c.* 8. [A Sheriff cannot act as a Justice during the year of his office: but it has been observed, that neither this statute referred to by Blackstone, nor any other, disqualifies a Coroner from acting as a Justice of the Peace: nor do the two offices in their nature seem incompatible. 1 *Comm. c.* 9, *n.* 14.] Formerly it was thought, that if a man was named in any commission of the peace, and had afterwards a new dignity conferred upon him, that this determined his office; he no longer answering the description of the commission; but now by *stat.* 1 *E.* 6. *c.* 7. it is provided, that, notwithstanding a new title of dignity, the Justice on whom it is conferred shall still continue a Justice. If a new commission is made and granted for *Justices of Peace*, out of which some of the Justices in the old commission are omitted, yet what acts they do as Justices are lawful till the next sessions, at which the new commission is published; and when the new commission is published, they are to take notice of it, and not act further. *Moor.* 187. Though by granting a new commission, discharge under the Great Seal, accession of another office, and by the demise of the King, the power and offices of Justices of Peace determine, 4 *Inst.* 165; yet till then they are empowered to act in a great many *particular cases* by statute.

On renewing the commission of the peace, (which generally happeneth as any person is newly brought into the same), there cometh a writ of *Dedimus potestatem* directed out of Chancery, to some ancient Justice (or other) to take the oath of him which is newly inserted, which is usually in a schedule annexed: and to certify the same into that Court, at such a day as the writ commandeth. Unto which oath are usually annexed the oaths of allegiance and supremacy. *Lamb.* 53.

The form of which oath of office at this day is as followeth:

"YE shall swear, that as Justice of the Peace in the county of W. in all articles in the King's commission to you directed, you shall do equal right to the poor and to the rich, after your cunning, wit, and power, and after the laws and customs of the realm, and statutes thereof made: And ye shall not be of counsel of any quarrel hanging before you: And that ye hold your sessions after the form of the statutes thereof made. And the issues, fines, and amerciaments that shall happen to be made, and all forfeitures which shall fall before you, ye shall cause to be entered without any concealment (or embezzling), and truly send them to the King's Exchequer. Ye shall not let, for gift or other cause, but well and truly ye shall do your office of Justice of the Peace in that behalf: And that you take nothing for your office of Justice of the Peace to be done, but of the King and fees accustomed, and costs limited by statute. And ye shall not direct, nor cause to be directed, any warrant (by you to be made) to the parties, but ye shall direct them to the bailiff of the said county, or others the King's officers or ministers, or other indifferent persons, to do execution thereof. So help you God." *Burn. J.* title *Justices of the Peace*, III.

III. Touching the *Number* and *Qualifications* of these Justices; it was ordained by *stat.* 18 *E.* 3. *st.* 2. *c.* 2. that *two* or *three* of the best reputation in each county should be assigned to keep the peace. But these being found rather too few for that purpose, it was provided by *stat.* 34 *E.* 3. *c.* 1. that one lord, and three or four of the most worthy men in the county, with some learned in the law, shall be made Justices in every county. But afterwards the number of Justices through the ambition of private persons, became so large, that it was thought necessary, by *stats.* 12 *Ric.* 2. *c.* 10. and 14 *Ric.* 2. *c.* 11. to restrain them at first to six, and afterwards to eight only. But this rule is now disregarded, and the cause seems to be (as Lambard observed long ago) that the growing number of statute laws, committed from time to time to the charge of Justices of the Peace, have occasioned also (and very reasonably) their increase to a larger number. And as to their qualifications, the statutes just cited direct them to be of the best reputation, and most worthy men in the county; and *stat.* 13 *Ric.* 2. *st.* 1. *c.* 7. orders them to be of the most sufficient knights, esquires, and gentlemen of the law. Also, by *stat.* 2 *Hen.* 5. *st.* 2. *c.* 1. they must be resident in their several counties. And because, contrary to these statutes, men of small substance had crept into the commission, whose poverty made them both covetous and contemptible, it was enacted by *stat.* 18 *Hen.* 6. *c.* 11. that no Justice should be put in commission, if he had not lands to the value of 20*l. per annum*. And the rate of money being greatly altered since that time, it was enacted by *stats.* 5 *Geo.* 2. *c.* 18. 18 *Geo.* 2. *c.* 20. that every Justice, except as is therein excepted, shall have 100*l. per annum*, clear of all deductions; and, if he acts without such

qualification, he shall forfeit 100*l.* This qualification is almost an equivalent to the 20*l.* *per annum* required in Henry the Sixth's time; and of this the Justice must now make oath. *Stat.* 18 *Geo.* 2. *c.* 20. Also, it is provided by the *stat.* 5 *Geo.* 2. *c.* 18. that no practising attorney, solicitor, or proctor, shall be capable of acting as a Justice of the Peace for any county.

The said *stat.* 18 *Geo.* 2. *c.* 20. provides that no person shall be capable of being a Justice of Peace, or acting as such, who shall not have in law or equity, *for his own use in possession*, a freehold, copyhold, or customary estate for life, or some greater estate, or for years determinable upon a live or lives, or 21 years, in lands, &c. of the clear yearly value of 100*l.* over and above all incumbrances, rents, and charges; or entitled to the immediate reversion or remainder in lands, &c. of 300*l.* *per annum*, and who shall not take the oath in this act mentioned, under the penalty of 100*l.* to be recovered by action of debt, and the proof of the qualification to lie on the defendant; and if he insist on any lands not mentioned in the oath, he is to give notice of them; and lands, not mentioned in the oath or notice, are not to be allowed. This act not to extend to Corporation Justices, or to the eldest sons of peers, and of gentlemen qualified to be knights of shires, the officers of the Board of Green Cloth, principal Officers of the Navy, Under Secretaries of State, Heads of Colleges, or to the Mayors of Oxford and Cambridge; all of whom may act without any qualification by estate.

IV. The *Power, Office* and *Duty* of a Justice of the Peace depend on his commission, and on the several statutes which have created objects of his jurisdiction. His commission, first, empowers him singly to conserve the peace; and thereby gives him all the power of the ancient conservators at the common law, in suppressing riots and affrays, in taking securities for the peace, and in apprehending and committing felons, and other inferior criminals. It also empowers any two or more to determine all felonies, and other offences; which is the ground of their jurisdiction at the Sessions. And as to the powers given to one, two, or more Justices by the several statutes, which from time to time have heaped upon them such an infinite variety of business, that few care to undertake, and fewer understand, the office; they are such, and of so great importance to the public, that the country is greatly obliged to any worthy magistrate that, without sinister views of his own, will engage in this troublesome service. 1 *Comm. c.* 9. and see 4 *Comm. c.* 20. If therefore a well-meaning Justice makes any undesigned slip in his practice, great lenity and indulgence are shewn to him in the Courts of Law; and there are many statutes made to protect him in the upright discharge of his office; which, among other privileges prohibit such Justices from being sued for any oversights without notice before-hand; and stop all suits begun, on tender made of sufficient amends. See *stats.* 7 *Jac.* 1. *c.* 5. 21 *Jac.* 1. *c.* 12. 24 *Geo.* 2. *c.* 44. 43 *Geo.* 3. *c.* 141. (*See post.*) But, on the other hand, any malicious or tyrannical abuse of their office is usually severely punished; and all persons who recover a verdict against a Justice, for any wilful or malicious injury, are entitled to double costs. See 1 *Comm.* 350—354.

The *stat.* 24 *Geo.* 2. *c.* 44. particularly provides, that no writ shall be sued out against any Justice of Peace, for any thing done by him in the execution of his office, until a notice in writing shall be delivered to him one month before the suing out the same, containing the cause of action, &c. within which month he may tender amends, and if the tender be found sufficient, he shall have a verdict. No such plaintiff shall recover against the Justice, unless such notice shall be proved at the trial. If the Justice shall neglect to make such tender, he may, before issue joined, pay into Court such sum as he shall think fit. Where an action is against a Justice and constable, if there be a verdict against the Justice, and the constable be acquitted, the plaintiff shall recover such costs against the Justice, as to include the costs the plaintiff shall be obliged to pay the constable. And this statute enacts, that if the plaintiff in any such action shall recover against a Justice, *and the Judge shall certify that the injury was wilfully and maliciously done*, the plaintiff shall recover double costs. No action shall be brought against a Justice for any thing done in the execution of his office, unless commenced within six months after the act committed.

This act is by very many subsequent acts extended to Justices of various descriptions, and on several occasions, as Militia, &c.

By 43 *Geo.* 3. *c.* 141. it is provided, that in all actions against Justices on account of any conviction, &c. by them, the plaintiff (besides any penalty levied) shall recover only *two-pence* damages; unless notice and want of probable cause be expressly alledged in the declaration, and which shall be in an action upon the case only. And if on the trial of any such action it shall be proved that the plaintiff was guilty of the offence whereof he was convicted, and that he underwent no greater punishment than was by law assigned thereto, he shall not be entitled to recover any penalty levied, or any costs or damages against the Justice.

See as to proceedings on this latter statute, *Massey*, v. *Johnson*, 12 *East's Rep.* 67. *Gray* v. *Cookson*, 16 *East's Rep.* 13. *Burley* v. *Bethune*, 1 *Marsh*, 220.

Justices of Peace are to hold their sessions four times a year, *i. e.* the first week after Michaelmas, the Epiphany, Easter, and St. Thomas, called Becket, being the 7th of July. 12 *R.* 2. *c.* 10. 2 *H.* 5. *c.* 4. See title *Quarter Sessions.* They are Justices of Record, for none but Justices of Record can take a recognizance of the peace. Every Justice of Peace hath a separate power, and may do all acts concerning his office apart and by himself; and even may commit a fellow Justice upon treason, felony, or breach of the peace: and this is the antient power which Conservators of the peace had at common law. But it has been held, that one Justice of the Peace cannot *commit* another Justice, for breach of the peace, though the Justices in sessions may do it. *Lamb. Just.* 385. *Jenk. Cent.* 174. By several statutes Justices may act in many cases where their commission doth not reach, the statutes themselves being a sufficient commission. *Lamb. lib.* 4. *Wood's Inst.* 79, 80.

The statute 4 *H.* 7. *c.* 12. (and statutes 33 *H.* 8. *c.* 10. 37 *H.* 8. *c.* 7.) give them a farther general power than is expressed either in their commission, or in any particular statute. The particular statutes are to be executed as they direct; wherein if no express power is given to any one Justice, he can admonish only, and if not obeyed, may make presentment of the offence upon the statute, and with his fellow Justices hear and determine it in Sessions; or he may bind the offender to the peace, or the good behaviour: some statutes empower one Justice of Peace alone to act; some require two, three, four Justices, &c. And where a special authority is given to Justices of Peace, it must be exactly pursued; or the acts of the Justices will not be good. 2 *Salk.* 475.

If a Justice of Peace does not observe the form of proceeding directed by statute, it is *coram non judice*, and void; but if he acts according to the direction of the statutes, neither the Justices in sessions nor B. R. can reverse what he has done. *Jones*, 170.

The power of Justices is *ministerial* when they are commanded to do any thing by a superior authority, as by the court of B. R. &c. In all other cases they act as *judges*: but they must proceed according to their commission, &c,

Where a statute requires any act to be done by two Justices, it is an established rule, that if the act is of a judicial nature, or is the result of discretion, the two Justices must be present to concur and join in it, otherwise it will be void; as in orders of removal and filiation, the appointment of overseers, and the allowance of the indenture of a parish apprentice; but where the act is merely ministerial, they may act separately, as in the allowance of a poor rate. This is the only act of two Justices which has yet been construed to be ministerial; and the propriety of this construction has been justly questioned. 4 *Term Rep.* 386.

From the general rule of law that a Justice is to act only within his own county, two considerations arise: One, how far a Justice can act when he is out of the county; the other when he is in the county, how far his power extends to other counties.

As to the former case, when he is out of the county, it is said that the Justices have no *coercive* power when out of the county; and therefore that an order of bastardy, or for payment of labourer's wages, made by them out of the county, is not binding. Yet it is said, that recognizances and informations *voluntarily* taken before them in any place are good. 2 *Hawk. P. C.* And *Hale* says, that a Justice of the Peace may do a ministerial act out of his county, as examining a party robbed whether he knows the felons: but that he cannot do a compulsory act, as committing a person for not giving a recognizance.

Now, however, by *stats.* 28 *Geo.* 3. *c.* 49. (and 59 *Geo.* 3. *c.* 92. as to Ireland) any Justice acting as such for *any two or more counties*, being adjoining counties, may act in all matters concerning any or either of the said counties; and all acts of any such Justice, and of any officer in obedience thereto, shall be as valid as if done in the county to which they relate. Provided that such Justice be personally resident in one of the said counties at the time of doing such act, and that his warrants, &c. be directed, in the first instance, to the constable, &c. of the county to which the same relate.

*Stat.* 24 *Geo.* 2. *c.* 55. enacts, That where a Justice shall grant a warrant against a person escaping or residing out of his jurisdiction, a Justice of the county, &c. where such person shall reside, shall indorse his name on the warrant, which shall be a sufficient authority to the person to whom the warrant was originally directed, to execute the warrant, and carry the person before the Justice who indorsed the warrant, or any other Justice of the same county, who, if the offence be bailable, shall take bail for the person's appearing at the next sessions for the county, &c. where the offence was committed, and deliver the recognizance and all proceedings to the constable, &c. who apprehended the party, to be by him delivered to the clerk of the peace of the county, &c. where the fact was committed; if the fact be not bailable, or the party shall not give bail, the constable may carry the party before a Justice of the county where the fact was committed. No action lies against the Justice who indorses such warrant, but only against the Justice who granted it, if cause.

By *stat.* 13 *Geo.* 3. *c.* 31. Offenders against whom warrants are issued by any Justice of Peace in England, escaping into Scotland, the Justices in Scotland may indorse the warrant, and the offender shall be conveyed to the adjacent county of England, and the Justices there, shall, (if that is not the county where the offence was committed) indorse the warrant, &c. according to the directions of *stat.* 24 *Geo.* 2. *c.* 55: And by 54 *Geo.* 3. *c.* 186. the provisions of the act 13 *Geo.* 3. *c.* 31. are extended to the cases of all warrants issued in England, Scotland, or Ireland respectively. See, for a full statement of the provisions of the statutes 44 *Geo.* 3. *c.* 92. and 45 *Geo.* 3. *c.* 92. this Dict. titles *Ireland*, *Scotland*.

Justices either of the county from which tenants fraudulently remove goods, or of that in which they are concealed, may convict the offenders in their respective counties. Unless facts are stated to make the contrary appear, the court always presumes in favour of the acts of inferior jurisdictions. *R.* v. *Morgan*, *Cald. ca.* 156.—Also by *stat.* 9 *Geo.* 1. *c.* 7. a Justice dwelling in a city or precinct, that is a county of itself within the county at large, may act at his own dwelling-house for such county at large. This statute is explained by *stat.* 28 *Geo.* 3. *c.* 49. § 4. which provides, that any Justice acting for any county at large, may act as such at any place within any city, &c. being a county of itself, and situate within, or adjoining to such county at large; but not to extend to give such Justices of the county, not being Justices of the city, &c. power to act in any matters relating to such city, &c. And in Ireland 59 *Geo.* 3. *c.* 92. § 4.

A man may be a Justice of Peace in one part of Yorkshire, and yet not be a Justice of Peace in every part of the county; this county being divided into separate ridings. *Hill.* 22 *Car. B. R.*

By *stat.* 16 *Geo.* 2. *c.* 18. Justices of Peace may do all things relating to the laws for relief of the poor, the passing and punishing vagrants, the repairs of the highways, or concerning parochial taxes or rates, although such Justices are rated to the taxes, within any place where they execute their office: but no Justice shall act in determining any appeal to to the quarter-sessions, from any order that relates to the parish where he is so charged. In the case of *R.* v. *Yarpole*, it was determined, that on an appeal to the sessions, against an order of removal, those Justices who are rated to the relief of the poor in either of the contending parishes have not a right to vote. 4 *Term Rep.* 71.

By *stat.* 13 *Geo.* 2. *c.* 18. no *certiorari* shall issue to remove any order, made by Justices of Peace of any county, &c. or at the quarter-sessions, unless it be applied for within six months, and proved on oath that six days' notice in writing was given to the Justices, by whom the order was made, that they or the parties concerned may shew cause against it. See tit. *Certiorari*.

If a commissioner of *oyer* and *terminer* issues to hear and determine felonies, that determines the commissions of Justices of Peace as to felonies, though not as to the peace, &c. The *stat.* 1 & 2 *P. & M. c.* 13. directs Justices of Peace to take examinations in cases of felony and murder, and to certify them to the Justices of gaol-delivery, &c. since which they forbear to try great felonies. *H. P. C.* 166.

Justices of Peace may take an information against persons committing treason; issue warrants for their apprehension, and commit them to prison, &c. They commit all felons in order to trial; and bind over the prosecutors to the Assises: and if they do not certify examinations and informations to the next gaol-delivery, or do not bind over prosecutors, &c. they shall be fined. *Dalt. c.* 11.

For petit larceny and small felonies, the Justices in their Quarter Sessions may try offenders; other felonies being of course tried at the Assizes; and in case of felonies, and pleas upon penal statutes, they cannot hold cognizance without an express power given them by the statutes. Justices of Peace in their sessions cannot try a cause the same sessions, without consent of parties, &c. for the party ought to have convenient time or it will be error. *Cro. Car.* 317. *Sid.* 334. Nor can the sessions of Justices refer a matter which ought to be tried, to be determined by another session; yet they may refer a thing to another to examine, and make report to them for their determination. 2 *Salk.* 477. The Sessions is all as one day, and the Justices may alter their judgments at any time while it continues. *Ibid.* 494. See tit. *Sessions*.

It is incident to the office of a Justice of Peace to commit offenders: and a Justice may commit a person that doth a

felony in his own view, without warrant; but if it be on the information of another, he must make a warrant under hand and seal for that purpose. If a Justice issues a warrant to arrest a felon, and the accusation be false, the Justice is excused, where a felony is committed: if there be no accusation, action will lie against the Justice. 1 *Leon.* 187. A Justice makes a warrant to apprehend a felon, though he is not indicted, he who executes the warrant shall not be punished. 13 *Rep.* 76. *Cro. Jac.* 432. If complaint and oath be made before a Justice of Peace, by one, of goods stolen, and that he suspects they are in such a house, and shews the cause of his suspicion; the Justice may grant a warrant to the constable, &c. to search in the place suspected, and seize the goods and person in whose custody they are found, and bring them before him or some other Justice, to give an account how he came by them; and farther to abide such order, as to law shall appertain. 2 *Hale's Hist. P. C.* 114. The search on these warrants ought to be in the day-time, and doors may be broken open by constables to take the goods; which are to be deposited in the hands of the sheriff, &c. till the party robbed hath prosecuted the offender, to have restitution. *Ibid*, 150, 151.

A Justice of Peace may make a warrant to bring a person before himself only, and it will be good; though it is usual to make warrants to bring the offenders before him or any other Justice of the county, &c. And if a Justice directs his warrant to a private person, he may execute it. 5 *Rep.* 60. 1 *Salk.* 347.

It seems now to be indisputable, that in all cases where Justices of Peace have a jurisdiction over the offence, they may grant a warrant in order to compel the person accused to appear before them; for it would be absurd to give them power to examine an offender, unless they had also a power to compel him to attend and submit to such examination. 2 *Hawk. P. C. c.* 13. § 15. And this extends undoubtedly to all treasons, felonies, and breaches of the peace, and also to all such offences as they have power to punish by statute. Sir *E. Coke* indeed hath laid it down, that a Justice of the Peace cannot issue a warrant to apprehend a felon upon bare suspicion; no, not even till an indictment be actually found; 4 *Inst.* 176. and the contrary practice is by others held to be grounded rather upon connivance, than the express rule of law, though now by long custom established. 2 *Hawk. P. C. c.* 13. § 16. A doctrine which would in most cases give a loose to felons to escape without punishment; and therefore Sir *Mathew Hale* hath combated it with invincible authority and strength of reason: maintaining, 1. That a Justice of Peace hath power to issue a warrant to apprehend a person *accused* of felony, though not yet *indicted*; 2 *Hal. P. C.* 108. and, 2. That he may also issue a warrant to apprehend a person *suspected* of felony, though the original suspicion be not in himself, but in the party that prays his warrant, because he is a competent judge of the probability offered to him of such suspicion. But in both cases it is fitting to examine upon oath the party requiring a warrant, as well to ascertain that there *is* a felony or other crime actually committed, without which no warrant should be granted; as also to *prove* the cause and probability of suspecting the party against whom the warrant is prayed. *Ibid.* 110. This warrant ought to be under the hand and seal of the Justice, should set forth the time and place of making, and the cause for which it is made; and should be directed to the constable, or other peace-officer (or, it may be, to any private person by name;) *Salk.* 176. requiring him to bring the party either generally before *any* Justice of the Peace for the county, or only before the Justice who granted it; the warrant in the latter case being called a *special* warrant. 2 *Hawk. P. C. c.* 13. § 26. A general warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for its uncertainty. 1 *Hal. P. C.* 580. 2 *Hawk. P. C. c.* 13. for it is the duty of the magistrate, and ought not to be left to the officer, to judge of the ground of suspicion. And a warrant to apprehend all persons, guilty of a crime therein specified, is no legal warrant: for the point, upon which its authority rests, is a fact to be decided on a subsequent trial; namely, whether the person apprehended thereupon be really guilty or not. It is therefore in fact *no* warrant at all; for it will not justify the officer who acts under it; whereas a warrant properly penned, (even though the magistrate who issues it should exceed his jurisdiction,) will, by *stat.* 24 *Geo.* 2. *c.* 44. at all events indemnify the officer who executes the same ministerially. And, when a warrant is received by the officer, he is bound to execute it, so far as the jurisdiction of the magistrate and himself extends. A warrant from the Chief or other Justice of the Court of King's Bench extends all over the kingdom; and is *tested*, or *dated* England; not Oxfordshire, Berks, or any other particular county. But the warrant of a Justice of the Peace in one county, as Yorkshire, must be backed, that is, signed, by a Justice of the Peace in another, as Middlesex, before it can be executed there. Formerly, regularly speaking, there ought to have been a fresh warrant in every fresh county; but the practice of backing warrants had long prevailed without law, before it was authorised by *stats.* 23 *Geo.* 2. *c.* 26. § 11. 24 *Geo.* 2. *c.* 55. and 13 *Geo.* 3. *c.* 31. 4 *Comm.* 290—292. See *ante.*

Justices of Peace may make and persuade an agreement in petty quarrels and breaches of the peace, where the King is not entitled to a fine: though they may not compound offences, or take money for making agreements. *Noy*, 103. Justices may not intermeddle with property; if they do, action lies against them and the officers who execute their orders. 3 *Salk.* 217. But see title *Forcible Entry.*

A Justice of Peace hath a discretionary power of binding to the good behaviour; and may require a recognizance with a great penalty of one for his keeping of the peace, where the party bound is a dangerous person, and likely to break the peace, and do much mischief. *Pasch.* 1652. 2 *Lill. Abr.* 131. And where a person is to be bound to the good behaviour, for default of sureties he may be committed to gaol. But a man giving security for keeping the peace in B. R. or the Chancery, may have a *supersedeas* to the Justices in the country not to take security; and so where a person hears of a warrant out against him, and gives surety of the peace to any other Justice, &c. See title *Surety of the Peace.*

A Justice of the peace is authorised to require surety of the peace for a limited time, according to his discretion, and need not bind the party over to the next session only. *Willes* v. *Bridger*, *Term Rep. K. B. Hil.* 59 *Geo.* 3. 278.

If one make an assault upon a Justice of Peace, he may apprehend the offender, and send him to goal till he finds sureties for the peace; and a Justice may record a forcible entry upon his own possession: in other cases he cannot judge in his own cause. *Wood's Inst.* 81. Where a man abuseth a Justice by words, before his face, or behind his back, in relation to his office, he may be bound to his good behaviour; and if a Justice of Peace be abused in the execution of his office, the offender may be also indicted and fined. *Cromp.* 149. 4 *Rep.* 16. To say of a Justice of Peace he doth not understand law, &c. is indictable; and contempts against Justices are punishable by indictment and fine at the Sessions. 3 *Mod.* 139. 1 *Sid.* 144. But abusing a Justice out of his office, by words that do not relate to his office, seems to stand only as in the case of other persons.

If a magistrate abuses the authority reposed in him by the law, in order to gratify his malice, or promote his private interests or ambition, he may be punished also *criminally* by indictment or information. But the Court of K. B. have

frequently declared, that though a Justice of Peace should act illegally, yet if he has acted candidly without any bad view or ill intention whatsoever, the Court will never punish him by the extraordinary mode of an information, but will leave the party complaining to the ordinary method of prosecution by action or indictment. *Burr.* 556. 785. 1162. 1 *Term Rep.* 653. 692. And in no case will the Court grant an information, unless an application for it is made within the second Term after the offence is committed; and unless notice of the application be previously given to the Justice, and the party injured will undertake to bring no action. And if the party proceeds both by action and indictment, the Attorney General will grant a *noli prosequi* to the indictment. Indeed where a Justice has committed an involuntary error, without any corrupt motive or intention, it may be questioned, whether it is an indictable offence. 1 *Comm.* 354. *c.* 9. and Mr. *Christian's note* there.

Justices shall not be regularly punished for any thing done by them in Sessions as Judges; and if a Justice of Peace be sued for any thing done in his office, he may plead the general issue, and give the special matter in evidence; and if a verdict goes for him, or the plaintiff be nonsuit, he shall have double costs. *Stat.* 21 *Jac.* 1. *c.* 12. Though if a Justice of Peace is guilty of any misdemeanor in his office, Information lies against him in B. R. where he shall be punished by fine and imprisonment. *Sid.* 192. If a person be never summoned by Justices of Peace, to be heard and make his defence, before the Justices make any order against him, it is a misbehaviour for which an information will lie against them. See title *Conviction.*

The Court of B. R. will grant an information against a Justice of Peace on motion for sending a servant to the House of Correction without sufficient cause; if the Justice do not shew good cause. &c. *Mod. Cas. in L. and E.* 45, 46. And for contempt of laws, &c. attachment may be had against Justices of Peace in B. R. on motion of the Attorney General, &c. A Justice of Peace fined a thousand marks, for corrupt practice. See 1 *Keb.* 727.

By 41 *Geo.* 3. (*U. K.*) *c.* 85. for better payment of Fines and Forfeitures imposed by Justices out of Sessions in England, receipts are to be given by the Justices for such fines, accounts thereof kept by them, and the amount paid over annually to the Sheriff of the county: a duplicate account, to charge the Sheriff, is to be transmitted by the Justice to the clerk of the peace.

By the *stat.* 27 *Geo.* 2 *c.* 20, in all cases of a warrant of distress for levying any penalty inflicted, or money directed to be paid, the Justice or Justices granting such warrant, may therein order the goods distrained to be sold within a certain time limited in the warrant, to be not less than four days, nor more than eight days, unless the penalty or money, with the reasonable charges of taking and keeping such distress, be sooner paid. The officer may deduct the reasonable charges of taking, keeping, and selling the distress; and if required, shall shew the party his warrant, and permit him to take a copy of it. This not to extend to *stats.* 7 & 8 *W.* 3. *c.* 34. 1 *Geo.* 1. *c.* 6, as to levying tithes, &c. on Quakers.—The *stat.* 18 *Geo.* 3. *cap.* 19, enables Justices to award costs on determination of complaints before them, and to levy them by distress and sale of the party's goods, or commit the offender to the House of Correction. General rules as to costs may be settled in Sessions, and allowed by the Judges on their circuits.

The *stat.* 26 *Geo.* 2. *c.* 14, was made for the regulation of fees of Justices' clerks; a table of which is to be made at sessions, and allowed by the Judges on their circuits; and in Middlesex, by *stat.* 27 *Geo.* 2. *c.* 16, by the Chief Justices at Westminster, or any two of them,—And by 57 *Geo.* 3. *c.* 91, the Justices at sessions are empowered to settle the fees of the *Clerk of the Peace.*

For further matter relative to this extensive and useful office, see *Burn's Justice*, title *Justices of the Peace;* and that book, and this Dictionary, *passim;* under the appropriate titles.

Justices of Peace within Liberties; *Justiciarii ad pacem infrà libertates.*] Are such in cities, and other corporate towns, as the others are of the county; and their authority is all one within the several terrorities and precincts, having besides the assise of ale and beer, wood, victuals, &c. See *stat.* 27 *H.* 8. *c.* 5. But if the King grant to a Corporation, that the Mayor and Recorder, &c. shall be Justices of Peace within the city; if there be no words of exclusion Justices of the county have concurrent jurisdiction with them; and the King, notwithstanding his charter, may grant a commission of the peace specially in that city or county. 2 *Hale's Hist. P. C.* 47. Also where the Justices of any corporate town, deny doing right, Justices of the Peace of the county may inquire into it. *Mod. Cas.* 164. The Justices of Peace in cities, or towns corporate, may commit persons apprehended within their liberties to the House of Correction of the county, &c. which persons shall be liable to the like correction and punishment, as if committed there by any Justice of the same county. *Stat.* 15 *Geo.* 2. *c.* 24. Justices of cities and corporations are not within the qualification act, 5 *Geo.* 2. *c.* 18. See titles *Mayors, Corporations, Justices of the Peace.*

By *stat.* 38 *Geo.* 3. *c.* 52, it is enacted, that any prosecutor may prefer his indictment, for any offence committed within the county of any city or town corporate, to the grand jury of the next adjoining county, to be tried there; and by the same act provision is made for the trial of indictments, found by any grand jury of any city or town corporate, in the next adjoining county: and by *stat.* 51 *Geo.* 3. *c.* 100. the court, before whom the conviction shall take place, may order the offender to be punished either in the county where he was tried, or in the city, &c. where the offence was committed. In all those cases all expenses incurred by the trial, &c. are to be defrayed by the city, &c. in which the offence was committed.

By *stat.* 1 *Geo.* 4. *stat.* 1. *c.* 14. to remedy certain inconveniences in local and exclusive jurisdictions; after reciting that trial of *capital offences* before Justices of Peace within local and exclusive jurisdictions, not being counties, may be attended with inconvenience, it is enacted, that such Justices, acting within and for any town, liberty, soke, or place not being a county, but having exclusive jurisdiction for the trial of felonies and misdemeanours committed within the same, shall have full power within their respective limits, at their discretion, to commit persons charged with any capital offences, perpetrated within such limits, to the gaol of the county within which such liberty, &c. shall be situate, to be tried at the next sessions of Oyer and Terminer for the county; and such Justices shall bind over the parties and witnesses to prosecute and give evidence there, and shall transmit the depositions, &c. thither. The expenses of the prosecution, &c. to be defrayed (under orders of the Judges,) by the liberty, &c. within which the offence was perpetrated.

Justices of Trail-Baston. Were Justices appointed by King Ed. I. during his absence in the Scotch and French wars. They were so styled, says Hollingshed, of trailing or drawing the staff of justice; or for their summary proceeding, according to Sir Edward Coke, who tells us, they were in a manner Justices in Eyre; and it is said, they had a baston, or staff, delivered to them as the badge of their office, so that whoever was brought before them, was *trailé ad baston, traditus ad baculum:* whereupon they had the name of Justices *de trail baston*, or *Justiciarii ad trahendum offendentes*

*ad baculum vel baston.* Their office was to make inquisition through the kingdom on all officers and others, touching extortion, bribery, and such like grievances; of intruders into other men's lands, barretors, robbers, and breakers of the peace, and divers other offenders; by means of which inquisitions, some were punished with death, many by ransom, and the rest flying the realm, the land was quieted, and the King gained riches towards the support of his wars. *Mat. Westm. anno* 1305. A commission of *trail-baston* was granted to Roger de Gray, and others his associates, in the reign of King Ed. III. *Spelm. Gloss.*

JUSTICE-SEAT. Is the highest court that is held in a Forest, and is always held before the Lord Chief Justice in Eyre of the Forest, upon warning forty days before; and there fines are set for offences, and judgments given, &c. *Manwood's Forest Law, cap.* 24. The fine and amercement of the Justices in Eyre, for false judgment, or other trespass, shall be assessed by the said Justices upon the oaths of Knights, and other honest men, and be estreated into the Exchequer. *Stat.* 3 *Ed.* 1. *c.* 18. And Justices in Eyre shall appoint a time for delivering in all writs by the Sheriff, &c. *Stat.* 13 *Ed.* 1. *cap.* 10. See this Dictionary, title *Forest.*

JUSTICIAR, OR JUSTICIER, Fr. *Justicier.*] A Judge, Justice, or as he was sometimes termed, Justiciary. Shakspeare uses the term *Justicier* for Judge. The Lord Bermingham, Justicier of Ireland. *Baker's Chron. Angl. fol.* 118.

The whole jurisdiction which is now distributed among the several Courts of Westminster-Hall, seems in the first reigns after the Conquest to have been lodged in one Court, commonly called the King's Court, where justice is said to have been administered sometimes by the King himself in person, and sometimes by the High Justicier, who was an officer of very great authority, and used in the King's absence beyond sea, to govern the realm as Vice-Roy. 2 *Hawk. P. C. c.* 3.

The first Justiciaries after the Conquest were Odo bishop of Baieux in Normandy, half brother by the mother to the conqueror, and William Fitz-Osborn, who was viceroy, and had the same power in the north that Odo had in the south, and was the chief in the Conqueror's army. The next Justiciaries were William Earl of Warren in Normandy, a great commander in the battle against Harold, and Richard de Benefacta, alias Richard de Tonebridge, son to Gilbert Earl of Brion in Normandy, and were constituted in 1073. In a great plea between Lanfrank and the said Odo, Goisfrid Bishop of Constance in Normandy, was Justiciary. In the beginning of William Rufus, Odo was again Justiciary. William de Carilefo, Bishop of Durham, a Norman, succeeded Odo, and then followed Ranulph Flambard in 1099. Afterwards, in the reign of Henry I. in 1100, Hugo de Bocland, a Norman, was Justiciary, and after him his son Richard Basset; then Roger Bishop of Salisbury, was Justiciary and Chancellor. The next, in the time of King Stephen, was Henry Duke of Normandy, afterwards King Henry II. And in Henry the Second's time was Robert de Bello Monte Earl of Leicester in 1168, but Alboric de Vere Earl of Guisnes, is said to have been Justiciary before him; and after Earl of Leicester, Richard de Lucie was made Justiciary; after him in 1180, Ranulph de Glanville, that famous lawyer, was made Justiciary; after him, Hugo de Putacio, commonly called Pusas, Putac, or Pudsey, nephew to King Stephen by his sister, was made Justiciary in the north parts beyond Trent; and William de Longo-Campo, or Long-Champ, Bishop of Ely, was at the same time, by Richard the First, made Justiciary on the south parts of this side Trent. Then, after the deprivation of William Bishop of Ely, Walter Archbishop of Rouen in Normandy, was made Justiciary of all England. *Brady's Preface, &c.* 151. (D) (E) (F); 152. (A) (B) (C): See *Dugd. Chron. Series*, 1, 2, 3, 4, 5.

William Long-Champ Bishop of Ely, Chief Justiciar and Lord Chancellor to Richard I. *Speed.* 473. Fitz Peter, Chief Justiciar in the first of John. *Ib.* 487. Hubert de Burgh Earl of Kent, Chief Justiciar. 1 *Hen.* 3. *Ib.* 513. And after him, Stephen Segrave. *Ib.* 521. The Chief Justiciar was the Minister of regal command in the absence of the King. *Ib* 513.

Towards the latter end of the Norman period, the power of the Grand Justiciar was broken, so that *Aula Regis*, which before was one great Court where the Justiciar presided, was divided into four distinct Courts, *viz.* Chancery, Exchequer, King's Bench, and Common Pleas. *Gilb. Hist. View of the Court of Exchequer*, 7, cites *Madd.* 2. 4. It determined about the 45 *H.* 3. *Brady's Preface, &c.* 154, *b.*

The Chancellor was the first in order on the left hand of the Justiciary, and as he was a great person in Court, so he was in the Exchequer; for no great thing passed but with his consent and advice; nothing could be sealed without his allowance and privity. But the Justiciary surmounted him and all others in authority; and he alone was endowed with and exercised all the power which afterwards was executed by the four chief Judges, *viz.* the Chief Justice of B. R. the Chief Justice of C. B. the Chief Baron of the Exchequer, and the Master of the Court of Wards. *Brady's Preface to the Roman History*, 153. (B). As long as the power of the Justiciar continued, the *Aula Regis* was one Court, and only distinguished by the several officers; for all the officers were united under the Justiciar, and he was the governor and superintendant of the Courts. *Gilb. Hist. View of the Exchequer*, 10. See titles *Judge, Justices, Court, King's Bench, &c.*

JUSTICIATUS. Judicature, Prerogative. *Cowell.*

JUSTICIES. Is a writ directed to the Sheriff in some special cases, by virtue of which he may hold plea of debt in his County Court for a large sum; whereas, otherwise, by his ordinary power, he is limited to sums under 40*s.* *F. N. B.* 117. *Kitch.* 74. It is called *Justicies*, because it is a commission to the Sheriff to do a man justice and right, beginning with the word *Justices*, &c. *Bract. lib.* 4, makes mention of a *Justicies* to the Sheriff of London, in a case of dower: and it lies in account, annuity, customs, and services, &c. *New Nat. Br.* In debt, the writ runs thus: *The King to the Sheriff of S. greeting: We command you, that* You Justice A. B. *that justly and without delay be render to* C. D. *five pounds, which to him he oweth, as it is said, and as reasonably he can show, that he ought to render him, that no more clamour thereof we may hear, for default of justice, &c.*

This writ of *Justicies* impowers the Sheriff, for the sake of dispatch, to do the same justice in his County Court as might otherwise be had at Westminster. *Finch.* 318. *F. N. B.* 152. The Freeholders of the county are the real Judges in this Court, and the Sheriff is the ministerial officer. 3 *Comm.* 36. *c.* 4. See the statutes of Wales, 12. *Ed.* I. and this Dict. title *County Court.*

JUSTIFIABLE HOMICIDE. See title *Homicide.*

JUSTIFICATION, *justificatio.*] A maintaining or showing good reason in Court why one did such a thing which he is called to answer. *Broke.* Pleas in Justification are to set forth some special matter whereby the party justifies what he hath done concerning lands or goods; as that he did it by authority: and this may be by the law, or from another person; wherein, to make it right, there must be good authority, which is to be exactly pursued. *Shep. Epit.* 1041. Justification may be in trespass, and under writs, &c.

But a person cannot justify a trespass, unless he confesseth it; for he ought to plead the special matter, and confess and justify what he hath done. 3 *Salk.* 218. See titles *Action*, *Words*, *Libel*, *Pleading*, *Trespass*.

A Justification (in other words) is a special plea in bar; as in actions of assault and battery, *son assault demesne*, *viz.* that the plaintiff first, with force and arms, assaulted the defendant, and he defended himself, and therefore, if any damage happened to plaintiff, it was owing to the assault he made on defendant, and in his necessary defence;—in other actions of trespass, that the defendant did the thing complained of in right of some office which warranted him so to do;—or in an action of slander, that the plaintiff was guilty of such or such a crime, and therefore he, the defendant, spoke the words.

JUSTIFICATORS, *justificatores*.] A kind of compurgators, or those that by oath justified the innocence, or oaths of others; as in the case of waging of law. See *Wager of Law*.

JUSTIFYING BAIL. See title *Bail*, I.

JUSTITIA. A statute, law, or ordinance. *Hoveden. p.* 666.

*Justitia*, is often taken for jurisdiction, or the office of a Judge. *Leg. Edwd. Conf. cap.* 26.

JUSTITIAM FACERE. To hold plea of any thing. See *Selden in his Notes upon Eadmerus.*

JUSTITIUM. A ceasing from the prosecution of law, and exercising justice in places judicial. *Cowell.*

JUSTS, Fr. *Jousta, i. e. decursus.*] Were exercises between martial men and persons of honour, with spears on horseback; and different from *Tournaments*, which were military contentions, and consisted of many men in troops; whereas *Jousts* were usually between two men singly. They are mentioned in *stat.* 24 *Hen.* 8. *cap.* 13, but are now wholly disused and illegal.

# ADDENDA ET CORRIGENDA.

## VOL. I.

**** Numbers are prefixed to each of the following Additions, in order that Reference may be made to them with the Pen, at the several Places in the Volume where each is to be inserted.*

1. ALIEN. *Add at the end of Division* III.

By *stat* 58 *Geo.* 3. *c.* 97, (a temporary law, but continued by several subsequent acts) to guard against some evils which had been found to arise, from the powers of certain corporations to admit aliens to the privilege of natural born subjects, it is enacted, that no alien shall become a naturalized subject, or be made or become denizen, or become entitled to the privileges of any naturalized subject or denizen, in any other manner or by any other authority than by act of parliament, to be thereafter passed, or by letters of denization to be granted by the King. An exception is made as to rights of naturalization or denization under the acts of parliament for encouraging seamen, or naturalizing foreign protestants in the colonies, or having served in the king's forces; or under acts for the encouragement of the Fisheries.

2. ALNAGER. *Add at the end :—*

By *stat.* 57 *Geo.* 3. *c.* 109, the duties of Alnage, and the office of Alnager in Ireland, were abolished.

3. APOTHECARIES. *Add as follows :—*

By *stat.* 55 *Geo.* 3. *c.* 194, the practice of Apothecaries throughout England and Wales is regulated, and the powers of the Master Wardens and society of Apothecaries of London, (incorporated by King James I.) are extended and enlarged, for the controul of the regular practitioner, and for preventing the intrusion of ignorant or mischievous pretenders, throughout the kingdom, by a system of examination and certificate by the Company, and officers appointed by them for that purpose. But this act does not affect the trade of chemists or druggists in buying, preparing, compounding, dispensing and vending any drugs, medicines, or medicinal compounds.

4. APPEAL. Criminal Appeals.

By *stat.* 59 *Geo.* 3. *c.* 46, all existing Appeals of treason, murder, felony, or other offences were declared void: and it is enacted, that it shall not be lawful for any person in future to commence, take, or sue appeal of treason, murder, felony, or other offence against any other person or persons whomsoever; but all such Appeals shall be utterly abolished.

See *Kendal's Argument* on Trial by Battle, and for abolishing Appeals; for an excellent summary of the now antiquated law on this subject.

5. APPRENTICE. *At the end of Division* II, *add :—*

Further provisions are made for the regulation of cotton mills and factories, by *stats.* 59 *Geo.* 3. *c.* 66. 60 *Geo.* 3. *c.* 5. by the former of which acts no children under *nine* years of age are allowed to be employed.

6. ARMOUR and ARMS. *Add at the end of this Article:—*

By *stat.* 60 *Geo.* 3. *c.* 1, for preventing the *training* of persons to the Use of Arms and to the Practice of Military Evolutions and Exercises, all meetings and assemblies of persons (in England, Scotland, or Ireland,) for training and drilling themselves, or being trained or drilled, to the use of arms, or for practising military exercise, movements, or evolutions, without authority from the crown, or the lieutenant, or two justices of peace of the county, are prohibited, as dangerous to the peace and security of the king's subjects and of his government. Persons attending any such meeting, for the purpose of training others, are made punishable by transportation not exceeding seven years, or imprisonment not exceeding two years, in the discretion of the court; and the parties attending to be trained, are punishable by fine and by imprisonment not exceeding two years. All such meetings may be dispersed by any justice of peace, or constable, or peace officer, or any person acting in aid of them; and the parties present may be arrested, and committed for trial, or held to bail. Such parties, if not prosecuted under this act, may be indicted, &c., as before making the act. Offenders are to be prosecuted within six months, and actions against justices, &c. for executing the act, are limited to the like period.

Cap. 2. of the same session 60 *Geo.* 3, a temporary act, was passed for authorizing Justices of the Peace in certain disturbed counties to seize and detain arms, collected or kept for purposes dangerous to the public peace; to be in force until 25th March, 1822.

The Counties, &c. mentioned in the act are, Lancaster, Chester, York, (West Riding,) Warwick, Stafford, Derby, Leicester, Nottingham, Cumberland, Westmorland, Northumberland, Durham, Renfrew, and Lanark, the towns of Newcastle on Tyne, and Nottingham, and the city of Coventry. But it may be extended by the royal proclamation, by advice of the privy council, to any other Counties or Ridings of Great Britain, on representation from the justices at quarter or general sessions, or any general meeting of the lieutenancy of the county, in consequence of any disturbance therein: and by like proclamation, the counties named in the act, and subjected to its powers, may be freed from its operation.

One justice of the peace, (on information of one witness, on oath, of his belief that *any pike, pike head, or spear*, is in the possession of any person, or in any house or place: or that any dirk, dagger, pistol, gun, or other weapon is, *for any purpose dangerous to the public peace*, in the possession of any one, or in any house or place,) may issue his warrant to any constable or peace officer, to search for, and seize such pike, &c. or other weapon; and the constable acting under such warrant, or any one in his aid, may search for, and seize

such weapons: and if admission is refused, may enter by force, *by day or by night*, into the house or place, and shall detain the arms and weapons found, unless the owner shall prove to the satisfaction of the justice that such arms or weapons were not kept for any purpose dangerous to the public peace. If the justice refuse to restore the arms, the party may appeal to the quarter sessions, who may order the arms to be restored, or to be kept in safe custody, as they shall think proper. Any justice, or constable, &c. acting under his warrant, may arrest and detain any person found *carrying arms* at such time and manner as may afford just grounds of suspicion that they are carried for purposes dangerous to the public peace; and the party shall be committed (or bailed) to take his trial for a misdemeanour, at the ensuing assizes or sessions. Concurrent jurisdiction is given to the justices of adjoining counties to act in each county. Actions against the justices of peace, are limited to six months.

For the penalties on going to or attending at *Unlawful Assemblies*, armed or in military array, see *Addenda* to Vol. II. title *Riot*.

7. ASSAULT. *Add at the end of that Article, as follows:*—

By *stat.* 58 *Geo.* 3. *c.* 30, in actions for assault, brought in inferior courts (in England or Wales) holding pleas to the amount of 40*s.* if damages are given under 40*s.* the plaintiff shall recover only as much costs as damages, and without increase: and so in inferior courts, not having jurisdiction to 40*s.* if the damages are under 30*s.*

8. BANK OF ENGLAND. *Add at the end of this Article:*—

By *stat.* 59 *Geo.* 3. *c.* 49, the Restrictions on payments in cash, under the foregoing acts, (and on payments in *Gold* under 59 *Geo.* 3. *c.* 23.) were further continued to the 1st of May 1823: But with provisions that the Bank should pay in standard gold ingots of 60 oz. each, if demanded, at the following rates, *viz.*—From 1st of Feb. 1820, to 1st Oct. 1820. at 4*l.* 1*s.* per oz. From thence till 1st May, 1821, at 3*l.* 19. 6*d.* and from thence till 1st May, 1823, at 3*l.* 17*s.* 10½*d.* per oz. being the Mint price. The Bank are allowed to pay in cash at any time after 1st May 1822. By the same act the Bank is required, until the end of the period of restriction, to deliver to the Privy Council weekly accounts of the average amount of Bank notes in circulation.

This plan of payment in Ingots was adopted on very detailed and interesting Reports from both Houses of Parliament; and it was supposed the plan would gradually regulate the prices of gold: which however fell from 4*l.* 1*s.* to 3*l.* 17*s.* 10½*d* the Mint price, before the 1st Feb. 1820.

Similar regulations were made as to payments by the Bank of Ireland, by 59 *Geo.* 3. *c.* 99.

By *stat.* 59 *Geo.* 3. *c.* 76, to establish further regulations respecting advances by the Bank of England for the public service, it is enacted, that the Bank shall not make any advances to Government, without the express and distinct authority of Parliament. That all applications for such advances shall be made in writing, by the first Lord of the Treasury or Chancellor of the Exchequer, and that copies of all such applications, and the answers of the Bank thereto, shall be yearly laid before Parliament. Advances to supply the deficiencies of the Consolidated Fund, according to *stats.* 57 *Geo.* 3. *c.* 48, and 59 *Geo.* 3. *c.* 19, are excepted; as also the actual purchase of Exchequer Bills, &c. by the Bank, but of which accounts are also to be laid before parliament.

9. BATTEL. *Add at the end of this Article:*—

By *stat.* 59 *Geo.* 3. *c.* 46, Trial by Battel in Writs of Right is abolished: as also all Appeals in criminal cases, and consequently Trial by Battel therein. See titles *Wager of Battel: Wager of Law.*

10. BLASPHEMY. For the provisions of *stat.* 60 *Geo.* 3. *cc.* 8, 9, for the prevention and punishment of blasphemous and seditious Libels, see *Addenda* to Vol. II. title *Libel.*

The disabilities imposed by *stat.* 9, 10 *Wm.* 3. *c.* 32. on persons denying the doctrines of the Trinity, are repealed by *stat.* 53 *Geo.* 3. *c.* 160. See title *Trinity.*

11. BOGS, in Ireland. Tracts of uncultivated land, the draining and cultivating whereof have been in the contemplation of the Legislature. See *stat.* 49 *Geo.* 3. *c.* 102. continued by 51 *Geo.* 3. *c.* 122. 52 *Geo.* 3. *c.* 74. but now expired, for appointing Commissioners to enquire into the nature and extent of such Bogs. These Commissioners made several detailed and valuable reports, with plans annexed of all the bogs in Ireland, and suggestions for the means of draining them, which Reports were printed by order of the House of Commons, 1810—1814.

12. BUONAPARTE. The fate of this extraordinary Usurper of sovereign power in France, is now governed by two British acts of parliament: viz. 56 *Geo.* 3. *cc.* 22. & 23. the former authorising his detention in such place within his Majesty's dominions and under such restrictions, during the King's pleasure as shall, from time, to time seem fit to his Majesty, his heirs and successors. This act imposes the penalty of *Felony*, without benefit of clergy, on all British subjects who shall rescue or attempt to rescue, or shall assist in any escape or attempt to escape of the prisoner from his confinement; and all such offences, whether committed on the high seas or elsewhere, may be tried in any county in England.

The act 56 *Geo.* 3. *c.* 23. is for regulating the intercourse with the Island of *St. Helena* during the time Buonaparte shall be detained there, and for indemnifying persons acting in his detention.

13. CAMBRICK. Instead of 49 *Geo.* 3. *c.* 98. *Sched.* A. read 59 *Geo.* 3. *c.* 52. *Table* A.

14. CHARITABLE USES. *Add at the end of that Article as follows:*—

By *stat.* 59 *Geo.* 3. *c.* 81, the powers of the act 58 *Geo.* 3. *c.* 91, are extended to all Charities and charitable donations and trusts whatsoever in England and Wales. And by *cap.* 91 of the same session the Commissioners are authorized to make application to Courts of equity regarding the management of estates and funds belonging to any such Charities.

15. CHURCH. After abstract of the act 58 *Geo.* 3. *c.* 45, *add as follows:*—

By *stat.* 59 *Geo.* 3. *c.* 134, the commissioners for building new churches appointed by 58 *Geo.* 3. *c.* 45. are incorporated. Further powers are also given them. They are empowered to unite parts of contiguous parishes into Ecclesiastical Districts for the purpose of the acts, and to build Chapels for the use of such Districts, and several other regulations are made for effectuating the intent of the Legislature on this important measure.

16. CINQUE PORTS.

By *stat.* 51 *Geo.* 3. *c.* 36, the King is empowered to appoint justices of the peace within and throughout the liberties of the Cinque Ports for facilitating the execution of justice; but such justices are not to interfere with the power of the sessions within the several Cinque Ports, nor within the corporate towns of Pevensey, Seaford, Lydd, Folkestone, Feversham, Fordwich, Tenterden, or Deal; nor to claim any authority within those towns nor any right or privilege belonging to any member of those corporations.

# ADDENDA ET CORRIGENDA.

17. CLERGY. Paragraph 4, at the beginning. "See now *stat.* 57 *Geo.* 3. *c.* 99. as to England."

18. CLERK OF THE PEACE. *Add, at the end of that Article, as follows:—*

By *stat.* 57 *Geo.* 3. *c.* 91, Justices of peace, at their general sessions, are authorised to settle tables of fees to be taken by Clerks of the Peace in the several counties of England and Wales: and a penalty of 5*l.* is imposed on such clerks taking higher fees: copies of the tables of fees are to be kept hung up in the sessions room.

19. CLERK OF THE PRIVY SEAL.
20. CLERK OF THE SIGNET. } *Add:—*

See *stat.* 57 *Geo.* 3. *c.* 63. for regulating the offices of Clerks of the Signet and Privy Seal; the duties of which, (after the termination of the then existing interests), are to be performed in person under directions of the treasury; and such officers are declared incapable of sitting in parliament.

21. COIN. *Add at the end of that Article, as follows:—*

By *stat.* 59 *Geo.* 3. *c.* 49. § 10, reciting that the laws in force against melting and exporting gold and silver coin of the realm have been found ineffectual, it is declared lawful for any person to export such gold or silver coin, and to melt such coin, and to manufacture or export or otherwise dispose of the gold or silver bullion produced thereby. And by § 11. of the said act, the *stats.* 9 *E.* 3. *stat.* 2. *cc.* 1. 3, and 13, 14 *Car.* 2. *c.* 31. and other acts against melting and exporting the coin, are expressly repealed. See title *Gold and Silver.*

22. CUSTOMS ON MERCHANDISE.

The act 59 *Geo.* 3. *c.* 52. is now the last General Consolidation Act.

23. CONSTABLE, Div. II. *add:—*

Officers and effective members of any Yeomanry corps or volunteer cavalry are exempted from serving the office of Constable, while they are actually enrolled in, and effective members of, such corps. *Stat.* 57 *Geo.* 3. *c.* 44. § 3.

24. DEBATING SOCIETIES. *Add:—*

By *stat.* 60 *Geo.* 3. *c.* 6. § 26. &c. All places for giving public lectures or debates, for the purpose of raising money, or where money, &c. shall be taken for admission, are declared disorderly, unless licensed by two Justices at Sessions. Penalty on persons opening such places, 100*l.* and on persons acting as chairmen, &c. or receiving money for admission, 20*l.* Magistrates may demand admission into such places. Penalty on persons refusing such admission, 20*l.* Such places may be yearly licensed by justices at Sessions on payment of 1*s.*; and such license may be revoked in the discretion of the justices. Justices may visit such licensed places at the time of lecture. Lectures in the Universities, Inns of Court, Gresham College, the East India College, &c. and all Incorporated Societies, and School-masters, are excepted. Licence may be voided by two justices of the peace, if the place is commonly used for lectures of a seditious, irreligious, or immoral tendency. Prosecutions under the act are limited to six months after the offence; as are also actions against magistrates for any thing done in execution of the act.

25. DISTRESS. *Add at the end of Division* III.

By *stat.* 57 *Geo.* 3. *c.* 93, regulations are made for restraining the charges of Distresses for Rent not exceeding 20*l.* and persons aggrieved may be relieved by one Justice of Peace who shall adjudge the party transgressing to pay treble the amount received by him contrary to the act. The charges allowed are; for levying the Distress, 3*s.*—for man in possession, 2*s.* 6*d.* a day.—for advertisements (if any) 10*s.*—for appraisement 6*d.* per pound on the value of the goods.—for catalogues, sales, commission and delivery of the goods, 1*s.* per pound on the net produce of the sale.

26. EXTENT. *Add at the end of this Article, as follows:—*

By *stat.* 57 *Geo.* 3. *c.* 117, for regulating the issuing of *Extents in Aid;* after reciting that Extents in Aid have been in many cases issued for levying larger sums of money than were due to the Crown, by the debtors on whose behalf such Extents in Aid were issued, and that it was expedient to prevent such practice: and also that in other cases Extents in Aid had been issued at the instance, and for the benefit of persons indebted to the Crown by simple contract only; it is enacted, that, upon the issuing of any Extent in Aid or behalf of any debtor to the Crown, the amount of the debt due to the Crown shall be specified in the fiat for issuing such Extent in aid; that where the debt due to the crown-debtor is equal to, or more than the debt due from him to the Crown, the amount specified in the fiat shall be indorsed on the writ as the sum to be levied; and where the debt due to the Crown-debtor is less than his debt to the Crown, the actual amount of such debt shall be endorsed on the writ and levied accordingly; and the money levied under every such Extent in Aid shall be paid over to the use of the Crown under the order of the Court of Exchequer. Any overplus produced beyond the sum so indorsed shall be paid to the Court of Exchequer and disposed of by the Court on summary application. A proviso is made that such Extent in Aid shall not prejudice the Crown-debtor in recovering the remainder of his debt, not levied under such Extent. By this act also it is provided, that Extents in Aid shall not be sued out by debtors to the Crown on simple contract only; or on bonds for payment of excise duties, or duties on insurance, &c.—Persons imprisoned under any capias on Extent in Aid may apply for their discharge to the Court of Exchequer, or in vacation to a Judge of the Court, who may relieve as to the personal imprisonment.

END OF VOL. I.

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New Bridge-street, London.

BSB Bayerische StaatsBibliothek
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